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**THE EXCEPTIONS APPLY TO INFORMATION IN A RECORD –
SEVERING**

The right to access a record under [FIPPA](#) is not absolute.

Severing information

7(2) *The right of access to a record does not extend to information that is excepted from disclosure under Division 3 or 4 of this Part, but if that information can reasonably be severed from the record, an applicant has a right of access to the remainder of the record.*

If information in a record falls within an exception to disclosure in Secs. 17 to 32 of [FIPPA](#), an applicant is not entitled to access to that information. More than one exception may apply to the same information.

The exceptions to disclosure in Secs. 17 to 32 of [FIPPA](#) authorize or require the head of a public body to refuse to disclose information. The term information, rather than the term record, is used in the exception sections to indicate that the exceptions apply to the information in a record and not necessarily to the whole record.

In general, access to a record cannot be refused because of its type, title or form. Rather, the information in the record must be carefully examined – line-by-line – to determine if an exception to disclosure applies.

Subsection 7(2) of [FIPPA](#) requires that, where an exception applies to some of the information in a record, only that information is severed – that is, is obscured or removed from the record – and the applicant is entitled to access the remainder of the record, unless another exception to disclosure in FIPPA applies to it.¹

¹ For a discussion of severing and subsection 7(2) see chapter 4, under *Severing a Record*.

EXCEPTIONS TO DISCLOSURE

The point of severing is to release as much information in a record as possible, without disclosing or revealing information protected by an exception to disclosure.

GENERAL APPROACHES TO INTERPRETING THE EXCEPTIONS TO DISCLOSURE

Where a record falls under Part 2 of [FIPPA](#), a refusal to disclose information in a record to an applicant for access must be based on one or more of the exceptions to disclosure in Secs. 17 to 32.²

For example, it is not appropriate to refuse access simply because disclosure of the record may cause embarrassment to the public body - embarrassment is not an exception to disclosure under [FIPPA](#).

In considering whether an exception to disclosure applies to information in a requested record, the following principles should be kept in mind:

- Clauses 2(a) and 2(b) of [FIPPA](#) state that the purpose of the act is to provide a right to access records, subject to the limited and specific exceptions set out in the act. This means that the exception provisions should be strictly interpreted.
- The courts in Manitoba have taken the position that access should be the rule and that the exceptions to disclosure must be strictly interpreted. To come within an exception to disclosure, the information must fall squarely within the ambit of the exception provision.³
- Generally, the public body has the burden of proving that an exception to disclosure is justified if there is a complaint to the ombudsman, in the case of a review by the information and privacy adjudicator or an appeal to court.⁴

² To determine what records do not fall under [FIPPA](#), see Secs. 4 and 5 of [FIPPA](#) and the discussion in chapter 2, under *Records That Fall under FIPPA* and *Records That Do Not Fall under FIPPA*. Also see chapter 1, *Relationship of FIPPA to Other Legislation*, for a discussion of other situations where [FIPPA](#) does not apply.

³ *Marchand v. The Minister of Government Services* (1990), 74 D.L.R. (4th) 186 (Manitoba Court of Queen's Bench) at page 185. Also see *Oakley v. Manitoba (Minister of Health)* (1995), 101 Man. R. (2d) 98 (Manitoba Court of Queen's Bench) at page 101.

⁴ See, for example, Secs. 66.7 and 70 of [FIPPA](#). Complaints under [FIPPA](#), and the role of the ombudsman, the information and privacy adjudicator and the courts,

EXCEPTIONS TO DISCLOSURE

References to the head of a public body in this manual and the exceptions to disclosure include an access and privacy officer that the head has delegated duties and powers to under Sec. 81 of [FIPPA](#).

are discussed in chapter 8 of this manual.

EXCEPTIONS TO DISCLOSURE

LIMITS TO AN EXCEPTION

In determining whether an exception to disclosure applies, it is extremely important to read all the subsections, clauses and paragraphs in the section relating to that exception. Frequently, an exception to disclosure is followed by specific limits that have the effect of significantly cutting down or limiting the scope of that exception. However, another exception provision may apply to the information.

An example of an exception to disclosure that contains a specific limit is Sec. 23, the exception for advice to a public body. Subsection 23(1) sets out the exceptions to disclosure, while subsection 23(2) sets out numerous records and types of information that are not included in the exceptions. The records and information described in subsection 23(2) must be disclosed unless an exception to disclosure in another section of [FIPPA](#) applies.

The following exception sections contain provisions limiting the application of the exception:

- Sec. 17 Privacy of a Third Party subsection 17(4)
- Sec. 18 Business Interests of Third Parties subsection 18(3)
- Sec. 19 Cabinet Confidences subsection 19(2)
- Sec. 20 Information Provided by Another Government subsection 20(3)
- Sec. 22 Local Public Body Confidences subsection 22(2)
- Sec. 23 Advice to a Public Body subsection 23(2)
- Sec. 25 Law Enforcement and Legal Proceedings subsection 25(3)
- Sec. 28 Economic and Other Interests of a Public Body subsection 28(2)
- Sec. 30 Confidential Evaluations about the Applicant subsection 30(2)
- Sec. 32 Information that will be Available to the Public clause 32(2)(b)

EXCEPTIONS TO DISCLOSURE

EXCEPTIONS THAT PROTECT THIRD PARTIES

Certain exceptions to disclosure protect information that has been provided by, or that is about or could affect, a third party.

Third party is defined in subsection 1(1) of [FIPPA](#) to mean “a person, group of persons or an organization other than the applicant or a public body.” The word person means a natural person (an individual) and includes “a corporation and the heirs, executors, administrators or other legal representatives of a person.”⁵ An organization is “an organized body, especially a business, charity, etc.”⁶ For example, a trade union is an organization.

Although other exception provisions may also apply, third party information is protected by:

- Sec. 17 Privacy of a Third Party
- Sec. 18 Business Interests of Third Parties
- Sec. 24 Individual or Public Safety
- Clause 25(1)(e) Life or safety of law enforcement officer or others
- Clause 25(1)(f) Right to a fair trial or impartial adjudication
- Clause 25(1)(l) Confidential information in a correctional record
- Clause 25(1)(m) Author of, or person quoted in, law enforcement record
- Subsection 27(2) Legal privilege of person other than the public body
- Clause 29.1(b) Labour relations information supplied to the public body, either explicitly or implicitly, in confidence
- Paragraph 29.1(c)(iv) Labour relations information supplied to or a report of an

⁵ [The Interpretation Act](#) of Manitoba, Sec. 17 and the Schedule of Definitions.

⁶ The Concise Oxford Dictionary, 9th edition.

EXCEPTIONS TO DISCLOSURE

arbitrator, mediator, labour relations officer etc.

- Sec. 29.2 Workplace Investigations
- Sec. 30 Confidential Evaluations about the Applicant

Information in a record must be carefully reviewed – line-by-line – to ensure that privacy and other third party rights are protected under [FIPPA](#). Even when an applicant has applied for access to a record containing personal information about themselves, that record may also contain information provided by, about or affecting one or more third parties.

The exceptions in these third party provisions do not apply to information from or about other governments or public bodies. Other exceptions to disclosure in [FIPPA](#) protect sensitive information from or about other governments or public bodies (for example, Secs. 20, 21 and 28).

Sec. 33 of [FIPPA](#) states that the head of a public body must, where possible, notify a third party in writing if the head is considering giving access to a record, and the disclosure of it might result in an unreasonable invasion of the third party's privacy under Sec. 17 or affect a third party's business interests described in subsection 18(1) or 18(2). Secs. 33 and 34 further state that the third party has a right to make representations respecting the proposed disclosure.⁷

⁷ Secs. 33 and 34 and third party notice and intervention are discussed in chapter 4, under *Third Party Notice and Intervention*.

EXCEPTIONS TO DISCLOSURE

MANDATORY EXCEPTIONS TO DISCLOSURE

There are two types of exceptions to disclosure in [FIPPA](#): mandatory exceptions and discretionary exceptions.

A mandatory exception to disclosure contains the following words:

"the head of a public body shall refuse to disclose information..."

If facts exist or may exist that bring the information, or part of the information, in a record within a mandatory exception, the head is required to refuse to disclose the information to the applicant.

There is no discretion to disclose information under Part 2 of [FIPPA](#) if a mandatory exception applies.

The main mandatory exceptions to disclosure are in Division 3 of Part 2 of [FIPPA](#):

- Sec. 17 Privacy of a Third Party
- Sec. 18 Business Interests of Third Parties
- Sec. 19 Cabinet Confidences
- Sec. 20 Information Provided by another Government

The following are also mandatory exceptions to disclosure:

- Subsection 25(2) No disclosure of law enforcement record if prohibited by an enactment of Canada
- Subsection 27(2) Legal privilege of a person other than the public body

DISCRETIONARY EXCEPTIONS TO DISCLOSURE

A discretionary exception to disclosure contains the following words:

"the head of a public body may refuse to disclose information....."

A discretionary exception to the right of access permits the head of a public body to disclose information in a record, even though the information falls within the exception.

Determining whether to apply a discretionary exception involves two steps:

1. The head must first determine whether some or all of the information in the requested record falls within the discretionary exception provision.
2. Then, the head must determine whether to disclose the information, even though the exception could be relied on as a basis for refusing access – that is, the head must exercise their discretion.

In other words, if a discretionary exception applies, the head must still consider whether it is appropriate to disclose the information in the circumstances. A decision whether to disclose information falling within a discretionary exception to disclosure is an exercise of discretion.

EXERCISING A DISCRETION

The discretionary exceptions to disclosure recognize that, on occasion, the head of a public body may decide, after considering all relevant factors, that it is appropriate to disclose the requested information, even though an exception could be relied on as a basis for refusing access.

The following is a summary of some of the general principles that apply to the exercise of a discretion:

“...the discretion must be exercised by the authority to which it is committed, which must act on its own and not under the dictation of any other body, and ...it must be willing to exercise its discretion in each individual case which comes before it. The authority must act in good faith, must have regard to all relevant considerations and must not be swayed by irrelevant considerations, must not seek to promote purposes alien to the letter or to the spirit of the legislation which gives it power to act, and must not act arbitrarily or capriciously.”⁸

Exercising discretion is not simply a formality where the head of the public body considers the issues before routinely saying no. The head must consider whether to exercise the discretion to disclose information for each access request, taking into consideration the information requested and the particular circumstances of the case. The head must not replace the exercise of discretion with a blanket policy that information will not be released, simply because it can be withheld under one of the discretionary exceptions. A public body may develop guidelines on exercising discretion but may not treat them as binding rules. In exercising discretion, the head must have regard to all relevant considerations and to the spirit and purposes of [FIPPA](#).⁹

The ombudsman, when investigating a complaint about a refusal of access, the information and privacy adjudicator when conducting a review and the court when hearing an appeal about a refusal of access, cannot override a head's decision where

⁸ Administrative Law by Evans, Janisch, Mullan and Risk (1980), at page 623.

⁹ The underlying principles and the purposes of [FIPPA](#) are discussed in chapter 1 of this manual.

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the head has properly exercised their discretion.¹⁰ But, the adjudicator or the court can require that discretion be exercised where there is evidence this has not been done.¹¹

¹⁰ Subsection 66.8(4) and subsection 73(2) of [FIPPA](#).

¹¹ Complaints, and the powers of the ombudsman, the information and privacy adjudicator and the court, are discussed in chapter 8 of this manual.

CLASS EXCEPTIONS

Some of the exceptions to disclosure in [FIPPA](#) protect a class or type of information. These class exceptions are concerned with the type of information in a requested record, rather than the consequences of disclosure.

When dealing with a class exception, the head must determine whether the information in the record falls within the specified class or type. If it does, the exception will apply.

Examples of class exceptions are:

- Clause 18(1)(a) - a mandatory exception that protects the trade secrets of a third party
- Clause 28(1)(a) - a discretionary exception that protects the trade secrets of a public body

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REASONABLE EXPECTATION OF HARM

Many of the exceptions to disclosure in [FIPPA](#) contain a reasonable expectation of harm test. These exceptions are concerned with the consequences for the public body or another party if the information were disclosed.

A reasonable expectation of harm test is indicated by wording such as:

- “could reasonably be expected to harm”
- “could reasonably be expected to interfere with”
- “could reasonably be expected to result in [a specified harm]”

Examples of exceptions that contain a reasonable expectation of harm test are:

- Paragraph 18(1)(c)(i) - a mandatory exception that protects third party commercial, financial, labour relations, scientific or technical information if disclosure could reasonably be expected to harm the competitive position of the third party
- Clause 25(1)(h) - a discretionary exception that protects information which, if disclosed, could reasonably be expected to facilitate the escape from custody of an individual who is lawfully detained

When considering whether such an exception applies, the head of the public body must determine whether disclosure of the requested information could reasonably be expected to cause the harm described in the exception provision. Whether or not disclosure could reasonably be expected to result in a specified harm or injury is a question of fact that must be determined in the circumstances of each access request, and in the context of the information contained in the record requested.

There must be a clear and direct link between the disclosure of the information and the harm that is alleged¹² and the expectation of harm must be reasonable.

¹² Ontario Information and Privacy Commissioner [Order M-202](#), (Re Metropolitan

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Reasonableness is judged by an objective standard. A reasonable expectation is one which is not fanciful, imaginary or contrived, but rather one which is based on reason.¹³

However, the requirement that an expectation be reasonable does not require that it be a certainty. It is not necessary to prove that disclosure of the requested record will actually result in the alleged harm.¹⁴ The fact that disclosure of a similar record in the past did not result in the alleged harm is a relevant consideration, but is not determinative of the issue.¹⁵

Evidence of reasonable expectation of harm is not required to be detailed and convincing. There only needs to be evidence of a reasonable expectation of probable harm, which of necessity involves some speculation.¹⁶

As the Manitoba Court of Queen's Bench found in *Kattenburg v. Minister of Industry, Trade and Tourism*, the reasonable expectation of harm test requires a reasonable expectation of probable, not possible, harm – it requires that the facts establish a likelihood that the specified harm will result from the disclosure of the record or part of the record.¹⁷

Toronto Police Services Board, Oct. 15, 1993).

Also see *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.), quoted at page 9 of Ontario Information and Privacy Commissioner [Order MO-2151](#).

¹³ Ontario Information and Privacy Commissioner [Order P-203](#) (Re Stadium Corp. of Ontario, Nov. 5, 1990).

¹⁴ Ontario Information and Privacy Commissioner [Order P-557](#) (Re Ministry of Agriculture & Food, Oct. 20, 1993 and [Order P-203](#) (Re Stadium Corp. of Ontario, Nov. 5, 1990).

¹⁵ Ontario Information and Privacy Commissioner [Order P-557](#) (Re Ministry of Agriculture & Food, Oct. 20, 1993).

¹⁶ *Ontario Workers' Compensation Board v. Ontario Assistant Information and Privacy Commissioner* [1995], [O.J. No. 1319](#) (Ont. Divisional Court). This case was reversed by *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information & Privacy Commissioner)*, [1998] O.J. No. 3485 on other grounds.

¹⁷ *Kattenburg v. Manitoba (Minister of Industry, Trade & Tourism)* (1999), 143 Man. R. (2d) 42.

PRIVACY OF A THIRD PARTY - [SEC. 17]

Summary of the Exception

The exception to disclosure protecting third party privacy is set out in subsection 17(1). Subsection 17(1) states that the head of a public body is required to (shall) refuse to disclose personal information about another individual (a third party) to an applicant if the disclosure would be an unreasonable invasion of the third party's privacy.

Subsection 17(1) is a mandatory exception to the right to access under Sec. 7 of [FIPPA](#).

The exception protects personal information about an identifiable individual (a natural person). It does not apply to information about corporations, organizations, businesses, public bodies, etc.

The exception to disclosure is set out in subsection 17(1) – the head of a public body is required to (shall) refuse to disclose personal information about a third party to an applicant if the disclosure would be an unreasonable invasion of the third party's privacy.

Subsections 17(2) and 17(3) set out the circumstances in which disclosure would be an unreasonable invasion of privacy.

In practical terms, Sec. 17 requires a three-step process:

Step 1: Does the personal information requested fall under subsection 17(2)?

Subsection 17(2) list types of personal information that are so sensitive that disclosure of this information is an unreasonable invasion of privacy of a third-party individual.

A head of a public body must not disclose the personal information listed in subsection 17(2) to an applicant requesting access under Part 2, unless one of the circumstances in subsection 17(4) applies.

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Step 2: If subsection 17(2) does not apply, subsections 17(1) and (3) must be read together to determine whether disclosure of the personal information would be an unreasonable invasion of the third party's privacy in the circumstances.

Subsection 17(3) sets out how to determine whether disclosure of the personal information would be an unreasonable invasion of the third party's privacy, under subsection 17(1) if subsection 17(2) does not apply.

Subsection 17(3) requires that, in determining whether disclosure to the applicant would be an unreasonable invasion of privacy, the head of the public body must consider all the relevant circumstances, including the circumstances set out in clauses 17(3)(a) to 17(3)(i).

Some of the circumstances in subsection 17(3) favour access, while some favour withholding the information.

Step 3: Does one of the limits to the exception to disclosure in subsection 17(4) apply?

Subsection 17(4) limits the exception to disclosure protecting third party privacy. If one of the limits in clauses 17(4)(a) to (i) applies, disclosing the personal information would not be an unreasonable invasion of privacy, and the exception to disclosure in Sec. 17 does not apply. But an exception in another section of [FIPPA](#) may apply to the information.

Clause 17(4)(a) and subsection 17(5) provide for access to third party personal information with the consent of the individual the information is about.

Clauses 17(4)(b) to 17(4)(i) describe other situations where disclosure of personal information is not an unreasonable invasion of a third party's privacy.

Note that subsection 17(4.1) requires the head of a public body to give the applicant a summary of the information withheld under clause 17(2)(h.1) (e.g. personal information about the applicant that a third party provided in confidence to the applicant's employer) unless a summary cannot be prepared without revealing the

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identity of a third party who provided the personal information.

Subsection 17(6) prohibits disclosure of personal information in a public registry on a volume or bulk basis to an applicant requesting access under Part 2.

Clause 12(2)(b) states that the head of a public body may, in responding to a request for access under Part 2 of [FIPPA](#), refuse to confirm or deny the existence of a record containing personal information about a third party, if disclosure of the existence of the record would be an unreasonable invasion of the third party's privacy.¹⁸

Sec. 33 of [FIPPA](#) states that the head of a public body must, where possible, notify a third party in writing if the head is considering giving access to a record, where disclosing it might result in an unreasonable invasion of the third party's privacy, under Sec. 17. Secs. 33 and 34 further state that the third party has a right to make representations on the proposed disclosure.¹⁹

■ Disclosure an Unreasonable Invasion of Privacy: Scope of the Exception - [Subsection 17(1)]

Disclosure harmful to a third party's privacy

17(1) The head of a public body shall refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's privacy.

Sec. 17 is a cornerstone provision of [FIPPA](#). It balances the public's right to access records in custody or under the control of a public body and an individual's right of privacy about their personal information. Sec. 17 protects privacy by providing a mandatory exception to the right to access under Part 2 for personal information about a third party.

¹⁸ Subsection 12(2) is discussed in chapter 4, under *Refusal to Confirm or Deny the Existence of a Record*.

¹⁹ Secs. 33 and 34, and third party notice and intervention, are discussed in chapter 4, under *Third Party Notice and Intervention*.

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The scope of the exception is set out in subsection 17(1), which states that the head of a public body is required to (shall) refuse to disclose to an applicant requesting access to a record under Part 2 of [FIPPA](#) personal information about another individual (a third party), if the disclosure would be an unreasonable invasion of the third party's privacy.

1. Exception protects personal information about individuals

The exception in subsection 17(1) protects personal information about third parties.

Personal information is defined in section 1 of [FIPPA](#) to mean “recorded information about an identifiable individual...”.²⁰ An individual is a natural person, a human being. Thus, the exception in subsection 17(1) protects personal information about third parties who are individuals (human beings).

The third-party privacy exception in subsection 17(1) does not protect information about third parties that are corporations, organizations, businesses, other public bodies, etc.

The exceptions to disclosure in Sec. 18 protect the business interests of third parties that are corporations, organizations and businesses, as well as third parties who are individuals. Other exceptions to disclosure protect the interests of other public bodies (for example, the exceptions in Secs. 20, 21 and 28).

2. When the third party privacy exception applies

The exception to disclosure in subsection 17(1) applies when an applicant makes a request under Part 2 of [FIPPA](#) for access to personal information, including personal health information about someone else (a third party).

If an individual requests access to personal information about

²⁰ See the discussion of the definition personal information in chapter 2, under *Key Definitions*.

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themselves, or is authorized to make such a request on behalf of another individual under Sec. 79²¹ of [FIPPA](#), Sec. 17 does not apply, with the exception of personal information that must be refused under clause 17(2)(h.1) (e.g., personal information about the applicant that a third party provided in confidence to the applicant's employer).

If the information about the applicant could reasonably be expected to reveal the identity of the third party, subsection 17(4.1) requires that the head of a public body give the applicant a summary of the information withheld under clause 17(2)(h.1), unless a summary cannot be prepared without revealing the identity of a third party who provided the personal information.

Note: Sec. 44 in Part 3 of [FIPPA](#) sets out situations in which a public body is authorized to disclose personal information in the course of its operations; an access request under Part 2 is not required.²²

3. Requests for personal health information

Meaning of personal health information

Personal health information is defined in subsection 1(1) of [FIPPA](#):²³

"personal health information" means recorded information about an identifiable individual that relates to

- (a) the individual's health, or health care history, including genetic information about the individual,*
- (b) the provision of health care to the individual, or*

²¹ Sec. 79 of the act sets out specific situations where someone may act on behalf of another under [FIPPA](#). See chapter 3, under *Exercising Rights on Behalf of Another*.

²² Sec. 44 and the Relationship between Disclosure under Part 3 of [FIPPA](#) and Access Requests under Part 2 of [FIPPA](#) are discussed in chapter 6, under *Disclosure of Personal Information*.

²³ The definition personal health information is discussed in chapter 2, under *Key Definitions*. The definition is the same in [FIPPA](#) as in The Personal Health Information Act ([PHIA](#)).

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- (c) *payment for health care provided to the individual, and includes*
- (d) *the PHIN as defined in The Personal Health Information Act and any other identifying number, symbol or particular assigned to an individual, and*
- (e) *any identifying information about the individual that is collected in the course of, and is incidental to, the provision of health care or payment for health care;*

Subsection 1(2) of [FIPPA](#) states:

1(2) *For the purpose of the definition "personal health information", "health" and "health care" have the same meaning as in The Personal Health Information Act.*

Request for one's own personal health information

Subsection 6(1) states that Part 2 of [FIPPA](#) does not apply to a record or part of a record that contains the applicant's own personal health information. Requests for access to one's own personal health information must be handled under [PHIA](#), not under [FIPPA](#),²⁴ and a refusal to give the individual access to their own personal health information must be based on the reasons set out in Sec. 11 of [PHIA](#).

Note, however, that there may be instances when an individual makes a request for access to a record under Part 2 of [FIPPA](#), but that record includes their own personal health information. The individual should not be required to make a separate request under [PHIA](#) because subsection 6(1.1) deems the request as one made under [PHIA](#) for the parts of the record that consist of the applicant's own personal health information. [PHIA](#) then applies to the parts of the record that consist of the applicant's own personal health information.

If the individual has requested their own personal health information that is in a clinical record compiled and maintained in a psychiatric facility, the request must be dealt with under [The Mental Health Act](#), and a refusal of access must be based on the reasons set out in [The](#)

²⁴ Sec. 6 of [FIPPA](#).

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[Mental Health Act](#).²⁵

Request for personal health information on behalf of the individual the information is about

If a person requests access to personal health information about another individual, and the person is authorized to act on behalf of the individual the information is about under Sec. 60 of [PHIA](#), the public body must deal with the request under [PHIA](#).²⁶ Subsections 6(1) and 6(1.1), as discussed above under Request for one’s own personal health information”, apply.

If the authorized person is requesting access to personal health information in a clinical record compiled in a psychiatric facility, the request should be dealt with under [The Mental Health Act](#).²⁷

Request for personal health information about someone else

If a person requests personal health information about someone else, and the information is in a clinical record compiled and maintained in a psychiatric facility, the request should be dealt with under [The Mental Health Act](#).²⁸

If a person requests personal health information about someone else, and the public body is authorized to disclose the requested information under Part 3 of [PHIA](#), the public body should deal with the request under Part 3 of [PHIA](#).

Other requests by a person for access to personal health information about someone else, who is not authorized to act on behalf of that other person, should be dealt with under Part 2 of [FIPPA](#) – and access will usually be refused, because disclosure of personal health information about someone else is an unreasonable invasion of privacy

²⁵ Sec. 5 and subsection 6(1) of [FIPPA](#) and subsection 4(3) of [PHIA](#).

²⁶ Sec. 60 of [PHIA](#) is similar to Sec. 79 of [FIPPA](#). Sec. 79 of [FIPPA](#) is discussed in chapter 3, under *Exercising Rights on Behalf of Another*.

²⁷ Sec. 5 of [FIPPA](#) and subsection 4(3) of [PHIA](#).

²⁸ Sec. 5 of [FIPPA](#) and subsection 4(3) of [PHIA](#).

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under subsection 17(2) of [FIPPA](#).

Request for personal health information about a deceased individual

If a relative requests personal health information about a deceased individual, they should make the request under clause 22(2)(d) of [PHIA](#), not under [FIPPA](#),²⁹ unless the information is in a clinical record compiled in a psychiatric facility.

A request for personal health information about a deceased individual that is in a clinical record compiled in a psychiatric facility should be dealt with under [The Mental Health Act](#), whether the request is by a relative or by another person.³⁰

Other requests by a person for access to personal health information about a deceased individual should be dealt with under Part 2 of [FIPPA](#).

4. Record containing personal information about more than one third party

A record may contain personal information about more than one individual. The privacy of each individual referred to in a record is protected by the exception in subsection 17(1).

5. Severing - subsection 7(2)

The phrase personal information, rather than the term record, is used in subsection 17(1) to indicate that the exception applies to the information in a record and not necessarily to the whole record. Subsection 7(2) of [FIPPA](#) requires that, where an exception applies to some of the information in a record, only that information is severed, and the applicant is entitled to access the remainder of the information in the record (unless an exception to disclosure in another section of

²⁹ Sec. 5 of [FIPPA](#) and clause 22(2)(d) of [PHIA](#).

³⁰ Sec. 5 of [FIPPA](#) and [The Mental Health Act](#).

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[FIPPA](#) applies to it).³¹

6. Unreasonable Invasion of a Third Party's Privacy

Subsections 17(2) and 17(3) set out what is an unreasonable invasion of a third party's privacy for the purposes of the exception to disclosure in subsection 17(1).

■ When Disclosure is deemed to be an Unreasonable Invasion of Privacy - [Subsection 17(2)]

Disclosure deemed to be an unreasonable invasion of privacy

17(2) A disclosure of personal information about a third party is deemed to be an unreasonable invasion of the third party's privacy if ...

Clauses 17(2)(a) to (i) list types of personal information about a third party that are so sensitive that disclosure to someone else is deemed or considered to be an "unreasonable invasion" of the privacy of the individual the information is about. When the personal information is of a type listed in clauses 17(2)(a) to (i), the head is not required to look at the factors listed in subsection 17(3) – disclosure is "deemed" to be an unreasonable invasion of privacy.

If an applicant under Part 2 requests access to personal information about another individual and the information is of a type listed in any one of clauses 17(2)(a) to (i), the head of the public body is required to refuse to disclose this information unless one of the circumstances in subsection 17(4) applies.

³¹ For a discussion of severing and subsection 7(2) see earlier in this chapter, under *The Exceptions Apply to Information in a Record – Severing* and chapter 4, under *Severing a Record*.

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■ Deemed Invasion: Personal Health Information - [Clause 17(2)(a)]

Disclosure deemed to be an unreasonable invasion of privacy

17(2) A disclosure of personal information about a third party is deemed to be an unreasonable invasion of the third party's privacy if

(a) the personal information is personal health information; ...

Personal health information is defined in subsection 1(1) of [FIPPA](#):³²

personal health information means recorded information about an identifiable individual that relates to

(a) the individual's health, or health care history, including genetic information about the individual,

(b) the provision of health care to the individual, or

(c) payment for health care provided to the individual, and includes

(d) the PHIN as defined in The Personal Health Information Act and any other identifying number, symbol or particular assigned to an individual, and

(e) any identifying information about the individual that is collected in the course of, and is incidental to, the provision of health care or payment for health care;

Subsection 1(2) of [FIPPA](#) states:

1(2) *For the purpose of the definition "personal health information", "health" and "health care" have the same meaning as in The Personal Health Information Act.*³³

³² The definition personal health information is discussed in chapter 2, under *Key Definitions*. The definition is the same in [FIPPA](#) as in [PHIA](#).

³³ Subsection 1(2) was added to [FIPPA](#) by [The Freedom of Information and Protection of Privacy Amendment Act, S.M. 2008 c. 40](#).

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Health and health care are defined in subsection 1(1) of [PHIA](#) as follows:

***health** means the condition of being sound in mind, body and spirit;*

***health care** means any care, service or procedure*

(a) provided to diagnose, treat or maintain an individual's health,

(b) provided to prevent disease or injury or promote health, or

(c) that affects the structure or a function of the body,

and includes the sale or dispensing of a drug, appliance, device, equipment or other item pursuant to a prescription.

If an applicant requests access to personal health information about another individual under Part 2 of [FIPPA](#), the head of the public body is required to refuse to disclose the personal health information, unless the individual the information is about consents to disclosure, or one of the other grounds in subsection 17(4) applies.

There are situations where a request by a person for personal health information about someone else must be dealt with under another act, not under [FIPPA](#):

- If a person requests personal health information about someone else and the information is in a clinical record compiled and maintained in a psychiatric facility, the request must be dealt with under [The Mental Health Act](#).³⁴
- If a person requests access to personal health information about someone else, and that person is authorized to act on behalf of the individual the information is about under Sec. 60 of [PHIA](#), the request must be dealt with under [PHIA](#),³⁵ except where the information is in a clinical record compiled in a psychiatric facility.

³⁴ Sec. 5 of [FIPPA](#) and subsection 4(3) of [PHIA](#).

³⁵ Sec. 60 of [PHIA](#) is like Sec. 79 of [FIPPA](#). Sec. 79 of [FIPPA](#) is discussed in chapter 3, under *Exercising Rights on Behalf of Another*.

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- If a person requests access to personal health information about someone else that is in a clinical record compiled and maintained in a psychiatric facility, and that person is authorized to act on behalf of the individual the information is about, the request should be dealt with under [The Mental Health Act](#).³⁶
- If a person requests access to personal health information about someone else, and the public body is authorized to disclose the requested personal health information under Part 3 of [PHIA](#), the public body should deal with the request under Part 3 of [PHIA](#).
- If a relative requests personal health information about a deceased individual, the relative should make the request under clause 22(2)(d) of [PHIA](#), not under [FIPPA](#)³⁷, except where the information is in a clinical record compiled in a psychiatric facility.
- A request by any person, including a relative, for personal health information about a deceased individual that is in a clinical record compiled and maintained in a psychiatric facility should be dealt with under [The Mental Health Act](#).³⁸
- If an individual requests access to their own personal health information, clause 17(2)(a) does not apply. The access request must be handled under [PHIA](#) or, in the case of a clinical record compiled and maintained in a psychiatric facility, under [The Mental Health Act](#).³⁹
- If an individual requests access to a record, and parts of the record consist of their own personal health information, the individual should not be required to make a separate request under [PHIA](#), because subsection 6(1.1) deems the request as one made under [PHIA](#), for the parts of the record that consist of the applicant's own personal health information. [PHIA](#) then applies to the portions of the record that consists of the applicant's own personal health information.

³⁶ Sec. 5 of [FIPPA](#) and subsection 4(3) of [PHIA](#).

³⁷ Sec. 5 of [FIPPA](#) and clause 22(2)(d) of [PHIA](#).

³⁸ Sec. 5 of [FIPPA](#).

³⁹ Sec. 6 of [FIPPA](#), subsection 4(3) of [PHIA](#) and [The Mental Health Act](#).

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■ Deemed Invasion: Information Compiled as Part of an Investigation into a Violation of Law - [Clause 17(2)(b)]

Disclosure deemed to be an unreasonable invasion of privacy

17(2) A disclosure of personal information about a third party is deemed to be an unreasonable invasion of the third party's privacy if

...

(b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of a law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation.

...

To compile personal information for an investigation means to collect or accumulate it for that purpose.⁴⁰

An investigation is a systematic inquiry or search.⁴¹ A violation of a law includes an offence under the Criminal Code (Canada) or under another federal statute or regulation, an offence under a provincial statute or regulation or a contravention of a municipal by-law.

Clause 17(2)(b) applies to personal information that, at some point in time, has been assembled or gathered together as part of an investigation into a possible violation of a law, even if the information was not originally created or prepared for such an investigation.⁴² The clause only requires that there be an investigation into a possible violation of law. It also continues to apply once the investigation is completed and does not cease to apply if a conviction is obtained.⁴³

⁴⁰ The Concise Oxford Dictionary, 9th Edition.

⁴¹ The Concise Oxford Dictionary, 9th Edition.

⁴² Ontario Information and Privacy Commissioner [Order P-892](#) (Re Ministry of the Solicitor General & Correctional Services, March 22, 1995).

⁴³ Ontario Information and Privacy Commissioner [Order M-389](#) (Re Sudbury Regional Police Services Board, Sept. 16, 1994).

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Clause 17(2)(b) continues to apply if charges are not laid⁴⁴ or are withdrawn.⁴⁵

Sec. 25 of [FIPPA](#) contains exceptions to disclosure for records relating to law enforcement that protect the law enforcement process. Clause 17(2)(b) complements the exceptions to disclosure in Sec. 25, as it protects the privacy of an individual whose personal information has been compiled and is part of an investigation into a possible violation of law.

Information about the convictions or criminal history of a third party would not fall under clause 17(2)(b). If a request is made for a record of the convictions or criminal history of a third party, the head of the public body must make an assessment under subsection 17(3) to determine if disclosure to the applicant amounts to an unreasonable invasion of the privacy of the third party in the circumstances.

■ **Deemed Invasion: Identity of Third Party Providing Confidential Information for Law Enforcement or Administration of an Enactment - [Clause 17(2)(c)]**

Disclosure deemed to be an unreasonable invasion of privacy

17(2) A disclosure of personal information about a third party is deemed to be an unreasonable invasion of the third party's privacy if

...

(c) *disclosure could reasonably be expected to reveal the identity of a third party who has provided information in confidence to a public body for the purposes of law enforcement or the administration of an enactment.*

...

Clause 17(1)(c) protects the identity of a confidential source. For the

⁴⁴ Ontario Information and Privacy Commissioner [Order P-223](#) (Re Ministry of Community & Social Services, March 1, 1991).

⁴⁵ Ontario Information and Privacy Commissioner [Order P-392](#) (Re Ministry of the Attorney General, Jan. 4, 1993).

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exception in this clause to apply, four conditions must be met:

- (i) *The information must have been provided to a public body by a third party.*

Clause 17(2)(c) does not apply if the information was created or generated by a public body. However, the exception to disclosure does apply if the information was provided to the public body that has received the access request or to any other public body, as the phrase a public body is used.

- (ii) *The information must have been provided in confidence.*

Information is provided in confidence if the person providing it requests or indicates (in writing or verbally) that it is to be kept confidential, or if an intention or expectation that the information will be treated as confidential can be implied from the circumstances in which it was provided or received - for example, from the manner in which the information was provided and received,⁴⁶ past practices followed for such information, a stated policy, etc. A confidentiality provision in another statute may form the basis for a reasonable expectation on the part of someone providing information that the information will remain confidential.⁴⁷

- (iii) *The information must have been provided for a purpose related to law enforcement or the administration of an enactment.*⁴⁸

Law enforcement is defined in subsection 1(1) of [FIPPA](#):⁴⁹

“law enforcement” means any action taken for the

⁴⁶ Ontario Information and Privacy Commissioner [Order P-274](#) (Re Ministry of Correctional Services, Feb. 21, 1992).

⁴⁷ Ontario Information and Privacy Commissioner [Order P-309](#) (Re Ministry of Consumer & Commercial Relations; June 8, 1992).

⁴⁸ *Marchand v. Minister of Government Services* (1990), 74 D.L.R. (4th) 186 (Manitoba Court of Queen’s Bench) at pages 195-196 (commenting on a similar provision in the 1985 Freedom of Information Act).

⁴⁹ The definition law enforcement is discussed in chapter 2, under *Key Definitions*.

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purpose of enforcing an enactment, including
(a) policing,
(b) investigations or inspections that lead or could lead to a penalty or sanction being imposed, or that are otherwise conducted for the purpose of enforcing an enactment, and
(c) proceedings that lead or could lead to a penalty or sanction being imposed, or that are otherwise conducted for the purpose of enforcing an enactment;

An enactment is defined in Sec. 1 of [FIPPA](#) as an act or regulation.

- An act is a statute passed by the Legislative Assembly of a province or by the parliament of Canada.
- A regulation is a law made under the authority of a statute by the Lieutenant Governor in Council (in the case of a province), the Governor General in Council (in the case of Canada), a minister, etc.

Administering an enactment includes activities undertaken to manage or implement a scheme or a provision in a statute or regulation.⁵⁰

- (iv) *Disclosure of the information could reasonably be expected to reveal the identity of the third party who provided it.*

Clause 17(2)(c) protects the identity of a third party who has provided information in confidence for the purposes of law enforcement or administration of an enactment. Any information that could reasonably be expected to reveal the identity of the third party, including name, address and identifying characteristics, must not be disclosed.

Disclosure would reveal the identity of an individual if, for example:

- their name, address or other identifying characteristics were disclosed

⁵⁰ The Concise Oxford Dictionary, 9th Edition.

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- the information disclosed would permit accurate inferences to be drawn about the identity of the individual⁵¹ or
- the information disclosed could be combined with other information to reveal the individual's identity

Because it is often difficult to determine whether information can be linked together with other information to identify a confidential source, caution should be exercised in releasing information provided by or connected to a confidential source of information about law enforcement or the administration of an enactment.

■ **Deemed Invasion: Information Relates to Eligibility for, Receipt of or Determination of Income Assistance or Other Benefits - [Clause 17(2)(d)]**

Disclosure deemed to be an unreasonable invasion of privacy

17(2) A disclosure of personal information about a third party is deemed to be an unreasonable invasion of the third party's privacy if

...

(d) the personal information relates to eligibility for or receipt of income assistance, legal aid benefits, social service benefits or similar benefits, or to the determination of benefit levels;

...

Information respecting eligibility means information as to whether an individual is entitled to or qualifies for a benefit.⁵²

Income assistance means any monetary benefits provided by the federal,

⁵¹ Ontario Information and Privacy Commissioner [Order P-226](#) (Re Minister of Consumer and Commercial Relations: March 26, 1991) (made in the context of cabinet confidences).

⁵² The Concise Oxford Dictionary, 9th Edition.

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provincial or a municipal government to provide an income to an individual or to increase an individual's income or earnings.

Legal aid benefits are benefits under [The Legal Aid Manitoba Act](#).

Social service benefits may be monetary or non-monetary and may be the only source of an individual's income or may supplement earnings or income from another source.

■ **Deemed Invasion: Employment, Occupational or Educational History - [Clause 17(2)(e)]**

Disclosure deemed to be an unreasonable invasion of privacy

17(2) A disclosure of personal information about a third party is deemed to be an unreasonable invasion of the third party's privacy if

...

(e) the personal information relates to the third party's employment, occupational or educational history;

...

Employment history refers to information about an individual's work record, including the names of employers, length of employment, positions held, employment duties, salary, evaluations of job performance and reasons for leaving employment.

Occupational history refers to information about an individual's profession, business or calling, and can include accomplishments and how an individual spent their time.

Educational history refers to information about an individual's schooling and formal training, including names of educational institutions attended, courses taken and results achieved.

Example:

In a complaint about a refusal of access to a current list of names of all

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persons in possession of a certificate of qualification in a particular trade, the ombudsman agreed with the public body that disclosure of the names would, in and of itself, reveal the individuals' profession, business or calling – that is, their occupational history.⁵³

■ **Deemed Invasion: Personal Information Collected for Tax Purposes - [Clause 17(2)(f)]**

Disclosure deemed to be an unreasonable invasion of privacy

17(2) A disclosure of personal information about a third party is deemed to be an unreasonable invasion of the third party's privacy if

...

(f) the personal information was collected on a tax return or for the purpose of determining tax liability or collecting a tax;

...

Three types of personal information are covered by this clause:

- (i) personal information collected on a tax return
- (ii) personal information collected for the purpose of determining tax liability
- (iii) personal information collected for the purpose of collecting a tax

A tax is “a contribution to state revenue compulsorily levied on individuals, property or businesses”⁵⁴ and includes federal, provincial, municipal and school taxes. The term tax usually will not include a license fee or other fee or charge payable for a direct benefit received by the party paying the fee. A royalty may qualify as a tax under some statutes. Legal counsel should be

⁵³ Manitoba ombudsman report under [FIPPA](#) regarding Case 2009-0754 (Manitoba Labour and Immigration, October 4, 2010).

⁵⁴ The Concise Oxford Dictionary, 9th Edition.

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consulted if there is any doubt as to whether a tax is involved.

Personal information is collected on a tax return if it is provided or assembled on a form used to report taxable personal or business income or property.

Collected for the purpose of determining tax liability means the personal information is collected for the purpose of determining if an individual owes past, current or future taxes. An example is information collected during an income tax audit undertaken to determine whether an individual owes additional taxes.

Collected for the purpose of collecting a tax means the personal information is collected for the purpose of collecting due or overdue taxes.

Note:

Clause 17(2)(f) only applies to tax information of individuals. Subsection 18(2) contains a similar exception to disclosure about tax information of corporations, businesses and organizations.

■ **Deemed Invasion: Source of Income or Financial Circumstances, Activities or History - [Clause 17(2)(g)]**

Disclosure deemed to be an unreasonable invasion of privacy

17(2) A disclosure of personal information about a third party is deemed to be an unreasonable invasion of the third party's privacy if

...

(g) the personal information describes the third party's source of income or financial circumstances, activities or history;

...

Income means money or other assets received.⁵⁵

⁵⁵ The Concise Oxford Dictionary, 9th Edition.

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Financial circumstances refer to the monetary resources of an individual⁵⁶ and includes information about the individual's creditworthiness or credit rating.

Financial activities refer to information about an individual's current financial activities and financial history refers to any information about an individual's past financial activities.

■ **Deemed Invasion: Personal Recommendations, Evaluations, etc. - [Clause 17(2)(h)]**

Disclosure deemed to be an unreasonable invasion of privacy

17(2) A disclosure of personal information about a third party is deemed to be an unreasonable invasion of the third party's privacy if

...

(h) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations; or

...

Personal recommendations or evaluations and character references are commonly given in an employment context, but can arise in other contexts. For example, some landlords may require recommendations or character references from a prospective tenant.

Personnel evaluations usually arise in the context of employment and include job performance appraisals.

■ **Deemed Invasion: Identity of Third Party that Provided the Applicant's Personal Information to Applicant's Employer - [Clause 17(2)(h.1) & Subsection 17(4.1)]**

Disclosure deemed to be an unreasonable invasion of

⁵⁶ The Concise Oxford Dictionary, 9th Edition.

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privacy

17(2) A disclosure of personal information about a third party is deemed to be an unreasonable invasion of the third party's privacy if

...

(h.1) disclosure could reasonably be expected to reveal personal information about the applicant that a third party provided in confidence to the applicant's employer, and the disclosure could reasonably be expected to reveal the identity of the third party; or

...

Summary of information

17(4.1) On refusing to disclose personal information under clause (2)(h.1), the head of the public body must give the applicant a summary of the information unless a summary cannot be prepared without revealing the identity of a third party who provided the personal information.

Clause 17(2)(h.1) and subsection 17(4.1) together balance the protection of a third party's privacy with an applicant's right of access to their own personal information.

Clause 17(2)(h.1) protects the identity of a confidential source. For the exception in this clause to apply, three conditions must be met:

- (i) *The personal information about the applicant was provided by a third party to the applicant's employer*

Clause 17(2)(h.1) does not apply where the information was created or generated by a public body. However, the exception to disclosure can apply to information provided by an officer or employee of a public body about the applicant, when the provision of the applicant's personal information to the public body, as the applicant's employer, was not part of the employment responsibilities of the officer or employee of the public body.⁵⁷

⁵⁷ See the Manitoba ombudsman practice note titled [Dealing with Access Requests Involving Employee Information](#).

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(ii) *The third party provided the personal information in confidence*

Information is provided in confidence if the individual providing it requests or indicates, in writing or verbally, that it is to be kept confidential, or if an intention or expectation that the information will be treated as confidential can be implied from the circumstances in which it was provided or received - for example, from the manner in which the information was provided and received,⁵⁸ past practices followed for such information, a stated policy, etc. A confidentiality provision in another statute may form the basis for a reasonable expectation for someone providing information that the information will remain confidential.

(iii) *The disclosure of the applicant's personal information could reveal the identity of the third party that provided it*

Disclosure would reveal the identity of an individual if, for example:

- their name, address or other identifying characteristics are disclosed
- the information disclosed would permit accurate inferences to be drawn about the identity of the individual⁵⁹
- the information disclosed could be combined with other information to reveal the individual's identity

Because it is often difficult to determine whether information can be linked together with other information to identify a confidential source, caution should be exercised in releasing information provided by or connected to a confidential source of information. It is recommended that you consult with your legal counsel to ensure that you are applying this exception properly.

⁵⁸ Ontario Information and Privacy Commissioner [Order P-274](#) (Re Ministry of Correctional Services, Feb. 21, 1992).

⁵⁹ Ontario Information and Privacy Commissioner [Order P-226](#) (Re Minister of Consumer and Commercial Relations: March 26, 1991) (made in the context of cabinet confidences).

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Because one of the purposes of [FIPPA](#) is to allow individuals a right to access records containing personal information about themselves in the custody or under the control of public bodies [clause 2(b)], the head of a public body must consider subsection 17(4.1) when refusing to disclose an applicant's own personal information under clause 17(2)(h.1). Subsection 17(4.1) requires the head of the public body to give the applicant a summary of the personal information unless doing so would reveal the identity of the third party who provided the applicant's personal information in confidence to the employer.

Secs. 29.1 and 29.2 contain exceptions to disclosure for information relating to labour relations and workplace investigations, respectively. Depending on the circumstances surrounding the records requested by an applicant, these exceptions to disclosure may also be a consideration.

Also, the exception to disclosure under Sec. 30 may be considered for confidential evaluations about the applicant in the context of determining the applicant's suitability, eligibility or qualifications for employment, or for awarding a contract.

■ **Deemed Invasion: Information about Racial or Ethnic Origin, Religious or Political Beliefs or Associations, or Sexual Orientation - [Clause 17(2)(i)]**

Disclosure deemed to be an unreasonable invasion of privacy

17(2) A disclosure of personal information about a third party is deemed to be an unreasonable invasion of the third party's privacy if

...

(i) *the personal information indicates the third party's racial or ethnic origin, religious or political beliefs or associations, or sexual orientation.*

...

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Ethnic origin refers to a common national or cultural tradition.⁶⁰

The terms used in this clause are like the terms used in the [Manitoba Human Rights Code](#).

Use of the word or indicates that these are alternatives. For example, information that reveals an individual's political beliefs falls within the clause, even if it does not reveal a political association.

■ **Determining When Disclosure is an Unreasonable Invasion of Privacy if Subsection 17(2) Does Not Apply - [Subsection 17(3)]**

Determining unreasonable invasion of privacy

17(3) In determining under subsection (1) whether a disclosure of personal information not described in subsection (2) would unreasonably invade a third party's privacy, the head of a public body shall consider all the relevant circumstances including, but not limited to, whether

If subsection 17(2) does not apply, subsections 17(1) and (3) must be read together to determine whether disclosure of personal information would be an unreasonable invasion of a third party's privacy in the circumstances.

Subsection 17(3) sets out how to determine whether disclosure of the personal information would be an unreasonable invasion of the third party's privacy under subsection 17(1), if subsection 17(2) does not apply.

Subsection 17(3) requires that, in determining whether disclosure to the applicant would be an unreasonable invasion of privacy, the head of the public body must consider all the relevant circumstances, including the circumstances set out in clauses 17(3)(a) to 17(3)(i).

Some factors that may be relevant to determining that disclosure would not be an unreasonable invasion of privacy that are not listed in clauses 17(3)(a) to (i) include:

⁶⁰ The Concise Oxford Dictionary, 9th Edition.

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- whether disclosure is desirable for the purpose of ensuring public confidence in the integrity of a public body
- the passage of time after the death of the individual the information is about (unless the information falls under subsection 17(2))
- the personal information was required to be provided by law (for example, by a statute, regulation or court order)

The circumstances in clauses 17(3)(a) to (c) tend to favour disclosure of personal information, while those in clauses 17(3)(d) to (i) tend to favour refusing access to protect the third party's privacy.

Note:

The circumstances set out in subsection 17(3) do not have to be considered if the type of personal information being requested is listed in subsection 17(2). Disclosure of this information is 'deemed' to be an unreasonable invasion of privacy.

If one of the circumstances in subsection 17(4) applies, the head of the public body cannot refuse access on the basis of subsections 17(1) and 17(3). However, another exception to disclosure in [FIPPA](#) may apply to the information.

■ **Consideration: Disclosure would Subject Activities of Manitoba or a Public Body to Public Scrutiny - [Clause 17(3)(a)]**

Determining unreasonable invasion of privacy

17(3) In determining under subsection (1) whether a disclosure of personal information not described in subsection (2) would unreasonably invade a third party's privacy, the head of a public body shall consider all the relevant circumstances including, but not limited to, whether

...

(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Manitoba or a public body to public scrutiny;

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...

This consideration favours disclosure to the applicant.

Clause 17(3)(a) recognizes that, in some cases, the broader public interest in subjecting the internal workings of a public body to scrutiny or examination by the public may prevail over the protection of an individual's personal privacy.

For clause 17(3)(a) to be a relevant consideration, there must be some evidence of public interest or a public demand for scrutiny. It will not be enough for one person to have the subjective opinion that scrutiny is necessary.⁶¹

Note:

This consideration does not apply if the third party personal information requested is listed in subsection 17(2).

■ **Consideration: Disclosure would Promote Public Health or Safety or Protection of the Environment - [Clause 17(3)(b)]**

Determining unreasonable invasion of privacy

17(3) *In determining under subsection (1) whether a disclosure of **personal information** not described in subsection (2) would unreasonably invade a **third party's** privacy, the **head** of a **public body** shall consider all the relevant circumstances including, but not limited to, whether*

...

(b) the disclosure is likely to promote public health or safety or protection of the environment;

...

This consideration favours disclosure to the applicant.

Public health refers to the well-being of the general public, or a significant part of the public. Clause 17(3)(b) does not authorize disclosure of personal

⁶¹ Ontario Information and Privacy Commissioner [Order P-347](#) (Re Ministry of Consumer & Commercial Relations, Aug. 28, 1992).

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health information about a third party. This information can only be disclosed with consent or if the circumstances in subsection 17(4) apply.

Safety means the condition of being safe - freedom from danger or risks.⁶² A disclosure of personal information would promote public safety if it would reduce the exposure of the general public, or a significant part of the public, to risk or danger.

Environment refers to the physical surroundings, conditions, circumstances, etc. in which a person lives; the area surrounding a place; external conditions as affecting plant and animal life; the totality of the physical conditions on the earth or a part of it, especially as affected by human activity.⁶³

Note:

This consideration does not apply if the third party personal information is listed in subsection 17(2).

Public bodies may disclose personal information where necessary, to protect the mental, physical health or the safety of any individual or group of individuals under clause 44(1)(l) of Part 3 of [FIPPA](#), without the need for a request under Part 2.⁶⁴

Similarly, under clause 22(2)(b) of [PHIA](#), a trustee of personal health information, including a public body, may disclose personal health information to any person if the trustee reasonably believes the disclosure is necessary to prevent or lessen a serious and immediate threat to:

- the health or safety of the individual the information is about or another individual
- to prevent or lessen a serious and immediate threat to public health or public safety

⁶² The Concise Oxford Dictionary, 9th Edition.

⁶³ The Concise Oxford Dictionary, 9th edition.

⁶⁴ Clause 44(1)(l) is discussed in chapter 6, under *Disclosure of Personal Information*.

■ **Consideration: Disclosure will Assist In a Fair Determination of the Applicant's Rights - [Clause 17(3)(c)]**

Determining unreasonable invasion of privacy

17(3) *In determining under subsection (1) whether a disclosure of personal information not described in subsection (2) would unreasonably invade a third party's privacy, the head of a public body shall consider all the relevant circumstances including, but not limited to, whether ...*

(c) the disclosure will assist in a fair determination of the applicant's rights; ...

This consideration favours disclosure to the **applicant**.

There may be situations when an applicant requires access to personal information about someone else to assist in determining their own rights. This is one situation where an applicant's motives in requesting access to information may be relevant.

For clause 17(3)(c) to be a relevant consideration, the applicant must establish that:

- the right in question is a legal right based on statute or common law
- the right relates to an existing or contemplated proceeding, not one that has been completed
- the personal information being sought has some significance to the determination of the right
- the applicant requires access to the personal information to prepare for the proceeding or to ensure an impartial hearing⁶⁵

⁶⁵ Ontario Information and Privacy Commissioner [Order P-312](#) (Re Ministry of Government Services, June 10, 1992).

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The interests of the applicant and the privacy interests of the third party will have to be weighed to determine if disclosure is appropriate. One relevant factor is whether the applicant can obtain the requested personal information some other way.

Note:

This consideration does not apply if the third party personal information requested is listed in subsection 17(2).

■ **Consideration: Disclosure may Unfairly Expose the Third Party to Harm - [Clause 17(3)(d)]**

Determining unreasonable invasion of privacy

17(3) In determining under subsection (1) whether a disclosure of personal information not described in subsection (2) would unreasonably invade a third party's privacy, the head of a public body shall consider all the relevant circumstances including, but not limited to, whether

...

(d) the disclosure may unfairly expose the third party to harm;

...

This consideration favours protection of the third party's privacy.

Unfairly means not equitably,⁶⁶ without justification. Harm means hurt or damage,⁶⁷ and can include harassment.⁶⁸

⁶⁶ The Concise Oxford Dictionary, 9th Edition.

⁶⁷ The Concise Oxford Dictionary, 9th Edition.

⁶⁸ Ontario Information and Privacy Commissioner [Order P-213](#) (Re Ministry of Natural Resources, Jan. 16, 1991).

EXCEPTIONS TO DISCLOSURE

■ **Consideration: Provided, Explicitly or Implicitly, in Confidence** **- [Clause 17(3)(e)]**

Determining unreasonable invasion of privacy

17(3) In determining under subsection (1) whether a disclosure of personal information not described in subsection (2) would unreasonably invade a third party's privacy, the head of a public body shall consider all the relevant circumstances including, but not limited to, whether

...

(e) the personal information has been provided, explicitly or implicitly, in confidence;

...

This consideration favours protection of the third party's privacy.

Personal information is explicitly provided in confidence when the party providing it expressly requests or indicates that it is to be kept confidential. The intention to provide information in confidence can be stated in the record of the information itself, in an agreement or verbally. It is advisable to keep a written record of a verbal request.

Personal information is implicitly provided in confidence when an intention or expectation that the information will be treated as confidential can be implied from the circumstances in which it was provided - for example, from the way the information is provided and received,⁶⁹ past practices followed for such information and stated policies. A confidentiality provision in another statute may form the basis for a reasonable expectation for someone providing personal information that the information will remain confidential.⁷⁰

⁶⁹ Ontario Information and Privacy Commissioner [Order P-274](#) (Re Ministry of Correctional Services, Feb. 21, 1992).

⁷⁰ Ontario Information and Privacy Commissioner [Order P-309](#) (Re Ministry of Consumer & Commercial Relations; June 8, 1992).

EXCEPTIONS TO DISCLOSURE

■ **Consideration: Highly Sensitive Personal Information - [Clause 17(3)(f)]**

Determining unreasonable invasion of privacy

17(3) In determining under subsection (1) whether a disclosure of personal information not described in subsection (2) would unreasonably invade a third party's privacy, the head of a public body shall consider all the relevant circumstances including, but not limited to, whether

...

(f) the personal information is highly sensitive;

...

This consideration favours protection of the third party's privacy.

For personal information to be considered highly sensitive, it must be established that its release would cause serious personal distress to the individual affected. It is not enough that release might cause minor embarrassment.⁷¹

Examples of highly sensitive personal information include:

- information that a person has unsuccessfully applied for an employment position or appointment⁷²
- information outlining disciplinary action taken against an employee⁷³
- information contained in an individual's criminal record⁷⁴

⁷¹ Ontario Information and Privacy Commissioner [Order P-434](#) (Re Ministry of the Attorney General; March 22, 1993).

⁷² Ontario Information and Privacy Commissioner [Order 170](#) (Re Ministry of the Attorney General, May 25, 1990).

⁷³ Ontario Information and Privacy Commissioner [Order P-357](#) (Re Ministry of Correctional Services, Oct. 9, 1992).

⁷⁴ Ontario Information and Privacy Commissioner [Order M-222](#) (Re Stratford Police Services Board; Nov. 23, 1993).

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Personal information may be considered highly sensitive if it is intended to be used to make physical contact with the individual concerned. Personal information is sensitive if its disclosure could threaten an individual's security – for example, an individual's personal security could be violated if personal information, such as an address, is released.⁷⁵

■ **Consideration: Inaccurate or Unreliable Information - [Clause 17(3)(g)]**

Determining unreasonable invasion of privacy

17(3) In determining under subsection (1) whether a disclosure of personal information not described in subsection (2) would unreasonably invade a third party's privacy, the head of a public body shall consider all the relevant circumstances including, but not limited to, whether

...

(g) the personal information is likely to be inaccurate or unreliable;

...

This consideration favours protection of the third party's privacy.

Inaccurate information means information that is not correct.

Unreliable information is information that is not of sound and consistent character or quality, that should not be relied on.⁷⁶

A public body may have inaccurate or unreliable personal information in its custody or under its control for a number of reasons. For example, the information may have been incorrectly recorded at the time it was collected or it may have become inaccurate with the passage of time or changes in circumstances.

⁷⁵ Ontario Information and Privacy Commissioner [Order P-12](#) (Re Ministry of Community & Social Services, Aug. 3, 1988).

⁷⁶ The Concise Oxford Dictionary, 9th Edition.

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Where there is good reason to question the accuracy or reliability of personal information, disclosure should be refused on the basis that it would constitute an unreasonable invasion of privacy of the individual the information is about.⁷⁷

■ **Consideration: Damage to Reputation - [Clause 17(3)(h)]**

Determining unreasonable invasion of privacy

17(3) In determining under subsection (1) whether a disclosure of personal information not described in subsection (2) would unreasonably invade a third party's privacy, the head of a public body shall consider all the relevant circumstances including, but not limited to, whether

...

(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant;

...

This consideration favours protection of the third party's privacy.

Unfairly means not equitably,⁷⁸ without justification.

To damage the reputation of a person means to harm or injure what is generally said or believed about the person's character or standing.⁷⁹

⁷⁷ Ontario Information and Privacy Commissioner [Order P-151](#), (Re Ministry of Culture & Communications, Feb. 26, 1990) and [PO-1731](#) (re Ministry of Community and Social Services, Nov 19, 1999).

⁷⁸ The Concise Oxford Dictionary, 9th Edition.

⁷⁹ The Concise Oxford Dictionary, 9th Edition.

EXCEPTIONS TO DISCLOSURE

■ **Consideration: Inconsistent With Purpose for Which the Information was Obtained - [Clause 17(3)(i)]**

Determining unreasonable invasion of privacy

17(3) In determining under subsection (1) whether a disclosure of personal information not described in subsection (2) would unreasonably invade a third party's privacy, the head of a public body shall consider all the relevant circumstances including, but not limited to, whether

...

(i) the disclosure would be inconsistent with the purpose for which the personal information was obtained.

...

This consideration favours protection of the third party's privacy.

Where personal information is provided on the understanding that it will be used for specific purposes, by implication, the information should not be disclosed for other, unrelated purposes under Part 2 of [FIPPA](#).

For example, where the personal information is supplied to the public body by a third party under compulsion (where it is required to be supplied under a statute or regulation or by an order of a court or tribunal) and there are negative consequences for failing to provide the information, clause 17(3)(i) would be a consideration weighing against disclosure of the personal information to an applicant requesting access under Part 2 of [FIPPA](#).

■ **When Disclosure Is Not an Unreasonable Invasion of Privacy - [Subsection 17(4)]**

When disclosure not unreasonable

17(4) Despite subsection (2), disclosure of personal information is not an unreasonable invasion of a third party's privacy if...

Subsection 17(4) contains limits to the exception to disclosure protecting third party privacy.

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Clauses 17(4)(a) to (i) set out circumstances when a disclosure of personal information about a third party to an applicant for access under Part 2 of [FIPPA](#) is not an unreasonable invasion of the third party's privacy.

If the personal information requested by an applicant falls within any of the clauses of subsection 17(4), the head of the public body cannot rely on the exception to disclosure about third party privacy in Sec. 17. But another exception to disclosure in Secs. 18 to 32 of [FIPPA](#) may apply to the information.

■ **Disclosure Not Unreasonable: Consent or at the Request of the Third Party - [Clause 17(4)(a)]**

When disclosure not unreasonable

17(4) Despite subsection (2), disclosure of personal information is not an unreasonable invasion of a third party's privacy if

(a) the third party has consented to or requested the disclosure;

...

Disclosure with third party's consent

17(5) If the third party consents to or requests disclosure under clause (4)(a), the head of the public body may

(a) require the consent or request to be in writing;
and

(b) comply with the requirement to disclose by disclosing the information directly to the third party rather than to the applicant.

Personal information may be disclosed to an applicant if the third party the information is about consents to or requests the disclosure. The purpose of the exception to disclosure in Sec. 17 of [FIPPA](#) is to protect the privacy of the third party, not the interests of the public body that has custody or control of the information.

Clause 17(5)(a) of [FIPPA](#) states that the head of the public body may require that the consent or request be in writing. A consent or request for the

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purposes of this clause must be clear and specific, and the head should be satisfied that the consent or request is voluntary and informed (that is, the individual understands the effect of the consent or request). For a discussion of the elements of a valid consent, see chapter 6, under *Consent and FIPPA*.

In limited circumstances, consent may be provided or a request may be made by certain people who are authorized to act on behalf of the individual the information is about under Sec. 79 of [FIPPA](#).⁸⁰

To further protect the privacy of the third party, clause 17(5)(b) of [FIPPA](#) states that, where the third party has consented to or requested the disclosure, the head may “comply with the requirement to disclose by disclosing the information directly to the third party rather than to the applicant.” The third party can decide, after seeing the information, whether to release it to the applicant.

■ Disclosure Not Unreasonable: Compelling Circumstances Affecting Health or Safety - [Clause 17(4)(b)]

When disclosure not unreasonable

17(4) Despite subsection (2), disclosure of personal information is not an unreasonable invasion of a third party’s privacy if

...

(b) there are compelling circumstances affecting the mental or physical health or the safety of the applicant or another person and notice of the disclosure is mailed to the last known address of the third party;

...

Clause 17(4)(b) provides for disclosure of personal information about a third party, in response to a request for access, made under Part 2 of [FIPPA](#), in compelling circumstances affecting the mental, physical health or safety of the applicant or any other person.

A circumstance is compelling if there is an emergency and disclosure of the

⁸⁰ Sec. 79 is discussed in chapter 3, under *Exercising Rights on Behalf of Another*.

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personal information is the fastest and most effective way, or the only way, to protect someone's health or safety.

Safety means the condition of being safe; freedom from danger or risks.⁸¹

The compelling circumstances may relate to the health or safety of the applicant requesting access or another person.

Ordinarily, where personal information is to be disclosed under clause 17(4)(b) because of compelling circumstances affecting the mental or physical health or the safety of the applicant, or another person, it will not be possible for the head of the public body to give prior written notice to the affected third party, under Sec. 33 of [FIPPA](#). Sec. 33 requires prior notice to be given "where practicable."⁸² Legal counsel should be consulted if there is any question about whether prior notice should be given to the third party.

If the head of a public body discloses personal information under clause 17(4)(b), the head must mail a notice of the disclosure to the last known address of the third party the personal information is about. The "last known address" of the third party is the most recent address on the files of, or which is available to, the public body. The public body must make reasonable efforts to determine the address of the third party.

Note:

Public bodies may disclose personal information where necessary to protect the mental or physical health or the safety of any individual or group of individuals under clause 44(1)(l) of [FIPPA](#) without the need for a request under Part 2.⁸³

Similarly, a public body may disclose personal health information to any person if necessary to prevent or lessen a serious and immediate threat to the mental or physical health or the safety of the individual the information is about or another individual or to prevent or lessen a serious and immediate threat to public health or safety under clause 22(2)(b) of [PHIA](#).

⁸¹ The Concise Oxford Dictionary, 9th edition.

⁸² Secs. 33 and 34 are discussed in chapter 4, under *Third Party Notice and Intervention*.

⁸³ Clause 44(1)(l) is discussed in chapter 6, under *Disclosure of Personal Information*.

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■ Disclosure Not Unreasonable: Authorized or Required by an Enactment - [Clause 17(4)(c)]

When disclosure not unreasonable

17(4) Despite subsection (2), disclosure of personal information is not an unreasonable invasion of a third party's privacy if

...

(c) an enactment of Manitoba or Canada expressly authorizes or requires the disclosure;

...

An enactment is defined in subsection 1 of [FIPPA](#) as an act or regulation.

- An act of Manitoba or Canada is a statute passed by the Legislative Assembly of Manitoba or by the Parliament of Canada.
- A regulation is a law made under the authority of a statute, for example, by the Lieutenant Governor in Council (in the case of Manitoba), by the Governor General in Council (in the case of Canada), by a minister of the government of Manitoba or Canada.

Disclosure is authorized by an enactment where it is permitted but not required - words such as “may disclose” or “has a discretion to disclose” indicate disclosure is authorized.

Disclosure is required by an enactment where there is an obligation to disclose - words such as “shall disclose” or “must disclose” indicate a disclosure is required.

As one of the fundamental purposes of [FIPPA](#) is the protection of personal information, the concept of “expressly authorized or required” in clause 17(4)(c) should be given a narrow interpretation.⁸⁴ Expressly means definitely stated, not merely implied.⁸⁵ For disclosure to be “expressly” authorized or

⁸⁴ Ontario Information and Privacy Commissioner [Order M-484](#) (Re East York Health Unit, March 9, 1995).

⁸⁵ The Concise Oxford Dictionary, 9th edition.

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required by an enactment, the authority or requirement in the statute or regulation must be clear and explicit⁸⁶ and must be specific to the type of personal information concerned.

■ Disclosure Not Unreasonable: For Research Purposes Under Section 47 - [Clause 17(4)(d)]

When disclosure not unreasonable

17(4) Despite subsection (2), disclosure of personal information is not an unreasonable invasion of a third party's privacy if

...

(d) the disclosure is for research purposes and is in accordance with section 47;

...

Research means the systematic investigation into and study of materials and sources, to establish facts, reach new conclusions and to endeavour to discover new or collate old facts, by scientific study or by a course of critical investigation.⁸⁷

Before a public body can disclose personal information for research purposes, the public body and the researcher must comply with the conditions and requirements in Sec. 47 of [FIPPA](#), which are designed to protect the privacy rights of research subjects.⁸⁸

A request for personal health information by a researcher conducting a health research project must be dealt with under Sec. 24 of [PHIA](#), not under [FIPPA](#).⁸⁹

⁸⁶ Ontario Information and Privacy Commissioner [Order P-867](#) (Re Ministry of Health, Feb. 17, 1995).

⁸⁷ Ontario Information and Privacy Commissioner [Order P-666](#) (Re Ministry of Health, April 27, 1994):.

⁸⁸ Sec. 47 is discussed in chapter 6, under *Disclosure for Research Purposes*.

⁸⁹ Sec. 35 of [FIPPA](#).

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■ Disclosure Not Unreasonable: Certain Information About Officers, Employees, Elected Officials - [Clause 17(4)(e)]

When disclosure not unreasonable

17(4) Despite subsection (2), disclosure of personal information is not an unreasonable invasion of a third party's privacy if

...

(e) the information is about the third party's job classification, salary range, benefits, employment responsibilities or employment expenses

(i) as an officer or employee of a public body,

(ii) as a minister, or

(iii) as an elected or appointed member of the governing council or body of a local public body or as a member of the staff of such a council or body;

Clause 17(4)(e) is an indication that disclosure of certain types of information about officers, employees and elected and appointed officials of public bodies is in the public interest, as these individuals are paid out of public funds. Similar or additional information may also be available under other legislation, such as [The Public Sector Compensation Disclosure Act](#).

An officer is a person holding an office or position of trust, command or authority in a corporation, government, armed services or other institution or organization. In corporations, an officer is a person charged with important functions such as president, vice-president or treasurer.⁹⁰ An officer can include the position of a corporation director⁹¹, a sovereign's minister and an appointed or elected functionary.⁹²

Employee is defined in subsection 1(1) of [FIPPA](#):

“employee”, in relation to a public body, includes a person who performs services for the public body under a contract or

⁹⁰ Black's Law Dictionary, 6th Edition.

⁹¹ The Dictionary of Canadian Law.

⁹² The Concise Oxford Dictionary, 9th Edition.

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agency relationship with the public body.

Minister is defined in subsection 1(1) of [FIPPA](#) to mean a member of cabinet.

Clause 17(4)(e) authorizes disclosure of salary range, not of the specific salaries of employees, officers and elected or appointed officials of public bodies. However, specific salary information may be available under other legislation, such as [The Public Sector Compensation Disclosure Act](#), or may be available through the Public Accounts of the Province of Manitoba.

The term benefits include the entitlements that an officer, employee or elected or appointed official receives from being employed by or acting for the public body, such as insurance-related benefits and leave entitlements.⁹³

Employment expenses incurred as an employee, officer or elected or appointed official of a public body specifically fall under this clause; disclosure of such information is not an unreasonable invasion of privacy under [FIPPA](#).

Note:

Sec. 76.1 of [FIPPA](#) requires the government to make available to the public a summary of the total annual expenses incurred" by each minister for:

- transportation
- accommodation and meals
- promotion and hospitality
- cell phone and personal electronic communications devices

⁹³ [Order M-23](#), Ontario Information and Privacy Commissioner (Re Town of Gravenhurst, July 3, 1992).

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■ Disclosure Not Unreasonable: Financial or other Details of a Contract - [Clause 17(4)(f)]

When disclosure not unreasonable

17(4) Despite subsection (2), disclosure of personal information is not an unreasonable invasion of a third party's privacy if

...

(f) the disclosure reveals financial or other details of a contract to supply goods or services to or on behalf of a public body;

...

Clause 17(4)(f) recognizes that disclosure of information about the supply of goods and services to a public body is generally in the public interest.

Financial details are the amounts paid for the goods or services. Other details of a contract to supply goods or services include the names of the parties to the contract and the subject, terms and conditions of the contract.

Note:

In disclosing information under clause 17(4)(f), a public body should be careful to ensure that it is not disclosing third party information that may fall within one of the mandatory exceptions to disclosure in Sec. 18.

Similar or additional information respecting public body contracts may also be available under other legislation - for example, Sec. 80 of [The Financial Administration Act](#) requires disclosure of specified information about government contracts. More information about contracts exempt from the reporting requirement of Sec. 80 of [The Financial Administration Act](#) can be found in the [Contract Disclosure Regulation M.R. 199/2015](#).

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■ Disclosure Not Unreasonable: Discretionary Benefit of a Financial Nature - [Clause 17(4)(g)]

When disclosure not unreasonable

17(4) Despite subsection (2), disclosure of personal information is not an unreasonable invasion of a third party's privacy if

...

(g) the disclosure reveals information about a discretionary benefit of a financial nature granted to the third party by a public body, including the granting of a licence or permit;

...

A discretionary benefit is one which the public body may decide to provide or to refuse. Social allowances or other benefits that are determined by entitlement formula are not discretionary benefits for the purposes of this clause.

The benefit must be of a financial nature; that is, it must have a monetary aspect.

A licence or permit is an authorization, usually in writing, from a public body to carry out a specified activity.

An example of a discretionary benefit of a financial nature is a grant. The fact that an individual has received a grant from a public body and the amount and purposes of the grant would be information about the discretionary benefit and would fall under clause 17(4)(g). However, background personal information provided in support of the grant application would not fall under clause 17(4)(g).

Note:

In releasing information under clause 17(4)(g), a public body should be careful to ensure that it is not disclosing third party information that may fall within one of the mandatory exceptions to disclosure in Sec. 18.

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■ Disclosure Not Unreasonable: Individual Dead 25 Years or more - [Clause 17(4)(h)]

When disclosure not unreasonable

17(4) Despite subsection (2), disclosure of personal information is not an unreasonable invasion of a third party's privacy if

...

(h) the information is about an individual who has been dead for 25 years or more;

...

This provision puts a time limit on the protection of an individual's privacy after their death.

When considering releasing information under clause 17(4)(h), a public body should be careful to ensure that it is not disclosing information that may unreasonably invade the privacy of someone other than the deceased individual (for example, a family member).

When a relative requests personal information about a deceased individual, the head of the public body should consider clause 17(4)(h.1).⁹⁴

When a relative or a person who has the authority to exercise the rights of a deceased individual under Sec. 60 of [PHIA](#) requests personal health information about the deceased individual, they should make the request under Part 3 of [PHIA](#), not under [FIPPA](#),⁹⁵ unless the information is in a clinical record compiled and maintained in a psychiatric facility.

A request for personal health information about a deceased individual that is in a clinical record compiled and maintained in a psychiatric facility should be

⁹⁴ Clause 44(1)(z) of [FIPPA](#) authorizes a public body to disclose personal information to a relative of a deceased individual if the head reasonably believes that disclosure is not an unreasonable invasion of the deceased's privacy. The relative may complain to the ombudsman about a refusal to disclose the information under subsection 59(4). Clause 44(1)(z) is discussed in chapter 6, under Disclosure of Personal Information.

⁹⁵ Sec. 5 of [FIPPA](#) and clause 22(2)(d) of [PHIA](#).

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dealt with under [The Mental Health Act](#), whether the request is by a relative or by another person.⁹⁶

■ Disclosure Not Unreasonable: - Disclosing Personal Information about Deceased Individual for Compassionate Reasons [Clause 17(4)(h.1)]

When disclosure not unreasonable

17(4) Despite subsection (2), disclosure of personal information is not an unreasonable invasion of a third party's privacy if

...

(h.1) the information concerns a deceased individual and is disclosed to a relative of the deceased or an individual with whom the deceased shared a close personal relationship, if the head of the public body is satisfied that in the circumstances the disclosure is desirable for compassionate reasons; or

...

As discussed above, clause 17(4)(h) permits the head of a public body to disclose personal information about an individual who has been dead for 25 years or more. Clause 17(4)(h.1) however permits the head of a public body to disclose the personal information about an individual who has not yet been deceased for 25 years, but only for compassionate reasons and to certain individuals.

For this provision to apply, three conditions must be met:

- (i) *The requested personal information must be that of a deceased individual.*

A public body may require proof that the individual is deceased. Also, there are instances when personal information about others can be intertwined in a record with personal information about the deceased.

⁹⁶ Sec. 5 of [FIPPA](#) and subsection 4(3) of [PHIA](#).

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Caution must be taken to ensure that the disclosure of the deceased individual's personal information does not invade the privacy of others.

- (ii) *The applicant must be a relative or an individual with whom the deceased shared a close personal relationship.*

A relative is an individual connected with another by blood or affinity (that is, by reason of marriage).⁹⁷ A relative includes a spouse, common-law spouse, children, parents, siblings or anyone else who can establish a familial relationship with the deceased individual. Proof of the relationship with the deceased individual may be required from the applicant.

An individual with whom the deceased shared a close personal relationship is not a relative, but has an ongoing relationship with the deceased, such as a boyfriend, girlfriend, partner or caregiver. The types of public bodies that would typically be aware of individuals with whom the deceased shared a close personal relationship would be those with a client care-based relationship. The existence of a close personal relationship could already be known by notations that have been made in the deceased's client record. Otherwise, the onus is on the applicant to provide the head of the public body with satisfactory information to support that their relationship with the deceased was of a close personal nature. The public body may request that the applicant provide information supporting the close personal nature of their relationship with the deceased.

- (iii) *In the circumstances, the head is satisfied that the disclosure is desirable for compassionate reasons.*

Compassion means a feeling or emotion, when a person is moved by the suffering or distress of another, and by the desire to relieve it. Compassionate reasons, for the purpose of disclosing personal information of a deceased individual, would include information that may help the applicant cope with the grieving process.

[Order PO-3951](#) of the Ontario Information and Privacy

⁹⁷ Black's Law Dictionary, 6th Edition.

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Commissioner stated that “this office has repeatedly recognized that for surviving family members, greater knowledge of the circumstances of their loved one’s death is by its very nature compassionate.”

To satisfy the head that the disclosure would be for compassionate reasons, the head may consider such factors as:

- the nature of the applicant’s relationship with the deceased
- whether the personal information relates to circumstances surrounding the deceased’s death
- whether the deceased provided the personal information in confidence or request it not be disclosed
- whether the disclosure would harm the reputation of the deceased
- whether the disclosure would affect the privacy interests of other individuals

Essentially, the head’s decision to disclose the personal information should outweigh the presumptions that disclosure would be an unreasonable invasion of the deceased’s privacy as well as the privacy of other individuals involved.

Note:

A public body does not need a request for access to be made under Sec. 8 of Part 2 of [FIPPA](#) to disclose personal information to a relative of a deceased individual or an individual with whom the deceased shared a close personal relationship. Clause 44(1)(z) in Part 3 of [FIPPA](#) permits the disclosure of personal information when the disclosure is not an unreasonable invasion of the deceased’s privacy.

When a relative requests personal health information about a deceased individual, they should make the request under clause 22(2)(d) of [PHIA](#), not under FIPPA, unless the information is in a clinical record compiled in a psychiatric facility.

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A request for personal health information about a deceased individual that is in a clinical record compiled in a psychiatric facility should be dealt with under [The Mental Health Act](#), whether the request is by a relative or by another person.

Other requests for access to personal health information about a deceased individual should be dealt with under Part 2 of [FIPPA](#). See discussion under the heading, *Deemed Invasion: Personal Health Information – [Clause 17(2)(a)]* earlier in this chapter.

■ **Disclosure Not Unreasonable: Record Publicly Available - [Clause 17(4)(i)]**

When disclosure not unreasonable

17(4) Despite subsection (2), disclosure of personal information is not an unreasonable invasion of a third party's privacy if

...

(i) the record requested by the applicant is publicly available.

In applying this clause, it may be important for the public body to assess how public the record really is. Factors such as how the record was released to the public, the media, etc. will be relevant.

For example, a public body should not automatically treat a record containing personal information about an individual as public and freely disclose it to others simply because the information has been published in some form in the media or in a report. Depending on the circumstances, further disclosure may result in an unreasonable invasion of the individual's privacy.

Also note that it is the requested record, not the personal information in the record, that must be publicly available for this limit on the protection of an individual's privacy to apply.

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■ **No Volume or Bulk Access to Personal Information in a Public Registry - [Subsection 17(6)]**

Volume disclosure from a public registry

17(6) The head of a public body shall not disclose to an applicant under this Part personal information in a public registry on a volume or bulk basis.

The term public registry is not defined in [FIPPA](#), but is generally understood to mean a registry of information that is maintained by a public body and that is available to the general public, or a segment of the public.

If an applicant under Part 2 of [FIPPA](#) requests access to personal information in a public registry on a bulk or volume basis, the personal information must not be disclosed under Part 2 of [FIPPA](#).

■ **Refusal to Confirm or Deny Existence of Record - [Clause 12(2)(b)]**

In certain circumstances, the mere knowledge that a record containing personal information about a third party exists may be an unreasonable invasion of the third party's privacy.

Refusal to confirm or deny existence of record

12(2) Despite clause (1)(c), the head of a public body may, in a response, refuse to confirm or deny the existence of

...

(b) a record containing personal information about a third party if disclosing the existence of the record would be an unreasonable invasion of the third party's privacy

Under clause 12(2)(b) of [FIPPA](#), where the head of the public body decides to refuse access to a record containing personal information under Sec. 17, the head may also refuse to confirm or deny the existence of the record, if knowledge of the existence of the record would convey information to the applicant and disclosure of that information would be an unreasonable

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invasion of the third party's privacy.⁹⁸

This provision is discretionary and will only be used in rare situations.

For example, where an applicant requests access to a record containing information that another person has been tested for a communicable disease and is seeking treatment, knowledge of the existence of such a record would be an unreasonable invasion of that other person's privacy, and the head of the public body would exercise their discretion to refuse to confirm or deny the existence of the record under clause 12(2)(b).

■ **Third Party Notice and Consultations - [Secs. 33 and 34]**

1. Legal requirement to provide notice

When the head of a public body is considering giving access to a record that, if disclosed, "might result in an unreasonable invasion of a third party's privacy" under Sec. 17, the head must, where possible, give written notice to the third party before disclosing the personal information, and the third party must be given an opportunity to make a formal statement to the head about the proposed disclosure.⁹⁹

2. Informal consultations with third party may be advisable

The notice requirement and intervention process in Secs. 33 and 34 of [FIPPA](#) do not prevent informal consultations with third parties who may be affected by the disclosure of a record containing their personal information to an applicant. Indeed, there may be occasions when such consultations are advisable (for example, a public body considering the various factors in subsection 17(3) to determine whether disclosure would be an

⁹⁸ Subsection 12(2) is discussed in chapter 4, under *Refusal to Confirm or Deny Existence of Record*.

⁹⁹ Secs. 33 and 34 are discussed in chapter 4, under *Third Party Notice and Intervention*.

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unreasonable invasion of the third party's privacy may want to consult with the affected third party).

■ **Sec. 17: Related Provisions in FIPPA**

Subsection 1(1) (Definitions):

- “applicant”
- “employee”
- “enactment”
- “head”
- “law enforcement”
- “local public body”
- “minister”
- “personal health information”
- “personal information”
- “public body”
- “record”
- “third party”

Sec. 5	Relationship to other Acts
Sec. 6	Access to own personal health information
Subsection 7(2)	Severing information
Subsection 12(1)	Contents of response
Clause 12(2)(b)	Refusal to confirm or deny existence of record
Sec. 18	Business interests of third parties
Subsection 18(2)	Third party tax information
Sec. 24	Disclosure harmful to individual or public safety
Sec. 25	Law enforcement and legal proceedings
Sec. 29.1	Labour Relations Information

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Sec. 29.2	Workplace Investigations
Sec. 30	Confidential evaluations
Secs. 33 and 34	Third party intervention
Sec. 39	Correction of personal information
Sec. 44	Disclosure of personal information
Sec. 47	Disclosure of personal information for research purposes
Sec. 48	Disclosure of records more than 100 years old

BUSINESS INTERESTS OF A THIRD PARTY - [SEC. 18]

Summary of the Exception

Subsections 18(1) and 18(2) state that the head of a public body is required to (shall) refuse to disclose:

- (i) information that would reveal a trade secret of a third party
- (ii) commercial, financial, labour relations, scientific or technical information supplied in confidence by, and treated as confidential by, a third party
- (iii) commercial, financial, labour relations, scientific or technical information that, if disclosed, could reasonably be expected to result in one of the types of harm described in paragraphs 18(1)(c)(i) to (v) or
- (iv) information about a third party that was collected on a tax return or for the purpose of determining tax liability or collecting a tax

Subsections 18(1) and 18(2) are mandatory exceptions to the right to access under Sec. 7 of [FIPPA](#).

Clauses 18(1)(a) and (b), paragraph 18(1)(c)(v) and subsection 18(2) are class exceptions, because they protect a certain type or kind of information. The exceptions in paragraphs 18(1)(c)(i) to (iv) contain a reasonable expectation of harm test.

Subsection 18(3) limits the exceptions in subsections 18(1) and 18(2). Clause 18(3)(a) provides for access with the consent of the affected third party.

Subsection 18(4) gives the head of a public body the discretion to disclose information affecting a third party's business interests where it is in the public interest.

Sec. 33 states that the head must, where possible, notify a third party in writing if the head is considering giving access to a record which, if disclosed, might affect a third party's business interests as described in subsection 18(1) or (2). Secs. 33 and 34

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further states that the third party has a right to make representations (formal statements) about the proposed disclosure.¹⁰⁰

■ Purpose of the Exceptions in Subsections 18(1) and 18(2)

Public bodies acquire a great deal of information about the business activities of third parties. The exceptions in subsections 18(1) and 18(2), by imposing on the head of a public body a duty to refuse to disclose specific information about the business interests of a third party, recognize that much of this information is a valuable business asset and that disclosure to another would harm the third party's business interests.

1. Third Party

The phrase third party is defined in subsection 1(1) of the act:

Third party means a person, group of persons or an organization other than the applicant or a public body.

The word person means a natural person (an individual) and includes “a corporation and the heirs, executors, administrators or other legal representatives of a person.”¹⁰¹ An organization is “an organized body, especially a business, charity, etc.”¹⁰² For example, a trade union is an organization.

The exceptions in subsections 18(1) and 18(2) protect sensitive business information from or about corporations, businesses and organizations (for profit and not for profit), as well as sensitive business information from or about individuals.

The exceptions in subsections 18(1) and 18(2) do not apply to information from or about other public bodies (other exceptions in

¹⁰⁰ Secs. 33 and 34 are discussed in chapter 4, under *Third Party Notice and Intervention*.

¹⁰¹ [The Interpretation Act](#) of Manitoba, Sec. 17 and the Schedule of Definitions.

¹⁰² The Concise Oxford Dictionary, 9th edition.

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[FIPPA](#), such as the exceptions in Secs. 20, 21 and 28, protect sensitive information from or about other public bodies).

A record may contain information about the business interests of more than one third party. In such circumstances, the interests of each third party are protected from disclosure to another by the exceptions in subsection 18(1) and 18(2).

2. Severing - subsection 7(2)

The term information, rather than the term record, is used in subsections 18(1) and 18(2) to indicate that the exceptions apply to the information in a record and not necessarily to the whole record. Subsection 7(2) of [FIPPA](#) requires that, where an exception applies to some of the information in a record, only that information is severed, and the applicant is entitled to access to the remainder of the record (unless an exception in another section of [FIPPA](#) applies to it).¹⁰³

■ Disclosure Harmful to a Third Party's Business Interests: Scope of the Exception in Subsection 18(1)

18(1) *The head of a public body shall refuse to disclose to an applicant information that would reveal...*

1. Clauses 18(1)(a), (b) and (c) each contain a separate exception

Each of clauses 18(1)(a), (b) and (c) set out a separate exception to disclosure as the word *or* is used to join the clauses. Subsection 18(1) does not set up a three-pronged test; information does not have to meet the requirements of all three clauses for an exception to apply.

¹⁰³ For a discussion of severing and subsection 7(2) see *The Exceptions Apply to Information in a Record - Severing* earlier in this chapter and *Severing a Record* in chapter 4.

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2. Reveal

Disclosure would reveal the information protected by clauses 18(1)(a), (b) or (c) if, for example:

- The information disclosed is the protected information.
- The information disclosed directly refers to the protected information.
- The information disclosed would permit accurate inferences to be drawn about the protected information.¹⁰⁴
- The information disclosed could be combined with other information to reveal the protected information.

■ Exception to Disclosure: Trade Secret of a Third Party - [Clause 18(1)(a)]

18(1) *The head of a public body shall refuse to disclose to an applicant information that would reveal*
(a) a trade secret of a third party;

The head of a public body is required to (shall) refuse to disclose any information that would “reveal” a trade secret of a third party. The exception in clause 18(1)(a) is a ‘class exception’ as it protects a type or kind of information.

The meaning of the term reveal is discussed earlier in this chapter, under *Disclosure Harmful to a Third Party’s Business Interests*.

1. Source of the trade secret information

¹⁰⁴ Ontario Information and Privacy Commissioner [Order P-226](#) (Re Ministry of Consumer and Commercial Relations; March 26, 1991) (made in the context of Cabinet confidences).

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The exception to disclosure in clause 18(1)(a) applies even if the information about the trade secret was not provided or supplied by the third party itself - for example, the information may have come from another source or have been compiled by the public body.

2. Meaning of trade secret

The term trade secret has been described as follows:

The term trade secret refers to some identifiable business or technical information that is kept private for economic gain. The creator of that information expends resources (and often considerable resources) of one kind or another to gain a competitive edge in product or services over a competitor. If the nature of the information were publicly known, the competitive advantage would be lost.

There are potentially four categories of trade secrets:

- specific product secrets (such as chemical formula)
- technological secrets (that is, knowledge of some process or know-how that nobody else has yet developed)
- strategic business information (secret marketing information or customer lists)
- specialized compilations of information that, in sum, are not publicly known and have unique value on that account¹⁰⁵

In summary, trade secret means information, including a formula, pattern, compilation, programme, method, technique or process or

¹⁰⁵ Trade Secrets, a Report of the Institute of Law Research and Reform (Edmonton, Alberta) and a Federal Provincial Working Party on Trade Secrets ([Report No. 46](#)), July 1986, at page 6.

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information contained or embodied in a product, device or mechanism which

- (i) is or may be used in a trade or business,
- (ii) is not generally known in that trade or business,
- (iii) has economic value from not being generally known, and
- (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.¹⁰⁶

3. Of a third party

Trade secret of a third party means that the third party must own the trade secret or have a legal right or claim to the trade secret information (for example, under a license agreement).

If a public body intends to rely upon the third party trade secret exception, or is not sure if information is or would reveal a trade secret, legal counsel should be consulted. In addition, the public body should contact the third party to determine its position on the information.

■ Exception to Disclosure: Commercial and Other Information Supplied on a Confidential Basis - Clause 18(1)(b)

18(1) The head of a public body shall refuse to disclose to an applicant information that would reveal

...

(b) commercial, financial, labour relations, scientific or technical information supplied to the public body by a third party, explicitly or implicitly, on a confidential basis and treated

¹⁰⁶ Ontario Information and Privacy Commissioner [Order M-29](#) (Re Etobicoke Board of Education, July 30, 1992) which adopts the definition from Trade Secrets, cited above.

EXCEPTIONS TO DISCLOSURE

consistently as confidential information by the third party;¹⁰⁷ or

The head of a public body is required to (shall) refuse to disclose the confidential third party information described in clause 18(1)(b). The exception in clause 18(1)(b) is a class exception as it protects a type or kind of information.

The focus of the exception in clause 18(1)(b) is the confidential nature of the information. How the information is obtained by the public body, and the manner in which the information is treated by the third party, are also important in determining whether this exception applies.

The exception in clause 18(1)(b) has four requirements, all of which must be met for the exception to apply:

- (i) *The information must reveal commercial, financial, labour relations, scientific or technical information*

The term reveal is discussed earlier in this chapter, under *Disclosure Harmful to a Third Party's Business Interests*.

Commercial information is information related to or connected with trade or commerce,¹⁰⁸ with the buying, selling or exchange of merchandise or services.¹⁰⁹ Examples include price lists, lists of suppliers and customers, market research surveys and other similar information relating to the commercial operation of a business.¹¹⁰ The term “commercial information” can apply to both profit-making

¹⁰⁷ Substantially the same as clause 42(1)(b) of the 1985 Freedom of Information Act. References to labour relations information and the phrase “explicitly or implicitly” have been added.

¹⁰⁸ [Order P-179](#), Ontario Information and Privacy Commissioner (Re Ministry of Health, June 20, 1990).

¹⁰⁹ Ontario Information and Privacy Commissioner [Order P-493](#) (Re Ministry of Municipal Affairs, July 9, 1993).

¹¹⁰ Ontario Information and Privacy Commissioner [Order P-16](#) (Re Ministry of Agriculture & Food, Sept. 8, 1988).

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enterprises and non-profit enterprises.¹¹¹

Financial information is information relating to finance - money and the monetary resources of a person, company, etc.¹¹² Examples include information on pricing practices, profit and loss data, overhead and operating expenses.¹¹³

Labour relations information means information respecting the collective bargaining relationship between the public body and its employees, as governed by collective bargaining legislation, or analogous relationships.¹¹⁴

Scientific information refers to information relating to or exhibiting the methods or principles of science. In particular, it is information belonging to an organized field of knowledge in the natural, biological or social sciences or mathematics which relates to the observation and testing of specific hypotheses or conclusions and which is undertaken by an expert in the field.¹¹⁵

Technical information usually refers to information of, involving or concerned with the mechanical arts and applied sciences.¹¹⁶ Examples of mechanical arts and applied sciences include architecture, engineering and electronics. An example of “technical information” is a description of the deficiencies in the structure of a building.¹¹⁷

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- ¹¹¹ Ontario Information and Privacy Commissioner [Order P-493](#) (Re Ministry of Municipal Affairs, July 9, 1993).
- ¹¹² The Concise Oxford Dictionary, 9th Edition.
- ¹¹³ Ontario Information and Privacy Commissioner [Order P-80](#) (Re Ministry of Health, July 26, 1989).
- ¹¹⁴ *Waterloo (City) Re*, [2008] O.I.P.C. No. 62 at para 15
- ¹¹⁵ Ontario Information and Privacy Commissioner [Order P-454](#) (Re Ontario Native Affairs Secretariat, May 7, 1993).
- ¹¹⁶ The Concise Oxford Dictionary, 9th Edition.
- ¹¹⁷ Ontario Information and Privacy Commissioner [Order P-444](#) (Re Ministry of Health, April 2, 1993).

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- (ii) *The information must have been supplied to the public body by the third party who would be affected by the disclosure*

Supplied means provided or furnished¹¹⁸ and includes information supplied voluntarily or information supplied because of a legal requirement (for example, where a statute requires that the information be provided). It would include information provided orally by the third party and recorded by an employee of the public body.

Information created or generated by the public body or provided by someone other than the third party would not fall within the exception to disclosure in clause 18(1)(b).

- (iii) *The information must have been supplied, explicitly or implicitly, on a confidential basis*

Information is explicitly supplied in confidence when the third party providing the information expressly requests or indicates that it is to be kept confidential. The intention to provide information in confidence can be stated in the record of the information itself, in an agreement or verbally. It is advisable to keep a written record of a verbal request.

Information is implicitly provided in confidence when an intention that the information be treated as confidential can be implied from the circumstances in which it was provided - for example, from the manner in which the information is provided and received,¹¹⁹ past practices followed with respect to such information, stated policies, etc. A confidentiality provision in another statute may form the basis for a reasonable expectation on the part of someone providing sensitive commercial and other information that the information will remain confidential.¹²⁰

¹¹⁸ The Concise Oxford Dictionary, 9th Edition.

¹¹⁹ Ontario Information and Privacy Commissioner [Order P-274](#) (Re Ministry of Correctional Services, Feb. 21, 1992) (made in the context of third party personal information).

¹²⁰ Ontario Information and Privacy Commissioner [Order P-309](#) (Re Ministry of Consumer & Commercial Relations; June 8, 1992) (made in the context of third party personal information).

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- (iv) *The information must be treated consistently as confidential information by the third party*

For the exception to disclosure in clause 18(1)(b) to apply, it is not enough that the information has been provided to the public body in confidence by the third party. The third party must also consistently treat this information as confidential information. For example, the exception would not apply to information that has been made available to the public by the third party.

■ **Exception to Disclosure: Harm to a Third Party’s Competitive Position, Negotiations, etc. - Opening Words of Clause 18(1)(c)**

18(1) *The head of a public body shall refuse to disclose to an applicant information that would reveal*

...

(c) *commercial, financial, labour relations, scientific or technical information the disclosure of which could reasonably be expected to.*

...

The head of a public body is required to (shall) refuse to disclose to an applicant under Part 2 of [FIPPA](#) the third party business information described in clause 18(1)(c) if any of the harms described in paragraphs 18(1)(c)(i) to (v) could reasonably be expected to result. Each of paragraphs 18(1)(c)(i), (ii), (iii), (iv) and (v) contain a separate exception to disclosure.

The term reveal is discussed earlier in this chapter, under *Disclosure Harmful to a Third Party’s Business Interests*.

1. Type of information protected by clause 18(1)(c)

For an exception in clause 18(1)(c) to apply, the information must be “commercial, financial, labour relations, scientific or technical

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information.”¹²¹

2. Source of the information

The exceptions in clause 18(1)(c) apply even if the information was not provided or supplied by the third party itself - for example, the information may have come from another source or may have been generated or compiled by the public body. In some cases, the party that provided the information may not be the third party, or the only third party, whose interests would be harmed by disclosing the information.

Unlike clause 18(1)(b), the focus of the exceptions in clause 18(1)(c) is not the source of the information, but whether or not the specified harm or injury could reasonably be expected to result from disclosure or, in the case of paragraph 18(1)(c)(v), whether the type of information described would be disclosed.

■ Exception to Disclosure: Harm to Competitive Position of a Third Party - [Paragraph 18(1)(c)(i)]

18(1) *The head of a public body shall refuse to disclose to an applicant information that would reveal*

...

(c) *commercial, financial, labour relations, scientific or technical information the disclosure of which could reasonably be expected to*

(i) *harm the competitive position of a third party,*

...

The exception in paragraph 18(1)(c)(i) involves a ‘reasonable expectation of harm’ test.¹²² The head of the public body must determine whether disclosure of the information could “reasonably be expected” to result in the harm described in paragraph 18(1)(c)(i). The individual circumstances of each

¹²¹ These terms are discussed in detail earlier in this chapter, under *Commercial and Other Information Supplied on a Confidential Basis* - Clause 18(1)(b).

¹²² See *Reasonable Expectation of Harm*, earlier in this chapter.

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request for such information must be carefully assessed, and the determination must be based on objective grounds. As the best source of necessary facts and information about potential harm will usually be the third party the information is about, the public body will usually consult with that third party when considering this exception.

Harm means that disclosure of the information would hurt or damage the third party's competitive position.¹²³

There can be harm to the competitive position of a third party even if there is no immediate loss. However, for the exception in paragraph 18(1)(c)(i) to apply there must be:

- a competitive community or an existing or potential business rival, and
- a reasonable expectation that harm could result to a third party from a competitor's knowledge of the information.

■ **Exception to Disclosure: Interfere with Negotiations of a Third Party - [Paragraph 18(1)(c)(ii)]**

18(1) *The head of a public body shall refuse to disclose to an applicant information that would reveal*

...

(c) *commercial, financial, labour relations, scientific or technical information the disclosure of which could reasonably be expected to*

...

(ii) *interfere with contractual or other negotiations of a third party,*

...

The exception in paragraph 18(1)(c)(ii) involves a reasonable expectation of harm test.¹²⁴ The head of the public body must determine whether disclosure of the information could reasonably be expected to result in the harm

¹²³ The Concise Oxford Dictionary, 9th Edition.

¹²⁴ See *Reasonable Expectation of Harm*, earlier in this chapter.

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described in paragraph 18(1)(c)(ii). The individual circumstances of each request for such information must be carefully assessed, and the determination must be based on objective grounds. Because the best source of necessary facts and information about potential harm will usually be the third party the information is about, the public body will usually consult with that third party when considering this exception.

To interfere with means to obstruct, to meddle with, hinder or get in the way of contractual or other negotiations of a third party.¹²⁵

To negotiate means to confer with others to reach a compromise or agreement.¹²⁶ Negotiations in this context means discussions and communications where the intent is to arrive at an agreement or a settlement. For example, the negotiations referred to in paragraph 18(1)(c)(ii) can include contractual negotiations or negotiations relating to settling a lawsuit or a dispute.

■ **Exception to Disclosure: Significant Financial Loss or Gain to a Third Party - [Paragraph 18(1)(c)(iii)]**

***18(1)** The head of a public body shall refuse to disclose to an applicant information that would reveal*

...

(c) commercial, financial, labour relations, scientific or technical information the disclosure of which could reasonably be expected to

...

(iii) result in significant financial loss or gain to a third party,

...

The exception in paragraph 18(1)(c)(iii) involves a reasonable expectation of harm' test.¹²⁷ The head of the public body must determine whether disclosure

¹²⁵ The Concise Oxford Dictionary, 9th Edition.

¹²⁶ The Concise Oxford Dictionary, 9th edition.

¹²⁷ See *Reasonable Expectation of Harm*, earlier in this chapter.

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of the information could reasonably be expected to result in the harm described in paragraph 18(1)(c)(iii). The individual circumstances of each request for such information must be carefully assessed, and the determination must be based on objective grounds. Because the best source of necessary facts and information about potential harm will usually be the third party the information is about, the public body will usually consult with that third party when considering this exception.

The financial loss or gain to a third party resulting from disclosure of the information must be significant, not minimal or negligible.

The loss or gain under this exception must be financial - that is, must be monetary or have a monetary equivalent or value (for example, a loss of revenue, loss of business reputation or loss of goodwill).

■ **Exception to Disclosure: Disclosure would Result in Similar Information no Longer being Supplied - [Paragraph 18(1)(c)(iv)]**

18(1) The head of a public body shall refuse to disclose to an applicant information that would reveal

...

(c) commercial, financial, labour relations, scientific or technical information the disclosure of which could reasonably be expected to

...

(iv) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied, or

...

The exception in paragraph 18(1)(c)(iv) involves a reasonable expectation of harm test.¹²⁸ The head of the public body must determine whether disclosure of the information could reasonably be expected to result in the harm described in paragraph 18(1)(c)(iv). The individual circumstances of each request for such information must be carefully assessed, and the

¹²⁸ See *Reasonable Expectation of Harm*, earlier in this chapter.

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determination must be based on objective grounds.

Supplied means provided or furnished to the public body.¹²⁹

“Result in similar information no longer being supplied to the public body” means that disclosure of the information would discourage either the third party concerned or other third parties from providing similar information to the public body in the future.

"When it is in the public interest that similar information continue to be supplied" means that the head of the public body must determine whether it is in the public interest that the third party, or other third parties, continue to supply this type of information. In making this determination, the head should consider all relevant facts and circumstances, including third party representations.

■ **Exception to Disclosure: Disclosure would Reveal Report of Labour Relations Arbitrator, etc. - [Paragraph 18(1)(c)(v)]**

*18(1) The **head** of a **public body** shall refuse to disclose to an **applicant** information that would reveal*

...

(c) commercial, financial, labour relations, scientific or technical information the disclosure of which could reasonably be expected to

...

(v) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

The exception in paragraph 18(1)(c)(v) does not contain a reasonable expectation of harm test. It is a class exception because it protects a type or kind of information.

¹²⁹ The Concise Oxford Dictionary, 9th edition.

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The term reveal was discussed earlier in this chapter, under *Disclosure Harmful to a Third Party's Business Interests*.

Information supplied to an arbitrator, mediator, labour relations officer, etc. means that the information has been provided or furnished¹³⁰ by someone else to those people.

A report includes an account given or formally expressed after investigation or consideration, or a description, summary or reproduction of an event, a periodical statement on work, conduct, etc.¹³¹

For the exception to apply, the information must be supplied to, or the report must be the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

An arbitrator is a private, disinterested person, chosen by the parties to a disputed question, for the purpose of hearing their contentions and giving judgement between them, to whose decision or award the parties submit themselves either voluntarily or, in some cases, compulsorily.¹³²

A mediator is a person who interposes between parties at variance for the purpose of reconciling them.¹³³

A labour relations officer is a person appointed to inquire into or resolve any form of labour relations dispute or issue.

The phrase "other person or body appointed to resolve or inquire into a labour relations dispute" includes a person or body appointed by any level of government or a public body (for example, an appointment by cabinet, by a minister or by the chief executive officer of an incorporated government agency).

¹³⁰ The Concise Oxford Dictionary, 9th Edition.

¹³¹ The Concise Oxford Dictionary, 9th Edition.

¹³² Black's Law Dictionary, 6th Edition.

¹³³ Black's Law Dictionary, 6th Edition.

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■ Exception to Disclosure: Third Party Tax Information - [Subsection 18(2)]

Tax return information

18(2) The head of a public body shall refuse to disclose to an applicant information about a third party that was collected on a tax return or for the purpose of determining tax liability or collecting a tax.

- (i) information collected on a tax return
- (ii) information collected for the purpose of determining tax liability
- (iii) information collected for the purpose of collecting a tax

A tax is a contribution to state revenue compulsorily levied on individuals, property or businesses¹³⁴ and includes provincial, municipal or federal taxes. The term tax does not usually include a license fee, other fee or charge payable for a direct benefit received by the party paying the fee. A royalty may qualify as a tax under some statutes. Legal counsel should be consulted if there is any doubt as to whether a tax is involved.

Information collected on a tax return is information provided or assembled on a form used to report taxable personal or business income or property.

Information collected for the purpose of determining tax liability means the information is collected for the purpose of determining if a person, business or organization owes past, current or future taxes. An example is information collected during an audit of a business undertaken to determine whether the business owes additional taxes.

Information "collected for the purpose of ... collecting a tax" means the information is collected for the purpose of collecting due or overdue taxes. An example is a letter of credit deposited as security for payment of taxes by a

¹³⁴ The Concise Oxford Dictionary, 9th Edition.

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business which collects retail sales tax on behalf of the government.¹³⁵

Note:

The exception in clause 17(2)(f) also deals with tax information. However, that clause only applies to tax information about individuals (that is, human beings).

■ **When the Exceptions Don't Apply: Limits to the Exceptions Protecting Third Party Business Interests - [Subsection 18(3)]**

Subsection 18(3) limits the exceptions in subsections 18(1) and 18(2). If the information requested by an applicant falls within any of the clauses of subsection 18(3), the head of the public body cannot rely on the exceptions to disclosure in Sec. 18. An exception to disclosure in another section in [FIPPA](#) may, however, apply to the information.

■ **Limit on Exceptions: Consent of Third Party - [Clause 18(3)(a)]**

*18(3) Subsections (1) and (2) do not apply if
(a) the **third party** consents to the disclosure;*

...

The head of a public body cannot rely on the exceptions to disclosure in subsection 18(1) or 18(2) if the affected third-party consents to the disclosure of the information to the applicant. Unless another exception provision in the act applies, the head must disclose the record to the applicant. The purpose of Sec. 18 of [FIPPA](#) is to protect the business interests of third parties, not the interests of the public body that has custody or control of the information.

A consent under clause 18(3)(a) should, wherever possible, be in writing and should be based on adequate information (for example, the third party should have a clear understanding of the nature of the information that is to be disclosed to the applicant).

¹³⁵ [Order P-553](#), Ontario Information and Privacy Commissioner (Re Ministry of Finance, Oct. 14, 1993).

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■ **Limit on Exceptions: Information is Publicly Available - [Clause 18(3)(b)]**

18(3) Subsections (1) and (2) do not apply if
...
(b) the information is publicly available;
...

Unless another exception in the act applies, the head of a public body must give access to information related to a third party's business interests if the information is publicly available.

In applying this clause, it may be important for the public body to assess how public the information really is. Factors such as how the information was released to the public, the media, etc. will be relevant.

■ **Limit on Exceptions: Disclosure is Authorized or Required by an Enactment - [Clause 18(3)(c)]**

18(3) Subsections (1) and (2) do not apply if
...
(c) an enactment of Manitoba or Canada expressly authorizes or requires the disclosure;
...

An enactment is defined in subsection 1(1) of [FIPPA](#) as an act or regulation.

- An act of Manitoba or Canada is a statute passed by the Legislative Assembly of Manitoba or by the Parliament of Canada.
- A regulation is a law made under the authority of a statute by the Lieutenant Governor in Council (in the case of Manitoba), by the Governor General in council (in the case of Canada), by a minister of the Manitoba government or Canada, etc.

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Expressly means definitely stated, not merely implied.¹³⁶ For disclosure to be expressly authorized or required by an enactment, the authority or requirement in the statute or regulation should be clear and explicit and should relate to the type of information in question.

Disclosure is authorized by an enactment when it is permitted but not required - words such as “may disclose” or “has a discretion to disclose” indicate disclosure is authorized.

Disclosure is required by an enactment when there is an obligation to disclose - words such as “shall disclose” or “must disclose” indicate disclosure is required.

■ **Limit on Exceptions: Final Results of Product or Environmental Test - [Clause 18(3)(d)]**

18(3) *Subsections (1) and (2) do not apply if*

...

(d) the information discloses the final results of a product or environmental test conducted by or for the public body, unless the test was done for a fee paid by the third party.

The exceptions in subsections 18(1) and 18(2) do not apply to information related to a third party’s business interests if that information discloses “the final results of a product or environmental test conducted by or for the public body.” However, an exception in another section of [FIPPA](#) may apply to this information.

The limit in clause 18(3)(d) does not apply if the product or environmental test was done for a fee paid by the third party. In these circumstances, an exception to disclosure in subsections 18(1) or 18(2) may apply to the information.

Also, the limit in clause 18(3)(d) only applies to final results of a product or environmental test, not to preliminary test results. Final means situated at the

¹³⁶ The Concise Oxford Dictionary, 9th Edition.

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end, coming last; conclusive, decisive, unalterable, putting an end to doubt.¹³⁷

The testing can be carried out by the public body itself or for the public body by another person or organization.

Product means a thing or substance produced by natural process or manufacture, a result.¹³⁸

Environment refers to the physical surroundings, conditions or circumstances in which a person lives; the area surrounding a place; external conditions as affecting plant and animal life; the totality of the physical conditions on the earth or a part of it, especially as affected by human activity.¹³⁹

■ Disclosure of Third Party Business Information in the Public Interest - [Subsection 18(4)]

18(4) Subject to section 33 and the other exceptions in this Act, a head of a public body may disclose a record that contains information described in subsection (1) or (2) if, in the opinion of the head, the private interest of the third party in non-disclosure is clearly outweighed by the public interest in disclosure for the purposes of

- (a) public health or safety or protection of the environment;*
- (b) improved competition; or*
- (c) government regulation of undesirable trade practices.*

Unless an exception to disclosure in another section of [FIPPA](#) applies, subsection 18(4) gives the head of a public body a discretion to (may) disclose a record containing third party business information in the circumstances and for the public purposes set out in subsection 18(4).

Public health refers to the well-being of the general public, or a significant part of the public. Clause 18(4)(a) does not authorize disclosure of personal health

¹³⁷ The Concise Oxford Dictionary, 9th Edition.

¹³⁸ The Concise Oxford Dictionary, 9th Edition.

¹³⁹ The Concise Oxford Dictionary, 9th Edition.

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information about a third party. Such information can only be disclosed to an applicant under Part 2 of [FIPPA](#), if disclosure is not an unreasonable invasion of the third party's privacy under Sec. 17.

Safety means the condition of being safe; freedom from danger or risks.¹⁴⁰ A disclosure of third party business information would promote public safety if it would reduce the exposure of the general public, or a significant part of the public, to risk or danger.

Environment refers to the physical surroundings, conditions, circumstances, etc. in which a person lives; the area surrounding a place; external conditions as affecting plant and animal life; the totality of the physical conditions on the earth or a part of it, especially as affected by human activity.¹⁴¹

The head of the public body must believe that the private interest of the third party in non-disclosure of the business information is clearly outweighed by the public interest in disclosure for one of the purposes set out in clause 18(4)(a), (b) or (c). In this context, clearly means unambiguous, manifest, not confused or doubtful.¹⁴²

Before the head can disclose the third party business information on the public interest grounds in clauses 18(4)(a), (b) or (c), the head must, where possible, provide written notice to the third party under Sec. 33 of [FIPPA](#).¹⁴³

■ **Third Party Notice and Intervention - [Secs. 33 and 34]**

1. Legal requirement to provide notice

If the head of a public body is considering giving access to a record that, if disclosed might affect a third party's business interests described in subsection 18(1) or 18(2), the head must, where possible, give written notice to the third party and the third party must be given an opportunity to make representations (formal statements) to the

¹⁴⁰ The Concise Oxford Dictionary, 9th Edition.

¹⁴¹ The Concise Oxford Dictionary, 9th Edition.

¹⁴² The Concise Oxford Dictionary, 9th Edition.

¹⁴³ Secs. 33 and 34 are discussed in chapter 4, under *Third Party Notice and Intervention*.

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head about the proposed disclosure.¹⁴⁴

Similarly, if the head of a public body intends to disclose information related to a third party's business interests in the public interest under subsection 18(4), the third party must first be given written notice.

2. Informal consultations with third party may be advisable

The notice requirement and intervention process in Secs. 33 and 34 of [FIPPA](#) do not prevent informal consultations with third parties who may be affected by the disclosure of a record containing information about their business interests to an applicant.

Indeed, there may be occasions when such consultations are necessary. For example, in determining whether information has been supplied on a confidential basis and has been consistently kept confidential by the third party for the purposes of the exception in clause 18(1)(b), communication with the third party may be necessary. Similarly, in determining whether any harm described in clauses 18(1)(c)(i), (ii), (iii) or (iv) could reasonably be expected to result from disclosure of a record, information from the third party will often be required.

■ Sec. 18: Related Provisions in FIPPA

Subsection 1(1) (Definitions):

- “applicant”
- “enactment”
- “head”
- “public body”
- “record”
- “third party”

Subsection 7(2) **Severing information**

Subsection 12(1) **Contents of response**

¹⁴⁴ Secs. 33 and 34 are discussed in chapter 4, under *Third Party Notice and Intervention*.

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Sec. 17	Privacy of a third party
Clause 17(2)(f)	Personal information collected for tax purposes
Clause 23(2)(d)	Results of product or environmental test
Subsection 28(1)	Economic interests of a public body or the government
Subsection 28(2)	Results of product or environmental test
Sec. 29.1	Labour relations information
Secs. 33 and 34	Third party intervention

CABINET CONFIDENCES - [SEC. 19]

Summary of the Exception

Subsection 19(1) states that the head of a public body is required to (shall) refuse to disclose to an applicant requesting a record under Part 2 “information that would reveal the substance of deliberations of cabinet.”

Subsection 19(1) creates a mandatory exception to the right to access under Sec. 7 of [FIPPA](#).

The cabinet confidence exception is a class exception because it protects a certain type or kind of information.

Clause 19(2)(a) limits the cabinet confidence exception. The exception does not apply if the record is more than 20 years old.

Clause 19(2)(b) permits access to a record revealing the substance of deliberations of cabinet if the cabinet for which it was prepared, or to which it relates, consents.

■ **Scope of the Cabinet Confidence Exception - [Subsection 19(1)]**

Cabinet confidences

19(1) *The head of a public body shall refuse to disclose to an applicant information that would reveal the substance of deliberations of Cabinet, including ...*

1. Basis for the Cabinet Confidence Exception

In Manitoba, the Executive Council, consisting of the government ministers appointed under [The Executive Government Organization Act, C.C.S.M. c. E170](#) is commonly referred to as cabinet.

The source of the cabinet confidence exception is the British/Canadian parliamentary convention of collective ministerial responsibility - all ministers of the Manitoba government are collectively responsible to

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the Legislature and to the people of Manitoba for the actions of the government. In practice, all members of a cabinet are expected to publicly support the actions and policies of the government. Cabinet discussions and deliberations have traditionally been kept confidential to permit full and frank discussions within cabinet to facilitate collective decision making and to avoid breaches in cabinet unity once a decision has been made.

The Supreme Court of Canada has recognized that the right to access information held by public institutions must be subject to limits to protect this need for a free flow of advice and for frank discussions of issues:

*Access to information in the hands of public institutions can increase transparency in government, and enhance an open and democratic society. Some information in the hands of those institutions is, however, entitled to protection to prevent the impairment of those very principles and promote good governance.*¹⁴⁵

2. Meaning of Cabinet

Cabinet is defined in subsection 1(1) of [FIPPA](#):

Cabinet means the Executive Council appointed under [The Executive Government Organization Act](#) and includes a committee of the Executive Council.

The exception to disclosure in subsection 19(1) applies to the deliberations of cabinet itself and also to the deliberations of committees of cabinet.

Committees of cabinet are usually established by the Lieutenant Governor in Council under Sec. 7 of [The Executive Government Organization Act](#). Examples include:

¹⁴⁵ *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (Supreme Court of Canada), paragraph 1: <http://tinyurl.com/95xb2f3>.

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- Treasury Board
- the Statutes and Regulations Review Board
- the Community Economic Development Board
- the Healthy Child Committee of Cabinet
- other cabinet committees that may replace these committees or that may be created from time to time

3. Severing - subsection 7(2)

The term information, rather than the term record, is used in subsection 19(1) to indicate that the exception applies to the information in a record and not necessarily to the whole record. Subsection 7(2) of FIPPA requires that, where an exception applies to some of the information in a record, only that information is severed, and the applicant is entitled to access to the remainder of the record, unless an exception in another section of [FIPPA](#) applies to it.¹⁴⁶

4. Clauses 19(1)(a) to (e) are examples only - including

The word including in subsection 19(1) indicates that the records or information listed in clauses (a) to (e) are not the only records or information that fall within the exception to disclosure in subsection 19(1). There may be information that is not described in clauses 19(1)(a) to (e) that nonetheless would reveal the substance of deliberations of cabinet. Such information falls within the exception to disclosure described in the opening words of subsection 19(1) – "reveal the substance of deliberations of cabinet."

¹⁴⁶ For a discussion of severing and subsection 7(2) see *The Exceptions Apply to Information in a Record - Severing* earlier in this Chapter and *Severing a Record* in chapter 4.

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■ **Exception to Disclosure: Reveal the Substance of Deliberations of Cabinet - the Opening Wording - [Subsection 19(1)]**

Cabinet confidences

19(1) *The head of a public body shall refuse to disclose to an applicant information that would reveal the substance of deliberations of Cabinet, including.....*

The head of a public body is required to (shall) refuse to disclose to an applicant requesting access to a record under Part 2 information that “would reveal the substance of deliberations of cabinet” or of a committee of cabinet.

The exception to disclosure is described in the opening wording of subsection 19(1). Clauses 19(1)(a) to (e) set out examples of information that fall within this exception, but the list of examples is not exhaustive.

1. Reveal

Information would reveal the substance of deliberations of cabinet or of a committee of cabinet if, for example:

- the information disclosed contains the substance of deliberations of cabinet or of one of its committees
- the information disclosed directly refers to the substance of deliberations of cabinet or of one of its committees
- the information disclosed would permit accurate inferences to be drawn about the substance of deliberations of cabinet or of one of its committees;¹⁴⁷
- the information disclosed could be combined with other information to reveal the substance of deliberations of cabinet or of one of its committees

¹⁴⁷ Ontario Information and Privacy Commissioner [Order P-226](#) (Re Minister of Consumer and Commercial Relations; March 26, 1991).

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2. Substance of deliberations of Cabinet

Substance means the matter, subject matter, subject¹⁴⁸ or the theme or subject of a thing.¹⁴⁹

Deliberation means careful consideration; the discussion of reasons for and against; a debate or discussion.¹⁵⁰

■ Exception to Disclosure: Agenda, Minute or Record of Cabinet Deliberations or Decisions - [Clause 19(1)(a)]

Cabinet confidences

19(1) *The head of a public body shall refuse to disclose to an applicant information that would reveal the substance of deliberations of Cabinet, including*

(a) an agenda, minute or other record of the deliberations or decisions of Cabinet;

...

An agenda of cabinet indicates the matters considered by cabinet and would therefore disclose the deliberations of cabinet.

A cabinet minute would disclose the deliberations and decisions of cabinet.

A list of issues tabled at cabinet that reflects the priorities of cabinet is an example of a record of the deliberations or decisions of cabinet that is not an agenda or a minute.

Remember, cabinet includes a committee of cabinet.

¹⁴⁸ The Compact Edition of the Oxford English Dictionary.

¹⁴⁹ The Concise Oxford Dictionary, 8th Edition, quoted in Ontario Information and Privacy Commissioner [Order M-196](#) (Re City of Kingston, Oct. 1, 1993).

¹⁵⁰ The Concise Oxford Dictionary, 9th Edition.

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■ **Exception to Disclosure: Briefing Materials for Cabinet - [Clause 19(1)(b)]**

Cabinet confidences

19(1) *The head of a public body shall refuse to disclose to an applicant information that would reveal the substance of deliberations of Cabinet, including*

...

(b) *discussion papers, policy analyses, proposals, advice or similar briefing material submitted or prepared for submission to Cabinet;*

...

This example of the exception respecting deliberations of cabinet only applies to material submitted to or prepared for submission to cabinet or a committee of cabinet.

Briefing material is submitted to cabinet if it is presented to Cabinet or a committee of cabinet for consideration or decision.¹⁵¹

Information is prepared for submission to cabinet if it is prepared with the reasonable expectation that it will be presented to cabinet or a committee of cabinet.

■ **Exception to Disclosure: Proposals or Recommendations for Cabinet - [Clause 19(1)(c)]**

Cabinet confidences

19(1) *The head of a public body shall refuse to disclose to an applicant information that would reveal the substance of deliberations of Cabinet, including*

...

(c) *a proposal or recommendation prepared for, or reviewed and approved by, a minister for submission to Cabinet; ...*

¹⁵¹ The Concise Oxford Dictionary, 9th Edition.

EXCEPTIONS TO DISCLOSURE

For clause 19(1)(c) to apply, the proposal or recommendation must have been:

- (i) prepared for a minister for submission to cabinet or a committee of cabinet, or
- (ii) reviewed and approved by a minister for submission to cabinet or a committee of cabinet.

A proposal or recommendation is prepared for submission to cabinet or is reviewed and approved for submission to cabinet if it is prepared, reviewed or approved with the intent that it be presented to cabinet or a committee of cabinet for consideration or decision.¹⁵²

■ **Exception to Disclosure: Communications Among Ministers - [Clause 19(1)(d)]**

Cabinet confidences

19(1) *The head of a public body shall refuse to disclose to an applicant information that would reveal the substance of deliberations of Cabinet, including*

...

(d) *a record that reflects communications among ministers relating directly to the making of a government decision or the formulation of government policy;*

...

This clause only applies if the record reflects communications among two or more ministers of the Manitoba government on matters relating directly to

- (i) the making of a government decision, or
- (ii) the formulation of government policy

¹⁵² The Concise Oxford Dictionary, 9th Edition.

EXCEPTIONS TO DISCLOSURE

Reflects means shows,¹⁵³ discloses or reveals.

■ **Exception to Disclosure: Record Briefing a Minister - [Clause 19(1)(e)]**

Cabinet confidences

19(1) *The head of a public body shall refuse to disclose to an applicant*

...

*(e) a record prepared to brief a minister about a matter that is before, or is proposed to be brought before, Cabinet or that is the subject of communications among ministers relating directly to government decisions or the formulation of government policy.*¹⁵⁴

The exception to disclosure in clause 19(1)(e) does not apply to all materials prepared to brief a minister. It only applies:

- (i) to a record prepared to brief a minister about a matter that is before, or is proposed to be brought before, cabinet or a committee of cabinet, or
- (ii) to a record prepared to brief a minister about a matter that is the subject of communications among two or more ministers relating directly to government decisions or the formulation of government policy.

Exceptions to disclosure in another section in FIPPA may apply to information in other materials prepared to brief a minister (for example, the exceptions in Sec. 23 - Advice to a public body). But remember: the duty to sever in subsection 7(2) of [FIPPA](#) requires that these materials be reviewed on a line-by-line basis to determine what information falls within the exceptions to disclosure in subsection 23(1) and can be withheld. Information is not advice, etc. simply because it appears under a heading such as "Confidential - Advice

¹⁵³ The Concise Oxford Dictionary, 9th Edition.

¹⁵⁴ This clause is substantially the same as clause 12(1)(e) of the [Ontario Freedom of Information and Protection of Privacy Act](#).

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to the Minister", or in document titled "advisory note", "briefing note", etc.¹⁵⁵

■ **When the Exceptions Don't Apply: Limits to the Cabinet Confidences Exception - [Subsection 19(2)]**

Subsection 19(2) limits the exceptions to disclosure in subsection 19(1).

Exceptions

19(2) *Subsection (1) does not apply if*

(a) the record is more than 20 years old; or

(b) consent to disclosure is given

(i) in the case of a record prepared for or in respect of the current government, by the Executive Council, and

(ii) in the case of a record prepared for or in respect of a previous government, by the President of the Executive Council of that government or, if he or she is absent or unable to act, by the next senior member of that government's Executive Council who is present and able to act.

The exceptions in subsection 19(1) do not apply to records that fall within either clause 19(2)(a) or 19(2)(b). Records that fall within clause 19(2)(a) must be disclosed to an applicant under Part 2 of [FIPPA](#) unless an exception in another section of [FIPPA](#) applies to information in the record.

Records will fall within clause 19(2)(b) where cabinet is prepared to consent to disclosure as set out in paragraphs 19(2)(b)(i) and (ii). Information in a record that falls within clause 19(2)(b) cannot be disclosed if a mandatory exception in another section of [FIPPA](#) applies to the information.

¹⁵⁵ Ontario Information and Privacy Commissioner [Order P-442](#) (Re Ministry of Finance, April 1, 1993).

EXCEPTIONS TO DISCLOSURE

■ **Limit on Exception: Record More than Twenty Years Old - [Clause 19(2)(a)]**

Exceptions

19(2) Subsection (1) does not apply if

(a) the record is more than 20 years old.¹⁵⁶

...

If a record that reveals the substance of deliberations of cabinet is more than 20 years old, the exception in subsection 19(1) does not apply. But, an exception in another section of [FIPPA](#) may apply to this information (for example, an exception in Sec. 28 – Disclosure harmful to economic and other interests of a public body).

Clause 19(2)(a) does not oblige the government, a department or any public body to store or retain a record for a specific period of time.¹⁵⁷ For example, [The Archives and Recordkeeping Act](#), and the records schedules approved under that act, set out the requirements respecting the retention, storage and destruction of records of the Manitoba government, its departments and certain government agencies.

■ **Limit on Exception: Access with Consent of Cabinet - [Clause 19(2)(b)]**

Exceptions

19(2) Subsection (1) does not apply if

...

(b) consent to disclosure is given

*(i) in the case of a record prepared for or in respect of the current government, by the Executive Council;
and*

¹⁵⁶ The period of time in clause 19(2)(a) of [FIPPA](#) was reduced from 30 to 20 years by [The Freedom of Information and Protection of Privacy Amendment Act, S.M. 2008 c. 40](#).

¹⁵⁷ See clause 3(b) of [FIPPA](#) and chapter 2, under *Procedures Not Affected by FIPPA*.

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(ii) *in the case of a record prepared for or in respect of a previous government, by the President of the Executive Council of that government, or, if he or she is absent or unable to act, by the next senior member of that government's Executive Council who is present and able to act.*¹⁵⁸

The Executive Council is established under [The Executive Government Organization Act](#), and is commonly called cabinet. With respect to a record prepared by or for the current government, cabinet's consent to disclosure would usually be reflected in a cabinet minute.

Where the government changes after an election, the new cabinet cannot consent to the disclosure of records revealing the substance of deliberations of a cabinet of the previous government. Paragraph 19(2)(b)(ii) sets out the process for obtaining consent to the disclosure of cabinet confidences of a former government.

■ **Sec. 19: Related Provisions in FIPPA**

Subsection 1(1) (Definitions):

- “applicant”**
- “cabinet”**
- “department”**
- “head”**
- “minister”**
- “public body”**
- “record”**

Clause 3(b): **Retention and destruction of records**

Subsection 7(2): **Severing information**

Subsection 12(1): **Contents of response**

¹⁵⁸ The process for obtaining consent to disclosure of cabinet confidences of a former government was added to [FIPPA](#) by [The Freedom of Information and Protection of Privacy Amendment Act, S.M. 2008 c. 40](#).

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Sec. 23: **Advice to a public body**

Sec. 28: **Disclosure harmful to economic and other interests of a public body**

INFORMATION PROVIDED BY ANOTHER GOVERNMENT - [SEC. 20]

Summary of the Exception

Subsection 20(1) applies when a request for access has been made to a public body that is a government department or a government agency. The head of a department or a government agency is required to (shall) refuse to disclose information to an applicant “if disclosure could reasonably be expected to reveal information provided, explicitly or implicitly, in confidence” by a government, an agency of a government, a local public body, the council of a band under the Indian Act (Canada) or an organization performing government functions on behalf of one or more bands, or a governmental or international organization listed in clauses 20(1)(a) to (f).

Subsection 20(2) applies where a request for access has been made to a public body that is a local public body. The head of a local public body is required to (shall) refuse to disclose information to an applicant “if disclosure could reasonably be expected to reveal information provided, explicitly or implicitly, in confidence” by:

- a government
- an agency of a government
- a local public body
- the council of a band under the Indian Act (Canada) or an organization performing government functions on behalf of one or more bands
- a governmental or international organization listed in clauses 20(1)(a) to (f);
- the Manitoba government or a government agency

Subsections 20(1) and 20(2) contain mandatory exceptions to the right to access under Sec. 7 of [FIPPA](#).

Subsections 20(1) and 20(2) are class exceptions as they protect a type or kind of

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information.

Subsection 20(3) limits the exceptions in subsections 20(1) and 20(2).

■ **Exception to Disclosure: Confidential Information Provided by another Government, etc. to a Manitoba Government Department or Government Agency - [Subsection 20(1)]**

Information provided by another government to department or government agency

20(1) *The head of a department or government agency shall refuse to disclose information to an applicant if disclosure could reasonably be expected to reveal information provided, explicitly or implicitly, in confidence by any of the following or their agencies:*

- (a) *the Government of Canada;*
- (b) *the government of another province or territory of Canada;*
- (c) *a local public body;*
- (c.1) *the council of a band as defined in the Indian Act (Canada), or an organization performing government functions on behalf of one or more bands;*
- (d) *the government of a foreign country, or of a state, province or territory of a foreign country;*
- (e) *an organization representing one or more governments;*
or
- (f) *an international organization of states.*

1. Subsection 20(1) applies where the request is to a department or government agency

The exception to disclosure in subsection 20(1) only applies when a request for access under Part 2 of the act has been made to a public body that is a department or a government agency. These terms are

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defined in subsection 1(1) of [FIPPA](#).¹⁵⁹

"department" means a department, branch or office of the executive government of the province;

"government agency" means

(a) any board, commission, association, agency, or similar body, whether incorporated or unincorporated, all the members of which, or all the members of the board of management or board of directors or governing board of which, are appointed by an Act of the Legislature or by the Lieutenant Governor in Council, and

(b) any other body designated as a government agency in the regulations.

2. Severing - subsection 7(2)

The term information, rather than the term record, is used in subsection 20(1) to indicate that the exception applies to the information in a record and not necessarily to the whole record. Subsection 7(2) of [FIPPA](#) requires that, when an exception applies to some of the information in a record, only that information is severed, and the applicant is entitled to access to the remainder of the record (unless an exception in another section of FIPPA applies to it).¹⁶⁰

3. Reveal

Disclosure would reveal information provided in confidence if, for example:

¹⁵⁹ The terms department, government agency and public body are defined in subsection 1(1) of [FIPPA](#), and are discussed in chapter 2, under *Public Bodies That Fall Under FIPPA*.

¹⁶⁰ For a discussion of severing and subsection 7(2) see *The Exceptions Apply to Information in a Record - Severing* earlier in this chapter and *Severing a Record* in chapter 4.

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- the confidential information itself is disclosed
- the information disclosed directly refers to the confidential information
- disclosure of the information would permit accurate inferences to be drawn about the confidential information¹⁶¹
- the information disclosed could be combined with other information to reveal the confidential information

4. Information provided explicitly or implicitly in confidence

Subsection 20(1) contains a class exception as it protects a type or kind of information.

For the exception in subsection 20(1) to apply, the information must have been provided by a government, local public body, band or organization described in clauses (a) to (f) in circumstances that places an obligation on the department or government agency receiving the information to keep it confidential.

Information is explicitly provided in confidence when the government or organization providing the information expressly requests or indicates that the information is to be kept confidential. The intention to provide information in confidence can be stated in the record of the information itself, in an agreement or verbally. It is advisable to keep a written record of a verbal request.

Information is implicitly provided in confidence where an intention that the information be treated as confidential can be implied from the circumstances in which it was provided - for example, from past practices followed with respect to the information, policies, etc.

¹⁶¹ Ontario Information and Privacy Commissioner [Order P-226](#) (Re Minister of Consumer and Commercial Relations; March 26, 1991) (made in the context of Cabinet confidences).

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When a request for access to information provided in confidence by another government or organization described in subsection 20(1) is received, consultation with the government or organization providing the information may be advisable, as evidence that the information was provided in confidence will be required if there is a complaint about access.

It will be seen then, that, in part, the respondent relies on an alleged practice that whenever information is exchanged between the federal and provincial government, it is understood to be confidential, unless the opposite is expressed. Such usages may be proved, either (1) by direct evidence of witnesses which must be positive and not amount to mere opinion or (2) by a series of particular instances in which it has been acted upon.¹⁶²

For example, a general letter from the Chief of the Winnipeg Police Service (a department of a local public body) to the Attorney-General for Manitoba about police reports provided by the Police Service, to Manitoba Justice, stating “in clear and unequivocal terms... that it was supplying its information to the Crown in confidence”, combined with evidence that the policy continued to be in force and a letter stating that the Police Service did not consent to the release of the requested information, were held to be clear evidence that the requested information was provided in confidence.¹⁶³

5. Source of the confidential information

For the exception in subsection 20(1) to apply, the information must have been provided in confidence by a government or organization described in clauses (a) to (f), or by an agency of such a government or organization.

An agency of a government or an organization is a person or entity designated to carry out responsibilities on its behalf - for example, the

¹⁶² Reid v. Manitoba (Minister of Justice) (1993), 89 Man. R. (2d) 259 (Manitoba Court Queen’s Bench) at page 262.

¹⁶³ Pollock v. Manitoba (Minister of Justice) (1995), 103 Man. R. (2d) 64 (Manitoba Court of Queen’s Bench), at pages 68 to 69.

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federal Department of Justice and the RCMP are agencies of the Government of Canada; UNICEF is an agency of the United Nations; the Winnipeg Police Service is an agency of the City of Winnipeg (a local public body).

In clause 20(1)(a), the Government of Canada includes a department and other agencies of the Government of Canada.

In clause 20(1)(b), the government of another province or territory of Canada includes the departments or ministries and other agencies of those governments.

Clause 20(1)(c) refers to a local public body, defined in subsection 1(1) of FIPPA to mean an educational body, a health care body and a local government body. Each of these terms is also defined in subsection 1(1) of [FIPPA](#).¹⁶⁴

Clause 20(1)(c.1) refers to:

- (i) the council of a band as defined in the *Indian Act* (Canada), and
- (ii) an organization performing government functions on behalf of one or more bands.

Paragraph 20(1)(c.1)(i) creates a 'function' test – if the organization exercises government functions on behalf of one or more bands, then information it provides to a Manitoba **public body** in confidence should be treated as confidential. An example of such an organization is the Assembly of Manitoba Chiefs.¹⁶⁵

If you have any questions about whether an organization falls under clause (c.1), contact legal counsel.

Clause 20(1)(d) refers to:

¹⁶⁴ See the discussion about local public bodies in chapter 2, under *Public Bodies that Fall Under FIPPA*.

¹⁶⁵ Clause 20(1)(c.1) was added to [FIPPA](#) by [The Freedom of Information and Protection of Privacy Amendment Act, S.M. 2008 c. 40](#).

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- (i) the government of a foreign country (for example, the government of the United States of America); and
- (ii) the governments of the component states, provinces or territories of a foreign country

A state means an organized political community under one government; a commonwealth; a nation; such a community forming part of a federal republic such as the states of the United States of America.¹⁶⁶ An example of a government of a component state of a foreign country would be the government of the State of North Dakota.

Clause 20(1)(e) refers to an organization representing one or more governments – that is, any organization with members representing and acting under the authority of one or more governments. An example is the Federal, Provincial and Territorial Committee of Ministers of Health.

An international organization of states for the purposes of clause 20(1)(f) means any organization with members representing and acting under the authority of the governments of two or more countries - for example, NATO or the United Nations.

■ **Exception to Disclosure: Confidential Information Provided by another Government to a Local Public Body - [Subsection 20(2)]**

Information provided by another government to a local public body

20(2) The head of a local public body shall refuse to disclose information to an applicant if disclosure could reasonably be expected to reveal information provided, explicitly or implicitly, in confidence by

(a) a government, local public body, organization or agency described in subsection (1); or

¹⁶⁶ The Concise Oxford Dictionary, 9th Edition.

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(b) *the Government of Manitoba or a government agency.*

The exception in subsection 20(2) only applies where a request for access under Part 2 of [FIPPA](#) has been made to a local public body.

Local public body means an educational body, a health care body and a local government body. These terms are defined in subsection 1(1) of [FIPPA](#).¹⁶⁷

1. **Scope of the Exception in subsection 20(2)**

The exception in subsection 20(2) is a class exception as it protects a type or kind of information.

For the exception in subsection 20(2) to apply, the information must have been provided to the local public body by one of the following bodies in circumstances that place an obligation on the local public body to keep the information confidential:

- (a) by a government, agency or organization described in clauses 20(1)(a) to (f); or
- (b) by the Government of Manitoba or a government agency.

For a discussion of the terms reveal and provided, explicitly or implicitly, in confidence and of the types of governments and bodies covered by clause 20(2)(a), see the discussions under subsection 20(1) earlier in this chapter.

For the purposes of clause 20(2)(b), the Manitoba government includes departments of the government.

Government agency, as that term is used in clause 20(2)(b), is defined in subsection 1(1) of [FIPPA](#):¹⁶⁸

“government agency” means

¹⁶⁷ These terms are discussed in chapter 2, under *Public Bodies that Fall Under FIPPA*.

¹⁶⁸ See *Public Bodies that Fall under FIPPA* in chapter 2.

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- (a) any board, commission, association, agency, or similar body, whether incorporated or unincorporated, all the members of which, or all the members of the board of management or board of directors or governing board of which, are appointed by an act of the Legislature or by the Lieutenant Governor in Council, and
- (b) any other body designated as a government agency in the regulations.

2. Severing - subsection 7(2)

The term information, rather than the term record, is used in subsection 20(2) to indicate that the exception applies to the information in a record and not necessarily to the whole record. Subsection 7(2) of [FIPPA](#) requires that, where an exception applies to some of the information in a record, only that information is severed, and the applicant is entitled to access to the remainder of the record (unless an exception in another section of [FIPPA](#) applies to it).¹⁶⁹

■ When the Exceptions Don't Apply: Limits to the Exceptions in [Subsections 20(1) and (2)]

Exceptions

20(3) Subsections (1) and (2) do not apply if

- (a) the record is more than 20 years old; or
- (b) the government, local public body, organization or agency that provided the information
- (i) consents to the disclosure, or
 - (ii) makes the information public.

¹⁶⁹ For a discussion of severing and subsection 7(2) see *The Exceptions Apply to Information in a Record - Severing* earlier in this chapter and *Severing a Record* in chapter 4.

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Unless the record is more than 20 years old, control over the release of the confidential information protected by the exceptions in subsections 20(1) and 20(2) remains with the government, local public body, band, governmental organization or agency that provided it.

The exceptions to disclosure in subsections 20(1) and 20(2) do not apply if:

- the record is more than 20 years old
- the government, local public body, organization or agency that provided it consents to disclosing the information, making the requested information public

But an exception to disclosure in another section in Part 2 of [FIPPA](#) may apply to this information (for example, an exception in Sec. 21 – Disclosure harmful to relations between Manitoba and other governments).

■ **Sec. 20: Related Provisions in FIPPA**

Subsection 1(1) (Definitions):

- “applicant”
- “department”
- “educational body”
- “government agency”
- “head”
- “health care body”
- “local government body”
- “local public body”
- “minister”
- “public body”
- “record”

Subsection 7(2) **Severing information**

Subsection 12(1) **Contents of response**

Sec. 21 **Relations between Manitoba and other governments**

RELATIONS BETWEEN MANITOBA AND OTHER GOVERNMENTS - [SEC. 21]

Summary of the Exception

The exception in subsection 21(1) protects the relations between:

- the Manitoba government or a government agency and another government
- an agency of another government
- a local public body
- the council of a band under the Indian Act (Canada)
- an organization performing government functions on behalf of one or more bands
- a governmental or international organization listed in clauses 21(1)(a) to (f)

The exception does not protect the relationships of local public bodies with other governments.

The exception is a discretionary exception as the head of a public body may refuse to disclose the requested record if the exception applies.

If the public body that has received the access request is a local public body, the head's discretion to disclose the information is limited by subsection 21(2).

Subsection 21(1) contains a 'reasonable expectation of harm' test.

■ Exception to Disclosure: Scope of the Exception Protecting Relations between Manitoba and Other Governments - [Subsection 21(1)]

*Disclosure harmful to relations between Manitoba and
other governments*

*21(1) The head of a public body may refuse to disclose
information to an applicant if disclosure could reasonably be
expected to harm relations between the Government of
Manitoba or a government agency and any of the following or*

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their agencies:

- (a) *the Government of Canada;*
- (b) *the government of another province or territory of Canada;*
- (c) *a local public body;*
- (c.1) *the council of a band as defined in the Indian Act (Canada), or an organization performing government functions on behalf of one or more bands;*
- (d) *the government of a foreign country, or of a state, province or territory of a foreign country;*
- (e) *an organization representing one or more governments;*
or
- (f) *an international organization of states.*

Subsection 21(1) gives the head of a public body the discretion to refuse to disclose information if disclosure could reasonably be expected to harm intergovernmental relations involving the Manitoba government or a government agency.

1. Discretionary exception

Subsection 21 is a discretionary exception to the right to access under Sec. 7 of [FIPPA](#), as the head may refuse to disclose the requested information. This is a two-step process. The head:

- must first determine whether the exception in subsection 21(1) applies to information in the requested record, and
- must then consider whether it is appropriate to release the information, even though the exception in Sec. 21 applies¹⁷⁰

2. Severing - subsection 7(2)

The term information, rather than record, is used in subsection 21(1) to indicate that the exception applies to the information in a record and not

¹⁷⁰ See *Exercising a Discretion* earlier in this chapter.

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necessarily to the whole record. Subsection 7(2) of [FIPPA](#) requires that, when an exception applies to some of the information in a record, only that information is severed, and the applicant is entitled to access the remainder of the record, unless an exception in another section of [FIPPA](#) applies to it.¹⁷¹

3. Reasonable expectation of harm

The exception in subsection 21(1) contains a 'reasonable expectation' of harm test.¹⁷²

The head of the public body must determine whether disclosure of the information could reasonably be expected to harm relations between the Manitoba government or a government agency and any of the governments or bodies described in clauses 21(1)(a) to (f). The circumstances of each request for such information must be carefully assessed, and the determination must be based on objective grounds.

For example, evidence that the Government of Canada does not release the type of information requested and that it would consider release by Manitoba or a public body to be harmful to federal-provincial relations would be evidence of reasonable expectation of harm to inter-governmental relations.¹⁷³

4. "Harm relations between"

Harm means hurt or damage.¹⁷⁴

The term relations cover both formal negotiations and general, ongoing associations and exchanges between the Manitoba government or a

¹⁷¹ For a discussion of severing and subsection 7(2) see *The Exceptions Apply to Information in a Record - Severing* earlier in this chapter and *Severing a Record* in chapter 4.

¹⁷² See Reasonable Expectation of Harm earlier in this chapter.

¹⁷³ *Brousseau v. Manitoba (Minister of Industry, Trade & Tourism)* (1996), 116 Man. R. (2d) 8 (Manitoba Court of Queen's Bench), at page 18.

¹⁷⁴ *The Concise Oxford Dictionary*, 9th Edition.

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government agency and the other governments and organizations listed in clauses 21(1)(a) to (f) or their agencies.

5. Manitoba government or a government agency

The exception in subsection 21(1) protects the relations between the Manitoba government or a government agency and the other governments or organizations listed in clauses 21(1)(a) to (f), or their agencies.

The exception does not protect the relations of local public bodies (that is, educational bodies, health care bodies and local government bodies) with other governments. These terms are defined in subsection 1(1) of [FIPPA](#).¹⁷⁵

Note:

The exception in Sec. 20, about information provided in confidence by another government or organization, applies to all public bodies, including local public bodies.

While the Manitoba government includes the departments of the government, it is a broader concept than public body or department. Government is the machinery by which the sovereign power in a state expresses its will and exercises its functions; the framework of political institutions, departments and offices by means of which the executive, judicial, legislative and administrative business of the state is carried on.¹⁷⁶ The Manitoba government is His Majesty the King, acting for the Province of Manitoba.¹⁷⁷ Use of the term "Government of Manitoba" in subsection 21(1) indicates that the exception protects the interests of the government in the broad 'corporate' sense, as well as the interests of individual government departments.

The term government agency is defined in subsection 1(1) of [FIPPA](#):

"government agency" means

¹⁷⁵ These terms are discussed in Chapter 2, under *Public Bodies that Fall Under FIPPA*.

¹⁷⁶ Black's Law Dictionary, 6th edition.

¹⁷⁷ [The Interpretation Act of Manitoba](#), Sec. 17 and the Schedule of Definitions.

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- (a) any board, commission, association, agency, or similar body, whether incorporated or unincorporated, all the members of which, or all the members of the board of management or board of directors or governing board of which, are appointed by an Act of the Legislature or by the Lieutenant Governor in Council, and*
- (b) any other body designated as a government agency in the regulations;¹⁷⁸*

6. Other governments and their agencies - clauses 21(1)(a) to (f)

For the exception in subsection 21(1) to apply, disclosure of the requested information must reasonably be expected to harm relations between the Manitoba government or a government agency and another government or organization described in clauses (a) to (f), or an agency of such a government or organization. The listing of governments and organizations is the same as in subsection 20(1) of [FIPPA](#) – Information provided in confidence by another government, etc.

An agency of a government or an organization is a person or entity designated to carry out responsibilities on its behalf - for example, the federal Department of Justice and the RCMP are agencies of the Government of Canada; UNICEF is an agency of the United Nations; the City of Winnipeg Police Service is an agency of the City of Winnipeg, a local public body.

In clause 21(1)(a), the Government of Canada includes a department and other agencies of the Government of Canada.

In clause 21(1)(b), the government of another province or territory of Canada includes the departments or ministries and other agencies of those governments.

Clause 21(1)(c) refers to a local public body, defined in subsection 1(1) of [FIPPA](#) to mean an educational body, a health care body and a local

¹⁷⁸ This term is discussed in Public Bodies that Fall Under FIPPA in Chapter 2.

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government body. These terms are also defined in subsection 1(1) of [FIPPA](#).¹⁷⁹

Clause 21(1)(c.1) refers to:

- the council of a band as defined in the Indian Act (Canada), and
- an organization performing government functions on behalf of one or more bands

Paragraph 21(1)(c.1) creates a 'function' test – the organization must exercise 'government functions' on behalf of one or more bands. An example of such an organization is the Assembly of Manitoba Chiefs.¹⁸⁰

If you have any questions about whether an organization falls under clause (c.1), contact legal counsel.

Clause 21(1)(d) includes:

- the government of a foreign country (for example, the government of the United States of America), and
- the governments of the component states of a foreign country

A state means an organized political community under one government; a commonwealth; a nation; such a community forming part of a federal republic such as the states of the United States of America.¹⁸¹ An example of a 'government' of a 'component state' of a foreign country would be the government of the State of North Dakota.

Clause 21(1)(e) refers to an organization representing one or more governments– that is, any organization with members representing and

¹⁷⁹ These terms are discussed in Chapter 2, under *Public Bodies that Fall Under FIPPA*.

¹⁸⁰ Clause 21(1)(c.1) was added to [FIPPA](#) by [The Freedom of Information and Protection of Privacy Amendment Act, S.M. 2008 c. 40](#).

¹⁸¹ The Concise Oxford Dictionary, 9th Edition.

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acting under the authority of one or more governments. An example is the Federal, Provincial and Territorial Committee of Ministers of Health.

An international organization of states for the purposes of clause 21(1)(f) means any organization with members representing and acting under the authority of the governments of two or more countries - for example, the North Atlantic Treaty Organization (NATO) or the United Nations.

■ **Consent Required for Disclosure by a Local Public Body - [Subsection 21(2)]**

Consent required for disclosure by local public body

21(2) When the request for access has been received by a local public body, the head of the local public body may disclose information referred to in subsection (1) only with the consent of the head of the department of the Government of Manitoba or government agency affected.

The purpose of the exception to disclosure in subsection 21(1) is to protect the relations of the Manitoba government or of a government agency with other governments and organizations. For this reason, if a local public body receives an access request for information that would fall within this exception to disclosure, subsection 21(2) states that the head of the local public body may disclose the information only with the consent of the head of the Manitoba government department or the government agency that would be affected by the disclosure.

Local public body means an educational body, a health care body and a local government body. These terms are defined in subsection 1(1) of [FIPPA](#).¹⁸²

Before the head of a local public body can exercise their discretion to disclose information that could reasonably be expected to harm the relations between the Manitoba government or a government agency and another government or organization listed in clauses 21(1)(a) to (f) (or one of their agencies), the head

¹⁸² These terms are discussed in chapter 2, under *Public Bodies that Fall Under FIPPA*.

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of the local public body must obtain the consent of the Manitoba government department or government agency affected.

■ **Sec. 21: Related Provisions in FIPPA**

Subsection 1(1) (Definitions):

- “applicant”
- “department”
- “educational body”
- “government agency”
- “head”
- “health care body”
- “local government body”
- “local public body”
- “public body”
- “record”

Subsection 7(2) **Severing information**

Subsection 12(1) **Contents of response**

Sec. 20 **Information provided by another government in confidence**

LOCAL PUBLIC BODY CONFIDENCES - [SEC. 22]

Summary of the Exception

Subsection 22(1) gives the head of a local public body the discretion to refuse to disclose to an applicant requesting access to a record under Part 2 of [FIPPA](#) information that could reveal:

- a draft of a resolution, by-law or other legal instrument by which the local public body acts; or
- the substance of deliberations of a meeting of the local public body's elected officials or governing body (or of a committee of elected officials or the governing body), if there is legal authority to hold the meeting in the absence of the public

The exceptions in subsection 22(1) apply to local public bodies only. They do not apply to Manitoba government departments or government agencies.

The exception is a discretionary exception as the head of a local public body may refuse to disclose the requested record if the exception applies.

Subsection 22(1) contains a 'reasonable expectation of harm' test.

Subsection 22(2) limits the exceptions in subsection 22(1).

■ **Scope of the Local Public Body Confidences Exceptions - [Sec. 22(1)]**

Local public body confidences

22(1) The head of a local public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to reveal

- (a) a draft of a resolution, by-law or other legal instrument by which the local public body acts; or*
- (b) the substance of deliberations of a meeting of its elected officials or of its governing body or a committee of its*

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elected officials or governing body, if an enactment or a resolution, by-law or other legal instrument by which the local public body acts authorizes the holding of that meeting in the absence of the public.

Subsection 22(1) recognizes the need for confidentiality for draft resolutions, by-laws and other legal instruments by which a local public body acts and for deliberations at a meeting of the local public body's elected officials or governing body (or of a committee of elected officials or governing body), if there is legal authority to hold the meeting in the absence of the public. Confidentiality is required to ensure full and frank discussions among elected officials or within the governing body of a local public body in these circumstances.

The exceptions to disclosure in subsection 22(1) do not affect the right of a local public body to regulate the procedures for its meetings and do not limit what may be discussed in a meeting closed to the public. These matters are governed by the legislation or legal authority under which the local public body operates.

1. Exceptions limited to local public bodies

The exceptions to disclosure in subsection 22(1) apply to local public bodies only. The exceptions do not apply to a department of the Manitoba government or to a government agency.

Local public body is defined in subsection 1(1) of [FIPPA](#) as follows:

"local public body" means

- (a) an educational body,
- (b) a health care body, and
- (c) a local government body.

The terms educational body, health care body and local government body are also defined in subsection 1(1) of [FIPPA](#):

"educational body" means

- (a) a school division or school district established under The Public Schools Act,

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- (b) *The University of Manitoba,*
- (c) *The University of Winnipeg,*
- (c.1) *Brandon University,*
- (c.2) *University College of the North,*
- (c.3) *L'Université de Saint-Boniface,*
- (c.4) *St. Paul's College,*
- (c.5) *St. John's College,*
- (d) *a college as defined in section 1 of The Advanced Education Administration Act, and*
- (e) *any other body designated as an educational body in the regulations;*

"health care body" means

- (a) *a hospital designated under The Health Services Insurance Act,*
- (b) *a health authority as defined in The Health System Governance and Accountability Act,*
- (c) *the board of a health and social services district established under The District Health and Social Services Act, and*
- (d) *[repealed] [S.M. 2017, c. 34, s. 18,](#)*
- (e) *any other body designated as a health care body in the regulations;*

"local government body" means

- (a) *The City of Winnipeg,*
- (b) *a municipality,*
- (c) *a local government district,*
- (d) *a council of a community under The Northern Affairs Act,*
- (e) *a planning district established under The Planning Act,*
- (f) *a watershed district established or continued under The Watershed Districts Act,*
- (g) *any other body designated as a local government body in the regulations.*

2. **Reveal**

Disclosure would reveal the information protected by subsection 22(1) if, for example:

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- the information disclosed is the protected information
- the information disclosed directly refers to the protected information
- the information disclosed would permit accurate inferences to be drawn about the protected information¹⁸³
- the information disclosed could be combined with other information to reveal the protected information

3. Discretionary exceptions

Subsection 22(1) contains discretionary exceptions to the right to access under Sec. 7 of the act, as the head of the local public body may refuse to disclose the requested information. This involves a two-step process. The head:

- must first determine whether an exception in subsection 22(1) applies to information in the requested record, and
- must then consider whether it is appropriate to release the information, even though an exception in subsection 22(1) applies¹⁸⁴

4. Severing - subsection 7(2)

The term information, rather than the term record, is used in subsection 22(1) to indicate that the exceptions apply to the information in a record and not necessarily to the whole record. Subsection 7(2) of [FIPPA](#) requires that, where an exception applies to some of the information in a record, only that information is severed,

¹⁸³ Ontario Information and Privacy Commissioner [Order P-226](#) (Re Minister of Consumer and Commercial Relations; March 26, 1991) (made in the context of cabinet confidences).

¹⁸⁴ See *Exercising a Discretion* earlier in this chapter.

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and the applicant is entitled to access to the remainder of the record (unless an exception in another section of [FIPPA](#) applies to it).¹⁸⁵

5. Reasonable expectation of harm

The exceptions in subsection 22(1) contain a reasonable expectation of harm test.¹⁸⁶

The head of the local public body must determine whether disclosing the information could reasonably be expected to cause the harm described in clause 22(1)(a) or (b). The circumstances must be carefully assessed, and the determination must be based on objective grounds.

6. Each clause contains a separate exception

Clauses 22(1)(a) and (b) set out separate exceptions to disclosure as the word *or* is used to join the clauses. Subsection 22(1) does not set up a two-fold test; information does not have to meet the requirements of both clauses for an exception to apply.

■ Exception to Disclosure: Draft Resolution, By-Law or Other Legal Instrument of a Local Public Body - [Clause 22(1)(a)]

Local public body confidences

22(1) *The head of a local public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to reveal*

(a) *a draft of a resolution, by-law or other legal instrument by which the local public body acts; or*

...

¹⁸⁵ For a discussion of severing and subsection 7(2) see *The Exceptions Apply to Information in a Record - Severing* earlier in this chapter and *Severing a Record* in chapter 4.

¹⁸⁶ See *Reasonable Expectation of Harm* earlier in this chapter.

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The exception to disclosure in clause 22(1)(a) covers resolutions, by-laws and other legal instruments by which the local public body acts while they are being drafted and formulated.

The exception covers all drafts, but does not apply to a resolution, by-law or other legal instrument that has been adopted.

A resolution is a formal expression of the opinion or will of an official body or public assembly, adopted by vote. The term is usually employed to denote the adoption of a motion, the subject matter of which would not properly constitute a law.¹⁸⁷

In the context of clause 22(1)(a), the term by-law means a law made by a local public body within the scope of its jurisdiction or authority (in the United States, the term ordinance is more commonly used in this context).¹⁸⁸ The term can also mean a rule or resolution adopted by a corporation to regulate its operations.¹⁸⁹

Other legal instrument by which the local public body acts means any other formal written document that regulates the activities of the local public body or that regulates those matters within the jurisdiction of the local public body (for example, rules adopted by a local public body).

The exception in clause 22(1)(a) does not prevent a local public body from issuing draft documents to the public for consultation.

■ **Exception to Disclosure: Substance of Deliberations of Meeting Authorized to be Held in the Absence of the Public - [Clause 22(1)(b)]**

Local public body confidences

22(1) The head of a local public body may refuse to disclose information to an applicant if disclosure could reasonably be

¹⁸⁷ Black's Law Dictionary, 6th Edition.

¹⁸⁸ Black's Law Dictionary.

¹⁸⁹ Dictionary of Canadian Law.

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expected to reveal

...

(b) the substance of deliberations of a meeting of its elected officials or of its governing body or a committee of its elected officials or governing body, if an enactment or a resolution, by-law or other legal instrument by which the local public body acts authorizes the holding of that meeting in the absence of the public.

The exception to disclosure in clause 22(1)(b) is intended to maintain and encourage candor in discussions at a meeting of the elected officials, the governing body, a committee of elected officials, or of the governing body, of a local public body, where there is legal authority to hold the meeting in the absence of the public.

1. Substance of deliberations

Substance means the matter, subject matter, subject¹⁹⁰ or the theme or subject of a thing.¹⁹¹

Deliberation means "careful consideration; the discussion of reasons for and against; a debate or discussion".¹⁹²

2. Meeting of elected officials, governing body or a committee

An elected official of a local public body is a person who has been elected by the constituents of the local public body. Examples are municipal councillors and public school board trustees.

The governing body of a local public body is the group of people who are responsible for governing or directing the activities and operations of the local public body. These people may be elected, appointed or both. An example is the Board of Governors of the University of Manitoba.

¹⁹⁰ The Compact Edition of the Oxford English Dictionary.

¹⁹¹ The Concise Oxford Dictionary, 8th Edition, quoted in Ontario Information and Privacy Commissioner [Order M-196](#) (Re City of Kingston, Oct. 1, 1993).

¹⁹² The Concise Oxford Dictionary, 9th Edition.

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A committee of the elected officials or the governing body of a local public body is a group of people designated by the elected officials or the governing body to consider a particular subject area, matter or issue. The committee may consist of elected officials, members of the local public body or other persons appointed by the elected officials or governing body, or any combination of elected officials, members and other persons.

The exception in clause 22(1)(b) is limited to meetings of:

- elected officials of the local public body
- the governing body of the local public body
- a committee of elected officials or of the governing body

It does not apply to staff meetings of officers or employees of the local public body. (Other exceptions to disclosure in [FIPPA](#), such as the exception in clause 23(1)(b), may protect the substance of deliberations at staff meetings of officers or employees of the local public body.)

3. Legal authority to hold the meeting in the absence of the public required

The exception to disclosure in clause 22(1)(b) only applies with respect to the substance of deliberations at meetings of the local public body, where there is legal authority to hold the meeting in the absence of the public (without the public being there). Public, in this context, means the general public, the public at large.

The legal authority to hold a meeting in the absence of the public must be found in:

- (i) an enactment (defined in subsection 1(1) of [FIPPA](#) as a statute or a regulation)

Examples of enactments that authorize meetings of local public bodies to be held in the absence of the public are:

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- Subsection 152(3) of [The Municipal Act](#). Subsection 152(4) of that act further provides that no resolution or by-law may be passed at a meeting that is closed to the public, except a resolution to re-open the meeting to the public.
- Subsections 14(3) and (4) of The Colleges Act about meetings of the board of governors of a community college where confidential college matters or confidential personal matters are considered.

(ii) or in a resolution, by-law or other legal instrument of the local public body

■ **When the Exceptions Do Not Apply: Limits to the Local Public Body Confidences Exception - [Subsection 22(2)]**

Subsection 22(2) sets out two limits on the exceptions to disclosure in subsection 22(1). If information falls within either clause 22(2)(a) or (b), the exception to disclosure in subsection 22(1) does not apply to that information. (But another exception to disclosure in another section of [FIPPA](#) may apply.)

■ **Limit to Exception: Draft Resolution, etc. or Deliberations Considered in a Public Meeting - [Clause 22(2)(a)]**

Exceptions

22(2) Subsection (1) does not apply if

(a) the draft of the resolution, by-law or other legal instrument or the subject matter of the deliberations has been considered in a meeting open to the public; or

...

The exception to disclosure in subsection 22(1) does not apply where:

- the draft resolution, by-law or other legal instrument of the local public body has been considered in a meeting open to the public, or

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- the subject matter of deliberations at a closed meeting of the local public body has been considered in a meeting open to the public

A meeting is open to the public when a local public body does not expressly exclude the public. Many local public bodies are generally required to hold their meetings in public and are permitted to hold meetings in the absence of the public in limited circumstances only. For example:

- Subsection 152(1) of [The Municipal Act](#) states that every meeting of a council or council committee must be conducted in public. The limited situations where a council or council committee meeting can be closed to the public are set out in subsection 152(3) of that act.
- Subsection 14(2) of [The Colleges Act](#) states that all meetings of the board of governors of a community college established under that act must be open to the public. The limited situations where the board may hold a meeting in private are set out in subsections 14(3) and 14(4) of that act.

■ **Limit on Exception: Record More than 20 Years Old - [Clause 22(2)(b)]**

Exceptions

22(2) Subsection (1) does not apply if

...

(b) the information referred to in subsection (1) is in a record that is more than 20 years old.

Where information is in a record that is more than 20 years old, the exceptions to disclosure in subsection 22(1) do not apply to the information. But, an exception in another section of [FIPPA](#) may apply to this information (for example, the exceptions in Sec. 28 - Economic and other interests of a public body).

This limit to the local public body confidences exception is similar to the limit to the exception about the deliberations of cabinet in clause 19(2)(b), to the limit to the exception about information provided in confidence by another

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government in clause 20(3)(a), and to the limit to the exception about advice to a public body in clause 23(2)(a).

Clause 22(2)(b) does not oblige the local public body to store or retain a record for a specific period of time.¹⁹³ The requirements for records retention, storage and destruction for local public bodies may be set out in general legislation, in specific legislation establishing or regulating the local public body, in by-laws of the local public body, etc.

■ **Sec. 22: Related Provisions in FIPPA**

Subsection 1(1) (Definitions):

- “applicant”
- “department”
- “educational body”
- “employee”
- “enactment”
- “government agency”
- “head”
- “health care body”
- “local government body”
- “local public body”
- “record”

Clause 3(b)	Retention and destruction of records
Subsection 7(2)	Severing information
Subsection 12(1)	Contents of response
Clause 19(2)(a)	Cabinet records more than 20 years old
Subsection 20(1)	Information provided by another government to department or government agency in confidence

¹⁹³ Clause 3(b) of [FIPPA](#), discussed in chapter 2, under *Procedures Not Affected by FIPPA*.

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Subsection 20(2)	Information provided by another government to a local public body in confidence
Clause 20(3)(a)	Information provided by another government to a local public body in confidence that is in a record more than 20 years old
Sec. 21	Relations between Manitoba and other governments
Subsection 23(1)	Advice to a public body
Clause 23(1)(e)	Draft legislation, regulations and orders of ministers and the Lieutenant Governor in Council
Clause 23(2)(a)	Advice, etc. in a record more than 20 years old
Sec. 28	Economic and other interests of a public body
Subsection 31(2)	Contemplated designation of a municipal heritage site

ADVICE TO A PUBLIC BODY - [SEC. 23]

Summary of the Exception

Subsection 23(1) protects the advisory and deliberative processes involving a public body or a minister of the Manitoba government.

Subsection 23(1) contains discretionary exceptions to the right to access under Sec. 7 of FIPPA, as the head of the public body may refuse to disclose information to an applicant requesting access under Part 2 if an exception in subsection 23(1) applies.

The exceptions in subsection 23(1) are 'class exceptions' as they protect a type or kind of information in a record.

Subsection 23(2) limits the exceptions in subsection 23(1).

■ **Scope of the 'Advice to a Public Body' Exceptions - [Subsection 23(1)]**

Advice to a public body

23(1) The head of a local public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to reveal...

Subsection 23(1) protects the free flow of advice and the deliberative process involved in decision making and policy making by a public body or by a minister of the Manitoba government.

The need for confidentiality related to various aspects of decision making in a public body is not limited to decision making at the cabinet or municipal council level. The exceptions in subsection 23(1) are intended to ensure that full and frank discussion of issues takes place among officials, employees and others advising ministers or a public body.

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There is a need to preserve the confidential relationship between a minister or a public body and their advisors in our system of government, where officials and employees advise and the minister or public body decides and is accountable to the public for decisions made.

The Supreme Court of Canada has recognized that the right to access information held by public institutions must be subject to limits to protect this need for a free flow of advice and frank discussions of issues:

*Access to information in the hands of public institutions can increase transparency in government, and enhance an open and democratic society. Some information in the hands of those institutions is, however, entitled to protection to prevent the impairment of those very principles and promote good governance.*¹⁹⁴

The exceptions in clauses 23(1)(a) to (f) are 'class exceptions' as they protect a type or kind of information. The exceptions do not contain a 'reasonable expectation of harm test'. But, the exceptions in clauses 23(1)(a) to (f) do not protect a category of record – a line-by-line review of the information in a record is required.

1. **Reveal**

Disclosure would reveal the information protected by clauses 23(1)(a) to (f) if, for example:

- the information disclosed is the protected information
- the information disclosed directly refers to the protected information

¹⁹⁴ Ontario (Public Safety and Security) v. Criminal Lawyers' Association, 2010 SCC 23 (Supreme Court of Canada), paragraph 1: <http://tinyurl.com/95xb2f3>

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- the information disclosed would permit accurate inferences to be drawn about the protected information¹⁹⁵
- the information disclosed could be combined with other information to reveal the protected information

2. Discretionary exceptions

Subsection 23(1) contains discretionary exceptions to the right to access under Sec. 7 of the act, as the head may refuse to disclose the requested information. This involves a two-step process. The head:

- must first determine whether an exception in subsection 23(1) applies to information in the requested record
- must then consider whether it is appropriate to release the information, even though an exception in subsection 23(1) applies¹⁹⁶

3. Severing - subsection 7(2)

The term information, rather than the term record, is used in subsection 23(1) to indicate that the exceptions apply to the information in a record and not necessarily to the whole record. Subsection 7(2) of [FIPPA](#) requires that, when an exception applies to some of the information in a record, only that information is severed, and the applicant is entitled to access to the remainder of the record, unless an exception in another section of [FIPPA](#) applies to it.¹⁹⁷

¹⁹⁵ Ontario Information and Privacy Commissioner [Order P-226](#) (Re Minister of Consumer and Commercial Relations; March 26, 1991) (made in the context of Cabinet confidences).

¹⁹⁶ See *Exercising a Discretion* earlier in this chapter.

¹⁹⁷ For a discussion of severing and subsection 7(2) see *The Exceptions Apply to Information in a Record - Severing* earlier in this chapter and *Severing a Record* in chapter 4.

■ **Exception to Disclosure: Advice, Opinions, Proposals, Recommendations, Analyses or Policy Options - [Clause 23(1)(a)]**

Advice to a public body

23(1) The head of a local public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to reveal

(a) advice, opinions, proposals, recommendations, analyses or policy options developed by or for the public body or a minister;

...

The exception in clause 23(1)(a) is intended to maintain and encourage candour in giving advice, opinions, recommendations and related analytical alternatives, in the context of a deliberative or decision making process involving a minister or a public body.

Remember, the exception in clause 23(1)(a) protects a type or kind of information; it does not protect a type or category of record, such as an advisory note or a briefing note. A line-by-line review of the information in a record is required to determine what information in the record is indeed advice, opinions, proposals, recommendations, analyses or policy options.¹⁹⁸

1. Developed by or for the public body or a minister

The exception in clause 23(1)(a) applies to advice, etc. that is developed by officials or staff of the public body, or by the staff of a minister.

In addition, the exception extends to advice, etc. developed for the public body or for a minister by any person under a contract or other arrangement (whether written or verbal). An example is a private sector consultant providing advice, opinions or recommendations to a public body or to a minister under a contract.

¹⁹⁸ Ontario Information and Privacy Commissioner [Order P-442](#) (Re Ministry of Finance, April 1, 1993).

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2. Advice

There is some overlap among the terms used in clause 23(1)(a).

Advice refers to suggestions, less formal than recommendations, about particular approaches to take or courses of action to follow. Advice has been defined as follows:

"words given or offered as an opinion or recommendation about future action or behaviour; information given, news";¹⁹⁹

"view; opinion; information; an opinion expressed as to wisdom of future conduct";²⁰⁰

"the expression of counsel or opinion, favourable or unfavourable, as to action, but it may, chiefly in commercial usage, signify information or intelligence";²⁰¹

"an opinion or view expressed as to the wisdom of future conduct. Advice is optional in character, in the sense that it is optional with the person advised whether he will act on such advice or not, and optional with the giver in the sense that he can advise or remain silent";²⁰²

To qualify as advice, there must be evidence of some type of communication of information from one person to another.²⁰³

¹⁹⁹ Concise Oxford Dictionary, 9th Edition. The Concise Oxford Dictionary definition of the verb advice was considered by the Manitoba Court of Queen's Bench in *Sigurdson v. The Minister of Conservation*, [2002] M. J. No. 390 (September 30, 2002).

²⁰⁰ Black's Law Dictionary, 6th Edition.

²⁰¹ The Dictionary of Canadian Law, 2nd Edition.

²⁰² Corpus Juris Secundum, Volume 2A.

²⁰³ Ontario Information and Privacy Commissioner [Order P-58](#) (Re Ministry of Labour, May 16, 1989).

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Information is not advice, simply because it appears under a heading such as Confidential - Advice to the Minister, or in a document titled advisory note, briefing note, etc.²⁰⁴ Rather, the nature of the information in the record must be examined – on a line-by-line basis – to determine if it is indeed advice for the exception in clause 23(1)(a) to apply.

3. Opinions

An opinion is a judgment or belief based on grounds short of proof; a view held as probable; a formal statement of professional advice.²⁰⁵

4. Proposals

A proposal is a course of action put forward for consideration or as a plan.²⁰⁶

5. Recommendations

Recommendation means advice or counsel.²⁰⁷ Recommendations are formal suggestions about courses of action to be followed. They are usually specific in nature and are proposed mainly in connection with a particular decision.

²⁰⁴ Ontario Information and Privacy Commissioner [Order P-442](#) (Re Ministry of Finance, April 1, 1993).

²⁰⁵ The Concise Oxford Dictionary, 9th Edition. The Concise Oxford Dictionary definition of opinion was considered by the Manitoba Court of Queen's Bench in *Sigurdson v. The Minister of Conservation*, [2002] M. J. No. 390 (September 30, 2002).

²⁰⁶ The Concise Oxford Dictionary, 9th Edition. The Concise Oxford Dictionary definition of recommend was considered by the Manitoba Court of Queen's Bench in *Sigurdson v. The Minister of Conservation*, [2002] M. J. No. 390 (September 30, 2002).

²⁰⁷ Black's Law Dictionary, 6th Edition.

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6. Analyses or policy options

These terms are closely related to advice and recommendations and involve the development of advantages and disadvantages of possible courses of action.

An analysis is a detailed examination of the elements of something;²⁰⁸ separation into component parts or elements.²⁰⁹

In this context, an option is a choice, a thing that is or may be chosen.²¹⁰

7. Factual information

If factual information in a record is interwoven with advice, opinions, recommendations, etc. in such a way that it cannot reasonably be considered separate and distinct, the exception in clause 23(1)(a) will apply to this information.²¹¹

In other situations, it will be a question of fact as to whether background or factual information falls within the exception. In this context, the following statement of the Manitoba ombudsman, made when considering the exception to disclosure protecting advice in the 1985 Freedom of Information Act, is of interest:

The department raised a principle that a record containing a recitation of facts could be interpreted as advice. This did not go unheard and, in my opinion, has some validity. Where a recitation of facts communicated from one government official to another has the effect of revealing the formulation of a particular policy, the making of a particular decision or the development of a particular negotiating position under

²⁰⁸ The Concise Oxford Dictionary, 9th Edition.

²⁰⁹ The Dictionary of Canadian Law.

²¹⁰ The Concise Oxford Dictionary, 9th Edition.

²¹¹ Ontario Information and Privacy Commissioner [Order P-48](#) (Re Ministry of Industry, Trade & Technology, April 6, 1989).

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*consideration, one might be able to conclude that this constitutes advice and at that point severing should be considered.*²¹²

If there is an issue as to whether factual information falls within the exception in clause 23(1)(a), legal counsel should be consulted.

■ **Exception to Disclosure: Consultations or Deliberations - [Clause 23(1)(b)]**

Advice to a public body

23(1) The head of a local public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to reveal

...

(b) consultations or deliberations involving officers or employees of the public body or a minister;

...

1. Consultations or deliberations

A consultation is the seeking of information or advice from a person, referral of a matter to a person for advice, an opinion.²¹³ In the context of clause 23(1)(b), a consultation is the seeking of the views of one or more persons as to the appropriateness of suggested actions, proposals, etc.

Deliberation means careful consideration; the discussion of reasons for and against; a debate or discussion.²¹⁴

²¹² Re Department of Justice; [Report of the Ombudsman](#) dated October 31, 1997, p. 32.

²¹³ The Concise Oxford Dictionary, 9th Edition.

²¹⁴ The Concise Oxford Dictionary, 9th Edition.

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2. Involving officers or employees of the public body or a minister

For the exception in clause 23(1)(b) to apply, the consultations or deliberations must involve officers or employees of the public body or of a minister.

An officer is a person holding an office or position of trust, command or authority in a corporation, government, armed services or other institution or organization; in corporations, an officer is a person charged with important functions such as president, vice-president or treasurer.²¹⁵ An officer can include the position of a corporation director,²¹⁶ a sovereign's minister, an appointed or elected functionary.²¹⁷

The term employee is defined in subsection 1(1) of [FIPPA](#):

“employee”, in relation to a public body, includes a person who performs services for the public body under a contract or agency relationship with the public body;

For example, there is no specific exception to disclosure for agenda or minutes of meetings of officers or employees of a public body. But, if an agenda or minute contains information that could reasonably be expected to reveal consultations or deliberations involving officers or employees of the public body, this information could be severed from the record.

■ Exception to Disclosure: Positions, Plans, etc. for Contractual or Other Negotiations - [Clause 23(1)(c)]

Advice to a public body

23(1) The head of a local public body may refuse to disclose information to an applicant if disclosure could reasonably be

²¹⁵ Black's Law Dictionary, 6th Edition.

²¹⁶ The Dictionary of Canadian Law.

²¹⁷ The Concise Oxford Dictionary, 9th Edition.

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expected to reveal

...

(c) positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the Government of Manitoba or the public body, or considerations that relate to those negotiations;

...

The exception in clause 23(1)(c) covers the strategies, plans, approaches and bargaining positions developed by or for the Manitoba government as a whole, or by or for a particular public body (such as a department of the government or a government agency), for the purpose of contractual or other negotiations.

1. Positions, plans, procedures, criteria or instructions or related considerations

A plan is a formulated and detailed method by which a thing is to be done; a design or scheme; an intention or proposed proceeding.²¹⁸

Positions and plans refer to information and options that may be used in the course of negotiations.

Procedures, criteria, instructions and related considerations cover information relating to the factors and considerations involved in developing a negotiating position or plan, including tactics, fall-back positions, etc.

2. Developed for the purpose of contractual or other negotiations

To negotiate means to confer with others to reach a compromise or agreement.²¹⁹ Negotiations, in this context, means discussions and communications where the intent is to arrive at an agreement or a settlement. The negotiations referred to in clause 23(1)(c) can include

²¹⁸ The Concise Oxford Dictionary, 9th Edition. This definition has been accepted by the Ontario Information and Privacy Commissioner in [Order P-229](#) (Re Human Resources Secretariat, Management Board of Cabinet, May 6, 1991).

²¹⁹ The Concise Oxford Dictionary, 9th Edition.

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contractual negotiations and negotiations relating to the settlement of a lawsuit or dispute.

3. **Developed by or on behalf of the Manitoba government or the public body**

The exception in clause 23(1)(c) applies to negotiating positions, etc. that are developed by officials or staff of the public body or by the staff of a minister.

In addition, the exception extends to negotiating positions, etc. developed on behalf of the government or the public body by any person under a contract or other arrangement (whether written or verbal) - for example an agent retained to carry out negotiations for the government or the public body.

Note:

Clause 28(1)(c) contains a related discretionary exception for information the disclosure of which could reasonably be expected to interfere with or prejudice contractual or other negotiations of a public body or of the Manitoba government.

Subclause 29.1(c)(i) contains a discretionary exception for labour relations information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of the public body as an employer.

■ **Exception to Disclosure: Plans Relating to Management of Personnel or Administration - [Clause 23(1)(d)]**

Advice to a public body

23(1) The head of a local public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to reveal

...

(d) plans relating to the management of personnel or the administration of the public body that have not yet been

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implemented;

...

A plan is a formulated and especially detailed method by which a thing is to be done; a design or scheme; an intention or proposed proceeding.²²⁰

Management of personnel includes all aspects of the management of the human resources of the public body, including:

- staffing requirements
- job classification
- recruitment and selection
- salary and benefits
- hours and conditions of work
- leave management
- performance review
- training
- termination of employment
- management of personal service contracts

Administer means to attend to the running of (business affairs, etc.); manage; be responsible for the implementation of (the law, justice, punishment, etc.).²²¹

²²⁰ The Concise Oxford Dictionary, 9th Edition. This definition has been accepted by the Ontario Information and Privacy Commissioner in [Order P-229](#) (Re Human Resources Secretariat, Management Board of Cabinet, May 6, 1991).

²²¹ The Concise Oxford Dictionary, 9th Edition.

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Administration of the public body covers all aspects of the internal management of the public body required to support the delivery of programs and services, or to carry out the activities, of the public body. It includes financial, material, contract, property, information and risk management activities of the public body.

The exception in clause 23(1)(d) is temporary; once a plan for the management of personnel or the administration of the public body has been implemented, access to the information can no longer be refused under the exception in clause 23(1)(d). An exception in another section of [FIPPA](#) may, however, apply to the information. A plan has been implemented when those who are expected to carry it out have been authorized and instructed to do so.

■ **Exception to Disclosure: Draft Legislation, Regulations and Orders - [Clause 23(1)(e)]**

Advice to a public body

23(1) The head of a local public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to reveal

...

(e) the content of draft legislation, regulations, and orders of ministers or the Lieutenant Governor in Council; or

...

The exception in clause 23(1)(e) covers bills, regulations, orders of ministers and orders of the Lieutenant Governor in Council while they are being drafted and formulated in preparation for presentation to the Legislature or for publication.

The exception covers all drafts, but does not apply once the legislation, regulation or order has been passed or made.

The exception in clause 23(1)(e) does not prevent a department or government agency from issuing draft legislation to the public for consultation.

■ **Exception to Disclosure: Information about a Pending Policy or Budgetary Decision - [Clause 23(1)(f)]**

Advice to a public body

23(1) The head of a local public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to reveal

...

(f) information, including the proposed plans, policies or projects of a public body, the disclosure of which could reasonably be expected to result in disclosure of a pending policy or budgetary decision.

The exception in clause 23(1)(f) provides protection for information where its disclosure could lead to a premature disclosure of an anticipated policy or budgetary decision.

1. Proposed plans, policies and projects

The type of information protected includes, but is not limited to, proposed plans, policies and projects of any public body that could reasonably be expected to disclose a pending policy or budgetary decision.

A plan is a formulated and especially detailed method by which a thing is to be done; a design or scheme; an intention or proposed proceeding.²²² A proposed plan is a plan that has not been finalized and put into operation.

A proposed project means a planned undertaking that has not been implemented.²²³

²²² The Concise Oxford Dictionary, 9th Edition. This definition has been accepted by the Ontario Information and Privacy Commissioner in [Order P-229](#) (Re Human Resources Secretariat, Management Board of Cabinet, May 6, 1991).

²²³ Ontario Information and Privacy Commissioner [Order P-772](#) (Re Ministry of Natural Resources, Oct. 4, 1994).

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2. Of a public body

The exception in clause 23(1)(f) covers the plans, policies and projects of the public body that received the request for access to the record under Part 2 of [FIPPA](#), or the plans, policies and projects of another public body, as the phrase a public body is used in the exception.

3. Pending

The exception in clause 23(1)(f) is temporary. Pending means awaiting decision or settlement, undecided; about to come into existence.²²⁴

Once the policy or budgetary decision has been made and implemented, it is no longer pending and the exception in clause 23(1)(f) no longer applies. A decision is implemented when those who are expected to carry it out have been authorized and instructed to do so.

Note:

Clause 28(1)(e) contains a related discretionary exception to disclosure about information which, if disclosed, could result in premature disclosure of a pending policy decision.

■ When the Exceptions Don't Apply: Limits to the Advice to a Public Body Exceptions - [Sec. 23(2)]

Subsection 23(2) sets out limits on the exceptions to disclosure in subsection 23(1) – if information falls within one of clauses 23(2)(a) to (h), the exception to disclosure in subsection 23(1) does not apply to that information. But another exception to disclosure in another section of [FIPPA](#) may apply.

²²⁴ The Concise Oxford Dictionary, 9th Edition.

■ **Limit on Exception: Record More than 20 Years Old - [Clause 23(2)(a)]**

Exceptions

23(2) Subsection (1) does not apply if the information

...

(a) is in a record that is more than 20 years old;

...

If information is in a record that is more than 20 years old, the exceptions to disclosure in subsection 23(1) do not apply to the information. But an exception in another section of [FIPPA](#) may apply to this information—for example, one of the exceptions in Sec. 28 - Economic and other interests of a public body.

This limit to the advice exception is similar to the limit of the exception about the deliberations of cabinet in clause 19(2)(b), and the limit of the exception about information provided in confidence by another government in clause 20(3)(a).

Clause 23(2)(a) does not oblige the government, a department or any public body to store or retain a record for a specific period of time. For example, [The Archives and Recordkeeping Act](#), and the records schedules approved under that act, set out the requirements for the retention, storage and destruction of records of the Manitoba government and its departments.²²⁵

■ **Limit on Exception: Instruction or Guideline - [Clause 23(2)(b)]**

Exceptions

23(2) Subsection (1) does not apply if the information:

...

(b) is an instruction or guideline issued to officers or employees of the public body;

...

²²⁵ Clause 3(b) of [FIPPA](#), discussed in Chapter 2, under *Procedures Not Affected by FIPPA*.

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The exceptions to disclosure in subsection 23(1) do not apply to instructions or guidelines issued to officers or employees of the public body. But other exceptions to disclosure in other sections of [FIPPA](#) may apply to this information — for example, the exceptions in Sec. 25 - law enforcement and legal proceedings).

Generally, an instruction or guideline is information that is provided to officers or employees of the public body for use in interpreting or applying legislation, carrying out policy or exercising a discretion.

An officer is a person holding an office or position of trust, command or authority in a corporation, government, armed services or other institution or organization; in corporations, an officer is a person charged with important functions such as president, vice-president or treasurer.²²⁶ An officer can include the position of a corporation director,²²⁷ a sovereign's minister, an appointed or elected functionary.²²⁸

The term employee is defined in subsection 1(1) of [FIPPA](#):

“employee”, in relation to a public body, includes a person who performs services for the public body under a contract or agency relationship with the public body;

■ **Limit on Exception: Substantive Rule or Statement of Policy - [Clause 23(2)(c)]**

Exception

23(2) Subsection (1) does not apply if the information

...

(c) is a substantive rule or statement of policy that has been adopted by the public body for the purpose of interpreting an enactment or administering a service, program or activity of the public body; ...

²²⁶ Black's Law Dictionary, 6th Edition.

²²⁷ The Dictionary of Canadian Law.

²²⁸ The Concise Oxford Dictionary, 9th Edition.

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Clause 23(2)(c) expands on the limit in clause 23(2)(b). The exceptions to disclosure in subsection 23(1) do not apply to substantive rules or statements of policy adopted by the public body for interpreting legislation or administering services, programs or activities. But other exceptions may apply to this information — for example, the exceptions in Sec. 25 - Law enforcement and legal proceedings.

Substantive means having a firm or solid basis; important, substantial.²²⁹ In the context of clause 23(2)(c), a substantive rule would be a direction as to how an enactment is to be interpreted or a service, program or activity is to be administered.

Enactment is defined in subsection 1(1) of [FIPPA](#) as an act or regulation.

An act is a statute passed by the Legislative Assembly of a province or by the Parliament of Canada. A regulation is a law made under the authority of a statute by the Lieutenant Governor in Council (in the case of a province), the Governor General in Council (in the case of Canada), a minister, etc.

Administering a service, program or activity includes activities undertaken to manage or implement the service, program or activity.²³⁰

■ **Limit on Exception: Result of Product or Environmental Test - [Clause 23(2)(d)]**

Exception

23(2) Subsection (1) does not apply if the information

...

(d) is the result of a product or environmental test conducted by or for the public body;

...

The exceptions to disclosure in subsection 23(1) do not apply to information that is the result of a product or environmental test conducted by or for the

²²⁹ The Concise Oxford Dictionary, 9th Edition.

²³⁰ The Concise Oxford Dictionary, 9th Edition.

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public body. But an exception in another section of [FIPPA](#) may apply to this information — for example, the exceptions in Sec. 18 - Business interests of third parties.

This limit to the exceptions in subsection 23(1) applies whether the testing is carried out by the public body itself or for the public body by another person or organization.

Product means a thing or substance produced by natural process or manufacture, a result.²³¹

Environment refers to the physical surroundings, conditions or circumstances in which a person lives; the area surrounding a place; external conditions as affecting plant and animal life; the totality of the physical conditions on the earth or a part of it, especially as affected by human activity.²³²

Note:

Clause 18(3)(d) also refers to results of product or environmental tests. If the test has been carried out by or for the public body for a fee paid by a third party, an exception in subsection 18(1) may apply to the information. Subsection 28(2), which limits the exceptions to disclosure in subsection 28(1), also refers to results of product or environmental tests.

■ **Limit on Exception: Statement of the Reasons for a Decision - [Clause 23(2)(e)]**

Exceptions

23(2) Subsection (1) does not apply if the information

...

(e) is a statement of the reasons for a decision made in the exercise of a quasi-judicial function or a discretionary power that affects the applicant;

...

²³¹ The Concise Oxford Dictionary, 9th Edition.

²³² The Concise Oxford Dictionary, 9th Edition.

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The exceptions to disclosure in subsection 23(1) do not apply to information that is a statement of the reasons for a final decision. This decision would be made by an officer, minister or other person, or by a board or administrative tribunal in exercising a quasi-judicial function, or a discretionary power that affects the applicant requesting access under Part 2 of FIPPA. But, an exception in another section of [FIPPA](#) may apply to this information — for example, the exception in Sec. 17 - Third party privacy.

For the limit in clause 23(2)(e) to apply, the decision must be made; that is, it must be finalized. The matter cannot still be under consideration.

Reasons for a decision means the motive, cause or justification for the decision.²³³

In the exercise of a quasi-judicial function or a discretionary power means that the decision must result from the carrying out of such a function or power.

A quasi-judicial function is one that is partly administrative and partly judicial, where the decision maker is required to investigate facts or determine the existence of facts, hold hearings (usually), weigh evidence and draw conclusions as a basis for official actions, and to exercise discretion of a judicial nature. A person, board or administrative tribunal carrying out a quasi-judicial function is generally under a duty to act in accordance with the rules of natural justice.²³⁴

A discretionary power arises where, given certain factual circumstances, a person is empowered to make a particular decision, and has a choice among various decisions; in other words, when their conduct is not dictated in advance by law.²³⁵ A discretionary power is one that is not imperative or, if imperative, the time, manner or extent of the power is left to the discretion of the person exercising it.²³⁶

The limit only applies when the decision in some way affects the applicant requesting access to the record under Part 2 of [FIPPA](#).

²³³ The Concise Oxford Dictionary, 9th Edition.

²³⁴ Dictionary of Canadian Law and Black's Law Dictionary, 6th Edition.

²³⁵ Dussault and Borgeat, Administrative Law, 2nd Edition, page 241.
- not available on internet

²³⁶ Black's Law Dictionary, 6th Edition.

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The limit in clause 23(2)(e) applies even where the decision may be appealed. It also applies whether the reasons are recorded in an internal memorandum or external correspondence, and whether the reasons were given by the decision maker or subsequently incorporated into the decision, order or ruling.

Personal information related to individuals other than the applicant in the reasons for decision, such as names and other identifying information, may fall within the exception to disclosure in Sec. 17 protecting third party privacy.

Note:

Clause 4(b) of [FIPPA](#) states that [FIPPA](#) does not apply to a note made by or for, or a communication or draft decision of, a person who is acting in a judicial or quasi-judicial capacity.²³⁷

■ **Limit on Exception: Background Research of a Scientific or Technical Nature - [Clause 23(2)(f)]**

Exceptions

23(2) Subsection (1) does not apply if the information

...

(f) is the result of background research of a scientific or technical nature undertaken in connection with the formulation of a policy proposal;

...

Interpretation of background research

23(3) For the purpose of clause (2)(f), background research of a technical nature does not include economic or financial research undertaken in connection with the formulation of a tax policy or other economic policy of the public body.

The exceptions to disclosure in subsection 23(1) do not apply to information that is the result of background research of a scientific or technical nature

²³⁷ Section 4 and the records that don't fall under [FIPPA](#) are discussed in chapter 2, under *Records that Do Not Fall under FIPPA*.

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undertaken in connection with the formulation of a policy proposal. But an exception in another section of [FIPPA](#) may apply to this information — for example, the exceptions in Sec. 28 - Economic and other interests of a public body.

1. Background research

Research means the systematic investigation into and study of materials and sources to establish facts and reach new conclusions and endeavor to discover new or collate old facts, by scientific study or by a course of critical investigation.²³⁸ For the purpose of clause 23(2)(f), background research is research undertaken as the basis for formulating a policy proposal.

2. Scientific research

Scientific research is research conducted in accordance with the methods or principles of science in the fields of natural, biological or social sciences or mathematics, and involves the observation and testing of specific hypotheses or conclusions undertaken by an expert in the field.²³⁹

3. Technical research

Technical research is research involving or concerned with the mechanical arts and applied sciences; research of or relating to a particular subject or craft or its techniques.²⁴⁰ Examples of mechanical arts and applied sciences include architecture, engineering and electronics.

²³⁸ Ontario Information and Privacy Commissioner [Order P-666](#) (Re Ministry of Health, April 27, 1994).

²³⁹ Based on comments in Ontario Information and Privacy Commissioner [Order P-454](#) (Re Ontario Native Affairs Secretariat, May 7, 1993) respecting "scientific information".

²⁴⁰ The Concise Oxford Dictionary, 9th Edition.

4. Technical research does not include economic or financial research

For the purpose of the limit on the exception to disclosure in clause 23(2)(f), technical research does not include economic or financial research undertaken in connection with the formulation of a tax policy or other economic policy of the public body [subsection 23(3)]. That is, economic or financial research undertaken in connection with the formulation of a tax policy or other economic policy of the public body can fall within an exception to disclosure in subsection 23(1) — for example, clause 23(1)(f)).

A tax policy is one relating to taxes. A tax is a contribution to state revenue compulsorily levied on individuals, property or businesses,²⁴¹ and includes federal, provincial, municipal and school taxes. The term tax usually does not include a license fee, other fee or charge payable for a direct benefit received by the party paying the fee. A royalty may qualify as a tax under some statutes.

Financial research relates to the management of money and monetary resources.²⁴²

Economics means the science of the production and distribution of wealth; the condition of a country etc. and relates to material prosperity.²⁴³ Economy means the wealth and resources of a community, especially in terms of the production and consumption of goods and services; the careful management of (especially financial) resources.²⁴⁴

Economic policies relate to the broad interest of the government or a public body in managing the production, distribution and consumption of goods and services in Manitoba, management of financial and other resources of the government or a public body.

²⁴¹ The Concise Oxford Dictionary, 9th Edition.

²⁴² The Concise Oxford Dictionary, 9th Edition.

²⁴³ The Concise Oxford Dictionary, 9th Edition.

²⁴⁴ The Concise Oxford Dictionary, 9th Edition.

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Note:

Clause 28(1)(d) contains an exception to disclosure for innovative scientific or technical information obtained through an employee's research.

■ **Limit on Exception: Public Opinion Polls - [Clause 23(2)(f.1)]**

Exceptions

23(2) Subsection (1) does not apply if the information

...

(f.1) is a public opinion poll;

...

The exceptions to disclosure in subsection 23(1) do not apply to a 'public opinion poll'. There may be circumstances in which another exception to disclosure in FIPPA would apply to information in a public opinion poll, but these would be rare.

The term 'public opinion poll' is not defined in [FIPPA](#), but the following explanation from the B.C. *Freedom of Information and Protection of Privacy Act Policy Manual* is of assistance:

A public opinion poll is a survey which collects the opinions of a sample of the public on issues, and which usually contains statistical analysis on the results of that poll. The purpose of such polls generally is to extrapolate the information so that there is an indication of the opinion of a wider segment of the population.

Examples include:

- consumers and commercial research surveys
- public opinion focus group reports
- consumer and commercial focus group reports

■ Limit on Exception: Statistical Surveys - [Clause 23(2)(g)]

Exceptions

23(2) Subsection (1) does not apply if the information

...

(g) is a statistical survey; or

...

The exceptions to disclosure in subsection 23(1) do not apply to a statistical survey.

Statistics is the science of collecting and analyzing numerical data, especially in or for large quantities, and usually inferring proportions in a whole from proportions in a representative sample; any systematic collection or presentation of such facts.²⁴⁵

A survey is the act of viewing, examining or inspecting in detail, especially for some specific purpose; a written statement or description embodying the result of such examination.²⁴⁶

A statistical survey is information showing the collection, analysis, interpretation and presentation of aggregated data in relation to a topic or issue that is the object of study.

When a statistical survey appears in a record with information that can be withheld under subsection 23(1) or another exception in FIPPA, the excepted information should be severed, and the statistical survey should be disclosed. For example, any information in a statistical survey identifying individuals providing opinions may fall within the exception in Sec. 17 (third party privacy). If so, that information will have to be severed from the statistical survey before access is provided.

²⁴⁵ The Concise Oxford Dictionary, 9th Edition.

²⁴⁶ The Compact Edition of the Oxford English Dictionary.

■ **Limit on Exception: Final Report or Final Audit on Performance or Efficiency - [Clause 23(2)(h)]**

Exceptions

23(2) Subsection (1) does not apply if the information

...

(h) is a final report or final audit on the performance or efficiency of the public body or of any of its programs or policies, except where the information is a report or appraisal of the performance of an individual who is or was an officer or employee of the public body.

The exceptions to disclosure in subsection 23(1) do not apply to a final report or final audit on the performance or efficiency of the public body or its programs or policies, unless it is a performance appraisal or report about an individual. An exception in another section in [FIPPA](#) may apply to information in a final report or final audit — for example, the exceptions in Sec. 28 - Economic and other interests of a public body.

Final means situated at the end, coming last; conclusive, decisive, unalterable, putting an end to doubt.²⁴⁷

A report includes an account given or formally expressed after investigation or consideration or a description, summary or reproduction of an event, a periodical statement on work or conduct.²⁴⁸

An audit is an official examination of accounts or a systematic review.²⁴⁹

Performance of the public body refers to the carrying out, execution, discharge or fulfillment of the functions of the public body or of its programs or policies.²⁵⁰

²⁴⁷ The Concise Oxford Dictionary, 9th Edition.

²⁴⁸ The Concise Oxford Dictionary, 9th Edition.

²⁴⁹ The Concise Oxford Dictionary, 9th Edition.

²⁵⁰ The Compact Edition of the Oxford English Dictionary.

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Efficiency refers to the effectiveness of the public body or its programs or policies.²⁵¹

Where the information is a report or appraisal of the performance of an individual who is or was an officer or employee of the public body, the limit clause 23(2)(h) does not apply and an exception in subsection 23(1) may apply to the information. Other exceptions to disclosure in other sections of [FIPPA](#) may also apply to this information.

An officer is a person holding an office or position of trust, command or authority in a corporation, government, armed services or other institution or organization; in corporations, an officer is a person charged with important functions such as president, vice-president or treasurer.²⁵² An officer can include the position of a corporation director,²⁵³ a sovereign's minister, an appointed or elected functionary.²⁵⁴

The term employee is defined in subsection 1(1) of [FIPPA](#):

“employee”, in relation to a public body, includes a person who performs services for the public body under a contract or agency relationship with the public body.

Note:

The exceptions to disclosure in clause 29(a) protect testing or auditing procedures or techniques.

■ **Sec. 23: Related Provisions in FIPPA**

Subsection 1(1) (Definitions):

- “applicant”
- “department”
- “employee”
- “enactment”

²⁵¹ The Concise Oxford Dictionary, 9th Edition.

²⁵² Black's Law Dictionary, 6th Edition.

²⁵³ The Dictionary of Canadian Law.

²⁵⁴ The Concise Oxford Dictionary, 9th Edition.

EXCEPTIONS TO DISCLOSURE: SECTION 23

“head”
“minister”
“public body”
“record”

Clause 3(b)	Retention and destruction of records
Clause 4(b)	Notes and draft decisions of person acting in judicial or quasi-judicial capacity
Subsection 7(2)	Severing information
Subsection 12(1)	Contents of response
Clause 18(3)(d)	Results of product or environmental test
Clause 19(1)(d)	Communications among ministers
Clause 19(1)(e)	Record to brief a minister about a matter before Cabinet
Paragraph 28(1)(c)(iii)	Interfere with or prejudice contractual or other negotiations
Clause 28(1)(d)	Innovative scientific or technical information obtained through employee research
Clause 28(1)(e)	Undue loss or benefit to a person or premature disclosure of a pending policy decision
Subsection 28(2)	Results of a product or environmental test
Sec. 29	Testing procedures, tests and audits

DISCLOSURE HARMFUL TO INDIVIDUAL HEALTH OR SAFETY OR PUBLIC SAFETY - [SEC. 24]

Summary of the Exception

Sec. 24 states that the head of a public body has the discretion to refuse to disclose to an applicant requesting a record under Part 2 information, including personal information about the applicant, if the disclosure could reasonably be expected to:

- threaten or harm the safety of another person
- result in serious harm to the applicant's health or safety
- threaten public safety

Sec. 24 contains discretionary exceptions to the right to access under Sec. 7 of [FIPPA](#), as the head of the public body may refuse to disclose the requested record if the exception applies.

Sec. 24 contains a 'reasonable expectation of harm' test.

Clause 12(2)(a) states that the head of a public body may, in responding to a request for access under Part 2 of [FIPPA](#), refuse to confirm or deny the existence of a record containing information described in Sec. 24.

■ **Scope of Individual or Public Safety Exceptions - [Sec. 24]**

Disclosure harmful to individual or public safety

24 The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if disclosure could reasonably be expected to

...

Sec. 24 gives the head of a public body the discretion to refuse to disclose to an applicant requesting a record under Part 2 information, including personal information about the applicant, if the disclosure could reasonably be

EXCEPTIONS TO DISCLOSURE: SECTION 24

expected to threaten or harm the safety of another person, result in serious harm to the applicant's health or safety, or threaten public safety.

1. Discretionary exception

Sec. 24 contains discretionary exceptions to the right of access under Sec. 7 of [FIPPA](#), as the head may refuse to disclose the requested information. This involves a two-step process. The head:

- must first determine whether an exception in Sec. 24 applies to information in the requested record
- must then consider whether it is appropriate to release the information, even though an exception in Sec. 24 applies²⁵⁵

2. Severing - subsection 7(2)

The term information, rather than the term record, is used in Sec. 24 to indicate that the exceptions apply to the information in a record, and not necessarily to the whole record. Subsection 7(2) of [FIPPA](#) requires that, where an exception applies to some of the information in a record, only that information is severed, and the applicant is entitled to access the remainder of the record, unless an exception in another section of [FIPPA](#) applies to it.²⁵⁶

3. Reasonable expectation of harm

The exceptions in Sec. 24 contain a reasonable expectation of harm test.²⁵⁷

The head of the public body must determine whether disclosure of the information could reasonably be expected to cause the harm described in clause 24(a), (b) or (c). The circumstances must be

²⁵⁵ See *Exercising a Discretion* earlier in this chapter.

²⁵⁶ For a discussion of severing and subsection 7(2) see *The Exceptions Apply to Information in a Record - Severing* earlier in this chapter and *Severing a Record* in chapter 4.

²⁵⁷ See *Reasonable Expectation of Harm* earlier in this chapter.

EXCEPTIONS TO DISCLOSURE: SECTION 24

carefully assessed, and the determination must be based on objective grounds.

4. Each clause contains a separate exception

Each of clauses 24(a), (b) and (c) set out a separate exception to disclosure as the word *or* is used to join the clauses. Sec. 24 does not set up a three-pronged test; information does not have to meet the requirements of all three clauses for an exception to apply.

5. Refusal to Confirm or Deny Existence of Record - [subsection 12(2)]

In certain circumstances, the mere knowledge that a record containing the information described in Sec. 24 exists could cause harm.

Under clause 12(2)(a) of [FIPPA](#), where the head of the public body exercises their discretion to refuse access to a record because disclosure could reasonably be expected to threaten or harm the safety of another person, result in serious harm to the applicant's health or safety, or threaten public safety, the head may also refuse to confirm or deny the existence of the record.²⁵⁸

This provision is discretionary and will only be used in rare situations.

■ Exception to Disclosure: Threaten or Harm Health or Safety of another Person - [Clause 24(a)]

Disclosure harmful to individual or public safety

24 *The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if disclosure could reasonably be expected to*

(a) threaten or harm the mental or physical health or the safety of another person;

...

²⁵⁸ Subsection 12(2) is discussed in chapter 4, under *Refusal to Confirm or Deny Existence of a Record*.

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The exception to disclosure in clause 24(a) protects the mental or physical health or the safety of any person other than the applicant requesting access to the record.

To threaten in the context of clause 24(a) means to be likely to injure; to be a source of danger to; to endanger actively.²⁵⁹

To harm means to hurt or damage.²⁶⁰

Safety means the condition of being safe; freedom from danger or risks.²⁶¹

Person means a natural person (human being) and includes a corporation and the heirs, executors, administrators or other legal representatives of a person.²⁶² Another person means any person other than the applicant requesting access to the record. The other person need not be named in the record so long as they would be at risk as a result of disclosure of the record.

Note:

Clause 17(2)(c) requires that the identity of a third party who has provided information in confidence to a public body for law enforcement or the administration of an enactment not be disclosed.

Clause 25(1)(e) provides a discretion to refuse to disclose information if disclosure could reasonably be expected to endanger the life or safety of a law enforcement officer or any other person.

■ **Exception to Disclosure: Serious Harm to the Applicant's Health or Safety - [Clause 24(b)]**

Disclosure harmful to individual or public safety

24 *The head of a public body may refuse to disclose to an applicant information, including personal information about*

²⁵⁹ The Compact Edition of the Oxford English Dictionary.

²⁶⁰ The Concise Oxford Dictionary, 9th Edition.

²⁶¹ The Concise Oxford Dictionary, 9th Edition.

²⁶² [The Interpretation Act of Manitoba](#), Sec. 17 and the Schedule of Definitions.

EXCEPTIONS TO DISCLOSURE: SECTION 24

the applicant, if disclosure could reasonably be expected to

...

(b) result, in the opinion of a duly qualified physician, psychologist, or other appropriate expert, in serious harm to the applicant's mental or physical health or safety; or

...

The exception to disclosure in clause 24(b) can be relied on in those rare situations where disclosure of information to an applicant requesting access under Part 2, including personal information about the applicant, could reasonably be expected to result in serious harm to the applicant's mental or physical health or safety.

Serious harm is hurt or damage that is significant, not slight or negligible.²⁶³

Before a public body can rely on the exception to disclosure in clause 24(b), it must obtain an opinion from a duly qualified physician, psychologist or other appropriate expert, that disclosure will result in serious harm to the applicant's mental or physical health or safety.

The intent of clause 24(b) is to ensure the applicant does not receive their own personal information that could cause them serious harm. Efforts should be made to provide as much personal information as is reasonable to the applicant.

Note:

Clause 44(1)(x), in Part 3 of [FIPPA](#), authorizes the public body to disclose personal information to an expert for the purposes of clause 24(b).

■ **Exception to Disclosure: Threaten Public Safety - [Clause 24(c)]**

Disclosure harmful to individual or public safety

24 *The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if disclosure could reasonably be expected to*

...

²⁶³ The Concise Oxford Dictionary, 9th Edition.

EXCEPTIONS TO DISCLOSURE: SECTION 24

(c) *threaten public safety.*

To threaten, in the context of clause 24(c), means to be likely to injure; to be a source of danger to; to endanger actively.²⁶⁴

Safety means the condition of being safe; freedom from danger or risks.²⁶⁵
Public safety refers to the safety of the general public, or a significant part of the public.

For example, disclosure of incorrect or defective test results related to a possible health hazard that could cause, or be used to cause, widespread disorder or panic would threaten public safety.

■ **Sec. 24: Related Provisions in FIPPA**

Subsection 1(1) (Definitions):	“applicant” “head” “public body”
Subsection 7(2)	Severing information
Subsection 12(1)	Contents of Response
Clause 12(2)(a)	Refusal to confirm or deny existence of a record
Clause 17(2)(c)	Identity of a third party providing information in confidence for the purpose of law enforcement
Clause 25(1)(e)	Life or safety of a law enforcement officer or any other person
Sec. 26	Security of property, etc.

²⁶⁴ The Compact Edition of the Oxford English Dictionary.

²⁶⁵ The Concise Oxford Dictionary, 9th Edition.

EXCEPTIONS TO DISCLOSURE: SECTION 24

Clause 44(1)(x)

**Disclosure of personal information to an expert
for the purposes of clause 24(b) permitted**

LAW ENFORCEMENT AND LEGAL PROCEEDINGS - [SEC. 25]

Summary of the Exception

Subsection 25(1) states that the head of a public body has the discretion to (may) refuse to disclose to an applicant requesting a record under Part 2 information which, if disclosed, could reasonably be expected to:

- harm law enforcement activities and other specified investigative, regulatory, adjudicative and protective functions of a public body
- disclose specified records or information about law enforcement and related matters
- be injurious to legal proceedings

Subsection 25(1) contains discretionary exceptions to the right to access under Sec. 7 of [FIPPA](#).

Subsection 25(2) requires the head to refuse to disclose information if it is in a law enforcement record and the disclosure is prohibited under a statute or regulation of the Government of Canada.

The majority of the exceptions in subsection 25(1) contain a reasonable expectation of harm test. The exceptions in clauses 25(1)(d), (g), (j) and (l) and the exception in subsection 25(2) are class exceptions because they protect a type or kind of information.

Subsection 25(3) limits the exceptions in subsection 25(1). These exceptions do not apply to a report on the degree of success achieved by a law enforcement program or a record providing a general outline of the structure or programs of a law enforcement agency.

Clause 12(2)(a) states that the head of a public body may, in responding to a request for access under Part 2 of the act, refuse to confirm or deny the existence of a record containing information described in Sec. 25.

■ **Scope of the Exception for Law Enforcement and Legal Proceedings - [Subsection 25(1)]**

Disclosure harmful to law enforcement or legal proceedings

25(1) The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to

...

Subsection 25(1) states that the head of a public body has the discretion to (may) refuse to disclose to an applicant requesting a record under Part 2, with information which, if disclosed, could reasonably be expected to:

- harm law enforcement activities and other specified investigative, regulatory, adjudicative and protective functions of a public body described in clauses 25(1)(a), (b), (c), (e), (f), (h), (i), (k) or (m)
- disclose specified records or information about law enforcement and related matters described in clauses 25(1)(d), (g), (j) and (l)
- be injurious (damaging) to legal proceedings (clause 25(1)(n))

Subsection 25(1) of [FIPPA](#) contains exceptions to disclosure for records relating to law enforcement that protect the law enforcement process. Clauses 17(2)(b) and (c) complement Sec. 25, because they protect the privacy of an individual who has been investigated for a possible violation of law or the identity of an individual who has provided information in confidence to a public body for law enforcement.

1. Discretionary exceptions

Subsection 25(1) contains discretionary exceptions to the right of access under Sec. 7 of the act, because the head may refuse to disclose the requested information. This involves a two-step process. The head:

EXCEPTIONS TO DISCLOSURE: SECTION 25

- must first determine whether an exception in subsection 25(1) applies to information in the requested record
- must then consider whether it is appropriate to release the information, even though an exception in subsection 25(1) applies²⁶⁶

2. Severing - subsection 7(2)

The term information, rather than the term record, is used in subsection 25(1) to indicate that the exception applies to the information in a record and not necessarily to the whole record. Subsection 7(2) of [FIPPA](#) requires that, where an exception applies to some of the information in a record, only that information is severed, and the applicant is entitled to access to the remainder of the record (unless an exception in another section of [FIPPA](#) applies to it).²⁶⁷

3. Reasonable expectation of harm

The exceptions in clauses 25(1)(d), (g), (j) and (l) protect a class or type of information.

The remainder of the exceptions in subsection 25(1) contain a reasonable expectation of harm test.²⁶⁸

The head of the public body must determine whether disclosure of the information could reasonably be expected to cause the harm described in the exception provision. The circumstances must be carefully assessed, and the determination must be based on objective grounds.

²⁶⁶ See *Exercising a Discretion* earlier in this chapter.

²⁶⁷ For a discussion of severing and subsection 7(2) see *The Exceptions Apply to Information in a Record - Severing* earlier in this chapter and *Severing a Record* in chapter 4.

²⁶⁸ See *Reasonable Expectation of Harm* earlier in this chapter.

4. Reasonable expectation of harm and the mosaic effect

The mosaic effect, in the context of disclosing information related to a law enforcement matter, has been described as follows:

Law enforcement investigations sometimes resemble jigsaw puzzles. Crucial pieces of evidence are often collected without initial awareness of their importance. Different agencies collect parts of the puzzle and then collectively draw this information together to complete an investigation. An assumption that disclosure of information will cause harm presumes that the law enforcement agency is already aware of the information's importance. In reality, the opposite often is true during an investigation.

Cases may arise where there is a mosaic effect inherent in the disclosure. The requested information may not satisfy the threshold test for harm under subsection 25(1) when considered in isolation. However, a public body may exempt information when it forms part of a larger picture, or is one of many requests that collectively fall within one or more of the paragraphs of subsection 25(1). A public body that exempts information on the basis of the mosaic effect must be able to demonstrate that the cumulative effect of a series of disclosures related to the requested information could satisfy the reasonable expectation of harm test.²⁶⁹

5. Refusal to confirm or deny existence of record [clause 12(2)(a)]

In certain circumstances, the mere knowledge that a record containing the information described in subsection 25(1) or 25(2) exists could

²⁶⁹ The Government of British Columbia Freedom of Information and Protection of Privacy [Policy and Procedures Manual](#). Also discussed in the Government of [Alberta Access to Information Guide](#).

EXCEPTIONS TO DISCLOSURE: SECTION 25

cause harm. For example, the mere disclosure of the existence or non-existence of a police investigation may well provide useful information to the subjects or possible subjects of the investigation. Accordingly, the disclosure of the existence of a record relating to the investigation could compromise the effectiveness of this law enforcement activity.²⁷⁰

Under clause 12(2)(a) of [FIPPA](#), where the head of the public body exercises their discretion to refuse access to a record under subsection 25(1), or is required to refuse to disclose a record under subsection 25(2), the head may also refuse to confirm or deny the existence of the record.²⁷¹

■ **Exception to Disclosure: Harm a Law Enforcement Matter - [Clause 25(1)(a)]**

Disclosure harmful to law enforcement or legal proceedings

25(1) *The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to*

...

(a) *harm a law enforcement matter;*

...

Clause 25(1)(a) permits the head of a public body to refuse to disclose information that could reasonably be expected to harm a law enforcement matter.

²⁷⁰ Ontario Information and Privacy Commissioner [Order P-170](#), (Re Ministry of the Attorney General, May 25, 1990).

²⁷¹ Subsection 12(2) is discussed in chapter 2, under *Refusal to Confirm or Deny Existence of Record*.

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This exception contains a reasonable expectation of harm test. A disclosure of information would harm a law enforcement matter if that disclosure would hurt or damage²⁷² or be detrimental to a law enforcement matter.

Law enforcement is defined in subsection 1(1) of [FIPPA](#):

"law enforcement" means any action taken for the purpose of enforcing an enactment, including

- (a) policing,*
- (b) investigations or inspections that lead or could lead to a penalty or sanction being imposed, or that are otherwise conducted for the purpose of enforcing an enactment, and*
- (c) proceedings that lead or could lead to a penalty or sanction being imposed, or that are otherwise conducted for the purpose of enforcing an enactment;*²⁷³

Law enforcement is not limited to the investigative activities of police forces. Clause 25(1)(a) provides an exception for a wide variety of investigations and actions by public bodies, if they are undertaken for the purpose of enforcing an enactment.

Enactment is defined in subsection 1(1) of [FIPPA](#) as an act or regulation.

- An act is a statute passed by the Legislative Assembly of a province or by the parliament of Canada.
- A regulation is a law made under the authority of a statute by the Lieutenant Governor in Council (in the case of a province), the Governor General in Council (in the case of Canada) or a minister.

A law enforcement matter is anything that relates to one of the categories in the definition of law enforcement. To rely on this exception, the head must demonstrate that disclosure of a record could reasonably be expected to harm:

²⁷² The Concise Oxford Dictionary, 9th Edition.

²⁷³ The definition law enforcement is discussed in Chapter 2, under *Key Definitions*.

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- any action taken for the purpose of enforcing an enactment (a statute or a regulation)
- a policing matter
- investigations or inspections that could result in a penalty or sanction being imposed, or that are otherwise conducted to enforce an enactment
- proceedings that result or could result in a penalty or sanction or that are otherwise conducted for the purpose of enforcing an enactment

The exception to disclosure in clause 25(1)(a) does not extend to investigations or proceedings related to civil actions for damages, such as a civil court proceeding for breach of contract.

■ **Exception to Disclosure: Prejudice the Defence of Canada; Espionage, Sabotage or Terrorism - [Clause 25(1)(b)]**

Disclosure harmful to law enforcement or legal proceedings

25(1) *The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to*

...

(b) prejudice the defence of Canada or of a foreign state allied to or associated with Canada or harm the detection, prevention or suppression of espionage, sabotage or terrorism;

...

Clause 25(1)(b) contains two exceptions. Both contain a 'reasonable expectation of harm' test.

1. Prejudice the defence of Canada or allied or associated states

Clause 25(1)(b) allows the head of a public body to refuse to disclose information that could reasonably be expected to be detrimental to national security.

EXCEPTIONS TO DISCLOSURE: SECTION 25

While sensitive defence records are more likely to be in the hands of the federal government, the Manitoba government and Manitoba public bodies may hold some information related to national security — for example, emergency planning information.

Prejudice, in the context of clause 25(1)(b), means that disclosure of the information would harm or injure the defence of Canada.²⁷⁴

Defence means the act of defending from or resisting attack.²⁷⁵

Defence of Canada means any activity or plan relating to the defence of Canada and includes activities that improve Canada's resistance to attack.

An allied state is a state with which Canada has concluded formal alliances or treaties. An associated state is a state with which Canada may be linked for trade or other purposes outside the scope of a formal alliance.

2. Harm the detection, prevention or suppression of espionage, sabotage or terrorism

Clause 25(1)(g) also allows the head of a public body to refuse to disclose information that could reasonably be expected to hinder activities to detect, prevent or suppress espionage, sabotage or terrorism.

Harm means hurt or damage.²⁷⁶

Espionage is the practice of spying or of using spies to secretly collect and report information on the activities or movements of an enemy or competitor.²⁷⁷

²⁷⁴ The Concise Oxford Dictionary, 9th Edition.

²⁷⁵ The Concise Oxford Dictionary, 9th Edition.

²⁷⁶ The Concise Oxford Dictionary, 9th Edition.

²⁷⁷ The Concise Oxford Dictionary, 9th Edition.

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Sabotage is deliberate damage to productive capacity, especially as a political act.²⁷⁸

Terrorism means acts of serious violence or other activities that create fear in individuals, groups or nations. Terrorist tactics are generally used to coerce governments or communities into taking or ceasing specific actions.

■ **Exception to Disclosure: Harm Investigative Techniques and Procedures - [Clause 25(1)(c)]**

Disclosure harmful to law enforcement or legal proceedings

25(1) *The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to*

...

(c) harm the effectiveness of investigative techniques and procedures currently used, or likely to be used, in law enforcement;

...

Clause 25(1)(c) permits a head to refuse to disclose information that could reasonably be expected to harm the effectiveness of investigative techniques used in law enforcement. The exception is limited to investigative techniques or procedures currently in use or that are likely to be used.

This exception contains a reasonable expectation of harm test.

1. Harm the effectiveness

Harm means hurt or damage.²⁷⁹

²⁷⁸ The Concise Oxford Dictionary, 9th Edition.

²⁷⁹ The Concise Oxford Dictionary, 9th Edition.

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Effectiveness, in this context, means ensuring the investigative technique or procedure continues to have its desired effect;²⁸⁰ remains useful, productive and efficient.

Under the exception in clause 25(1)(c), the only reason for withholding information about investigative techniques and procedures is to ensure their continued usefulness.

2. Investigative technique or procedure

An investigation is a systematic inquiry or search.²⁸¹ A technique is a means or method of achieving a purpose.²⁸² A procedure is a way of carrying out or performing an activity.²⁸³

Investigative techniques and procedures are the means or methods by which inquiries or searches are carried out, and include the equipment and technology employed to conduct an investigation.

3. Currently used, or likely to be used, in law enforcement

The exception in clause 25(1)(c) only applies to investigative techniques and procedures which are currently used, or likely to be used, in law enforcement.

Law enforcement is defined in subsection 1(1) of [FIPPA](#), and is discussed above under clause 25(1)(a). Law enforcement is

- any action taken for the purpose of enforcing an enactment (a statute or a regulation)
- policing

²⁸⁰ The Concise Oxford Dictionary, 9th Edition.

²⁸¹ The Concise Oxford Dictionary, 9th Edition.

²⁸² The Concise Oxford Dictionary, 9th Edition.

²⁸³ The Concise Oxford Dictionary, 9th Edition.

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- investigations or inspections that could result in a penalty or sanction being imposed or that are otherwise conducted to enforce an enactment
- proceedings that result or could result in a penalty or sanction or that are otherwise conducted for the purpose of enforcing an enactment

The exception extends to investigative techniques and procedures that are likely to be used to protect techniques and procedures under development, new techniques or procedures that have not yet been used.

■ **Exception to Disclosure: Criminal Intelligence - [Clause 25(1)(d)]**

Disclosure harmful to law enforcement or legal proceedings

25(1) *The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to*

...

(d) interfere with the gathering of, or reveal criminal intelligence that has a reasonable connection with, the detection, prevention or suppression of organized criminal activities or of serious and repetitive criminal activities;

...

Clause 25(1)(d) contains two exceptions. The head of a public body has the discretion to refuse to disclose information:

- (i) where disclosure could interfere with the gathering of criminal intelligence
- (ii) where disclosure could reveal criminal intelligence

1. Interfere with the gathering of criminal intelligence

To interfere with the gathering of criminal intelligence means to obstruct, to meddle, hinder or get in the way of gathering this information.²⁸⁴

This exception contains a reasonable expectation of harm test.

2. Reveal criminal intelligence

Disclosure would reveal criminal intelligence if, for example:

- the information disclosed is the criminal intelligence
- the information disclosed directly refers to the criminal intelligence
- the information disclosed would permit accurate inferences to be drawn about the criminal intelligence²⁸⁵
- the information could be combined with other information to reveal the criminal intelligence

This exception in clause 25(1)(d) protects a class or type of information. To withhold information under this exception, a public body does not need to establish that harm could result from disclosure. Because it could take months or even years before the significance of the criminal intelligence becomes apparent, it may not be possible to demonstrate such harm.

²⁸⁴ The Concise Oxford Dictionary, 9th Edition.

²⁸⁵ Ontario Information and Privacy Commissioner [Order P-226](#) (Re Minister of Consumer and Commercial Relations; March 26, 1991) (made in the context of Cabinet confidences).

3. Criminal intelligence

Criminal intelligence may be described as information gathered by a law enforcement agency in a covert manner, related to on-going efforts devoted to the detection and prosecution of crime or the prevention of possible violations of law, and is distinct from information compiled and identifiable as part of the investigation of a specific occurrence.²⁸⁶

Criminal intelligence can relate to a person, group of people or an organization. As noted above, intelligence gathering is usually a separate activity from the conduct of an investigation into a specific offence. However, criminal intelligence may be drawn from investigations of previous incidents that may or may not have resulted in the trial and conviction of the person or persons under investigation, or may be gathered through surveillance of associates of known or suspected criminals.

Criminal intelligence is information compiled by a law enforcement agency to anticipate, prevent or monitor possible criminal activity. It may be used for future investigations, for activities aimed at preventing the commission of an offence, or to ensure the security of individuals or organizations.

For the exceptions in clause 25(1)(d) to apply, the criminal intelligence information must have a reasonable connection with the detection, prevention or suppression of organized criminal activities or of serious and repetitive criminal activities.

Organized criminal activities means criminal conspiracies and other criminal activities of organizations or groups of people. Organized refers to a degree of coordination of the criminal activity, and excludes random criminal activities.

Serious and repetitive criminal activities means serious criminal activities committed more than once by the same person, group of

²⁸⁶ Ontario Information and Privacy Commissioner [Order M-202](#) (Re Metropolitan Police Services Board, Oct. 15, 1993).

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persons or organization. The criminal activities may be committed randomly or in a pattern.

■ **Exception to Disclosure: Life or Safety of Law Enforcement Officer or Others - [Clause 25(1)(e)]**

Disclosure harmful to law enforcement or legal proceedings

25(1) *The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to*

...

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

...

Clause 25(1)(e) allows the head of a public body to refuse to disclose information where disclosure could reasonably be expected to endanger the life or safety of a law enforcement officer or any other person. This exception contains a reasonable expectation of harm test.

Endanger means to put in danger or expose to harm;²⁸⁷ threaten. Safety means the condition of being safe; freedom from danger or risks.²⁸⁸ Safety, in this exception to disclosure, is not limited to physical safety. Endanger the life or safety means disclosure of the information could threaten, or put in peril, someone's life or well-being.

Law enforcement is defined in subsection 1(1) of [FIPPA](#).²⁸⁹ Law enforcement officer means any individual engaged in:

- enforcing an enactment (a statute or a regulation)
- policing
- investigations or inspections that could result in a penalty or sanction being imposed or that are otherwise conducted to enforce an enactment

²⁸⁷ The Concise Oxford Dictionary, 9th Edition.

²⁸⁸ The Concise Oxford Dictionary, 9th Edition.

²⁸⁹ The definition law enforcement is discussed in chapter 2, under *Key Definitions*.

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- proceedings that result or could result in a penalty or sanction or that are otherwise conducted for the purpose of enforcing an enactment

The phrase “any other person” extends the protection provided by the exception in clause 25(1)(e) to individuals who are not law enforcement officers. Person means a natural person (human being) and includes a corporation and the heirs, executors, administrators or other legal representatives of a person.²⁹⁰

Note: Clause 17(2)(c) of [FIPPA](#) protects the identity of a confidential source of law enforcement information, and is a mandatory exception to disclosure.

■ **Exception to Disclosure: Fair Trial or Impartial Adjudication - [Clause 25(1)(f)]**

Disclosure harmful to law enforcement or legal proceedings

25(1) *The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to*

...

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

...

The head of a public body may refuse to disclose information when its disclosure could reasonably be expected to deprive a person of the right to a fair trial or impartial adjudication. The exception contains a reasonable expectation of harm test.

Deprive, in the context of clause 25(1)(f), means to take away the right to or prevent a fair trial or impartial adjudication. Person means a natural person

²⁹⁰ [The Interpretation Act of Manitoba](#), section 17 and the Schedule of Definitions.

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(human being) and includes a corporation and the heirs, executors, administrators or other legal representatives of a person.²⁹¹

Fair trial means a hearing by an impartial and disinterested tribunal; a proceeding that hears before it condemns, that proceeds upon inquiry, and renders judgment only after consideration of evidence and facts as a whole.²⁹²

An adjudication is a legal process for resolving disputes. An impartial adjudication is one that is unbiased, in which the merits of the disputed case have not been pre-judged.²⁹³

This exception is not limited to law enforcement proceedings. It can apply to civil court actions, criminal court actions, regulatory and disciplinary proceedings and proceedings before tribunals established to determine individual or collective rights.

To rely on this exception, the head must present arguments about how or why the disclosure of the requested information could deprive a person of the right to a fair trial or an impartial adjudication. The mere fact that a legal proceeding has begun will usually not be enough to justify relying on this exception.

■ Exception to Disclosure: Confiscated Record - [Clause 25(1)(g)]

Disclosure harmful to law enforcement or legal proceedings

25(1) *The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to*

...

(g) disclose a record that has been confiscated from a person by a peace officer in accordance with an enactment of Manitoba or Canada; ...

²⁹¹ [The Interpretation Act](#) of Manitoba, section 17 and the Schedule of Definitions.

²⁹² Black's Law Dictionary, 6th Edition.

²⁹³ Black's Law Dictionary, 6th Edition.

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The head of a public body may refuse to disclose information where disclosure could reasonably be expected to disclose a record that has been seized from a person by a peace officer in accordance with a statute or regulation of Manitoba or Canada.

Confiscated in accordance with an enactment means that the authority to confiscate (to take or seize) the record in question must be found in an enactment (that is, a statute or regulation) of Manitoba or Canada and that the confiscation was carried out in a manner that meets the requirements of the statute or regulation.

Person means a natural person (human being) and includes a corporation and the heirs, executors, administrators or other legal representatives of a person.²⁹⁴

Peace officer includes:

- (a) a mayor, reeve, sheriff, deputy sheriff, sheriff's officer and a justice of the peace
- (b) a correctional officer of a penitentiary, custodial facility or other place of detention, and any other officer or person who is in the service of the government and is employed in a custodial facility or place of detention
- (c) a police officer, police constable, constable, special constable and any other person employed to preserve and maintain the public peace
- (d) a member of the Royal Canadian Mounted Police
- (e) a person appointed under any act for the enforcement of that act²⁹⁵

²⁹⁴ [The Interpretation Act](#) of Manitoba, Sec. 17 and the Schedule of Definitions.

²⁹⁵ [The Interpretation Act](#) of Manitoba, Sec. 17 and the Schedule of Definitions.

■ **Exception to Disclosure: Facilitate Escape from Custody - [Clause 25(1)(h)]**

Disclosure harmful to law enforcement or legal proceedings

25(1) *The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to*

...

(h) facilitate the escape from custody of an individual who is lawfully detained;

...

Clause 25(1)(h) allows the head of a public body to refuse to disclose information where disclosure could reasonably be expected to facilitate the escape from custody of a person who is under lawful detention. The exception contains a reasonable expectation of harm test.

Facilitate, in the context of clause 25(1)(h), means to make easier or less difficult.²⁹⁶ For example, a public body would be able to withhold construction plans for a maximum security facility under this exception.²⁹⁷

Escape means the departure or deliverance out of custody of a person who was lawfully imprisoned before they are entitled to liberty by process of law.²⁹⁸

Custody may mean actual imprisonment or physical detention or the power, legal or physical, of imprisoning or of taking manual possession.²⁹⁹ Lawfully detained means that the detention is authorized by law — for example, by a warrant, court order or other order, statute or regulation.

Examples of people who are lawfully detained in custody include:

²⁹⁶ Ontario Information and Privacy Commissioner [Order P-187](#) (Re Ministry of Government Services, July 13, 1990).

²⁹⁷ Ontario Information and Privacy Commissioner [Order P-187](#) (Re Ministry of Government Services, July 13, 1990).

²⁹⁸ Black's Law Dictionary, 6th Edition.

²⁹⁹ Black's Law Dictionary, 6th Edition.

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- people in custody under a federal or provincial statute or regulation or a municipal bylaw
- people remanded in custody by a court, who are charged but not yet found guilty or are not yet sentenced
- young people in open or secure custody or pre-trial detention under the Youth Criminal Justice Act (Canada)
- parole violators held under a warrant issued by a parole board
- people involuntarily detained in a psychiatric facility under the provisions of The Mental Health Act of Manitoba

■ **Exception to Disclosure: Facilitate an Unlawful Act or Interfere with the Control of Crime - [Clause 25(1)(i)]**

Disclosure harmful to law enforcement or legal proceedings

25(1) *The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to*

...

(i) facilitate the commission of an unlawful act or interfere with the control of crime;

...

Clause 25(1)(i) permits the head of a public body to refuse to disclose information that could reasonably be expected to facilitate the commission of an unlawful act or to interfere with the control of crime.

There are two exceptions in clause 25(1)(i) and both contain reasonable expectation of harm tests.

1. Facilitate the commission of an unlawful act

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Facilitate, in the context of clause 25(1)(i), means to make easier or less difficult.³⁰⁰

Commission of an unlawful act means committing an offence, a breach of the law.

2. Interfere with the control of crime

To interfere with the control of crime means to obstruct or hinder³⁰¹ the control of crime. Crime is conduct that society's laws prohibit.³⁰²

■ Exception to Disclosure: Technical Information Relating to Weapons or Potential Weapons - [Clause 25(1)(j)]

Disclosure harmful to law enforcement or legal proceedings

25(1) *The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to*

...

(j) disclose technical information relating to weapons or potential weapons;

...

Clause 25(1)(j) permits the head of a public body to refuse to disclose technical information relating to weapons or potential weapons. The exception is a class exception because it protects a type or kind of information.

The exception would cover information such as how to make a bomb.

³⁰⁰ Ontario Information and Privacy Commissioner [Order P-187](#) (Re Ministry of Government Services, July 13, 1990) (in the context of "facilitate escape from custody").

³⁰¹ The Concise Oxford Dictionary, 9th Edition.

³⁰² The Dictionary of Canadian Law.

■ **Exception to Disclosure: Interfere with Custody or Supervision
- [Clause 25(1)(k)]**

Disclosure harmful to law enforcement or legal proceedings

25(1) The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to

...

(k) interfere with the proper custody or supervision of an individual who is lawfully detained;

...

Clause 25(1)(k) permits the head of a public body to refuse to disclose information that could reasonably be expected to interfere with the proper custody or supervision of an individual who is detained under the authority of law. The exception contains a reasonable expectation of harm test.

To interfere with means to obstruct, to meddle, hinder or get in the way of something.³⁰³ Custody may mean actual imprisonment or physical detention or the power, legal or physical, of imprisoning or of taking manual possession.³⁰⁴

Lawfully detained means that the detention is authorized by law — for example, by a warrant, court order or other order, statute or regulation.

Examples of people who are lawfully detained in custody include:

- people in custody under a federal or provincial statute or regulation or a municipal bylaw
- people remanded in custody by a court, who are charged but not yet found guilty or sentenced

³⁰³ The Concise Oxford Dictionary, 9th Edition.

³⁰⁴ Black's Law Dictionary, 6th Edition.

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- young people in open or secure custody or pre-trial detention under the Youth Criminal Justice Act (Canada)
- parole violators held under a warrant issued by a parole board
- people involuntarily detained in a psychiatric facility under the provisions of The Mental Health Act of Manitoba

Supervision means having general oversight or superintendence over a person.³⁰⁵ Adults and young people subject to control by a correctional authority or its agents because of legally imposed restrictions on their liberty are lawfully detained under supervision. This includes:

- individuals on parole
- individuals on probation
- individuals on a temporary absence permit
- individuals under bail supervision
- individuals performing community service work

■ **Exception to Disclosure: Information in a Correctional Record Supplied in Confidence - [Clause 25(1)(l)]**

Disclosure harmful to law enforcement or legal proceedings

25(1) *The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to*

...

(l) reveal information in a correctional record supplied, explicitly or implicitly, in confidence; ...

³⁰⁵ Black's Law Dictionary, 6th Edition.

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Clause 25(1)(l) protects information in a correctional record which has been supplied, explicitly or implicitly, in confidence. This exception is a class exception because it protects a type or kind of information.

A correctional record is a record of information collected or compiled while an individual is lawfully in custody or under the supervision of a correctional authority or its agents.

Supplied means the information in the record has been provided or furnished³⁰⁶ to the public body and includes information which has been supplied voluntarily or because of a legal requirement — for example, when a statute requires that the information be provided. It would include information provided orally by someone and recorded by an employee of the public body.

Information is explicitly supplied in confidence when the party providing it expressly requests or indicates that it is to be kept confidential. The intention to provide information in confidence can be stated in the record of the information itself, in an agreement or verbally. It is advisable to keep a written record of a verbal request.

Information is implicitly supplied in confidence when an intention or expectation that the information will be treated as confidential can be implied from the circumstances in which it was provided — for example:

- from the manner in which the information is provided and received,³⁰⁷
- past practices followed for such information
- stated policies
- a confidentiality provision in another statute³⁰⁸

³⁰⁶ The Concise Oxford Dictionary, 9th Edition.

³⁰⁷ Ontario Information and Privacy Commissioner [Order P-274](#) (Re Ministry of Correctional Services, Feb. 21, 1992).

³⁰⁸ Ontario Information and Privacy Commissioner [Order P-309](#) (Re Ministry of Consumer and Commercial Relations; June 8, 1992).

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Disclosure would reveal the information protected by clause 25(1)(l) if, for example:

- the information disclosed is the protected information
- the information disclosed directly refers to the protected information
- the information disclosed would permit accurate inferences to be drawn about the protected information³⁰⁹
- the information disclosed could be combined with other information to reveal the protected information

■ **Exception to Disclosure: Protection of Author of Law Enforcement Record from Civil Liability - [Clause 25(1)(m)]**

Disclosure harmful to law enforcement or legal proceedings

25(1) *The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to*

...

(m) expose to civil liability the author of a law enforcement record or a person who has been quoted or paraphrased in the record; or

...

Clause 25(1)(m) permits the head of a public body to refuse to disclose information that could reasonably be expected to expose the author of a law enforcement record, or a person quoted or paraphrased in the record, to civil liability (such as a defamation action).

Clause 25(1)(m) contains a reasonable expectation of harm test.

³⁰⁹ Ontario Information and Privacy Commissioner [Order P-226](#) (Re Minister of Consumer and Commercial Relations; March 26, 1991) (made in the context of Cabinet confidences).

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This exception protects law enforcement officials who might be sued as a result of disclosure of information in records made while carrying out their duties. It also protects private citizens who submit records for the purposes of an investigation or proceeding, and people such as witnesses or other sources of information who are quoted or paraphrased in records related to an investigation or proceeding.

Expose to civil liability means disclosure of the information could reasonably be expected to lead to a civil claim for damages. For example, reports prepared during the initial stages of a criminal investigation may contain conjecture that may or may not be substantiated by the investigation.

A law enforcement record is any recorded information relating to law enforcement as defined in subsection 1(1) of [FIPPA](#):

- a record relating to any action taken for the purpose of enforcing an enactment (a statute or a regulation)
- a record relating to a policing matter
- a record relating to investigations or inspections that could result in a penalty or sanction being imposed or that are otherwise conducted to enforce an enactment
- a record relating to proceedings that result or could result in a penalty or sanction or that are otherwise conducted for the purpose of enforcing an enactment (a statute or a regulation)³¹⁰

The record does not need to be created for the purpose of law enforcement, provided it is submitted to or used by the public body for a law enforcement purpose.

³¹⁰ See the discussion of the definition "law enforcement" in chapter 2, under *Key Definitions*.

■ **Exception to Disclosure: Injurious to Conduct of Existing or Anticipated Legal Proceedings - [Clause 25(1)(n)]**

Disclosure harmful to law enforcement or legal proceedings

25(1) *The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to*

...

(n) be injurious to the conduct of existing or anticipated legal proceedings.

Clause 25(1)(n) permits the head of a public body to refuse to disclose information that could reasonably be expected to be injurious to the conduct of existing or anticipated legal proceedings. This exception contains a reasonable expectation of harm test.

Injurious means hurtful or harmful to the conduct of legal proceedings.³¹¹

The conduct of legal proceedings is the management, direction and carrying on of legal proceedings.³¹²

A legal proceeding is any civil or criminal proceeding or inquiry in which evidence is or may be given, and includes an arbitration;³¹³ any proceeding authorized or sanctioned by law, and brought or instituted for acquiring a right or enforcing a remedy.³¹⁴

To rely on this exception, the head must present arguments about how or why the disclosure of the requested information could injure the conduct of legal proceedings. The mere fact that a legal proceeding has begun, or may begin, will usually not be enough to justify relying on this exception.

³¹¹ The Concise Oxford Dictionary, 9th Edition.

³¹² Black's Law Dictionary, 6th Edition.

³¹³ The Dictionary of Canadian Law.

³¹⁴ Black's Law Dictionary, 6th Edition.

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Note: Clause 4(i) of [FIPPA](#) states that [FIPPA](#) does not apply to a record relating to a prosecution or an inquest under [The Fatality Inquiries Act](#), if all proceedings related to the prosecution or inquest have not been completed.³¹⁵

Clause 27(1)(a) gives the head of a public body the discretion to refuse access to information that is subject to any type of legal privilege, including solicitor-client privilege and litigation privilege.

■ **Exception to Disclosure: Disclosure Prohibited Under an Enactment of Canada - [Subsection 25(2)]**

No disclosure if offence

25(2) *The head of a public body shall refuse to disclose information to an applicant if the information is in a law enforcement record and the disclosure is prohibited under an enactment of Canada.*

Subsection 25(2) states that the head of a public body must refuse to disclose information to an applicant for access under Part 2 of [FIPPA](#) if that information is in a law enforcement record and a statute or regulation of the Government of Canada prohibits disclosure of the record.

A law enforcement record is any recorded information relating to law enforcement, as defined in subsection 1(1) of [FIPPA](#):

- a record relating to any action taken for the purpose of enforcing an enactment (a statute or a regulation)
- a record relating to a policing matter
- a record relating to investigations or inspections that could result in a penalty or sanction being imposed, or that are otherwise conducted to enforce an enactment

³¹⁵ Sec. 4 is discussed in chapter 2, under *Records That Do Not Fall Under FIPPA*.

EXCEPTIONS TO DISCLOSURE: SECTION 25

- a record relating to proceedings that result or could result in a penalty or sanction or that are otherwise conducted for the purpose of enforcing an enactment³¹⁶

The record does not need to be created for the purpose of law enforcement, provided it is submitted to or used by the public body for a law enforcement purpose.

Enactment is defined in subsection 1(1) of [FIPPA](#) as an act or regulation.

Examples of enactments of Canada that prohibit disclosure are:

- the provisions in the Youth Criminal Justice Act that prohibit disclosure of certain court, police and government records related to young offenders, except as authorized by that act
- the prohibition of disclosing information under The Official Secrets Act (Canada)
- the prohibition on release of wiretap transcripts under the Criminal Code (Canada)

■ **When the Exceptions Don't Apply: Limit on the Law Enforcement and Legal Proceedings Exceptions - [Subsection 25(3)]**

Subsection 25(3) contains two limits on the exceptions to disclosure related to law enforcement and legal proceedings in subsection 25(1).

The exceptions in subsection 25(1) do not apply to any information that falls within either clause 25(3)(a) or (b), and this information must be disclosed to an applicant under Part 2 of [FIPPA](#) unless an exception in another section of [FIPPA](#) applies to the information.

³¹⁶ See the discussion of the definition law enforcement in *Key Definitions*, chapter 2.

■ **Limit on Exception: Report on the Degree of Success Achieved by a Law Enforcement Program - [Clause 25(3)(a)]**

Exceptions

25(3) *Subsection (1) does not apply to*

(a) *a report, including statistical analysis, on the degree of success achieved by a law enforcement program, unless disclosure of the report could reasonably be expected to cause any harm or interference referred to in subsection (1); or*

...

Clause 25(3)(a) requires the head to disclose a report, including statistical analysis, on the degree of success achieved in a law enforcement program where the harm referred to in subsection 25(1) would not result from its disclosure, unless another exception in [FIPPA](#) applies.

A report includes an account given or formally expressed after investigation or consideration or a description, summary or reproduction of an event, a periodical statement on work, or conduct.³¹⁷

Statistics is the science of collecting and analyzing numerical data, especially in or for large quantities, and usually inferring proportions in a whole from proportions in a representative sample; any systematic collection or presentation of such facts.³¹⁸ Statistical analysis means an examination of facts in a numerical format.

■ **Limit on Exception: General Outline of the Structure or Programs of a Law Enforcement Agency - [Clause 25(3)(b)]**

Exceptions

25(3) *Subsection (1) does not apply to*

...

(b) *a record that provides a general outline of the structure or programs of a law enforcement agency.*

³¹⁷ The Concise Oxford Dictionary, 9th Edition.

³¹⁸ The Concise Oxford Dictionary, 9th Edition.

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Subsection 7(2)	Severing information
Subsection 12(1)	Contents of response
Clause 12(2)(a)	Refusal to confirm or deny existence of record
Clause 17(2)(b)	Personal information compiled as part of an investigation
Clause 17(2)(c)	Identity of a third party providing law enforcement information in confidence
Clause 17(3)(c)	Fair determination of applicant's rights
Clause 24(a)	Health or safety of another person
Clause 24(c)	Threaten public safety
Clause 27(1)(a)	Legal privilege, including solicitor-client privilege and litigation privilege

SECURITY OF PROPERTY - [SEC. 26]

Summary of the Exception

Sec. 26 states that the head of a public body has the discretion to refuse to disclose information to an applicant requesting a record under Part 2, if disclosure could reasonably be expected to harm or threaten the security of any property or system, including a building, a vehicle, an electronic information system or a communications system.

Sec. 26 is a discretionary exception to the right to access under Sec. 7 of the act, because the head of the public body may refuse to disclose the requested record if the exception applies.

Sec. 26 contains a reasonable expectation of harm test.

■ **Scope of the Security of Property Exception - [Sec. 26]**

Disclosure harmful to security of property

26 *The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to harm or threaten the security of any property or system, including a building, a vehicle, an electronic information system or a communications system.*

Sec. 26 gives the head of a public body the discretion to refuse to disclose to an applicant requesting a record under Part 2 information that, if disclosed, could reasonably be expected to harm or threaten the security of any property or system, including a building, a vehicle, an electronic information system or a communications system.

1. Discretionary exception

Sec. 26 contains a discretionary exception to the right of access under Sec. 7 of the act, because the head may refuse to disclose the requested information. This involves a two-step process. The head:

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- must first determine whether the exception in Sec. 26 applies to information in the requested record
- must then consider whether it is appropriate to release the information, even though the exception in Sec. 26 applies³²⁰

2. Severing - subsection 7(2)

The term information, rather than the term record, is used in Sec. 26 to indicate that the exception applies to the information in a record and not necessarily to the whole record. Subsection 7(2) of [FIPPA](#) requires that, when an exception applies to some of the information in a record, only that information is severed, and the applicant is entitled to access to the remainder of the record (unless an exception in another section of [FIPPA](#) applies to it).³²¹

3. Reasonable expectation of harm

The exception in Sec. 26 contains a reasonable expectation of harm test.³²²

The head of the public body must determine whether disclosure of the information could reasonably be expected to cause the harm described in Sec. 26. The circumstances must be carefully assessed, and the determination must be based on objective grounds.

4. Harm or threaten the security

To harm means to hurt or damage.³²³

³²⁰ See *Exercising a Discretion* earlier in this chapter.

³²¹ For a discussion of severing and subsection 7(2) see *The Exceptions Apply to Information in a Record - Severing* earlier in this chapter and *Severing a Record* in chapter 4.

³²² See *Reasonable Expectation of Harm* earlier in this chapter.

³²³ The Concise Oxford Dictionary, 9th Edition.

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Clause 24(c)	Threaten public safety
Clause 25(1)(e)	Endanger life or safety of a law enforcement officer or any other person
Clause 25(1)(h)	Facilitate escape from custody
Clause 25(1)(k)	Interfere with custody or supervision

LEGAL PRIVILEGE - [SECTION 27]

Summary of the Exception

Subsection 27(1) states that the head of a public body has the discretion to refuse to disclose information to an applicant requesting a record under Part 2 of [FIPPA](#) if the information is:

- subject to any type of legal privilege, such as solicitor-client privilege or litigation privilege
- has been prepared by or for an agent or lawyer of a public body in relation to a matter involving the provision of legal advice or legal services, or in relation to the investigation or prosecution of an offence
- is contained in correspondence about a legal matter between an agent or lawyer for a public body and any other person

Subsection 27(1) contains discretionary exceptions to the right to access under Sec. 7 of the act.

Subsection 27(2) requires the head of a public body to refuse to disclose information that is subject to a legal privilege of a person other than the public body.

Subsection 27(2) is a mandatory exception to the right of access under Sec. 7 of the act.

The exceptions in subsection 27(1) and 27(2) are class exceptions because they protect a type or kind of information in a record.

■ **Scope of Exception to Disclosure: Legal Privilege of the Public Body - [Subsection 27(1)]**

Privileged information

27(1) The head of a public body may refuse to disclose to an

EXCEPTIONS TO DISCLOSURE: SECTION 27

applicant

(a) information that is subject to any type of legal privilege, including solicitor-client privilege and litigation privilege;

(b) information prepared by or for an agent or lawyer of the Minister of Justice and Attorney-General or the public body in relation to a matter involving the provision of legal advice or legal services, or in relation to the investigation or prosecution of an offence; or

(c) information in correspondence between an agent or lawyer of the Minister of Justice and Attorney-General, or the public body and any other person in relation to a matter involving the provision of legal advice or legal services, or in relation to the investigation or prosecution of an offence.

Subsection 27(1) states that the head of a public body has the discretion to refuse to disclose information to an applicant requesting a record under Part 2 if the information:

- is subject to any type of legal privilege, such as solicitor-client privilege or litigation privilege
- has been prepared by or for an agent or lawyer of a public body in relation to a matter involving the provision of legal advice or legal services, or in relation to the investigation or prosecution of an offence
- is contained in correspondence about a legal matter between an agent or lawyer for a public body and any other person related to a legal matter

The exceptions in subsection 27(1) are class exceptions because they protect a type or kind of information. The exception does not contain a reasonable expectation of harm test.

Advice from legal counsel should be sought when considering the exceptions in subsection 27(1).

1. Discretionary exceptions

EXCEPTIONS TO DISCLOSURE: SECTION 27

Subsection 27(1) contains discretionary exceptions to the right to access under Sec. 7 of the act, because the head may refuse to disclose the requested information. This involves two steps. The head:

- must first determine whether an exception in subsection 27(1) applies to information in the requested record
- must then consider whether it is appropriate to release the information, even though an exception in subsection 27(1) applies³²⁶

2. Severing - subsection 7(2)

The term information, rather than the term record, is used in subsection 27(1) to indicate that the exception applies to the information in a record and not necessarily to the whole record. Subsection 7(2) of [FIPPA](#) requires that, when an exception applies to some of the information in a record, only that information is severed, and the applicant is entitled to access to the remainder of the record, unless an exception in another section of [FIPPA](#) applies to it.³²⁷

But, in the case of legal privilege, the severing principle must be applied in a manner that recognizes the full extent of the privilege.³²⁸ It is strongly recommended that legal counsel be consulted.

3. Each clause contains a separate exception

Each of clauses 27(1)(a), (b) and (c) set out a separate exception to disclosure as the word or is used to join the clauses. Subsection 27(1) does not set up a three-pronged test; information does not have to meet the requirements of the three clauses for an exception to apply.

³²⁶ See *Exercising a Discretion* earlier in this chapter.

³²⁷ For a discussion of severing and subsection 7(2), see *The Exceptions Apply to Information in a Record – Severing*, earlier in this chapter, and *Severing a Record* in chapter 4.

³²⁸ See, for example, *The Minister of Justice v. Blank*, [2007 FCA 87](#) (Federal Court of Appeal).

■ **Legal Privilege - [Clause 27(1)(a)]**

Privileged Information

27(1) *The head of a public body may refuse to disclose to an applicant*

(a) *information that is subject to any type of legal privilege, including solicitor-client privilege and litigation privilege;*

...

The exception to disclosure in clause 27(1)(a) gives the head of a public body the discretion to refuse to disclose information that is subject to any type of legal privilege, including solicitor-client privilege or litigation privilege.

Legal privilege and the exception in clause 27(1)(a) can apply to a legal privilege involving:

- Crown counsel and Crown prosecutors employed by Manitoba Justice
- legal counsel on the staff of a government agency or other public body;³²⁹
- private bar legal counsel retained to act on behalf of the government or a public body

1. Examples of legal privilege

The word including indicates that the types of legal privilege provided in clause 27(1)(a) are examples; they are not the only types of legal privilege that fall within the exception. In addition to solicitor-client privilege and litigation privilege, there are other types of legal privileges that can be considered. Those other types of legal privileges typically can be asserted in relation to ongoing litigation. Solicitor-client privilege and litigation privilege are discussed below. Advice from legal counsel should be sought when considering this exception to disclosure, related to solicitor-client privilege, litigation privilege or any other type of legal privilege.

³²⁹ See, for example, *Pritchard v. Ontario (Human Rights Commission)*, [2004 SCC 31](#), [2004] 1 S.C.R. 809 (Supreme Court of Canada).

2. Solicitor-client privilege

The common law recognizes that communications between solicitor and client are privileged in the sense that they are protected from disclosure. The solicitor-client relationship is based on confidentiality and it is in the public interest that all persons have full and ready access to legal advice and that full and frank communication takes place in the solicitor-client relationship.

As the Supreme Court of Canada has stated:

*..... solicitor-client privilege ... has been held to be all but absolute in recognition of the high public interest in maintaining the confidentiality of the solicitor-client relationship. ...The only exceptions recognized to the privilege are the narrowly guarded public safety and right to make full answer and defence exceptions....*³³⁰

And:

Solicitor-client privilege is fundamental to the proper functioning of our legal system. The complex of rules and procedures is such that, realistically speaking, it cannot be navigated without a lawyer's expert advice. ... Experience shows that people who have a legal problem will often not make a clean breast of the facts to a lawyer without an assurance of confidentiality "as close to absolute as possible". ...

It is in the public interest that this free flow of legal advice be encouraged. Without it, access to justice and the quality of justice in this country would be severely compromised. The privilege belongs to the client not the lawyer. ...

³³⁰ *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, [2010 SCC 23](#); [2010] 1 S.C.R. 815 (Supreme Court of Canada), paragraph 53.

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..... *While the solicitor-client privilege may have started life as a rule of evidence, it is now unquestionably a rule of substance applicable to all interactions between a client and their lawyer when the lawyer is engaged in providing legal advice or otherwise acting as a lawyer rather than as a business counsellor or in some other non-legal capacity.*

...³³¹

Solicitor-client privilege encompasses all communications, verbal or written, of a confidential character between a client and a legal advisor directly related to the seeking, formulating or giving of legal advice or legal assistance, including the legal advisor's working papers, which are directly related to the legal advice or assistance³³²

Solicitor-client privilege protects information flowing in both directions between lawyer and client. Client-generated information, such as a request for a legal opinion or for advice, as well as legal opinions or advice from the lawyer fall within this exception.

Examples of Solicitor-Client Privilege

A request from a police department to Manitoba Justice for a decision on whether charges ought to be laid is a request for legal advice, and the response falls within the realm of solicitor-client privilege.³³³

A request by senior legal personnel within Manitoba Justice that other lawyers review the law and the facts and provide an opinion, as well as the opinion itself, fall within the realm of solicitor-client privilege.³³⁴

³³¹ *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, [2008] 2 S.C.R. 574, 2008 SCC 44 (Supreme Court of Canada), paragraphs 9 and 10. <http://tinyurl.com/acpc846>.

³³² *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

³³³ *Pollock v. Manitoba (Minister of Justice)* (1995), 103 Man. R. (2d) 64 (Manitoba Court of Queen's Bench) at page 68.

³³⁴ *Pollock v. Manitoba (Minister of Justice)* (1995), 103 Man. R. (2d) 64 (Manitoba Court of Queen's Bench) at page 68.

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A letter drafted by legal counsel as suggested correspondence for an official to sign in a client department also falls within the exceptions to disclosure that protect solicitor-client privilege.³³⁵

3. Litigation privilege

Litigation privilege is a type of legal privilege that attaches to documents prepared for the dominant purpose of anticipated or pending litigation, including communications between a solicitor and a third party made for the dominant purpose of litigation.³³⁶ The Supreme Court of Canada has endorsed the following description of the purpose of litigation privilege, as distinguished from solicitor-client privilege:

“Its purpose is more particularly related to the needs of the adversarial trial process. Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate. In other words, litigation privilege aims to facilitate a process (namely, the adversary process), while the solicitor-client privilege aims to protect a relationship (namely, the confidential relationship between a lawyer and a client).”³³⁷

2. Waiver of solicitor-client privilege

The right to solicitor-client privilege belongs to the client, not the solicitor, and may be waived by the client.

It is consistent with the nature of solicitor-client privilege that the exception to disclosure in clause 27(1)(a) is discretionary. The head of the public body may exercise discretion to disclose the information, even though the exception applies.

If solicitor-client privilege has been waived in the past, the exception in clause 27(1)(a) cannot be relied on. Usually, a public body will be considered to have waived solicitor-client privilege if the information has

³³⁵ *Sigurdson v. The Minister of Conservation*, [2002] M.J. No. 390 (Manitoba Court of Queen's Bench, Schwartz, J.).

³³⁶ *Blank v Canada (Minister of Justice)*, 2006 SCC 39 at paras 27 and 60.

³³⁷ *Blank v Canada (Minister of Justice)*, 2006 SCC 39 at para 28.

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been disclosed to a party with a separate interest from that of the public body.

An exercise of discretion to disclose information that falls within the exception in clause 27(1)(a) will usually be considered an implied waiver of the privilege for other purposes.

3. Termination of Litigation Privilege

While solicitor-client privilege exists until it is waived by the client, litigation privilege ends when the litigation, or the possibility of litigation, including related litigation, ends.

Advice from legal counsel should be sought when seeking to rely on the legal privilege exception in clause 27(1)(a), to ensure the information falls within the exception.

Legal counsel should also be consulted before a decision is made to disclose information that falls under clause 27(1)(a), to ensure that the legal position of the public body will not be prejudiced.

Note: Clause 4(i) of [FIPPA](#) states that [FIPPA](#) does not apply to a record relating to a prosecution or an inquest under [The Fatality Inquiries Act](#) if all proceedings related to the prosecution or inquest have not been completed.³³⁸

■ Exception to Disclosure: Information Prepared by or for an Agent or Lawyer - [Clause 27(1)(b)]

Privileged Information

27(1) *The head of a public body may refuse to disclose to an applicant*

...

(b) *information prepared by or for an agent or lawyer of the Minister of Justice and Attorney-General or the public body in*

³³⁸ Sec. 4 is discussed in chapter 2, under *Records That Do Not Fall Under FIPPA*.

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relation to a matter involving the provision of legal advice or legal services, or in relation to the investigation or prosecution of an offence; or

...

Clause 27(1)(b) protects certain information prepared by or for:

- a Crown counsel, Crown prosecutor or other lawyer retained by the Justice Minister and attorney general, including a private sector lawyer
- a staff lawyer of or private sector lawyer retained by the **public body**
- an agent of the justice minister and attorney general or the **public body**

The information must be in relation to one of the following:

- a matter involving the provision of legal advice or legal services

Legal advice will generally include a legal opinion about a legal issue, and a recommended course of action based on legal considerations, regarding a matter with legal implications.³³⁹

- the investigation or prosecution of an offence

An investigation is a systematic inquiry or search.³⁴⁰

A prosecution is a criminal action; a proceeding instituted and carried on by due course of law, before a competent tribunal, for the purpose of determining the guilt or innocence of a person charged with a crime.³⁴¹

³³⁹ Ontario Information and Privacy Commissioner [Order P-210](#) (Re Ministry of Attorney General, Dec. 19, 1990).

³⁴⁰ The Concise Oxford Dictionary, 9th Edition.

³⁴¹ Black's Law Dictionary, 6th Edition.

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Offence includes an offence under the *Criminal Code (Canada)* or under another federal statute or regulation, an offence under a provincial statute or regulation or a contravention of a municipal by-law.

Note: Clause 4(i) of [FIPPA](#) states that [FIPPA](#) does not apply to a record related to a prosecution or an inquest under [The Fatality Inquiries Act](#), if all proceedings related to the prosecution or inquest have not been completed.³⁴²

■ **Exception to Disclosure: Correspondence Between an Agent or Lawyer and Another Person - [Clause 27(1)(c)]**

Privileged Information

27(1) *The head of a public body may refuse to disclose to an applicant*

...

(c) *information in correspondence between an agent or lawyer of the Minister of Justice and attorney general or the public body and any other person in relation to a matter involving the provision of legal advice or legal services or in relation to the investigation or prosecution of an offence.*

Clause 27(1)(c) protects information in correspondence between one of the following and any other person:

- a Crown counsel, Crown prosecutor or other lawyer retained by the justice minister and attorney general, including a private sector lawyer
- a staff lawyer of or private sector lawyer retained by the public body
- an agent of the justice minister and attorney General or the public body

The exception protects information in correspondence flowing in both directions between the lawyer or agent and the other person.

³⁴² Sec. 4 is discussed in chapter 2, under *Records That Do Not Fall Under FIPPA*.

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The correspondence must be related to one of the following:

- a matter involving the provision of legal advice or legal services

Legal advice will generally include a legal opinion about a legal issue, and a recommended course of action based on legal considerations, regarding a matter with legal implications.³⁴³

- the investigation or prosecution of an offence

An investigation is a systematic inquiry or search.³⁴⁴

A prosecution is a criminal action; a proceeding instituted and carried on by due course of law, before a competent tribunal, for the purpose of determining the guilt or innocence of a person charged with a crime.³⁴⁵

Offence includes an offence under the Criminal Code (Canada) or under another federal statute or regulation, an offence under a provincial statute or regulation or a contravention of a municipal by-law.

Note: Clause 4(i) of [FIPPA](#) states that [FIPPA](#) does not apply to a record related to a prosecution or an inquest under [The Fatality Inquiries Act](#), if all proceedings related to the prosecution or inquest have not been completed.³⁴⁶

■ **Exception to Disclosure: Legal Privilege of Other Persons - [Subsection 27(2)]**

Third party's legal privilege

27(2) The head of a public body shall refuse to disclose to an applicant information that is subject to a legal privilege of a

³⁴³ Ontario Information and Privacy Commissioner [Order P-210](#) (Re Ministry of Attorney General, Dec. 19, 1990.).

³⁴⁴ The Concise Oxford Dictionary, 9th Edition.

³⁴⁵ Black's Law Dictionary, 6th Edition.

³⁴⁶ Sec. 4 is discussed in chapter 2, under *Records That do Not Fall Under FIPPA*.

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Clause 4 (i)	Act does not apply to record relating to a prosecution or inquest that has not been completed
Subsection 7(2)	Severing information
Subsection 12(1)	Contents of response
Clause 25(1)(n)	Injurious to the conduct of existing or anticipated legal proceedings

ECONOMIC AND OTHER INTERESTS OF A PUBLIC BODY - [SEC. 28]

Summary of the Exception

The exceptions in subsection 28(1) are designed to protect diverse economic, financial and other interests of the Manitoba government or a public body.

Subsection 28(1) contains discretionary exceptions to the right to access under Sec. 7 of [FIPPA](#), because the head of the public body may refuse to disclose the requested record if an exception applies.

The exception in the opening words of subsection 28(1) and the exceptions in clauses 28(1)(c) and 28(1)(e) contain a reasonable expectation of harm test.

The exceptions in clauses 28(1)(a), (b) and (d) are class exceptions because they protect a type or kind of information.

Subsection 28(2) limits the exceptions in subsection 28(1).

■ **Scope of the Exceptions for Economic and Other Interests of a Public Body - [Subsection 28(1)]**

Disclosure harmful to economic and other interests of a public body

28(1) The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to harm the economic or financial interests or negotiating position of a public body or the Manitoba government, including the following information:

...

The Manitoba government and public bodies hold significant amounts of financial and economic information critical to the financial management of public bodies and the management of the provincial economy. Subsection

EXCEPTIONS TO DISCLOSURE: SECTION 28

28(1) gives the public body receiving a request for access under Part 2 of [FIPPA](#) the discretion to protect information that, if released, could harm the economic or financial interests or negotiating position of:

- the public body receiving the request
- another public body
- the Manitoba government in the broad, corporate sense

1. Relationship to Sec. 18 - Business interests of third parties

Under [FIPPA](#), the economic and other interests of public bodies are addressed by the exceptions to disclosure in subsection 28(1), not by the exceptions in subsections 18(1) and 18(2).

Subsections 18(1) and 18(2) protect sensitive commercial and business information from or about third parties who are not other public bodies. Third party is defined in subsection 1(1) of [FIPPA](#) to mean a person, group of persons or an organization other than the applicant or a public body.

2. Discretionary exceptions

Subsection 28(1) contains discretionary exceptions to the right to access under Sec. 7 of the act, as the head may refuse to disclose the requested information. This involves two steps. The head:

- must first determine whether an exception in subsection 28(1) applies to information in the requested **record**
- must then consider whether it is appropriate to release the information, even though an exception in subsection 28(1) applies³⁴⁸

³⁴⁸ See *Exercising a Discretion* earlier in this chapter.

3. Severing - subsection 7(2)

The term information, rather than the term record, is used in subsection 28(1) to indicate that the exception applies to the information in a record and not necessarily to the whole record. Subsection 7(2) of [FIPPA](#) requires that, where an exception applies to some of the information in a record, only that information is severed, and the applicant is entitled to access to the remainder of the record unless an exception in another section of [FIPPA](#) applies to it.³⁴⁹

4. Of a public body

The exceptions in subsection 28(1) protect economic or financial interests, negotiating positions, etc. of a public body.

In most cases, the public body whose interests are involved and are protected by subsection 28(1) will be the public body with custody or control of the requested record.

In some situations, however, a public body may have custody or control of information about another public body whose interests may be affected by disclosure. The interests of this other public body can also be protected under subsection 28(1), as the phrase a public body is used in the exceptions.

It's best to consult the public bodies affected to determine whether the harm contemplated by the exception could actually happen.

5. Of... the Manitoba government

The exceptions in subsection 28(1) also protect the interests of the Manitoba government in the broad corporate sense.

The phrase Manitoba government is broader than the concept public body. Government is the machinery by which the sovereign power in a

³⁴⁹ For a discussion of severing and subsection 7(2) see *The Exceptions Apply to Information in a Record - Severing* earlier in this chapter and *Severing a Record* in chapter 4.

state expresses its will and exercises its functions; the framework of political institutions, departments and offices by means of which the executive, judicial, legislative and administrative business of the state is carried on.³⁵⁰ The Manitoba government is His Majesty the King, acting for the Province of Manitoba.³⁵¹

In the context of subsection 28(1), harm to economic or financial interests, negotiating positions, etc. includes not only hurt or damage to the interests of a single public body (such as a Manitoba government department), but also hurt or damage to policies and programs for which the Manitoba government is responsible and that affect the overall economy or interests of Manitoba.

6. Scope of the exception in subsection 28(1) - "including"

The word including, used to introduce clauses 28(1)(a) to (e), indicates that the records or information listed in clauses (a) to (e) are not the only records or information that fall within the exception.

There may be information or records that are not described in clauses 28(1)(a) to (e) which, if disclosed, "could reasonably be expected to harm the economic or financial interests or negotiating position of a public body or the Government of Manitoba". Such information or records fall within the exception to disclosure in the opening words of subsection 28(1).

■ Exception to Disclosure: Economic or Financial Interests or Negotiating Position of a Public Body or the Manitoba Government - Opening Wording of Subsection 28(1)

Disclosure harmful to economic and other interests of a public body

28(1) The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be

³⁵⁰ Black's Law Dictionary, 6th Edition.

³⁵¹ [The Interpretation Act](#) of Manitoba, section 17 and the Schedule of Definitions.

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expected to harm the economic or financial interests or negotiating position of a public body or the Manitoba government, including:

...

1. Reasonable expectation of harm

The exceptions to disclosure in the opening wording of subsection 28(1) contain a reasonable expectation of harm test.³⁵²

The head of the public body must determine whether disclosure of the information could reasonably be expected to cause the harm described in the opening wording of subsection 28(1). The circumstances must be carefully assessed, and the determination must be based on objective grounds.

Harm means hurt or damage.³⁵³

2. Economic interests

Economics means the science of the production and distribution of wealth; the condition of a country as it relates to material prosperity.³⁵⁴

Economy means the wealth and resources of a community, especially in terms of the production and consumption of goods and services; the careful management of (especially financial) resources.³⁵⁵

Economic interests relate to the broad interest of the Manitoba government or a public body (a department, government agency or local public body) in managing the production, distribution and consumption of goods and services in Manitoba, and the more specific interests of the government or a public body in the management of its financial and other resources.

³⁵² See *Reasonable Expectation of Harm* earlier in this chapter.

³⁵³ The Concise Oxford Dictionary, 9th Edition.

³⁵⁴ The Concise Oxford Dictionary, 9th Edition.

³⁵⁵ The Concise Oxford Dictionary, 9th Edition.

3. Financial interests

Financial interests relate to the management of money and monetary resources.³⁵⁶ Financial interests include matters such as the management of assets and liabilities, the ability of a public body or the government to protect its interests in financial transactions with others, the ability to collect taxes and generate revenues.

4. Negotiating position

To negotiate means to confer with others to reach a compromise or agreement.³⁵⁷ A negotiating position can relate to contractual negotiations, negotiations for the settlement of a lawsuit, etc.

5. Of a public body or the Manitoba government

The exception in the opening wording of subsection 28(1) protects economic or financial interests or the negotiating position of:

- the public body that has received the request for access
- another public body
- the interests of the Manitoba government in the broad, corporate sense³⁵⁸

³⁵⁶ The Concise Oxford Dictionary, 9th Edition.

³⁵⁷ The Concise Oxford Dictionary, 9th Edition.

³⁵⁸ See *Scope of the Exception for Economic and Other Interests of a Public Body* earlier in this chapter, for a more detailed discussion.

■ **Exception to Disclosure: Trade Secret of a Public Body or the Government - [Clause 28(1)(a)]**

28(1) The head of a public body may refuse to disclose...
(a) a trade secret of a public body or the Manitoba government;
...

1. Meaning of trade secret

The exception to disclosure in clause 28(1)(a) is a class exception because it protects a type or kind of information.

The term trade secret refers to some identifiable business or technical information that is kept private for the purpose of economic gain. The creator of that information uses resources (and often considerable resources) of one kind or another to gain a competitive edge in product or services over a competitor. If the nature of the information were publicly known, the competitive advantage would be lost.

There are potentially four categories of trade secrets:

- specific product secrets, such as chemical formula
- technological secrets (that is, knowledge of some process or know-how that nobody else has yet developed)
- strategic business information (secret marketing information or customer lists) * specialized compilations of information that, in sum, are not publicly known and have unique value on that account³⁵⁹

³⁵⁹ *Trade Secrets, a Report of the Institute of Law Research and Reform (Edmonton, Alberta) and a Federal Provincial Working Party on Trade Secrets (Report No. 46), July 1986, at page 6.*

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In summary:

Trade secret means information including but not limited to a formula, pattern, compilation, programme, method, technique, process or information contained or embodied in a product, device or mechanism which:

- (i) is or may be used in a trade or business,
- (ii) is not generally known in that trade or business,
- (iii) has economic value from not being generally known, and
- (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.³⁶⁰

2. Of a public body or the Manitoba government

Trade secret of a public body or the Manitoba government means that a public body or the Manitoba government must own the trade secret or have a legal right or claim to the trade secret information (for example, under a license agreement).

The exception in clause 28(1)(a) protects a trade secret of:

- the public body that has received the request for access
- another public body, or
- the Manitoba government in the broad, corporate sense³⁶¹

³⁶⁰ Ontario Information and Privacy Commissioner [Order M-29](#) (Re Etobicoke Board of Education, July 30, 1992) which adopts the definition from Trade Secrets, cited above.

³⁶¹ See *Scope of the Exception for Economic and Other Interests* earlier in this chapter for a more detailed discussion.

■ **Exception to Disclosure: Financial, Commercial, Scientific, Technical or Other Proprietary Information - [Clause 28(1)(b)]**

28(1) The head of a public body may refuse to disclose

...

(b) financial, commercial, scientific, technical or other information in which a public body or the Manitoba government has a proprietary interest or right of use;

1. Financial, commercial, scientific, technical or other information

The exceptions to disclosure in clause 28(1)(b) are class exceptions because they protect a type or kind of information.

Financial information is information related to finance — money and the monetary resources of a person, company, etc.³⁶² Examples include information on pricing practices, profit and loss data, overhead and operating expenses.³⁶³

Commercial information is information related to or connected with trade or commerce,³⁶⁴ with the buying, selling or exchange of merchandise or services.³⁶⁵ Examples include price lists, lists of suppliers and customers, market research surveys and other similar information related to the commercial operation of a business.³⁶⁶ The term commercial information can apply to both profit-making enterprises and non-profit enterprises.³⁶⁷

³⁶² The Concise Oxford Dictionary, 9th Edition.

³⁶³ Ontario Information and Privacy Commissioner [Order P-80](#) (Re Ministry of Health, July 26, 1989).

³⁶⁴ Ontario Information and Privacy Commissioner [Order P-179](#) (Re Ministry of Health, June 20, 1990).

³⁶⁵ Ontario Information and Privacy Commissioner [Order P-493](#) (Re Ministry of Municipal Affairs, July 9, 1993).

³⁶⁶ [Order P-16](#), Ontario Information and Privacy Commissioner (Re Ministry of Agriculture and Food, Sept. 8, 1988).

³⁶⁷ [Order P-493](#), Ontario Information and Privacy Commissioner (Re Ministry of Municipal Affairs, July 9, 1993).

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Scientific information refers to information relating to or exhibiting the methods or principles of science. In particular, it is information belonging to an organized field of knowledge in the natural, biological or social sciences or mathematics that relates to the observation and testing of specific hypotheses or conclusions and which is undertaken by an expert in the field.³⁶⁸

Technical information usually refers to information of or involving or concerned with the mechanical arts and applied sciences.³⁶⁹ Examples of mechanical arts and applied sciences include architecture, engineering and electronics. An example of technical information is a description of the deficiencies in the structure of a building.³⁷⁰

The other information referred to in the exception is information in which a public body or the Manitoba government has a proprietary interest or right of use.

2. Proprietary interest or right of use

A proprietary interest is a legal property interest in the information that would arise through ownership or through contractual rights. A right of use would arise through contractual rights or a licensing agreement.

3. Of a public body or the Government

The exception in clause 28(1)(b) protects financial and other proprietary information in which the public body receiving the request for access, another public body or the Manitoba government in the broad corporate sense has a proprietary interest or right of use.³⁷¹

³⁶⁸ [Order P-454](#), Ontario Information and Privacy Commissioner (Re Ontario Native Affairs Secretariat, May 7, 1993).

³⁶⁹ The Concise Oxford Dictionary, 9th Edition.

³⁷⁰ [Order P-444](#), Ontario Information and Privacy Commissioner (Re Ministry of Health, April 2, 1993).

³⁷¹ See *Scope of the Exception for Economic and Other Interests* earlier in this chapter, for a more detailed discussion.

■ **Exception to Disclosure: Result in Financial Loss, Prejudice Competitive Position or Interfere With Negotiations - [Clause 28(1)(c)]**

28(1) The head of a public body may refuse to disclose
...
(c) information the disclosure of which could reasonably be expected to
(i) result in financial loss to,
(ii) prejudice the competitive position of, or
(iii) interfere with or prejudice contractual or other negotiations of,
a public body or the Manitoba government;

The three exceptions to disclosure in clause 28(1)(c) provide similar protection for the business and commercial activities of a public body or the Manitoba government as is provided for the activities of private sector third parties under clause 18(1)(c).

1. Reasonable expectation of harm test

The exceptions in paragraphs 28(1)(c)(i), (ii) and (iii) involve a reasonable expectation of harm test.³⁷² The head of the public body receiving the request for access must determine whether disclosure of the information could reasonably be expected to result in any one of more of the harms described in paragraphs 28(1)(c)(i), (ii) or (iii). The individual circumstances of each request for such information must be carefully assessed, and the determination must be based on objective grounds.

2. Result in financial loss - paragraph 28(1)(c)(i)

The loss under this exception must be financial — that is, must be monetary or have a monetary equivalent or value (for example, a loss of revenue, reputation or goodwill in the marketplace).

³⁷² See "Reasonable Expectation of Harm" in the Introduction to this chapter.

3. "Prejudice the competitive position" - paragraph 28(1)(c)(ii)

"Prejudice" in the context of paragraph 28(1)(c)(ii) means that disclosure of the information would harm or injure the competitive position of a public body or of the Government of Manitoba.³⁷³

There can be prejudice to a competitive position of a public body or the government even if there is no immediate loss. However, for this exception to apply there must be:

- a competitive community or an existing or potential competitor, and
- a reasonable expectation that harm, such as loss or reduction in market, could result from a competitor's knowledge of the information.

4. "Interfere with or prejudice contractual or other negotiations" - clause 28(1)(c)(iii)

To "interfere with" means to obstruct, to meddle, hinder or get in the way of something.³⁷⁴

"Prejudice" in the context of paragraph 28(1)(c)(iii) means that disclosure of the information would harm or injure the negotiations of a public body or of the Manitoba government.³⁷⁵

To "negotiate" means to confer with others in order to reach a compromise or agreement.³⁷⁶ "Negotiations" in this context means discussions and communications where the intent is to arrive at an agreement or a settlement. The "negotiations" referred to in paragraph 28(1)(c)(iii) can include contractual negotiations, negotiations relating to the settlement of a lawsuit, etc.

³⁷³ The Concise Oxford Dictionary, 9th Edition.

³⁷⁴ The Concise Oxford Dictionary, 9th Edition.

³⁷⁵ The Concise Oxford Dictionary, 9th Edition.

³⁷⁶ The Concise Oxford Dictionary, 9th Edition.

Note: Clause 23(1)(c) contains a related exception for positions, plans, procedures, criteria or instructions developed for contractual or other negotiations.

5. Of a public body or the Manitoba government

The exceptions in clause 28(1)(c) protect the public body that has received the request for access, another public body and the Manitoba government in the broad corporate sense from the harm contemplated in paragraphs 28(1)(c)(i), (ii) and (iii).³⁷⁷

■ Exception to Disclosure: Innovative Scientific or Technical Research - [Clause 28(1)(d)]

28(1) The head of a public body may refuse to disclose...
(d) innovative scientific or technical information obtained through research by an employee of a public body or the Government of Manitoba;

...

1. Innovative scientific or technical information obtained through research

The exception to disclosure in clause 28(1)(d) is a class exception because it protects a type or kind of information.

Innovative means a new method, idea or something changed or altered.³⁷⁸

Scientific information refers to information relating to or exhibiting the methods or principles of science. In particular, it is information belonging to an organized field of knowledge in the natural, biological or social sciences or mathematics, which relates to the observation

³⁷⁷ See *Scope of the Exception for Economic and Other Interests of a Public Body* earlier in this chapter, for a more detailed discussion.

³⁷⁸ The Concise Oxford Dictionary, 9th Edition.

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and testing of specific hypotheses or conclusions and which is undertaken by an expert in the field.³⁷⁹

Technical information usually refers to information of or involving or concerned with the mechanical arts and applied sciences.³⁸⁰

Examples of mechanical arts and applied sciences include architecture, engineering and electronics. An example of technical information is a description of the deficiencies in the structure of a building.³⁸¹

Research means the systematic investigation into and study of materials and sources, to establish facts and reach new conclusions and endeavor to discover new or collate old facts, by scientific study or by a course of critical investigation.³⁸²

2. Employee of a public body or the Manitoba government

For the exception in clause 28(1)(d) to apply, the scientific or technical information must have been obtained through research by an employee of a public body or the Manitoba government.

The term employee is defined in subsection 1(1) of [FIPPA](#):

“employee”, in relation to a public body, includes a person who performs services for the public body under a contract or agency relationship with the public body;

³⁷⁹ Ontario Information and Privacy Commissioner [Order P-454](#) (Re Ontario Native Affairs Secretariat, May 7, 1993).

³⁸⁰ The Concise Oxford Dictionary, 9th Edition.

³⁸¹ Ontario Information and Privacy Commissioner [Order P-444](#) (Re Ministry of Health, April 2, 1993).

³⁸² Ontario Information and Privacy Commissioner [Order P-666](#), (Re Ministry of Health, April 27, 1994).

■ **Exception to Disclosure: Undue Loss or Benefit to a Person or Premature Disclosure of a Pending Policy Decision - [Clause 28(1)(e)]**

28(1) The head of a public body may refuse to disclose...

(e) information the disclosure of which could reasonably be expected to result in an undue loss or benefit to a person, or premature disclosure of a pending policy decision, including but not limited to,

(i) a contemplated change in taxes or other source of revenue,

(ii) a contemplated change in government borrowing,

(iii) a contemplated change in the conditions of operation of a financial institution, stock exchange, or commodities exchange, or of any self-regulating association recognized by The Manitoba Securities Commission under an enactment of Manitoba, or

(iv) a contemplated sale or purchase of securities, bonds or foreign or Canadian currency.

1. Including, but not limited to

The wording including, but not limited to, used to introduce paragraphs 28(1)(e)(i) to (iv), indicates that the information listed in paragraphs (i) to (iv) is not the only information that falls within the exception.

There may be information that is not described in paragraphs 28(1)(e)(i) to (iv) which nonetheless could reasonably be expected to result in an undue loss or benefit to a person, or premature disclosure of a pending policy decision. Such information falls within the exception to disclosure described in the opening words of clause 28(1)(e).

2. Exceptions to Disclosure: Undue loss or benefit to a person, or premature disclosure of a pending policy decision - Exceptions in opening wording of clause 28(1)(e)

The opening wording of clause 28(1)(e) contains two exceptions; both contain a reasonable expectation of harm test.

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(i) *Result in an undue loss or benefit to a person*

An undue loss or benefit is a loss or benefit that is excessive, disproportionate; not suitable; not owed.³⁸³ The loss or benefit does not need to be financial in nature. Person means a natural person (human being) and includes a corporation and the heirs, executors, administrators or other legal representatives of a person.³⁸⁴

(ii) *Result... in premature disclosure of a pending policy decision*

This exception is temporary.

A premature disclosure is one occurring before the usual or proper time; one which is too early or too hasty.³⁸⁵ Pending means awaiting decision or settlement, undecided; about to come into existence.³⁸⁶ Once the policy decision has been made and implemented, it is no longer pending and this exception no longer applies. A decision is implemented when those who are expected to carry it out have been authorized and instructed to do so.

Note: Clause 23(1)(f) also refers to disclosure of a pending policy or budgetary decision.

The head of the public body must determine whether disclosure of the information could reasonably be expected to cause the harm described in the opening to subsection 28(1). Harm means hurt or damage.³⁸⁷ The circumstances must be carefully assessed, and the determination must be based on objective grounds.

³⁸³ The Concise Oxford Dictionary, 9th Edition.

³⁸⁴ [The Interpretation Act of Manitoba](#), Sec. 17 and the Schedule of Definitions.

³⁸⁵ The Concise Oxford Dictionary, 9th Edition.

³⁸⁶ The Concise Oxford Dictionary, 9th Edition.

³⁸⁷ The Concise Oxford Dictionary, 9th Edition.

■ **Exceptions to Disclosure: Examples of Undue Loss or Benefit or Premature Disclosure of a Pending Policy Decision - [Clauses 28(1)(e)(i) to (iv)]**

- 28(1) The head of a public body may refuse to disclose...*
- (e) information the disclosure of which could reasonably be expected to result in an undue loss or benefit to a person, or premature disclosure of a pending policy decision, including but not limited to,*
- (i) a contemplated change in taxes or other source of revenue,*
- (ii) a contemplated change in government borrowing,*
- (iii) a contemplated change in the conditions of operation of a financial institution, stock exchange or commodities exchange, or of any self-regulating association recognized by The Manitoba Securities Commission under an enactment of Manitoba, or*
- (iv) a contemplated sale or purchase of securities, bonds or foreign or Canadian currency.*

Clauses 28(1)(e)(i) to (iv) are examples of situations where disclosure of information would result in undue loss or gain by a person or premature disclosure of a pending policy decision.

The focus of these examples is largely financial (contemplated change in taxes or other sources of revenue, contemplated change in government borrowing, etc.).

The exceptions in paragraphs 28(1)(e)(i) to (iv) are class exceptions because they protect a type or kind of information.

The exceptions in clause 28(1)(e) are not limited to the examples in paragraphs 28(1)(e)(i) to (iv), or to financial matters. There may be information that is not described in these paragraphs which nonetheless could reasonably be expected to result in an undue loss or benefit to a person, or premature disclosure of a pending policy decision if the information were to be disclosed. Such information falls within the exception to disclosure described in the opening words of clause 28(1)(e).

■ **When the Exceptions Don't Apply: Limit to the Exceptions for Economic and Other Interests of a Public Body - [Subsection 28(2)]**

Exception

28(2) Subsection (1) does not apply to the results of a product or environmental test conducted by or for the public body, unless the test was done for the purpose of developing methods of testing or for the purpose of testing products for possible purchase.

The exceptions to disclosure in subsection 28(1) do not apply to the results of a product or environmental test conducted by or for the public body, unless the test was done to develop methods of testing or to test products for possible purchase. Other exceptions to disclosure in [FIPPA](#) may apply to the results of a product or environmental test (for example, Sec. 18 - Business interests of third parties).

This limit to the economic interests exceptions in subsection 28(2) applies whether the testing is carried out by the public body itself or for the public body by another person, organization, etc.

Product means a thing or substance produced by natural process or manufacture, a result.³⁸⁸

Environment refers to the physical surroundings, conditions and circumstances in which a person lives; the area surrounding a place; external conditions as affecting plant and animal life; the totality of the physical conditions on the earth or a part of it, especially as affected by human activity.³⁸⁹

The limit does not apply, and the exceptions to disclosure in subsection 28(1) may apply to the information, if the product or environmental test was done:

- for the purpose of developing methods of testing, or

³⁸⁸ The Concise Oxford Dictionary, 9th Edition.

³⁸⁹ The Concise Oxford Dictionary, 9th Edition.

TESTING PROCEDURES, TESTS AND AUDITS - [SEC. 29]

Summary of the Exception

The exceptions to disclosure in Sec. 29 provide protection for procedures and techniques involved in testing and auditing, and for details relating to specific tests to be given or audits to be conducted.

Sec. 29 contains discretionary exceptions to the right to access under Sec. 7 of the act, because the head of the public body may refuse to disclose the requested record if an exception applies.

The exceptions in Sec. 29 contain a reasonable expectation of harm test.

■ **Scope of the Exception: Testing Procedures, Tests and Audits - [Sec. 29]**

Testing procedures, tests and audits

29 *The head of a public body may refuse to disclose to an applicant information relating to*

- (a) testing or auditing procedures or techniques; or*
- (b) details of specific tests to be given or audits to be conducted;*

if disclosure could reasonably be expected to prejudice the use or results of particular tests or audits.

The exceptions in Sec. 29 protect procedures and techniques involved in testing and auditing, and details related to specific tests or audits to be given or conducted, where disclosure of information could reasonably be expected to prejudice the use, or results, of particular tests or audits.

1. Discretionary exceptions

EXCEPTIONS TO DISCLOSURE: SECTION 29

Sec. 29 contains discretionary exceptions to the right to access under Sec. 7 of the act, because the head may refuse to disclose the requested information. This involves two steps. The head:

- must first determine whether an exception in Sec. 29 applies to information in the requested record
- must then consider whether it is appropriate to release the information, even though an exception in Sec. 29 applies³⁹⁰

2. Severing - subsection 7(2)

The term information, rather than the term record, is used in Sec. 29 to indicate that the exceptions apply to the information in a record and not necessarily to the whole record. Subsection 7(2) of [FIPPA](#) requires that, when an exception applies to some of the information in a record, only that information is severed, and the applicant is entitled to access the rest of the record — unless an exception in another section of [FIPPA](#) applies to it.³⁹¹

3. Reasonable expectation of harm

The exceptions in Sec. 29 contain a reasonable expectation of harm test.³⁹²

The head of the public body must determine whether disclosure of the information could reasonably be expected to cause the harm described in Sec. 29. The circumstances must be carefully assessed, and the determination must be based on objective grounds.

4. Prejudice the use or results of particular tests or audits

³⁹⁰ See *Exercising a Discretion* earlier in this chapter.

³⁹¹ For a discussion of severing and subsection 7(2), see *The Exceptions Apply to Information in a Record - Severing* earlier in this chapter, and *Severing a Record* in chapter 4.

³⁹² See *Reasonable Expectation of Harm* earlier in this chapter.

EXCEPTIONS TO DISCLOSURE: SECTION 29

The exception in Sec. 29 protects the testing or auditing procedure. The exception applies to specific types of information: testing or auditing procedures, techniques or details of specific tests to be given, or audits to be conducted. Where disclosure of this information would prejudice the use of particular tests, audits or the results of testing or auditing, access may be refused.

Sec. 29 does not provide a basis for refusing to disclose the results of tests or audits.

Prejudice, in the context of Sec. 29, means to impair the validity of³⁹³ the testing or auditing procedures or techniques, or of the results of the test or audit.

An audit is an official examination of accounts or a systematic review.³⁹⁴

The terms test and audit can include staffing tests, financial audits and program audits.

The test or audit can be carried out by the public body itself or by consultants or contractors on behalf of the public body.

Note: Clause 4(h) of [FIPPA](#) states that [FIPPA](#) does not apply to a question that is to be used on an examination or test.³⁹⁵

Clauses 18(3)(d) and 23(2)(d) and subsection 28(2) deal with disclosure of final results of a product or environmental test conducted by or for a public body.

■ **Sec. 29: Related Provisions in FIPPA**

Subsection 1(1) (Definitions): **“applicant”**

³⁹³ The Concise Oxford Dictionary, 9th Edition.

³⁹⁴ The Concise Oxford Dictionary, 9th Edition.

³⁹⁵ Sec. 4 is discussed in chapter 2, under *Records That Do Not Fall Under FIPPA*.

EXCEPTIONS TO DISCLOSURE: SECTION 29

**“head”
“public body”**

Clause 4(h)	FIPPA does not apply to a question that is to be used on an examination or test
Subsection 7(2)	Severing information
Subsection 12(1)	Contents of response
Clause 18(3)(d)	Results of a product or environmental test
Clause 23(2)(d)	Results of a product or environmental test
Subsection 28(2)	Results of a product or environmental test

LABOUR RELATIONS INFORMATION - [SEC. 29.1]

Summary of the Exception

Sec. 29.1 gives the head of a public body the discretion to refuse to disclose to an applicant information that could reveal, and harm labour relations matters of a public body as an employer.

Sec. 29.1 is a discretionary exception to the right to access under Sec. 7 of [FIPPA](#), because the head of the public body may refuse to disclose information to an applicant requesting access under Part 2, if the exception to disclosure represented by Sec. 29.1 applies.

The exception to disclosure sets up a three-pronged test. Information must meet the requirements of all three clauses: 29.1(a), (b) and (c), because the word and is used to join them.

Sec. 29.1 is a class exception when paragraph 29.1(c)(iv) applies, along with clauses 29.1(a) and (b) because it protects a certain type or kind of information.

Sec. 29.1 contains a reasonable expectation of harm test when paragraphs 29.1(c)(i), (ii) or (iii) applies, along with clauses 29.1(a) and (b).

■ **Scope of the Exceptions for Labour Relations Information - [Sec. 29.1]**

Disclosure harmful to public body's labour relations

29.1 *The head of a public body may refuse to disclose information to an applicant if*

(a) disclosure would reveal labour relations information of the public body as an employer;

(b) the information was prepared by or supplied to the public body, explicitly or implicitly, on a confidential basis and treated consistently as confidential information by the public body as an employer; and

EXCEPTIONS TO DISCLOSURE: SECTION 29

(c) disclosure could reasonably be expected to
(i) harm the competitive position or interfere with contractual or other negotiations of the public body as an employer;
(ii) result in significant financial loss or gain to the public body as an employer,
(iii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied, or
(iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

1. **Scope of the exception**

The exception to disclosure in Sec. 29.1 gives the head of a public body the discretion to refuse to disclose information to an applicant under Part 2 of [FIPPA](#) if three conditions are met:

- (i) the disclosure would reveal labour relations information of the public body as an employer
- (ii) the information was prepared by or supplied to the public body, explicitly or implicitly, on a confidential basis and treated consistently as confidential by the public body as an employer, and
- (iii) the disclosure could reasonably be expected to
 - harm the competitive position or interfere with contractual or other negotiations of the public body as an employer
 - result in significant financial loss or gain to the public body as an employer
 - result in similar information no longer being supplied to the public body when it is in the public interest that the information continue to be supplied

EXCEPTIONS TO DISCLOSURE: SECTION 29

- reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body applied to resolve or inquire into a labour relations dispute

The exception to disclosure in Sec. 29.1 protects labour relations information of the public body as an employer. This exception does not:

- protect labour relations information of third parties, such as corporations, businesses, organizations (for-profit and not-for-profit), or individuals (other exceptions in subsection 18(1) protect labour relations information of third parties)
- apply to labour relations information of other public bodies, as the phrase “the public body” is used

Other exceptions to disclosure in [FIPPA](#) may also be considered, such as:

- clause 17(2)(h) that requires the head of a public body to protect personal information consisting of personal recommendations or evaluations, character references or personnel evaluations
- clause 17(2)(h.1) that requires the head of a public body to protect the identity of an individual that provided personal information about the applicant in confidence to the applicant’s employer
- Sec. 29.2 that allows the head of a public body the discretion to protect information related to workplace investigations

2. Discretionary exception

Sec. 29.1 is a discretionary exception to the right to access under Sec. 7 of the act, because the head may refuse to disclose the requested information. This involves a two-step process. The head:

EXCEPTIONS TO DISCLOSURE: SECTION 29

- must first determine whether the exception in Sec. 29.1 applies to information in the requested record
- must then consider whether it is appropriate to release the information, even though the exception in Sec. 29.1 applies³⁹⁶

3. Severing - subsection 7(2)

The term information, rather than the term record, is used in Sec. 29.1 to indicate that the exception applies to the information in a record and not necessarily to the whole record. Subsection 7(2) of [FIPPA](#) requires that, when an exception applies to some of the information in a record, only that information is severed, and the applicant is entitled to access to the remainder of the record — unless an exception in another section of [FIPPA](#) applies to it.³⁹⁷

■ First Condition of Exception to Disclosure: Reveal Labour Relations Information of the Public Body as an Employer - [subsection 29.1(a)]

Disclosure harmful to public body's labour relations

29.1 *The head of a public body may refuse to disclose information to an applicant if*

(a) disclosure would reveal labour relations information of the public body as an employer;

...

The exception to disclosure in section 29.1 gives the head of a public body the discretion to refuse to disclose information to an applicant under Part 2 of [FIPPA](#) if the three conditions of clauses 29.1(a), (b) and (c) are met. Clause 29.1(a) represents the first condition.

³⁹⁶ See *Exercising a Discretion* earlier in this chapter.

³⁹⁷ For a discussion of severing and subsection 7(2), see *The Exceptions apply to Information in a Record - Severing* earlier in this chapter and *Severing a Record* in chapter 4.

EXCEPTIONS TO DISCLOSURE: SECTION 29

1. **Reveal**

Disclosure would reveal the information protected by clause 29.1(a) if, for example:

- the information disclosed is the protected information
- the information disclosed directly refers to the protected information
- the information disclosed would permit accurate inferences to be drawn about the protected information;³⁹⁸
- the information disclosed could be combined with other information to reveal the protected information

2. **Labour relations**

Labour relations information means information about the collective bargaining relationship between the public body and its employees, as governed by collective bargaining legislation, or analogous relationships.³⁹⁹

3. **The Public body as an employer**

The exception can only be applied to labour relations information of the public body as an employer and does not include:

- third parties, such as corporations, businesses, organizations (for-profit and not-for-profit), or individuals (other exceptions in subsection 18(1) protects labour relations information of third parties)

³⁹⁸ Ontario Information and Privacy Commissioner [Order P-226](#) (Re Ministry of Consumer and Commercial Relations; March 26, 1991) (made in the context of Cabinet confidences).

³⁹⁹ *Waterloo (City) Re*, [2008] O.I.P.C. No. 62 at para 15

- other public bodies, as the phrase “the public body” is used

■ **Second Condition of Exception to Disclosure: Reveal Labour Relations Information of the Public Body as an Employer- [Subsection 29.1(b)]**

Disclosure harmful to public body’s labour relations

29.1 *The head of a public body may refuse to disclose information to an applicant if*

...

(b) the information was prepared by or supplied to the public body, explicitly or implicitly, on a confidential basis and treated consistently as confidential information by the public body as an employer; and

...

The exception to disclosure in Sec. 29.1 gives the head of a public body the discretion to refuse to disclose information to an applicant under Part 2 of [FIPPA](#), if the three conditions of clauses 29.1(a), (b) and (c) are met. Clause 29.1(b) represents the second condition.

The focus of clause 29.1(b) is the confidential nature of the information. How the information is obtained by the public body, the circumstances in which it is prepared, and the manner in which the information is treated by the public body are important in determining whether this clause applies.⁴⁰⁰

Clause 29.1(b) has three requirements, all of which must be met for it to apply:

- (i) *The information must be prepared by or supplied to the public body*

Even if the information was prepared by the public body, the rest of the requirements in the clause must be met.

⁴⁰⁰ Ontario Information and Privacy Commissioner [Order PO-2613](#) (Re Ministry of Government Services; September 20, 2007).

EXCEPTIONS TO DISCLOSURE: SECTION 29

Supplied means provided or furnished⁴⁰¹ and includes information supplied voluntarily or information supplied because of a legal requirement — for example, where a statute requires that the information be provided. It would include information provided orally and recorded by an employee of the public body.

- (ii) *The information was prepared by the public body or supplied to the public body, explicitly or implicitly, on a confidential basis*

Information is explicitly prepared on a confidential basis, for example, when the public body has a policy that requires confidentiality, or when the information is stamped as confidential during its creation.

Information may be implicitly prepared in confidence when an intention that the information be treated as confidential can be implied from the circumstances in which it was prepared – for example, where a document is created in draft, past practices followed for such information, stated policies, legislative requirements, etc.

Information is explicitly supplied in confidence when it was expressly requested or indicated that it is to be kept confidential. The intention to provide information in confidence can be stated in the record of the information itself, in an agreement or verbally. It is best to keep a written record of a verbal request.

Information is implicitly supplied in confidence when an intention that the information be treated as confidential can be implied from the circumstances in which it was provided — for example, from the way the information is provided and received,⁴⁰² past practices followed for such information, stated policies, etc. A confidentiality provision in another statute may form the basis for a reasonable expectation on the part of someone providing information that the information will remain

⁴⁰¹ The Concise Oxford Dictionary, 9th Edition.

⁴⁰² Ontario Information and Privacy Commissioner [Order P-274](#) (Re Ministry of Correctional Services, Feb. 21, 1992) (made in the context of third party personal information).

EXCEPTIONS TO DISCLOSURE: SECTION 29

confidential.⁴⁰³

- (iii) *The information must be treated consistently as confidential by the public body as an employer.*

It is not enough that the information has been prepared by or provided to the public body in confidence to meet this requirement of clause 29.1(b); the public body, because an employer must also consistently treat this information as confidential. For example, clause 29.1(b) would not be met if the information has been made available to the public by the public body as an employer.

Labour relations information about the public body as an employer does not include labour relations information about third parties, such as:

- corporations
- businesses
- organizations (for-profit and not-for-profit)
- individuals (other exceptions in subsection 18(1) protect labour relations information about third parties)
- other public bodies, because the phrase the public body is used

⁴⁰³ Ontario Information and Privacy Commissioner [Order P-309](#) (Re Ministry of Consumer & Commercial Relations; June 8, 1992) (made in the context of third party personal information).

■ **Third Condition of Exception to Disclosure: Reveal Information that is Harmful to the Public Body as an Employer or that is Supplied to Labour Relations Arbitrator, etc. - [Paragraphs 29.1(c)(i) to (iv)]**

Disclosure harmful to public body's labour relations

29.1 *The head of a public body may refuse to disclose information to an applicant if*

...

(c) disclosure could reasonably be expected to

(i) harm the competitive position or interfere with contractual or other negotiations of the public body as an employer,

(ii) result in significant financial loss or gain to the public body as an employer,

(iii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied, or

(iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

The exception to disclosure in Sec. 29.1 gives the head of a public body the discretion to refuse to disclose information to an applicant under Part 2 of [FIPPA](#) if the three conditions of clauses 29.1(a), (b) and (c) are met. Clause 29.1(c) represents the third condition. The third condition consists of four scenarios, of which, only one needs to apply, as indicated by the word or.

- (i) *Harm competitive position or interfere with contractual or other negotiations*

Paragraph 29.1(c)(i), when it is applicable along with clauses 29.1(a) and (b), involves a reasonable expectation of harm test.⁴⁰⁴ The head of the public body must determine whether disclosure of the information could reasonably be expected to result in the harm described in paragraph 29.1(c)(i). The individual circumstances of each request for

⁴⁰⁴ See *Reasonable Expectation of Harm*, earlier in this chapter.

EXCEPTIONS TO DISCLOSURE: SECTION 29

such information must be carefully assessed, and the determination must be based on objective grounds.

Harm means that disclosure of the information would hurt or damage the public body's competitive position as an employer.

To interfere with means to obstruct, to meddle with, hinder or get in the way of contractual or other negotiations of the public body as an employer.

To negotiate means to confer with others to reach a compromise or agreement. Negotiations, in this context, means discussions and communications where the intent is to arrive at an agreement or a settlement. For example, the negotiations referred to in paragraph 29.1(c)(i) can include contractual negotiations, negotiations relating to a collective agreement, settlement of a lawsuit or a dispute.

(ii) *Result in significant financial loss or gain*

Paragraph 29.1(c)(ii), when it is applicable along with clauses 29.1(a) and (b), involves a reasonable expectation of harm test.⁴⁰⁵ The head of the public body must determine whether disclosure of the information could reasonably be expected to result in the harm described in paragraph 29.1(c)(ii). The individual circumstances of each request for such information must be carefully assessed, and the determination must be based on objective grounds.

The financial loss or gain to a public body, as an employer, resulting from disclosure of the information must be significant, not minimal or negligible.

The loss or gain under this exception must be financial — that is, must be monetary or have a monetary equivalent or value (for example, a loss of revenue, loss of reputation or loss of goodwill).

(iii) *Result in similar information no longer being supplied to the public body*

⁴⁰⁵ See *Reasonable Expectation of Harm*, earlier in this chapter.

EXCEPTIONS TO DISCLOSURE: SECTION 29

Paragraph 29.1(c)(iii), when it is applicable along with clauses 29.1(a) and (b), involves a reasonable expectation of harm test.⁴⁰⁶ The **head** of the public body must determine whether disclosure of the information could reasonably be expected to result in the harm described in paragraph 29.1(c)(iii). The individual circumstances of each request for such information must be carefully assessed, and the determination must be based on objective grounds.

Supplied means provided or furnished to the public body.⁴⁰⁷

“Result in similar information no longer being supplied to the public body” means that disclosure of the information would discourage the provision of similar information to the public body in the future.

“When it is in the public interest that similar information continues to be supplied” means that the head of the public body must determine whether it is in the public interest that the information must continue to be supplied.

- (iv) *Reveal report of a labour relations arbitrator, etc.*

Paragraph 29.1(c)(iv), when it is applicable along with clauses 29.1(a) and (b), does not contain a ‘reasonable expectation of harm’ test because it is a class exception that protects a type or kind of information.

Disclosure would reveal the information protected by paragraph 29.1(c)(iv) if, for example:

- the information disclosed is the protected information
- the information disclosed directly refers to the protected information

⁴⁰⁶ See *Reasonable Expectation of Harm*, earlier in this chapter.

⁴⁰⁷ The Concise Oxford Dictionary, 9th edition.

EXCEPTIONS TO DISCLOSURE: SECTION 29

- the information disclosed would permit accurate inferences to be drawn about the protected information;⁴⁰⁸
- the information disclosed could be combined with other information to reveal the protected information

Information supplied to an arbitrator, mediator, labour relations officer, etc. means that the information has been provided or furnished⁴⁰⁹ by someone else to the arbitrator, etc.

A report includes an account given or formally expressed after investigation or consideration or a description, summary or reproduction of an event, a periodical statement on work or conduct.⁴¹⁰

For the paragraph to apply, the information must be supplied to, or the report must be the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

An arbitrator is a private, disinterested person, chosen by the parties to a disputed question, for the purpose of hearing their contentions and giving judgement between them, to whose decision or award the parties submit themselves either voluntarily or, in some cases, compulsorily.⁴¹¹

A mediator is a person who interposes between parties at various times to reconcile them.⁴¹²

A labour relations officer is a person appointed to inquire into or resolve any form of labour relations dispute or issue.

⁴⁰⁸ Ontario Information and Privacy Commissioner [Order P-226](#) (Re Ministry of Consumer and Commercial Relations; March 26, 1991) (made in the context of Cabinet confidences).

⁴⁰⁹ The Concise Oxford Dictionary, 9th Edition.

⁴¹⁰ The Concise Oxford Dictionary, 9th Edition.

⁴¹¹ Black's Law Dictionary, 6th Edition.

⁴¹² Black's Law Dictionary, 6th Edition.

EXCEPTIONS TO DISCLOSURE: SECTION 29

The phrase “other person or body appointed to resolve or inquire into a labour relations dispute” includes a person or body appointed by any level of government, or a public body — for example, an appointment by Cabinet, by a minister or by the chief executive officer of an incorporated government agency.

■ **Sec. 29.1: Related Provisions in FIPPA**

Subsection 1(1) (Definitions):	“applicant” “head” “public body”
Subsection 7(2)	Severing information
Subsection 12(1)	Contents of response
Sec. 17	Privacy of a third party
Clause 17(2)(h)	Personal recommendations or evaluations, character references or personnel evaluations
Clause 17(2)(h.1)	Identity of Third Party that Provided the Applicant’s Personal Information to Applicant’s Employer
Sec. 18	Business interests of third parties
Sec. 29.2	Workplace investigations

WORKPLACE INVESTIGATIONS - [SEC. 29.2]

Summary of the Exception

Sec. 29.2 gives the head of a public body the discretion to refuse to disclose to an applicant information that relates to a public body's investigation into the employment-related conduct of an employee.

Sec. 29.2 contains discretionary exceptions to the right to access under Sec. 7 of [FIPPA](#), because the head of the public body may refuse to disclose information to an applicant requesting access under Part 2 if an exception under Sec. 29.2 applies.

Clause 29.2(a) is a class exception because it protects a certain type or kind of information. Clause 29.2(b) contains a reasonable expectation of harm test.

■ **Scope of the Workplace Investigations Exceptions - [Sec. 29.2]**

Information relating to workplace investigations

29.2 *The head of a public body may refuse to disclose information to an applicant if*

(a) the information relates to an ongoing investigation by or on behalf of the public body into the employment-related conduct of an employee; or

(b) the information was created or collected for the purpose of such an investigation, regardless of whether the investigation took place, and disclosure of the information could reasonably be expected to cause harm to the applicant, a public body or a third party.

Sec. 29.2 is intended to protect information related to a public body's investigation into the employment-related conduct of an employee and information created for the purpose of an actual or potential investigation, the disclosure of which could reasonably be expected to cause harm to the applicant, a public body or a third party.

EXCEPTIONS TO DISCLOSURE: SECTION 29.2

There may be other exceptions that apply to information that relates to an ongoing, potential or completed investigation into the employment-related conduct of an employee.

1. Discretionary exception

Sec. 29.2 is a discretionary exception to the right to access under Sec. 7 of the act, because the head may refuse to disclose the requested information. This involves a two-step process. The head:

- must first determine whether one of the exceptions in Sec. 29.2 applies to information in the requested record
- must then consider whether it is appropriate to release the information, even though the exception in Sec. 29.2 applies⁴¹³

When the head of a public body is considering disclosing information that could be subject to the exceptions in Sec. 29.2, advice from legal counsel and human resources personnel should be sought, to ensure any disclosures do not negatively impact an investigation.

2. Severing - subsection 7(2)

The term information, rather than the term record, is used in Sec. 29.2 to indicate that the exception applies to the information in a record and not necessarily to the whole record. Subsection 7(2) of [FIPPA](#) requires that, when an exception applies to some of the information in a record, only that information is severed, and the applicant is entitled to access to the remainder of the record, unless an exception in another section of [FIPPA](#) applies to it.⁴¹⁴

⁴¹³ See *Exercising a Discretion* earlier in this chapter.

⁴¹⁴ For a discussion of severing and subsection 7(2) see *The Exceptions apply to Information in a Record - Severing* earlier in this chapter and *Severing a Record* in chapter 4.

■ **Exception to Disclosure: Information Relating to an Ongoing Workplace Investigation - [Subsection 29.2(a)]**

Information relating to workplace investigations

29.2 *The head of a public body may refuse to disclose information to an applicant if*

(a) the information relates to an ongoing investigation by or on behalf of the public body into the employment-related conduct of an employee; or

...

The exception to disclosure in clause 29.2(a) gives the head of a public body the discretion to refuse to disclose information to an applicant under Part 2 of [FIPPA](#) if the information relates to the public body's ongoing investigation into the employment-related conduct of an employee.

1. Relates to

The exception to disclosure in subsection 29.2(a) is for information that relates to an investigation into employment-related conduct of an employee. Therefore, the exception in subsection 29.2(a) can apply to information that is gathered or created in the course of an ongoing investigation, or information that may be relevant to the ongoing investigation.

Other exceptions to disclosure in [FIPPA](#) may also apply, such as subsection 17(1) when the disclosure of personal information would invade a third party's privacy in accordance with clauses 17(2)(a) relating to personal health information, 17(2)(h) relating to personal recommendations or evaluations, character references or personnel evaluations, or 17(2)(h.1) the identity of an individual that provided personal information about the applicant in confidence to the applicant's employer. It's important to note that these examples from Sec. 17 are mandatory exceptions to disclosure. If mandatory exceptions to disclosure apply, the head of a public body must refuse access.

EXCEPTIONS TO DISCLOSURE: SECTION 29.2

2. Investigation

An investigation is a systematic inquiry or search.⁴¹⁵

The type of investigation is described in clause 29.2(a) as one done by or on behalf of the public body into the employment-related conduct of an employee.

3. Ongoing

Ongoing means continuing to exist or develop. The exception in clause 29.2(a) is time limited as it relates to an ongoing investigation only. Once the investigation is complete or terminated, the exception in clause 29.2(a) no longer applies.

4. Employment-related conduct of an employee

Employee is defined in Sec. 1 of [FIPPA](#), in relation to a public body, to include “a person who performs services for the public body under a contract or agency relationship with the public body.”

The investigation must concern the employment-related conduct of the employee. Employment-related conduct can include behaviour of an employee that is related to their job responsibilities, their interactions with colleagues, clients or the public, and behaviour that is subject to an employment-related policy, such as a respectful workplace policy or code of conduct.

■ Exception to Disclosure: Harm to Applicant, Public Body or Third Party - [Subsection 29.2(b)]

Information relating to workplace investigations

29.2 *The head of a public body may refuse to disclose information to an applicant if*

⁴¹⁵ The Concise Oxford Dictionary, 9th Edition.

EXCEPTIONS TO DISCLOSURE: SECTION 29.2

(b) the information was created or collected for the purpose of such an investigation, regardless of whether the investigation took place, and disclosure of the information could reasonably be expected to cause harm to the applicant, a public body or a third party.

The exception to disclosure in clause 29.2(b) gives the head of a public body the discretion to refuse to disclose information to an applicant under Part 2 of [FIPPA](#), if the information created or collected for the investigation into the employment-related conduct of an employee could reasonably be expected to cause harm to the applicant, a public body or a third party.

1. Investigation

An investigation is a systematic inquiry or search.⁴¹⁶

Clause 29.2(b) refers to such an investigation, which is intended to connect to the investigation mentioned in clause 29.2(a).

2. Regardless of whether the investigation took place

Unlike clause 29.2(a), the exception in clause 29.2(b) applies whether or not the investigation took place and regardless of the status of the investigation. Therefore, the exception in clause 29.2(b) applies whether the investigation is ongoing, completed or was suspended for any reason.

3. Harm to applicant, a public body or a third party

Clause 29.2(b) involves a reasonable expectation of harm test. The head of the public body must determine whether disclosure of the information could reasonably be expected to cause harm to (in other words, hurt or damage), the applicant, a public body or a third party.

The terms applicant, public body, and third party are defined in Sec. 1 of [FIPPA](#) and are discussed in *Chapter 2 – Scope of FIPPA – Who and What Falls Under FIPPA*.

⁴¹⁶ The Concise Oxford Dictionary, 9th Edition.

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If it is determined that harm to an applicant, public body or third party can reasonably be expected from the disclosure of information related to an investigation into the employment-related conduct of an employee, other exceptions to disclosure should also be considered. The exceptions include those in Sec. 17 – Privacy of a Third Party, Sec. 18 – Business Interests of Third Parties, clause 23(1)(d) re: management of personnel or Sec. 28 – Economic and Other Interests of a Public Body.

■ **Sec. 29.2: Related Provisions in FIPPA**

Subsection 1(1) (Definitions):	“applicant” “head” “public body” “third party”
Subsection 7(2)	Severing information
Subsection 12(1)	Contents of response
Sec. 17	Privacy of a third party
Clause 17(2)(a)	Personal health information of a third party
Clause 17(2)(h)	Personal recommendations or evaluations, character references or personnel evaluations
Clause 17(2)(h.1)	Identity of Third Party that Provided the Applicant’s Personal Information to Applicant’s Employer
Sec. 18	Business interests of third parties
Clause 23(1)(d)	Plans relating to the management of personnel
Sec. 28	Economic and Other Interests of a Public Body

CONFIDENTIAL EVALUATIONS ABOUT THE APPLICANT - [SEC. 30]

Summary of the Exception

The exception to disclosure in subsection 30(1) protects personal information about the applicant requesting access to a record under Part 2, when that information has been provided by someone else in confidence, for determining the applicant's suitability, eligibility or qualifications for employment or for awarding a contract.

Subsection 30(2) states that the exception does not apply to information that the public body is required to provide to the applicant under The Personal Investigations Act.⁴¹⁷

Subsection 30(1) is a discretionary exception to the right to access under Sec. 7 of the act.

The exception in subsection 30(1) is a class exception because it protects a type or kind of information.

■ **Scope of the Exception for Confidential Evaluations - [Sec. 30]**

Confidential evaluations about the applicant

30(1) *The head of a public body may refuse to disclose to an applicant personal information that has been provided in confidence, explicitly or implicitly, for purposes of determining the applicant's suitability, eligibility or qualifications for employment, or for the purpose of awarding a contract.*

Exception

30(2) *Subsection (1) does not apply to information that the public body is required to provide to the applicant under The*

⁴¹⁷ Subsection 30(2) was added to FIPPA by [The Freedom of Information and Protection of Privacy Amendment Act, S.M. 2008 c. 40](#).

EXCEPTIONS TO DISCLOSURE: SECTION 30

Personal Investigations Act.

The exception to disclosure in subsection 30(1) is a class exception because it protects a type or kind of information.

Subsection 30(2) sets out a limit to the exception, and clarifies the relationship between the exception to disclosure in subsection 30(1) and the provisions of [The Personal Investigations Act](#).

1. Scope of the exception

The exception to disclosure in subsection 30(1) gives the head of a public body the discretion to refuse to disclose information to an applicant under Part 2 of [FIPPA](#) if four conditions are met:

- (i) the information is personal information⁴¹⁸ about the applicant;
- (ii) the personal information has been provided explicitly or implicitly in confidence by someone other than the applicant

The exception only applies when the personal information has been provided to the public body; it does not apply to personal information created or generated by the public body.

Personal information is explicitly provided in confidence when the party providing it expressly requests or indicates that it is to be kept confidential. The intention to provide information in confidence can be stated in the record of the information itself, in an agreement or verbally. It is best to keep a written record of a verbal request to keep information confidential.

Personal information is implicitly provided in confidence when an intention or expectation that the information will be treated as confidential can be implied from the circumstances in which it was provided — for example, from the manner in which the

⁴¹⁸ The term personal information is defined in subsection 1 of [FIPPA](#) and is discussed in chapter 2, under *Key Definitions*.

EXCEPTIONS TO DISCLOSURE: SECTION 30

information is provided and received,⁴¹⁹ past practices followed for such information and stated policies.

- (iii) the personal information has been provided
- for determining the applicant's suitability, eligibility or qualifications for employment, or
 - for awarding a contract

Suitability means fitness for the purpose, appropriateness.⁴²⁰ Eligibility means fitness or entitlement.⁴²¹ Qualifications means accomplishments fitting a person for a position or purpose.⁴²²

A contract referred to in subsection 30(1) can be a contract for goods, for services or for both goods and services.

- (iii) the information requested is not information that the public body would be required to provide to the applicant under [The Personal Investigations Act](#) [subsection 30(2)]

Subsection 30(2) sets out a limit to the exception and clarifies the relationship between the exception to disclosure in subsection 30(1) and the provisions of [The Personal Investigations Act](#).

Legal counsel should be consulted about whether [The Personal Investigations Act](#) applies to the public body, and what personal information is available under it.

⁴¹⁹ Ontario Information and Privacy Commissioner [Order P-274](#) (Re Ministry of Correctional Services, Feb. 21, 1992) (made in the context of third party privacy).

⁴²⁰ The Concise Oxford Dictionary, 9th Edition.

⁴²¹ The Concise Oxford Dictionary, 9th Edition.

⁴²² The Concise Oxford Dictionary, 9th Edition.

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Subsection 12(1) **Contents of response**

Clause 17(2)(h) **Personal recommendations or evaluations, character references or personnel evaluations**

PRESERVATION OF HERITAGE RESOURCES AND LIFE FORMS - [SEC. 31]

Summary of the Exception

Sec. 31 contains two types of discretionary exceptions to disclosure:

1. Subsection 31(1) states that the head of a public body has the discretion to refuse to disclose information to an applicant requesting access to a record under Part 2, if the disclosure of information could reasonably be expected to result in damage to or interfere with the preservation, protection or conservation of a heritage resource, or any rare, endangered, threatened or vulnerable life form, including plants, vertebrates and invertebrates.

The exceptions in subsection 31(1) contain a reasonable expectation of harm test.

2. Subsection 31(2) states that the head of a public body has the discretion to refuse to disclose to an applicant requesting access to a record under Part 2, information related to a contemplated designation of a heritage site, a municipal heritage site or a heritage object.

The exception in subsection 31(2) is a class exception because it protects a type or kind of information.

Subsection 31 is a discretionary exception to the right to access under Sec. 7 of the act.

■ Scope of Exception: Disclosure Harmful to Preservation of Heritage Resources and Life Forms - [Subsection 31(1)]

*Disclosure harmful to preservation of heritage resources
and life forms*

*31(1) The head of a public body may refuse to disclose
information to an applicant if disclosure could reasonably be*

EXCEPTIONS TO DISCLOSURE: SECTION 31(2)

expected to result in damage to or interfere with the preservation, protection or conservation of

(a) a heritage resource as defined in The Heritage Resources Act; or

(b) any rare, endangered, threatened or vulnerable life form, including plants, vertebrates and invertebrates.

Subsection 31(1) states that the head of a public body may refuse to disclose information to an applicant for access under Part 2 if disclosure could reasonably be expected to:

- result in damage to a heritage resource as defined in [The Heritage Resources Act](#)
- result in damage to any rare, endangered, threatened or vulnerable life form, including plants, vertebrates and invertebrates
- interfere with the preservation, protection or conservation of a heritage resource
- interfere with the preservation, protection or conservation of any rare, endangered, threatened or vulnerable life form, including plants, vertebrates and invertebrates

1. Discretionary exceptions

Subsection 31(1) contains discretionary exceptions to the right to access under Sec. 7 of the act, because the head may refuse to disclose the requested information. This involves a two-step process. The head:

- must first determine whether an exception in subsection 31(1) applies to information in the requested record

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- must then consider whether it is appropriate to release the information, even though an exception in subsection 31(1) applies⁴²⁵

2. Reasonable expectation of harm

The exceptions in subsection 31(1) contain a reasonable expectation of harm test.⁴²⁶

The head of the public body must determine whether disclosure of the information could reasonably be expected to cause the harm described in subsection 31(1). The circumstances must be carefully assessed, and the determination must be based on objective grounds.

3. Severing - subsection 7(2)

The term information, rather than the term record, is used in subsection 31(1) to indicate that the exceptions apply to the information in a record and not necessarily to the whole record. Subsection 7(2) of [FIPPA](#) requires that, when an exception applies to some of the information in a record, only that information is severed, and the applicant is entitled to access the rest of the record, unless an exception in another section of [FIPPA](#) applies to it.⁴²⁷

4. Heritage resource - clause 31(1)(a)

A heritage resource is defined in Sec. 1 of [The Heritage Resources Act](#) of Manitoba:

“heritage resource” includes

- (a) a heritage site,
- (b) a heritage object, and

⁴²⁵ The requirements to be met when exercising a discretion are discussed earlier in this chapter, under *Exercising a Discretion*.

⁴²⁶ See *Reasonable Expectation of Harm* earlier in this chapter.

⁴²⁷ For a discussion of severing and subsection 7(2), see *The Exceptions Apply to Information in a Record - Severing* earlier in this chapter and *Severing a Record* in chapter 4.

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(c) *any work or assembly of works of nature or of human endeavour that is of value for its archaeological, palaeontological, pre-historic, historic, cultural, natural, scientific or aesthetic features, and may be in the form of sites or objects or a combination thereof;*

A heritage site is a site designated by the minister responsible for [The Heritage Resources Act](#) as a heritage site under Part 1 of that act.

A heritage object is defined in subsection 43(1) of [The Heritage Resources Act](#):

"heritage object" includes

- (a) *an archaeological object,*
- (b) *a palaeontological object,*
- (c) *a natural heritage object, and*
- (d) *an object designated as a heritage object by the Lieutenant Governor in Council under subsection (2);*

The terms archaeological object, paleontological object and natural heritage object are also defined in subsection 43(1) of [The Heritage Resources Act](#):

"archaeological object" means an object

- (a) *that is the product of human art, workmanship or use, including plant and animal remains that have been modified by or deposited due to human activities,*
- (b) *that is of value for its historic or archaeological significance, and*
- (c) *that is or has been discovered on or beneath land in Manitoba, or submerged or partially submerged beneath the surface of any watercourse or permanent body of water in Manitoba;*

"palaeontological object" means the remains or fossil or other object indicating the existence of extinct or prehistoric animals, but does not include human

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remains.

"natural heritage object" means a work of nature consisting of or containing evidence of flora or fauna or geological processes;

5. **Rare, endangered, threatened or vulnerable life form – clause 31(1)(b)**

A life form in clause 31(1)(b) includes plants, vertebrates and invertebrates.

A vertebrate is an animal that has a spinal column, such as a mammal, bird reptile, amphibian or fish.⁴²⁸

An invertebrate is an animal that does not have a spinal column, such as a crayfish, crab, insect, spider, mite, starfish or jellyfish.

Life form includes any other living organism that is neither plant, vertebrate nor invertebrate, but is in the classification of all living things, such as fungi.

Rare means seldom found or occurring, uncommon, unusual.⁴²⁹ A rare life form includes any life form that is in a special category because it does not occur in great abundance in nature, because it is not prolific or its population or range has been adversely affected by modern civilization.

Endangered means placed in danger.⁴³⁰ An endangered life form includes any life form that is threatened with imminent extinction throughout all or a significant portion of its natural range. Endangered species can be identified from the national endangered species list compiled by the Committee on the Status of Endangered Wildlife in Canada and can be designated as endangered by federal or provincial legislation.

⁴²⁸ The Concise Oxford Dictionary, 9th Edition.

⁴²⁹ The Concise Oxford Dictionary, 9th Edition.

⁴³⁰ The Concise Oxford Dictionary, 9th Edition.

EXCEPTIONS TO DISCLOSURE: SECTION 31(2)

Threatened, in the context of clause 31(1)(b), means likely to be injured; to be in danger.⁴³¹ A threatened life form includes any life form that is likely to become endangered if the factors affecting its vulnerability are not reversed. Threatened species can be identified from the national threatened species list compiled by the Committee on the Status of Endangered Wildlife in Canada and can be designated as threatened by federal or provincial legislation.

Vulnerable means, may be wounded or harmed.⁴³² A vulnerable life form includes any life form that is of concern because it is naturally scarce or likely to become threatened as a result of disclosure of information about it.

6. Result in damage to heritage resource or life form

Damage means harm or injury impairing the value or usefulness of something or the loss of what is desirable.⁴³³

In the context of subsection 31(1), damage includes destruction, deterioration or reduction in value of a heritage resource; harm to a habitat; impairing the health or safety of a population of a rare, endangered, threatened or vulnerable life form.

7. Interfere with preservation, protection or conservation of heritage resource or life form

To interfere with means to obstruct, to meddle, hinder or get in the way of something.⁴³⁴

Conservation means preservation, keeping safe from harm or damage, especially for future use.⁴³⁵ In the context of subsection 31(1), conservation is the safeguarding of a heritage resource or life form for the future by active physical preservation, legal protection or both.

⁴³¹ The Compact Edition of the Oxford English Dictionary.

⁴³² The Concise Oxford Dictionary, 9th Edition.

⁴³³ The Concise Oxford Dictionary, 9th Edition.

⁴³⁴ The Concise Oxford Dictionary, 9th Edition.

⁴³⁵ The Concise Oxford Dictionary, 9th Edition.

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Interference with conservation means any activity that might threaten the safety, integrity or continued existence of a heritage resource or of a rare, endangered, threatened or vulnerable life form.

■ **Scope of Exception: Contemplated Designation of Heritage Sites or Objects - [Subsection 31(2)]**

Information re designation of sites

31(2) *The head of a public body may refuse to disclose to an applicant information relating to a contemplated designation of a heritage site, a municipal heritage site or a heritage object under The Heritage Resources Act.*

1. Scope of the exception

The exception in subsection 31(2) is a class exception because it protects a type or kind of information — information related to a contemplated designation under [The Heritage Resources Act](#) of:

- a heritage site
- a municipal heritage site
- a heritage object

A contemplated designation is an intended designation;⁴³⁶ a designation that is being considered.

A heritage site is a site designated by the minister responsible for [The Heritage Resources Act](#) as a heritage site under Part I of that act.

A municipal heritage site is a site designated by a municipality, by a by-law, as a municipal heritage site under Part III of [The Heritage Resources Act](#).

A heritage object is defined in subsection 43(1) of [The Heritage Resources Act](#):

⁴³⁶ The Concise Oxford Dictionary, 9th Edition.

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"heritage object" includes
(a) an archaeological object,
(b) a palaeontological object,
(c) a natural heritage object, and
(d) an object designated as a heritage object by the
Lieutenant Governor in Council under subsection (2);

The terms archaeological object, palaeontological object and natural heritage object are also defined in subsection 43(1) of [The Heritage Resources Act](#) (see the discussion under subsection 31(1), above).

2. Discretionary exceptions

Subsection 31(2) contains a discretionary exception to the right to access under Sec. 7 of the act, because the head may refuse to disclose the requested information. This is a two-step process. The head:

- must first determine whether the exception in subsection 31(2) applies to information in the requested record
- must then consider whether it is appropriate to release the information, even though the exception in subsection 31(2) applies⁴³⁷

3. Severing - subsection 7(2)

The term information, rather than the term record, is used in subsection 31(2) to indicate that the exception applies to the information in a record and not necessarily to the whole record. Subsection 7(2) of [FIPPA](#) requires that, where an exception applies to some of the information in a record, only that information is severed, and the applicant is entitled to access the rest of the record, unless an exception in another section of [FIPPA](#) applies to it.⁴³⁸

⁴³⁷ See *Exercising a Discretion* earlier in this chapter.

⁴³⁸ For a discussion of severing and subsection 7(2) see *The Exceptions Apply to Information in a Record - Severing* earlier in this chapter and *Severing a Record* in chapter 4.

INFORMATION THAT WILL BE AVAILABLE TO THE PUBLIC - [SEC. 32]

Summary of the Exception

Subsection 32(1) gives the head the discretion to decide whether or not to withhold information that will be published or released within 60 days after the applicant's access request under Part 2 of [FIPPA](#) is received.

Despite subsection 32(1), subsection 32(1.1) gives the head the discretion to refuse an applicant's access request for information that will be made available to the public under Sec. 76.2. Sec. 76.2 requires the Executive Council and the Manitoba government to make orders in council, mandate letters, briefing materials for new ministers and briefing materials for a minister about a department's estimates, available to the public within specific time periods. Sec. 76.2 is discussed in chapter 3: *Administration of FIPPA*.

Clause 32(2)(a) requires the head to notify the applicant when the information to which access was refused under subsections 32(1) or 32(1.1) becomes available.

Clause 32(2)(b) states that, if the exception in subsection 32(1) or 32(1.1) is relied on and the information is not published or released within 60 days, the applicant's request must be treated as a new request received on the last day of the 60-day period. The head cannot rely on the exception in subsection 32(1) or 32(1.1) again when reconsidering the access request.

Subsections 32(1) and 32(1.1) contain a discretionary exception to the right to access under Sec. 7 of [FIPPA](#).

The exceptions in subsection 32(1) and 32(1.1) are class exceptions because they protect a type or kind of information.

■ **Scope of Exceptions: Information that will be Available to the Public - [Subsections 32(1), 32(1.1) and (2)]**

Information that will be available to the public

32(1) *The head of a public body may refuse to disclose to an applicant information that will be made available to the public within 60 days after the applicant's request is received.*

Exception

32(1.1) *Despite subsection (1), the head of a public body may refuse to disclose to an applicant information that will be made available to the public under Sec. 76.2.*

Notification when information becomes available

32(2) *When the head of a public body has refused to disclose information under subsection (1) or (1.1), the head shall*

(a) notify the applicant when the information becomes available

(b) if the information is not available to the public within 60 days after the applicant's request is received, reconsider the request as if it were a new request received on the last day of the 60-day period and not refuse access to the information under subsection (1).

1. Scope of the exceptions

The exceptions in subsection 32(1) and 32.(1.1) are class exceptions because they protect a type or kind of information.

There may be situations where a request is made under Part 2 of [FIPPA](#) for information that is about to be published or otherwise made available to the public.

To rely on the exception in subsection 32(1), the public body must intend to publish or make the information available to the public within 60 days from the date the applicant's request is received.

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To rely on the exception in subsection 32(1.1), the records to which access is being requested must be those identified under Sec. 76.2. Sec. 76.2 requires the Executive Council and the Manitoba government to make orders in council, mandate letters, table of contents and index of the package of briefing materials for new ministers, and briefing materials for a minister about a department's estimates, available to the public within specific time periods. Sec. 76.2 is discussed in chapter 3: Administration of FIPPA.

These exceptions only apply to the information being published or made available, and not to surrounding data, research and background materials. These other records, if requested by an applicant, will have to be dealt with under other provisions of [FIPPA](#).

If the head of a public body has refused to disclose information under subsection 32(1) or 32(1.1) because it is to be made available to the public, the head must notify the applicant once the information has become available [clause 32(2)(a)]. The head should also notify the applicant of where and how the information can be accessed and the cost of the information (if any).

If information requested and refused based on subsection 32(1) is not published or made available to the public within 60 days after the applicant's request under Part 2 of [FIPPA](#) is received, the head is required to reconsider the applicant's request as if it were a new request received on the 60th day. The head has 45 days to respond to the request, starting from the 60th day — unless there are grounds to extend this time period under Sec. 15 of [FIPPA](#) [Clause 32(2)(b)].

The head cannot rely on the exception in subsection 32(1) in reconsidering the access request. That is, subsection 32(1) can be used a second time as a basis for refusing to give the applicant access to the requested information [Clause 32(2)(b)].

2. Discretionary exceptions

Subsections 32(1) and 32(1.1) contain a discretionary exception to the right to access under Sec. 7 of the act, because the head may refuse to

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Subsection 7(2)	Severing information
Subsection 12(1)	Contents of response
Paragraph 17(4)(i)	Publicly available record containing personal information
Paragraph 18(3)(b)	Publicly available third party business information
Paragraph 20(3)(b)	Other government makes information it provided in confidence publicly available
Section 76	Records available without an application
Subsection 76.2(1)	Executive Council records
Subsection 76.2(2)	Ministerial records