Chapter 5

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Chapter 5 EXCEPTIONS TO DISCLOSURE

OVERVIEW

An **applicant** under Part 2 of FIPPA has a right of access to any **record** in the custody or under the control of a **public body**, including a **record** containing **personal information** about the **applicant**.

This right of access does not extend to:

- the limited types of **records** excluded from FIPPA by clauses 4(a) to 4(k);[1]
- information that is available to the public free of charge [subsection 6(2)][2];
- **records** or information specifically excluded from the access to information provisions of FIPPA by another Act or regulation;[3] or
- information in a **record** that falls within an exception to disclosure.

The exceptions to disclosure are in sections 17 to 32 of FIPPA. Each of these sections deals with a separate category of excepted or protected information. Generally, there are four mandatory exceptions to disclosure (Division 3, sections 17 to 20) and twelve discretionary exceptions to disclosure (Division 4, sections 21 to 32).

This Chapter covers the following general topics:

- the exceptions to disclosure generally apply to information in a **record**, not to a type of **record**, and severing;
- general approaches to interpreting the exceptions to disclosure;
- which exceptions contain limits;

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1 Section 4 is discussed in Chapter 2, under *Records That Do Not Fall Under FIPPA*.

2 Subsection 6(2) is discussed in Chapter 2, under *Records That Do Not Fall Under FIPPA*. This provision was added to FIPPA by *The Freedom of Information and Protection of Privacy Amendment Act*, S.M. 2008 c. 40. The amending Act can be found at: http://web2.gov.mb.ca/laws/statutes/2008/c04008e.php.

3 Subsection 5(2) and the statutes and regulations that prevail over FIPPA are discussed in Chapter 2, under *Records Excluded by Other Legislation* and under *Acts that Prevail Over FIPPA*.

- which exceptions protect **third parties**;
- the meaning of "mandatory exception";
- the meaning of "discretionary exception";
- exercising a discretion;
- what is a 'class exception'; and
- the "reasonable expectation of harm" test.

Then, each of the sixteen exception categories in sections 17 to 32 is analysed separately. In general the discussion of each section containing an exception category is broken down as follows:

- Summary of the exception(s) in the section;
- Scope of the exception(s) in the section;
- Limits on the exception(s) in the section;
- Related provisions in FIPPA.

References to the **head** of a **public body** in this Chapter include an Access and Privacy Officer to whom the **head** has delegated duties or powers under section 81 of FIPPA.

Appendix 1 is a *Glossary of Terms* that includes terms defined in subsection 1(1) of FIPPA, as well as some other terms used in FIPPA or in this Manual.

The discussion of the exceptions to disclosure in this Chapter is intended to be used in conjunction with the Act. The provisions of the Act should be referred to at all times.[4]

[4] In preparing this Chapter, in addition to resources cited in the footnotes, the following have been referred to:
The Government of Alberta Freedom of Information and Protection of Privacy Guidelines and Practices: http://www.foip.alberta.ca/resources/guidelinespractices/index.cfm
The Government of British Columbia Freedom of Information and Protection of Privacy Policy and Procedures Manual:. http://www.cio.gov.bc.ca/cio/priv_leg/manual/index.page.
The Government of Ontario Freedom of Information and Protection of Privacy Manual: http://www.accessandprivacy.gov.on.ca/english/manual/index.html
The 2005 Annotated Ontario Freedom of Information and Protection of Privacy Acts, by C. McNairn and C. Woodbury.

THE EXCEPTIONS APPLY TO INFORMATION IN A RECORD – SEVERING

The right of access to 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 sections 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 sections 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 to the remainder of the **record** (unless another exception to disclosure in FIPPA applies to it).[5]

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

[5] For a discussion of severing and subsection 7(2) see Chapter 4, under *Severing a Record*.

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 sections 17 to 32.[6]

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 of access to **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.[7]

- Generally, the **public body** bears 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.[8]

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6 To determine what records do not fall under FIPPA, see sections 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.

7 *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.

8 See, for example, sections 66.7 and 70 of FIPPA. Complaints under FIPPA, and the role of the Ombudsman, the Information and Privacy Adjudicator and the courts, are discussed in Chapter 8 of this Manual.

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 section 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:

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

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".[9] An "organization" is "an organized body, especially a business, charity, etc."[10] For example, a trade union is an "organization".

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

Section 17	Privacy of a Third Party
Section 18	Business Interests of Third Parties
Section 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)	Solicitor-client privilege of person other than the public body
Section 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 where an **applicant** has applied for access to a **record** containing **personal information** about himself or herself, 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 **public bodies**. Other exceptions to disclosure in FIPPA protect sensitive information from or about other **public bodies** (for example, sections 20, 21 and 28).

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9 *The Interpretation Act* of Manitoba, section 17 and the Schedule of Definitions. *The Interpretation Act*, C.C.S.M. c. I80 can be found at: http://web2.gov.mb.ca/laws/statutes/ccsm/i080e.php.

10 The Concise Oxford Dictionary, 9th edition.

Section 33 of FIPPA provides that the **head** of a **public body** must, where practicable, notify a **third party** in writing if the **head** is considering giving access to a **record** the disclosure of which might result in an "unreasonable invasion" of the **third party's** privacy under section 17 or affect a **third party's** business interests described in subsection 18(1) or 18(2). Sections 33 and 34 further provide that the **third party** has a right to make representations respecting the proposed disclosure.[11]

[11] Sections 33 and 34 and third party notice and intervention are discussed in Chapter 4, under *Third Party Notice and Intervention*.

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 access **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:

Section 17	Privacy of a Third Party
Section 18	Business Interests of Third Parties
Section 19	Cabinet Confidences
Section 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)	Solicitor-client 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 or not some or all of the information in the requested **record** falls within the discretionary exception provision.

2. Then, the **head** must determine whether or not to disclose the information, even though the exception could be relied upon as a basis for refusing access – that is, the **head** must 'exercise' his or her 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 or not 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.[12]

The exercise of 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 or not to exercise the discretion to disclose information with respect to 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 his or her discretion, the **head** must "have regard to all relevant considerations" and to the spirit and purposes of FIPPA.[13]

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 the **head** has properly exercised his or her discretion.[14] But, the Adjudicator or the **court** can require that discretion be exercised where there is evidence this has not been done.[15]

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

13 The underlying principles and the purposes of FIPPA are discussed in Chapter 1 of this Manual.

14 Subsection 66.8(4) and subsection 73(2) of FIPPA.

15 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 or not 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**.

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 that would result to 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]"; etc.

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 application for access, 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 alleged[16] and the expectation of harm must be reasonable.

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[16] Ontario Information and Privacy Commissioner Order M-202, (Re Metropolitan Toronto Police Services Board, Oct. 15, 1993): http://www.ipc.on.ca/images/Findings/Attached_PDF/M-202.pdf.
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.

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.[17]

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.[18] 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.[19]

Evidence of 'reasonable expectation of harm' is not required to be detailed and convincing; there need only be evidence of a reasonable expectation of probable harm, which of necessity involves some speculation.[20]

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**.[21]

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17 Ontario Information and Privacy Commissioner Order P-203 (Re Stadium Corp. of Ontario, Nov. 5, 1990): http://ipc.on.ca/images/Findings/Attached_PDF/P-203.pdf.

18 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): http://www.ipc.on.ca/images/Findings/Attached_PDF/P-557.pdf. http://ipc.on.ca/images/Findings/Attached_PDF/P-203.pdf.

19 Ontario Information and Privacy Commissioner Order P-557 (Re Ministry of Agriculture & Food, Oct. 20, 1993: http://www.ipc.on.ca/images/Findings/Attached_PDF/P-557.pdf.

20 Ontario Workers' Compensation Board v. Ontario Assistant Information and Privacy Commissioner [1995], O.J. No. 1319 (Ont. Divisional Court): http://www.accessandprivacy.gov.on.ca/english/jr/p373div.htm. This case was reversed by Ontario (Workers' Compensation Board) v. Ontario (Assistant Information & Privacy Commissioner), [1998] O.J. No. 3485 on other grounds.

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

PRIVACY OF A THIRD PARTY - [SECTION 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 access **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 of access under section 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 access **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, section 17 requires a three step process:

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

Subsection 17(2) lists types of **personal information** that are so sensitive that disclosure of this information is "deemed" to be 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.

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 access **applicant** would be an "unreasonable invasion of privacy, the **head** of the **public body** must consider all the relevant circumstances, including, but not limited to, 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 section 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.

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) provides 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. [22]

[22] Subsection 12(2) is discussed in Chapter 4, under *Refusal to Confirm or Deny the Existence of a Record*.

Section 33 of FIPPA provides that the **head** of a **public body** must, where practicable, notify a **third party** in writing if the **head** is considering giving access to a **record** the disclosure of which might result in an "unreasonable invasion" of the **third party's** privacy under section 17. Sections 33 and 34 further provide that the **third party** has a right to make representations the proposed disclosure.[23]

[23] Sections 33 and 34, and third party notice and intervention, are discussed in Chapter 4, under *Third Party Notice and Intervention*.

■ 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.

Section 17 is a cornerstone provision of FIPPA. It balances the public's right of access to **records** in the custody or under the control of a **public body** and an individual's right of privacy with respect to his or her **personal information**. Section 17 protects privacy by providing a mandatory exception to the right of access under Part 2 for **personal information** about a **third party**.

The scope of the exception is set out in subsection 17(1), which provides 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….".[24] 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).

[24] See the discussion of the definition "personal information" in Chapter 2, under *Key Definitions*.

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 section 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 sections 20, 21, 28, etc.).

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 himself or herself, or is authorized to make such a request on behalf of another individual under section 79[25] of FIPPA, section 17 does not apply.

Where a relative of a deceased individual requests **personal information** about the deceased individual, he or she should be encouraged to make the request under clause 44(1)(z) of Part 3 of FIPPA, rather than under Part 2.[26]

Note: Section 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 application for access under Part 2 is not required.[27]

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[25] Section 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*.

[26] Under clause 44(1)(z) in Part 3 of FIPPA, a public body may 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 this information under subsection 59(4). Clause 44(1)(z) is discussed in Chapter 6 of this Manual.

[27] Sections 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*.

3. Requests for personal health information

Meaning of **personal health information**

Personal health information is defined in subsection 1(1) of FIPPA:[28]

> **"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*.

Request for one's own personal health information

If an individual requests **personal health information** about himself or herself, that request must be handled under *The Personal Health Information Act*, not under FIPPA,[29] and a refusal to give the individual access to his or her **personal health information** must be based on the reasons set out in section 11 of *The Personal Health Information Act*.

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[28] 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. *The Personal Health Information Act*, C.C.S.M. c. P33.5, can be found at: http://web2.gov.mb.ca/laws/statutes/ccsm/p033-5e.php.

[29] Section 6 of FIPPA.

If the individual has requested **personal health information** about himself or herself 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 Mental Health Act*.[30]

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 he or she is authorized to act on behalf of the individual the information is about under section 60 of *The Personal Health Information Act*, the **public body** must deal with the request under *The Personal Health Information Act*.[31]

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*.[32]

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*.[33]

If a person requests **personal health information** about someone else, and the **public body** is authorized to disclose the requested **personal health information** under Part 3 of *The Personal Health Information Act* the **public body** should deal with the request under Part 3 of *The Personal Health Information Act*.

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30 Section 5 and subsection 6(1) of FIPPA and subsection 4(3) of *The Personal Health Information Act*. *The Mental Health Act*, C.C.S.M. c. M110, can be found at: http://web2.gov.mb.ca/laws/statutes/ccsm/m110e.php.

31 Section 60 of *The Personal Health Information Act* is similar to section 79 of FIPPA. Section 79 of FIPPA is discussed in Chapter 3, under *Exercising Rights on Behalf of Another*.

32 Section 5 of FIPPA and subsection 4(3) of *The Personal Health Information Act*.

33 Section 5 of FIPPA and subsection 4(3) of *The Personal Health Information Act*.

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 as disclosure of **personal health information** about someone else is deemed to be an unreasonable invasion of privacy under subsection 17(2) of FIPPA.

Request for personal health information about a deceased individual

Where a relative requests **personal health information** about a deceased individual, he or she should make the request under clause 22(2)(d) of *The Personal Health Information Act*, not under FIPPA,[34] 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.[35]

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 to the remainder of the information in the **record** (unless an

[34] Section 5 of FIPPA and clause 22(2)(d) of *The Personal Health Information Act*.

[35] Section 5 of FIPPA and *The Mental Health Act*.

exception to disclosure in another section of FIPPA applies to it).[36]

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).

[36] For a discussion of severing and subsection 7(2) see earlier in this Chapter, under *The Exceptions Apply to Information in a Recor*d – *Severing* and Chapter 4, under *Severing a Record*.

■ 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.

■ 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:[37]

"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;

[37] 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*. *The Personal Health Information Act*, C.C.S.M. c. P33.5, can be found at: http://web2.gov.mb.ca/laws/statutes/ccsm/p033-5e.php.

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*.[38]
>
> "Health" and "health care" are defined in subsection 1(1) of *The Personal Health Information Act* 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, 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 **personal health 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*.[39]

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[38] Subsection 1(2) was added to FIPPA by *The Freedom of Information and Protection of Privacy Amendment Act*, S.M. 2008 c. 40. The amending Act can be found at: http://web2.gov.mb.ca/laws/statutes/2008/c04008e.php.

[39] Section 5 of FIPPA and subsection 4(3) of *The Personal Health Information Act*. *The Mental Health Act*, C.C.S.M. c. M110, can be found at: http://web2.gov.mb.ca/laws/statutes/ccsm/m110e.php.

- If a person requests access to **personal health information** about someone else and he or she is authorized to act on behalf of the individual the information is about under section 60 of *The Personal Health Information Act*, the request must be dealt with under *The Personal Health Information Act*,[40] except where the information is in a clinical record compiled in a psychiatric facility.

- 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*.[41]

- 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 *The Personal Health Information Act*, the **public body** should deal with the request under Part 3 of *The Personal Health Information Act*.

- If a relative requests **personal health information** about a deceased individual, he or she should make the request under clause 22(2)(d) of *The Personal Health Information Act*, not under FIPPA[42], 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*.[43]

- If an individual makes an application for **personal health information** about himself or herself, clause 17(2)(a) does not apply; the application must be handled under *The Personal Health Information Act* or, in the case of a clinical record compiled and maintained in a psychiatric facility, under *The Mental Health Act*.[44]

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[40] Section 60 of The Personal Health Information Act is similar to section 79 of FIPPA. Section 79 of FIPPA is discussed in Chapter 3, under *Exercising Rights on Behalf of Another*.

[41] Section 5 of FIPPA and subsection 4(3) of *The Personal Health Information Act*.

[42] Section 5 of FIPPA and clause 22(2)(d) of *The Personal Health Information Act*.

[43] Section 5 of FIPPA and *The Mental Health Act*.

[44] Section 6 of FIPPA, subsection 4(3) of *The Personal Health Information Act* and *The Mental Health Act*.

■ 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.[45]

An "investigation" is a systematic inquiry or search.[46] 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.[47] 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.[48]

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45 The Concise Oxford Dictionary, 9th Edition.

46 The Concise Oxford Dictionary, 9th Edition.

47 Ontario Information and Privacy Commissioner Order P-892 (Re Ministry of the Solicitor General & Correctional Services, March 22, 1995): http://www.ipc.on.ca/images/Findings/Attached_PDF/P-892.pdf

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

Clause 17(2)(b) continues to apply if charges are not laid[49] or are withdrawn.[50]

Section 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 section 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 respecting the convictions or criminal history of a **third party** would not fall within clause 17(2)(b). Where 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.

[49] Ontario Information and Privacy Commissioner Order P-223 (Re Ministry of Community & Social Services, March 1, 1991). http://ipc.on.ca/images/Findings/Attached_PDF/P-223.pdf.

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

■ 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 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 where 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,[51] past practices followed with respect to 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.[52]

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[51] Ontario Information and Privacy Commissioner Order P-274 (Re Ministry of Correctional Services, Feb. 21, 1992): http://www.ipc.on.ca/images/Findings/Attached_PDF/P-274.pdf.

[52] Ontario Information and Privacy Commissioner Order P-309 (Re Ministry of Consumer &

*(iii) The information must have been provided for a purpose related to **law enforcement** or the administration of an **enactment**.*[53]

"**Law enforcement"** is defined in subsection 1 of FIPPA:[54]

> "**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**;

An **"enactment"** is defined in section 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.[55]

Commercial Relations; June 8, 1992): http://www.ipc.on.ca/images/Findings/Attached_PDF/P-309.pdf.

53 *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*).

54 The definition "law enforcement" is discussed in Chapter 2, under *Key Definitions*.

55 The Concise Oxford Dictionary, 9th Edition.

*(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 (but not limited to) name, address and identifying characteristics, must not be disclosed.

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

- his or her name, address or other identifying characteristics are disclosed;
- the information disclosed would permit accurate inferences to be drawn about the identity of the individual;[56] or
- the information disclosed could be combined with other information to reveal the individual's identity.

As 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 respecting **law enforcement** or the administration of an **enactment**.

[56] 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): http://ipc.on.ca/images/Findings/Attached_PDF/P-226.pdf .

■ 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.[57]

"Income assistance" means any monetary benefits provided by the federal, 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.

[57] The Concise Oxford Dictionary, 9th Edition.

■ 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, reasons for leaving employment, etc.

"Occupational history" refers to information about an individual's profession, business or calling, and can include accomplishments and how an individual spent his or her 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, etc.

Example:

In a **complaint** about a refusal of access to a "current list of names of all 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.[58]

[58] Manitoba Ombudsman Report under FIPPA re Case 2009-0754 (Manitoba Labour and Immigration, October 4, 2010).

■ 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"[59] 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 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.

[59] The Concise Oxford Dictionary, 9th Edition.

Note: Clause 17(2)(f) only applies to tax information of individuals. Subsection 18(2) contains a similar exception to disclosure respecting 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.[60]

"Financial circumstances" refers to the monetary resources of an individual[61] and includes information about the individual's creditworthiness or credit rating.

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

60 The Concise Oxford Dictionary, 9th Edition.

61 The Concise Oxford Dictionary, 9th Edition.

■ 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: 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.

"Ethnic origin" refers to a common national or cultural tradition.[62]

The terms used in this clause are similar to the terms used in the Manitoba *Human Rights Code*.[63]

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

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62 The Concise Oxford Dictionary, 9th Edition.

63 *The Manitoba Human Rights Code*, C.C.S.M. c. H175, can be found at: http://web2.gov.mb.ca/laws/statutes/ccsm/h175e.php.

■ 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 access **applicant** would be an "unreasonable invasion of privacy, the **head** of the **public body** must consider all the relevant circumstances, including, but not limited to, 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:

- 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, court order, etc.).

EXCEPTIONS TO DISCLOSURE: SUBSECTION 17(3)

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.

Note: 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;

This consideration favours disclosure to the access **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.

In order 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 sufficient for one person to have formed the subjective opinion that scrutiny is necessary.[64]

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

[64] Ontario Information and Privacy Commissioner Order P-347 (Re Ministry of Consumer & Commercial Relations, Aug. 28, 1992). http://ipc.on.ca/images/Findings/Attached_PDF/P-347.pdf.

■ 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 access **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 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.[65] 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.[66]

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

[65] The Concise Oxford Dictionary, 9th Edition.

[66] The Concise Oxford Dictionary, 9th edition.

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 Part 3 of FIPPA without the need for a request under Part 2.[67]

Similarly, under clause 22(2)(b) of *The Personal Health Information Act,* a trustee of **personal health information**, including a **public body,** may disclose **personal health information** to any person if the trustee reasonably believes that 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; or

- to prevent or lessen a serious and immediate threat to public health or public safety.[68]

[67] Clause 44(1)(l) is discussed in Chapter 6, under *Disclosure of Personal Information*.

[68] *The Personal Health Information Act*, C.C.S.M. c. P33.5, can be found at: http://web2.gov.mb.ca/laws/statutes/ccsm/p033-5e.php.

■ 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 access **applicant**.

There may be situations when an **applicant** requires access to **personal information** about someone else to assist in determining his or her 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; and
- the **applicant** requires access to the **personal information** to prepare for the proceeding or to ensure an impartial hearing.[69]

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

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,[70] without justification. "Harm" means hurt or damage,[71] and can include harassment.[72]

[70] The Concise Oxford Dictionary, 9th Edition.

[71] The Concise Oxford Dictionary, 9th Edition.

[72] Order P-213, Ontario Information and Privacy Commissioner (Re Ministry of Natural Resources, Jan. 16, 1991). http://www.ipc.on.ca/images/Findings/Attached_PDF/P-213.pdf.

■ 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 manner in which the information is provided and received,[73] 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 **personal information** that the information will remain confidential.[74]

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[73] Ontario Information and Privacy Commissioner Order P-274 (Re Ministry of Correctional Services, Feb. 21, 1992). http://www.ipc.on.ca/images/Findings/Attached_PDF/P-274.pdf.

[74] Ontario Information and Privacy Commissioner Order P-309 (Re Ministry of Consumer & Commercial Relations; June 8, 1992). http://www.ipc.on.ca/images/Findings/Attached_PDF/P-309.pdf.

■ 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.

In order 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 sufficient that release might cause minor embarrassment.[75]

Examples of "highly sensitive" **personal information** include:

- information that a person has unsuccessfully applied for an employment position or appointment;[76]
- information outlining disciplinary action taken against an employee;[77]
- information contained in an individual's criminal record;[78]
- **personal information** may be considered "highly sensitive" if it is intended to

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

[76] Ontario Information and Privacy Commissioner Order 170 (Re Ministry of the Attorney General, May 25, 1990):
Decision: http://www.ipc.on.ca/images/Findings/Attached_PDF/P-170.pdf

[77] Ontario Information and Privacy Commissioner Order P-357 (Re Ministry of Services, Oct. 9, 1992): http://www.ipc.on.ca/images/Findings/Attached_PDF/P-357.pdf.

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

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.[79]

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

■ 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.[80]

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.

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.[81]

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80 The Concise Oxford Dictionary, 9th Edition.

81 Ontario Information and Privacy Commissioner Order P-151, (Re Ministry of Culture & Communications, Feb. 26, 1990). http://ipc.on.ca/images/Findings/Attached_PDF/P-151.pdf.

Could also mention PO-1731 of The Ontario Information and Privacy Commissioner (re Ministry of Community and Social Services, Nov 19, 1999) http://www.ipc.on.ca/images/Findings/Attached_PDF/Po-1731.pdf.

■ 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,[82] 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.[83]

82 The Concise Oxford Dictionary, 9th Edition.

83 The Concise Oxford Dictionary, 9th Edition.

■ 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.

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 respecting **third party** privacy in section 17. But, another exception to disclosure in sections 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 section 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 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 persons who are authorized to act on behalf of the individual the information is about under section 79 of FIPPA.[84]

[84] Section 79 is discussed in Chapter 3, under *Exercising Rights on Behalf of Another*.

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 or not 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 an application made under Part 2 of FIPPA in compelling circumstances affecting the mental or physical health or safety of the **applicant** or any other person.

A circumstance is "compelling" if there is an emergency and disclosure of the **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.[85]

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) due to 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 section 33 of FIPPA. Section 33 requires prior notice to be given "where practicable".[86] Legal counsel should be consulted if there is any question as to whether prior notice should be given to the **third party**.

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85 The Concise Oxford Dictionary, 9th edition.

86 Sections 33 and 34 are discussed in Chapter 4, under *Third Party Notice and Intervention*.

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.[87]

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 *The Personal Health Information Act*.

[87] Clause 44(1)(l) is discussed in Chapter 6, under *Disclosure of Personal Information*.

■ 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 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, etc.

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.[88] "Expressly" means definitely stated, not merely implied.[89] For disclosure to be "expressly" authorized or required by an **enactment**, the authority or requirement in the statute or regulation must be clear and explicit[90] and must be specific to the type of **personal information** concerned.

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88 Ontario Information and Privacy Commissioner Order M-484 (Re East York Health Unit, March 9, 1995). http://www.ipc.on.ca/images/Findings/Attached_PDF/M-484.pdf.

89 The Concise Oxford Dictionary, 9th edition.

90 Ontario Information and Privacy Commissioner Order P-867 (Re Ministry of Health, Feb. 17, 1995). http://www.ipc.on.ca/images/Findings/Attached_PDF/P-867.pdf.

■ 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, sources, etc. in order to establish facts and reach new conclusions and an endeavour to discover new or to collate old facts, etc. by scientific study or by a course of critical investigation.[91]

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 section 47 of FIPPA, which are designed to protect the privacy rights of research subjects.[92]

A request for **personal health information** by a researcher conducting a health research project must be dealt with under section 24 of *The Personal Health Information Act*, not under FIPPA.[93]

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91 Ontario Information and Privacy Commissioner Order P-666 (Re Ministry of Health, April 27, 1994). http://www.ipc.on.ca/images/Findings/Attached_PDF/P-666.pdf.

92 Section 47 is discussed in Chapter 6, under *Disclosure for Research Purposes*.

93 Section 35 of FIPPA.

■ 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 travel 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, treasurer, etc.[94] An "officer" can include the position of a corporation director[95], a sovereign's minister and an appointed or elected functionary.[96]

94 Black's Law Dictionary, 6th Edition.

95 The Dictionary of Canadian Law.

96 The Concise Oxford Dictionary, 9th Edition.

"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**.

"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" includes 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.[97]

"Travel 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: Section 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

(a) transportation;
(b) accommodation and meals;
(c) promotion and hospitality; and
(d) cell phone and personal electronic communications devices.[98]

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97 Order M-23, Ontario Information and Privacy Commissioner (Re Town of Gravenhurst, July 3, 1992). http://www.ipc.on.ca/images/Findings/Attached_PDF/M-23.pdf.

98 Section 76.1 was added to FIPPA by *The Freedom of Information and Protection of Privacy Amendment Act*, S.M. 2008 c. 40. The amending Act can be found at: http://web2.gov.mb.ca/laws/statutes/2008/c04008e.php.

■ 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 respecting 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 section 18 (Business Interests of **Third Parties**).

Similar or additional information respecting **public body** contracts may also be available under other legislation - for example, section 80 of *The Financial Administration Act* requires disclosure of specified information respecting untendered government contracts of more than $1000.00.

■ 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 clause17(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 section 18 (Business Interests of **Third Parties**).

■ Disclosure Not Unreasonable: Individual Dead more than 10 Years - [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 more than 10 years;

This provision puts a time limit on the protection of an individual's privacy after his or her 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).

Where a relative requests **personal information** about a deceased individual, he or she should be encouraged to make the request under clause 44(1)(z) of Part 3 of FIPPA.[99]

Where a relative requests **personal health information** about a deceased individual, he or she should make the request under Part 3 of *The Personal Health Information Act*, not under FIPPA,[100] unless the information is in a clinical record compiled and maintained in a psychiatric facility.

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[99] 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*.

[100] Section 5 of FIPPA and clause 22(2)(d) of *The Personal Health Information Act*. *The Personal Health Information Act*, C.C.S.M. c. P33.5, can be found at: http://web2.gov.mb.ca/laws/statutes/ccsm/p033-5e.php.

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 dealt with under *The Mental Health Act*, whether the request is by a relative or by another person.[101]

[101] Section 5 of FIPPA and subsection 4(3) of *The Personal Health Information Act*. *The Mental Health Act*, C.C.S.M. c. M110, can be found at: http://web2.gov.mb.ca/laws/statutes/ccsm/m110e.php.

■ 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.

■ 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.

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 section 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 invasion of the **third party's** privacy.[102]

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 his or her discretion to refuse to confirm or deny the existence of the **record** under clause 12(2)(b).

[102] Subsection 12(2) is discussed in Chapter 4, under *Refusal to Confirm or Deny Existence of Record*.

■ Third Party Notice and Consultations - [Clause 12(2)(b)]

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 section 17, the **head** must, "where practicable", give written notice to the **third party** before disclosing the **personal information** and the **third party** must be given an opportunity to make representations to the **head** about the proposed disclosure.[103]

2. Informal consultations with third party may be advisable

The notice requirement and intervention process in sections 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 unreasonable invasion of the **third party's** privacy may want to consult with the affected **third party**).

[103] Sections 33 and 34 are discussed in Chapter 4, under *Third Party Notice and Intervention*. Sections 33 and 34 give a third party who may be affected by a proposed disclosure of information about himself or herself the right to receive notice, to make representations to the head of a public body and to complain to the Ombudsman.

■ Section 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"**
Section 5	**Relationship to other Acts**
Section 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**
Section 18	**Business interests of third parties**
Subsection 18(2)	**Third party tax information**
Section 24	**Disclosure harmful to individual or public safety**
Section 25	**Law enforcement and legal proceedings**
Section 30	**Confidential evaluations**
Sections 33 and 34	**Third party intervention**
Section 39	**Correction of personal information**
Section 44	**Disclosure of personal information**
Section 47	**Disclosure of personal information for research purposes**
Section 48	**Disclosure of records more than 100 years old**

BUSINESS INTERESTS OF A THIRD PARTY - [SECTION 18]

Summary of Exception

Subsections 18(1) and 18(2) provide 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 of access under section 7 of FIPPA.

Clauses 18(1)(a) and (b), paragraph 18(1)(c)(v) and subsection 18(2) are 'class exceptions' as 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".

Section 33 provides that the **head** must, where practicable, 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). Sections 33 and 34 further provide that the **third party** has a right to make representations respecting the proposed disclosure.[104]

[104] Sections 33 and 34 are discussed in Chapter 4, under *Third Party Notice and Intervention*.

■ 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 specified 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 also includes "a corporation and the heirs, executors, administrators or other legal representatives of a person".[105] An "organization" is "an organized body, especially a business, charity, etc."[106] 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 FIPPA, such as the exceptions in sections 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).

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[105] *The Interpretation Act* of Manitoba, section 17 and the Schedule of Definitions. *The Interpretation Act*, C.C.S.M. c. I80, can be found at: http://web2.gov.mb.ca/laws/statutes/ccsm/i080e.php.

[106] The Concise Oxford Dictionary, 9th edition.

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).[107]

[107] 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.

■ 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) sets 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.

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;[108] or
- the information disclosed could be combined with other information to reveal the protected information.

[108] 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). http://ipc.on.ca/images/Findings/Attached_PDF/P-226.pdf

■ 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

The exception to disclosure in clause 18(1)(a) applies even if the information respecting 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 which is kept private for the purpose of 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); and specialized compilations of information that, in sum, are not publicly known and have unique value on that account.[109]

In summary:

> "trade secret" means information including but not limited to a formula, pattern, compilation, programme, method, technique or 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.[110]

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 respecting the information.

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109 *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. http://www.law.ualberta.ca/alri/docs/fr46.pdf

110 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. http://www.ipc.on.ca/images/Findings/Attached_PDF/M-29.pdf

■ 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 consistently as confidential information by the **third party**;[111] 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 or not 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,[112] with the buying, selling or exchange of merchandise or services.[113] Examples include price lists, lists of suppliers and customers,

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111 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.

112 Order P-179, Ontario Information and Privacy Commissioner (Re Ministry of Health, June 20, 1990) http://www.ipc.on.ca/images/Findings/Attached_PDF/P-179.pdf.

113 Ontario Information and Privacy Commissioner Order P-493 (Re Ministry of Municipal Affairs, July

market research surveys and other similar information relating to the commercial operation of a business.[114] The term “commercial information” can apply to both profit-making enterprises and non-profit enterprises.[115]

"Financial information" is information relating to finance - money and the monetary resources of a person, company, etc.[116] Examples include information on pricing practices, profit and loss data, overhead and operating expenses.[117]

“Labour relations information” means information respecting the “relations between management and labour, especially as involved in collective bargaining and maintenance of contract”.[118]

"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.[119]

"Technical information" usually refers to information of, involving or concerned with the mechanical arts and applied sciences.[120] 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.[121]

9, 1993). http://ipc.on.ca/images/Findings/Attached_PDF/P-493.pdf.

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

115 Ontario Information and Privacy Commissioner Order P-493 (Re Ministry of Municipal Affairs, July 9, 1993). http://ipc.on.ca/images/Findings/Attached_PDF/P-493.pdf.

116 The Concise Oxford Dictionary, 9th Edition.

117 Ontario Information and Privacy Commissioner Order P-80 (Re Ministry of Health, July 26, 1989).

118 Webster’s Third New International Dictionary, definition adopted in Ontario Information and Privacy Commissioner Order P-715 (Re Ministry of Community & Social Services, June 28, 1994).

119 Ontario Information and Privacy Commissioner Order P-454 (Re Ontario Native Affairs Secretariat, May 7, 1993). http://ipc.on.ca/images/Findings/Attached_PDF/P-454.pdf.

120 The Concise Oxford Dictionary, 9th Edition.

121 Ontario Information and Privacy Commissioner Order P-444 (Re Ministry of Health, April 2, 1993).

(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 furnished[122] 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,[123] 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.[124]

There is no requirement under clause 18(1)(b) that the information supplied be confidential in any objective sense.[125]

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122 The Concise Oxford Dictionary, 9th Edition.

123 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): http://www.ipc.on.ca/images/Findings/Attached_PDF/P-274.pdf .

124 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). http://www.ipc.on.ca/images/Findings/Attached_PDF/P-309.pdf.

125 *Oakley v. Manitoba (Minister of Health)* (1995), 101 Man. R. (2d) 98 (Manitoba Court of Queen's Bench) at page 102.

*(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 information".[126]

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 disclosure of the information.

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

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.[127] 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 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.[128]

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.

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[127] See *Reasonable Expectation of Harm*, earlier in this Chapter.

[128] The Concise Oxford Dictionary, 9th Edition.

■ 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.[129] 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)(ii). The individual circumstances of each 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.

To "interfere with" means to obstruct, to meddle with, hinder or get in the way of contractual or other negotiations of a **third party**.[130]

To "negotiate" means to confer with others in order to reach a compromise or agreement.[131] "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, negotiations relating to the settlement of a lawsuit or a dispute, etc.

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[129] See *Reasonable Expectation of Harm*, earlier in this Chapter.

[130] The Concise Oxford Dictionary, 9th Edition.

[131] The Concise Oxford Dictionary, 9th edition.

■ 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.[132] 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)(iii). The individual circumstances of each 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.

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, loss of goodwill).

[132] See *Reasonable Expectation of Harm*, earlier in this Chapter.

■ 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.[133] 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 determination must be based on objective grounds.

"Supplied" means provided or furnished to the **public body**.[134]

"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.

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133 See *Reasonable Expectation of Harm*, earlier in this Chapter.

134 The Concise Oxford Dictionary, 9th edition.

■ 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' as it protects a type or kind of information.

The term "reveal" is 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 furnished[135] 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, conduct, etc.[136]

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.

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135 The Concise Oxford Dictionary, 9th Edition.

136 The Concise Oxford Dictionary, 9th Edition.

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.[137]

A "mediator" is a person who interposes between parties at variance for the purpose of reconciling them.[138]

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**).

[137] Black's Law Dictionary, 6th Edition.

[138] Black's Law Dictionary, 6th Edition.

■ 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.

Three types of **third party** tax information are covered by this mandatory 'class' exception:

(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 businesses"[139] and includes provincial, municipal or federal taxes. The term "tax" does not usually 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 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.

[139] The Concise Oxford Dictionary, 9th Edition.

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 business which collects retail sales tax on behalf of the government.[140]

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).

[140] Order P-553, Ontario Information and Privacy Commissioner (Re Ministry of Finance, Oct. 14, 1993): http://www.ipc.on.ca/images/Findings/Attached_PDF/P-553.pdf.

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 section 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 section 18 of FIPPA is to protect the business interests of **third parties**, not the interests of the **public body** which 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**).

■ 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 respecting 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 **record** 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, by a minister of the government of Manitoba or Canada, etc.

"Expressly" means definitely stated, not merely implied.[141] 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** 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 disclosure is required.

[141] The Concise Oxford Dictionary, 9th Edition.

■ 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 respecting 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 such 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 end, coming last; conclusive, decisive, unalterable, putting an end to doubt.[142]

The testing can be 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.[143]

"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.[144]

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142 The Concise Oxford Dictionary, 9th Edition.

143 The Concise Oxford Dictionary, 9th Edition.

144 The Concise Oxford Dictionary, 9th Edition.

■ 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 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 section 17.

"Safety" means the condition of being safe; freedom from danger or risks.[145] 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.[146]

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145 The Concise Oxford Dictionary, 9th Edition.

146 The Concise Oxford Dictionary, 9th Edition.

The **head** of the **public body** must be of the opinion 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.[147]

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 practicable, provide written notice to the **third party** under section 33 of FIPPA.[148]

[147] The Concise Oxford Dictionary, 9th Edition.

[148] Sections 33 and 34 are discussed in Chapter 4, under *Third Party Notice and Intervention*.

■ Third Party Notice and Intervention - [Sections 33 and 34]

1. Legal requirement to provide notice

Where 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 practicable", give written notice to the **third party** and the **third party** must be given an opportunity to make representations to the **head** about the proposed disclosure.[149]

Similarly, if the **head** of a **public body** intends to disclose information respecting 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 sections 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 or not 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 or not 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.

[149] Sections 33 and 34 are discussed in Chapter 4, under *Third Party Notice and Intervention*. Sections 33 and 34 give a third party who may be affected by a proposed disclosure of business information about himself or herself the right to receive notice, to make representations to the head of a public body and to complain to the Ombudsman.

■ Section 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**
Section 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**
Sections 33 and 34	**Third party intervention**

CABINET CONFIDENCES - [SECTION 19]

Summary of Exception

Subsection 19(1) provides 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 of access under section 7 of FIPPA.

The **Cabinet** confidence exception is a 'class exception' as 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*,[150] 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 Government of Manitoba are collectively responsible to 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 of access to 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

[150] *The Executive Government Organization Act*, C.C.S.M. c. E170, can be found at: http://web2.gov.mb.ca/laws/statutes/ccsm/e170e.php

protection in order to prevent the impairment of those very principles and promote good governance.[151]

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 section 7 of *The Executive Government Organization Act*.[152] Examples include Treasury Board, the Human Resources Committee of **Cabinet**, the Healthy Child Committee of **Cabinet** (established under *The Healthy Child Manitoba Act*) and 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).[153]

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

152 *The Executive Government Organization Act*, C.C.S.M. c. E170 can be found at: http://web2.gov.mb.ca/laws/statutes/ccsm/e170e.php.

153 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.

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".

■ 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;[154] or

[154] Ontario Information and Privacy Commissioner Order P-226 (Re Minister of Consumer and Commercial Relations; March 26, 1991): http://ipc.on.ca/images/Findings/Attached_PDF/P-226.pdf.

- the information disclosed could be combined with other information to reveal the substance of deliberations of **Cabinet** or of one of its committees.

2. "Substance of deliberations of Cabinet"

"Substance" means the "matter, subject matter, subject"[155] or the "theme or subject" of a thing.[156]

"Deliberation" means "careful consideration; the discussion of reasons for and against; a debate or discussion".[157]

[155] The Compact Edition of the Oxford English Dictionary.

[156] The Concise Oxford Dictionary, 8th Edition, quoted in Ontario Information and Privacy Commissioner Order M-196 (Re City of Kingston, Oct. 1, 1993): http://www.ipc.on.ca/images/Findings/Attached_PDF/M-196.pdf.

[157] The Concise Oxford Dictionary, 9th Edition.

■ 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**.

■ 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.[158]

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**.

[158] The Concise Oxford Dictionary, 9th Edition.

■ 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**;

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.[159]

[159] The Concise Oxford Dictionary, 9th Edition.

■ 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 government of Manitoba on matters relating directly to

(i) the making of a government decision, or

(ii) the formulation of government policy.

"Reflects" means shows,[160] discloses or reveals.

[160] The Concise Oxford Dictionary, 9th Edition.

■ 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.[161]

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 section 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 to the Minister", or in document titled "advisory note", "briefing note", etc.[162]

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

[162] Ontario Information and Privacy Commissioner Order P-442 (Re Ministry of Finance, April 1, 1993): http://ipc.on.ca/images/Findings/Attached_PDF/P-442.pdf.

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

Subsection 19(2) sets out limits on the exceptions to disclosure in subsection 19(1) – if the information falls within clause 19(1)(a) or the Cabinet for which the information was prepared consents to its disclosure, the exception to disclosure in subsection 19(1) does not apply. (But, another exception to disclosure in another section of FIPPA may apply.)

■ 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.[163]

If a **record** that reveals the substance of deliberations of **Cabinet** is more than twenty 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 section 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.[164] 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 Government of Manitoba, its **departments** and certain **government agencies**.[165]

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[163] 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. The amending Act can be found at: http://web2.gov.mb.ca/laws/statutes/2008/c04008e.php.

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

[165] *The Archives and Recordkeeping Act*, C.C.S.M. c. A132, can be found at: http://web2.gov.mb.ca/laws/statutes/ccsm/a132e.php.

■ 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
>
> (ii) in the case of a r**ecord** 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.[166]

The "Executive Council" is established under *The Executive Government Organization Act*, and is commonly called "Cabinet".[167] 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.

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166 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.The amending Act can be found at: http://web2.gov.mb.ca/laws/statutes/2008/c04008e.php.

167 *The Executive Government Organization Act*, C.C.S.M. c. E170, can be found at: http://web2.gov.mb.ca/laws/statutes/ccsm/e170e.php.

■ Section 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**
Section 23	**Advice to a public body**
Section 28	**Disclosure harmful to economic and other interests of a public body**

INFORMATION PROVIDED BY ANOTHER GOVERNMENT - [SECTION 20]

Summary of Exception

Subsection 20(1) applies where a request for access has been made to a **public body** that is a government **department** or a Manitoba **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, or a governmental or international organization listed in clauses 20(1)(a) to (f); or

- by the Government of Manitoba or a Manitoba **government agency**.

Subsections 20(1) and 20(2) contain mandatory exceptions to the right of access under section 7 of FIPPA.

Subsections 20(1) and 20(2) are 'class exceptions' as they protect a type or kind of 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 request is to a department or government agency

The exception to disclosure in subsection 20(1) only applies where 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 defined in subsection 1(1) of FIPPA.[168]

[168] 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*.

"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, 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]

3. "Reveal"

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

- 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 information;[170] or

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[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.

[170] 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): http://ipc.on.ca/images/Findings/Attached_PDF/P-226.pdf.

- 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 such information, policies, etc.

Where 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 contrary 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.[171]

[171] *Reid v. Manitoba (Minister of Justice)* (1993), 89 Man. R. (2d) 259 (Manitoba Court Queen's Bench) at page 262.

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 respecting police reports provided by the Police Service to the Manitoba Department of 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.[172]

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 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.[173]

Clause 20(1)(c.1) refers to:

(i) the council of a band as defined in the *Indian Act* (Canada), and

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[172] *Pollock v. Manitoba (Minister of Justice)* (1995), 103 Man. R. (2d) 64 (Manitoba Court of Queen's Bench), at pages 68 to 69.

[173] See the discussion about "local public bodies" in Chapter 2, under *Public Bodies that Fall Under FIPPA*.

(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.[174]

If you have any questions about whether an organization falls under clause (c.1), contact legal counsel.

Clause 20(1)(d) refers to:

(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.[175] 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/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; the United Nations.

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[174] 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. The amending Act can be found at: http://web2.gov.mb.ca/laws/statutes/2008/c04008e.php.

[175] The Concise Oxford Dictionary, 9th Edition.

■ 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

(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.[176]

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 Manitoba **government agency**.

[176] These terms are discussed in Chapter 2, under *Public Bodies that Fall Under FIPPA*.

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 Government of Manitoba" 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:[177]

> **"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(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).[178]

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[177] See *Public Bodies that Fall under FIPPA* in Chapter 2.

[178] For a discussion of *sever*ing 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.

■ 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 the government, **local public body**, organization or agency that provided the information

(a) consents to the disclosure; or

(b) makes the information public.

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 other government or organization:

- consents to disclosure of the information; or
- makes the requested information public.

But, an exception to disclosure in another section in Part 2 of FIPPA may apply to this information.

■ Section 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**
Section 21	**Relations between Manitoba and other governments**

RELATIONS BETWEEN MANITOBA AND OTHER GOVERNMENTS - [SECTION 21]

Summary of the Exception

The exception in subsection 21(1) protects the relations between the Government of Manitoba or a Manitoba **government agency** and another government, an agency of another 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 21(1)(a) to (f).

The exception does not protect the relations 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 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 Government of Manitoba or a Manitoba government **agency**.

1. Discretionary exception

Subsection 21 is a discretionary exception to the right of access under section 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 section 21 applies.[179]

2. Severing - subsection 7(2)

The term information, rather than the term **record**, is used in subsection 21(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).[180]

3. Reasonable expectation of harm

The exception in subsection 21(1) contains a 'reasonable expectation' of harm test.[181]

The **head** of the **public body** must determine whether disclosure of the information could "reasonably be expected" to harm relations between the Government of Manitoba or a Manitoba **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.[182]

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179 See "*Exercising a Discretion*" earlier in this Chapter.

180 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.

181 See "Reasonable Expectation of Harm" earlier in this Chapter.

182 *Brousseau v. Manitoba (Minister of Industry, Trade & Tourism)* (1996), 116 Man. R. (2d) 8 (Manitoba Court of Queen's Bench), at page 18.

4. "Harm relations between"

"Harm" means hurt or damage.[183]

The term "relations" covers both formal negotiations and general, ongoing associations and exchanges between the Government of Manitoba or a Manitoba **government agency** and the other governments and organizations listed in clauses 21(1)(a) to (f) or their agencies.

5. "Government of Manitoba or a government agency"

The exception in subsection 21(1) protects the relations between the Government of Manitoba or a Manitoba **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.[184]

Note: The exception in section 20, respecting information provided in confidence by another government or organization, applies to all **public bodies**, including **local public bodies**.

While the "Government of Manitoba" 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 if carried on.[185] The Government of Manitoba is Her Majesty the Queen, acting for the Province of Manitoba.[186] 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**.

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183 The Concise Oxford Dictionary, 9th Edition.

184 These terms are discussed in Chapter 2, under *Public Bodies that Fall Under FIPPA*.

185 Black's Law Dictionary, 6th edition.

186 *The Interpretation Act* of Manitoba, section 17 and the Schedule of Definitions. *The Interpretation Act*, C.C.S.M. c. I80, can be found at: http://web2.gov.mb.ca/laws/statutes/ccsm/i080e.php.

The term **"government agency"** is defined in subsection 1(1) of FIPPA:

> "**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; [187]

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 Government of Manitoba or a Manitoba **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.

[187] This term is discussed in Public Bodies that Fall Under FIPPA in Chapter 2.

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 government body**. These terms are also defined in subsection 1(1) of FIPPA.[188]

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.[189]

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.[190] An example of a 'government' of a 'component state' of a foreign country would by 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 acting under the authority of one or more governments. An example is the Federal/Provincial/Territorial Committee of Ministers of Health.

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188 These terms are discussed in Chapter 2, under *Public Bodies that Fall Under FIPPA*.

189 Clause 21(1)(c.1) was added to FIPPA by *The Freedom of Information and Protection of Privacy Amendment Ac*t, S.M. 2008 c. 40. The amending Act can be found at: http://web2.gov.mb.ca/laws/statutes/2008/c04008e.php.

190 The Concise Oxford Dictionary, 9th Edition.

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, NATO (North Atlantic Treaty Organization), 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 Government of Manitoba 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) provides 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 of the Manitoba **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.[191]

Before the **head** of a **local public body** can exercise his or her discretion to disclose information that could reasonably be expected to harm the relations between the Government of Manitoba or a Manitoba **government agency** and another government or organization listed in clauses 21(1)(a) to (f) (or one of their agencies), the **head** of the **local public body** must obtain the consent of the Manitoba government **department** or Manitoba **government agency** affected.

[191] These terms are discussed in Chapter 2, under *Public Bodies that Fall Under FIPPA*.

■ Section 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**
Section 20	**Information provided by another government in confidence**

LOCAL PUBLIC BODY CONFIDENCES - [SECTION 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 - [Section 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 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 Government of Manitoba or to a Manitoba **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*,
> (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 established under *The Colleges 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 regional health authority established under *The Regional Health Authorities Act*,
> (c) the board of a health and social services district established under *The District Health and Social Services Act*,
> (d) the board of a hospital district established under *The Health Services Act*, and
> (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 conservation district established under *The Conservation 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:

- 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 respecting the protected information;[192] or
- 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 of access under section 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) applies.[193]

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, and the **applicant** is entitled to

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[192] 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): http://ipc.on.ca/images/Findings/Attached_PDF/P-226.pdf.

[193] See *Exercising a Discretion* earlier in this Chapter.

access to the remainder of the **record** (unless an exception in another section of FIPPA applies to it).[194]

5. Reasonable expectation of harm

The exceptions in subsection 22(1) contain a 'reasonable expectation of harm' test.[195]

The **head** of the **local public body** must determine whether disclosure of 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.

[194] 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.

[195] See *Reasonable Expectation of Harm* earlier in this Chapter.

■ 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

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.[196]

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).[197] The term can also mean a rule or resolution adopted by a corporation to regulate its operations.[198]

"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.

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196 Black's Law Dictionary, 6th Edition.

197 Black's Law Dictionary.

198 Dictionary of Canadian Law.

■ 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 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 candour in discussions at a meeting of the elected officials or the governing body (or of 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, subject"[199] or the "theme or subject" of a thing. [200]

"Deliberation" means "careful consideration; the discussion of reasons for and against; a debate or discussion".[201]

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199 The Compact Edition of the Oxford English Dictionary.

200 The Concise Oxford Dictionary, 8th Edition, quoted in Ontario Information and Privacy Commissioner Order M-196 (Re City of Kingston, Oct. 1, 1993): http://www.ipc.on.ca/images/Findings/Attached_PDF/M-196.pdf.

201 The Concise Oxford Dictionary, 9th Edition.

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, public school board trustees; etc.

The "governing body" of a **local public body** is the group of persons who are responsible for governing or directing the activities and operations of the **local public body**. These persons may be elected, appointed or both. An example is the Board of Governors of the University of Manitoba.

A committee of the elected officials or the governing body of a **local public body** is a group of persons 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**, or
- the governing body of the **local public body**, or
- 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. "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** which authorize meetings of **local public bodies** to be held in the absence of the public are:

- 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* respecting 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
- 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** which is more than 20 years old, the exceptions to disclosure in subsection 22(1) do not apply to the information.[202] But, an exception in another section of FIPPA may apply to this information (for example, the exceptions in section 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 respecting the deliberations of **Cabinet** in clause 19(2)(b) and to the limit to the exception respecting advice, etc. 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.[203] 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. For example, retention, storage and destruction of **records** by a community college established under *The Colleges Act* is governed by general legislation: *The Archives and Recordkeeping Act*, and the records schedules approved under that Act.[204]

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202 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. The amending Act can be found at: http://web2.gov.mb.ca/laws/statutes/2008/c04008e.php.

203 Clause 3(b) of FIPPA, discussed in Chapter 2, under *Procedures Not Affected by FIPPA*.

204 *The Archives and Recordkeeping Act*, C.C.S.M. c. A132, can be found at: http://web2.gov.mb.ca/laws/statutes/ccsm/a132e.php.

■ Section 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**
Subsection 20(2)	**Information provided by another government to a local public body in confidence**
Section 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**
Section 28	**Economic and other interests of a public body**
Subsection 31(2)	**Contemplated designation of a municipal heritage site**

ADVICE TO A PUBLIC BODY - [SECTION 23]

Summary of the Exception

Subsection 23(1) protects the advisory and deliberative processes involving a **public body** or a **minister** of the Government of Manitoba.

Subsection 23(1) contains discretionary exceptions to the right of access under section 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 Government of Manitoba.

The need for confidentiality with respect to various aspects of decision making within 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**.

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 of access to 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 in order to prevent the impairment of those very principles and promote good governance.[205]

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

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;
- the information disclosed would permit accurate inferences to be drawn respecting the protected information;[206] or
- 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 of access under section 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**; and
- must then consider whether it is appropriate to release the information, even though an exception in subsection 23(1) applies.[207]

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[206] 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): http://ipc.on.ca/images/Findings/Attached_PDF/P-226.pdf.

[207] 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 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, 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).[208]

[208] 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 the giving of 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".[209]

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.

[209] Ontario Information and Privacy Commissioner Order P-442 (Re Ministry of Finance, April 1, 1993): http://ipc.on.ca/images/Findings/Attached_PDF/P-442.pdf.

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";[210]
>
> "view; opinion; information; an opinion expressed as to wisdom of future conduct";[211]
>
> "the expression of counsel or opinion, favourable or unfavourable, as to action, but it may, chiefly in commercial usage, signify information or intelligence";[212]
>
> "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";[213]

In order to qualify as "advice", there must be evidence of some type of communication of information from one person to another. [214]

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.[215] 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" in order for the exception in clause 23(1)(a) to apply.

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210 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).

211 Black's Law Dictionary, 6th Edition.

212 The Dictionary of Canadian Law, 2nd Edition.

213 Corpus Juris Secundum, Volume 2A.

214 Ontario Information and Privacy Commissioner Order P-58 (Re Ministry of Labour, May 16, 1989): http://www.ipc.on.ca/images/Findings/Attached_PDF/P-58.pdf.

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

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.[216]

4. "Proposals"

A "proposal" is a course of action put forward for consideration or as a plan. [217]

5. "Recommendations"

"Recommendation" means advice or counsel.[218] "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.

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;[219] separation into component parts or elements.[220]

In this context, an "option" is a choice, a thing that is or may be chosen.[221]

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216 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).

217 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).

218 Black's Law Dictionary, 6th Edition.

219 The Concise Oxford Dictionary, 9th Edition.

220 The Dictionary of Canadian Law.

221 The Concise Oxford Dictionary, 9th Edition.

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.[222]

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 has 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 consideration, one might be able to conclude that this constitutes advice and at that point severing should be considered.[223]

Where there is an issue as to whether factual information falls within the exception in clause 23(1)(a), legal counsel should be consulted.

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[222] Ontario Information and Privacy Commissioner Order P-48 (Re Ministry of Industry, Trade & Technology, April 6, 1989): http://ipc.on.ca/images/Findings/Attached_PDF/P-48.pdf.

[223] Re Department of Justice; Report of the Ombudsman dated October 31, 1997. http://www.ombudsman.mb.ca/documents_and_files/annual-reports.html

■ 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.[224] 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.[225]

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, treasurer, etc.[226] An "officer" can include the position of a corporation director,[227] a sovereign's minister, an appointed or elected functionary.[228]

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224 The Concise Oxford Dictionary, 9th Edition.

225 The Concise Oxford Dictionary, 9th Edition.

226 Black's Law Dictionary, 6th Edition.

227 The Dictionary of Canadian Law.

228 The Concise Oxford Dictionary, 9th Edition.

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**.[229]

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**.

[229] This definition was amended by *The Freedom of Information and Protection of Privacy Amendment Act*, S.M. 2008 c. 40. The amending Act can be found at: http://web2.gov.mb.ca/laws/statutes/2008/c04008e.php.

■ 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 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 Government of Manitoba 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.[230]

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.

[230] 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).

2. "Developed for the purpose of contractual or other negotiations"

To "negotiate" means to confer with others in order to reach a compromise or agreement.[231] "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 contractual negotiations, negotiations relating to the settlement of a lawsuit or dispute, etc.

3. "Developed by or on behalf of the Government of Manitoba 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 Government of Manitoba.

[231] The Concise Oxford Dictionary, 9th Edition.

■ 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 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.[232]

"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; etc.

"Administer" means to attend to the running of (business affairs, etc.); manage; be responsible for the implementation of (the law, justice, punishment, etc.).[233]

"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, materiel, 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.

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[232] 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).

[233] The Concise Oxford Dictionary, 9th Edition.

■ 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,

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.[234] 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.[235]

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[234] 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).

[235] Ontario Information and Privacy Commissioner Order P-772 (Re Ministry of Natural Resources, Oct. 4, 1994): http://www.ipc.on.ca/images/Findings/Attached_PDF/P-772.pdf.

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.[236]

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 respecting information which, if disclosed, could result in premature disclosure of a pending policy decision.

[236] The Concise Oxford Dictionary, 9th Edition.

When the Exceptions Don't Apply: Limits to the Advice to a Public Body Exceptions - [Section 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.)

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;

Where information is in a **record** which 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 section 28 - Economic and other interests of a **public body**).

This limit to the advice exception is similar to the limit to the exception respecting the deliberations of **Cabinet** in clause 19(2)(b).

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*,[237] and the records schedules approved under that Act, set out the requirements respecting the retention, storage and destruction of **records** of the Government of Manitoba and its **departments**.[238]

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[237] *The Archives and Recordkeeping Act*, C.C.S.M. c. A132, can be found at: http://web2.gov.mb.ca/laws/statutes/ccsm/a132e.php.

[238] Clause 3(b) of FIPPA, discussed in Chapter 2, under *Procedures Not Affected by FIPPA*.

■ 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**;

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 section 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, treasurer, etc.[239] An "officer" can include the position of a corporation director,[240] a sovereign's minister, an appointed or elected functionary.[241]

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**.

[239] Black's Law Dictionary, 6th Edition.

[240] The Dictionary of Canadian Law.

[241] The Concise Oxford Dictionary, 9th Edition.

■ 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**;

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 the purpose of interpreting legislation or administering services, programs or activities. But, other exceptions may apply to this information (for example, the exceptions in section 25 - Law enforcement and legal proceedings).

"Substantive" means having a firm or solid basis; important, substantial.[242] 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.[243]

[242] The Concise Oxford Dictionary, 9th Edition.

[243] The Concise Oxford Dictionary, 9th Edition.

■ 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 **public body**. But, an exception in another section of FIPPA may apply to this information (for example, the exceptions in section 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, organization, etc.

"Product" means a thing or substance produced by natural process or manufacture, a result.[244]

"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.[245]

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.

[244] The Concise Oxford Dictionary, 9th Edition.

[245] The Concise Oxford Dictionary, 9th Edition.

■ 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**;

The exceptions to disclosure in subsection 23(1) do not apply to information that is a statement of the reasons for a final decision made by an officer, **minister** or other person or by a board or administrative tribunal in the course of 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 section 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.[246]

"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 ascertain 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.[247]

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246 The Concise Oxford Dictionary, 9th Edition.

247 Dictionary of Canadian Law and Black's Law Dictionary, 6th Edition.

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 his or her conduct is not dictated in advance by law. [248] 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.[249]

The limit only applies where the decision in some way affects the **applicant** requesting access to the **record** under Part 2 of FIPPA.

The limit in clause 23(2)(e) applies even where the decision may be appealed. It also applies whether or not the reasons are recorded in an internal memorandum or external correspondence and whether or not the reasons were given by the decision maker or were subsequently incorporated into the decision, order or ruling.

Personal information respecting 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 section 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".[250]

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[248] *Dussault and Borgeat, Administrative Law*, 2nd Edition, page 241.
- not available on internet

[249] Black's Law Dictionary, 6th Edition.

[250] Section 4 and the records that don't fall under FIPPA are discussed in Chapter 2, under *Records that Do Not Fall under FIPPA*.

■ 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 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 section 28 - Economic and other interests of a **public body**).

1. Background research

"Research" means the systematic investigation into and study of materials, sources, etc. in order to establish facts and reach new conclusions and an endeavour to discover new or to collate old facts, etc. by scientific study or by a course of critical investigation.[251] For the purpose of clause 23(2)(f), "background research" is research undertaken as the basis for formulating a policy proposal.

[251] Ontario Information and Privacy Commissioner Order P-666 (Re Ministry of Health, April 27, 1994): http://www.ipc.on.ca/images/Findings/Attached_PDF/P-666.pdf.

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.[252]

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.[253] Examples of mechanical arts and applied sciences include architecture, engineering and electronics.

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",[254] and includes federal, provincial, municipal and school taxes. The term "tax" usually does 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.

"Financial" research relates to the management of money and monetary resources.[255]

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252 Based on comments in Ontario Information and Privacy Commissioner Order P-454 (Re Ontario Native Affairs Secretariat, May 7, 1993) respecting "scientific information": http://ipc.on.ca/images/Findings/Attached_PDF/P-454.pdf.

253 The Concise Oxford Dictionary, 9th Edition.

254 The Concise Oxford Dictionary, 9th Edition.

255 The Concise Oxford Dictionary, 9th Edition.

"Economics" means the science of the production and distribution of wealth; the condition of a country etc. as regards material prosperity.[256] "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.[257]

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**, etc.

Note: Clause 28(1)(d) contains an exception to disclosure for innovative scientific or technical information obtained through an **employee's** research.

[256] The Concise Oxford Dictionary, 9th Edition.

[257] The Concise Oxford Dictionary, 9th Edition.

■ 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; etc.

■ 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;

The exceptions to disclosure in subsection 23(1) do not apply to a statistical survey.

"Statistics" is the science of collecting and analysing 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.[258]

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.[259]

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.

Where 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 section 17 (**third party** privacy); if so, that information will have to be severed from the statistical survey before access is provided.

[258] The Concise Oxford Dictionary, 9th Edition.

[259] 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 respecting 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 section 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.[260]

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.[261]

An "audit" is an official examination of accounts or a systematic review.[262]

"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.[263]

"Efficiency" refers to the effectiveness of the **public body** or its programs or policies.[264]

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260 The Concise Oxford Dictionary, 9th Edition.

261 The Concise Oxford Dictionary, 9th Edition.

262 The Concise Oxford Dictionary, 9th Edition.

263 The Compact Edition of the Oxford English Dictionary.

264 The Concise Oxford Dictionary, 9th Edition.

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, treasurer, etc.[265] An "officer" can include the position of a corporation director,[266,] a sovereign's minister, an appointed or elected functionary.[267]

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.

[265] Black's Law Dictionary, 6th Edition.

[266] The Dictionary of Canadian Law.

[267] The Concise Oxford Dictionary, 9th Edition.

■ Section 23: Related Provisions in FIPPA

Subsection 1(1) (Definitions):	**"applicant"** **"department"** **"employee"** **"enactment"** **"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**
Section 29	**Testing procedures, tests and audits**

DISCLOSURE HARMFUL TO INDIVIDUAL HEALTH OR SAFETY OR PUBLIC SAFETY - [SECTION 24]

Summary of the Exception

Section 24 states that the **head** of a **public body** has the discretion to refuse to disclose to an a**pplicant** 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; or
- threaten public safety.

Section 24 contains discretionary exceptions to the right of access under section 7 of FIPPA, as the **head** of the **public body** "may" refuse to disclose the requested **record** if the exception applies.

Section 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 section 24.

■ Scope of Individual or Public Safety Exceptions - [Section 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

Section 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 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

Section 24 contains discretionary exceptions to the right of access under section 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 section 24 applies to information in the requested **record**; and
- must then consider whether it is appropriate to release the information, even though an exception in section 24 applies.[268]

2. Severing - subsection 7(2)

The term information, rather than the term **record**, is used in section 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 to the

[268] See *Exercising a Discretion* earlier in this Chapter.

remainder of the **record** (unless an exception in another section of FIPPA applies to it).[269]

3. Reasonable expectation of harm

The exceptions in section 24 contain a 'reasonable expectation of harm test'.[270]

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 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. Section 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 section 24 exists could cause harm.

Under clause 12(2)(a) of FIPPA, where the **head** of the **public body** exercises his or her 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**.[271]

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

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269 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.

270 See *Reasonable Expectation of Harm* earlier in this Chapter.

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

■ 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;

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.[272]

To "harm" means to hurt or damage.[273]

"Safety" means the condition of being safe; freedom from danger or risks.[274]

"Person" means a natural person (human being) and includes a corporation and the heirs, executors, administrators or other legal representatives of a person.[275] "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 he or she would be at risk as a result of disclosure of the record.

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272 The Compact Edition of the Oxford English Dictionary.

273 The Concise Oxford Dictionary, 9th Edition.

274 The Concise Oxford Dictionary, 9th Edition.

275 *The Interpretation Act* of Manitoba, section 17 and the Schedule of Definitions. *The Interpretation Act*, C.C.S.M. c. I80, can be found at: http://web2.gov.mb.ca/laws/statutes/ccsm/i080e.php.

Note: Clause 17(2)(c) requires that 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** 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 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;

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 which is significant, not slight or negligible.[276]

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 information about himself or herself that could cause him or her 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).

[276] The Concise Oxford Dictionary, 9th Edition.

■ 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

(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.[277]

"Safety" means the condition of being safe; freedom from danger or risks.[278] "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 respecting a possible health hazard that could cause, or be used to cause, widespread disorder or panic would threaten public safety.

[277] The Compact Edition of the Oxford English Dictionary.

[278] The Concise Oxford Dictionary, 9th Edition.

■ Section 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**
Section 26	**Security of property, etc.**
Clause 44(1)(x)	**Disclosure of personal information to an expert for the purposes of clause 24(b) permitted**

LAW ENFORCEMENT AND LEGAL PROCEEDINGS - [SECTION 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 respecting **law enforcement** and related matters; or
- be injurious to legal proceedings.

Subsection 25(1) contains discretionary exceptions to the right of access under section 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' as 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) provides 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 section 25.

■ Scope of the Exception for Law Enforcement and Legal Proceedings - [Subsection 25(1)]

> **Disclosure harmful to law enforcement or legal proceedings**
> **25** The **head** of a **public body** may refuse to disclose information to an **applicant** if disclosure could reasonably be expected to

Subsection 25(1) provides 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** described in clauses 25(1)(a), (b), (c), (e), (f), (h), (i), (k) or (m);

- disclose specified **records** or information respecting **law enforcement** and related matters described in clauses 25(1)(d), (g), (j) and (l); or

- be injurious 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. Clause 17(1)(b) complements section 25, as it protects the privacy of an individual who has been investigated for a possible violation of law.

1. Discretionary exceptions

Subsection 25(1) contains discretionary exceptions to the right of access under section 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 25(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 25(1) applies.[279]

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).[280]

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.[281]

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.

4. Reasonable expectation of harm and the 'mosaic effect'

The 'mosaic effect' in the context of disclosure of information respecting 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

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279 See *Exercising a Discretion* earlier in this Chapter.

280 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.

281 See *Reasonable Expectation of Harm* earlier in this Chapter.

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 except information where 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 excepts 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.[282]

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 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.[283]

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[282] The Government of British Columbia Freedom of Information and Protection of Privacy Policy and Procedures Manual. Also discussed in the Government of Alberta Freedom of Information and Protection of Privacy – Guidelines and Practices.

B.C. Manual:
http://www.cio.gov.bc.ca/cio/priv_leg/manual/index.page

Alberta Guidelines and Practices 2009:
http://foip.alberta.ca/resources/guidelinespractices/index.cfm

[283] Ontario Information and Privacy Commissioner Order 170, (Re Ministry of the Attorney General, May 25, 1990):
Decision: http://www.ipc.on.ca/images/Findings/Attached_PDF/P-170.pdf.
Publishing date: http://www.ipc.on.ca/english/Decisions-And-Resolutions/Decisions-And-Resolutions-Summary/?id=3847.

Under clause 12(2)(a) of FIPPA, where the **head** of the **public body** exercises his or her 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**.[284]

[284] Subsection 12(2) is discussed in Chapter 2, under *Refusal to Confirm or Deny Existence of Record*.

■ 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.

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 damage[285] 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**;[286]

[285] The Concise Oxford Dictionary, 9th Edition.

[286] The definition "law enforcement" is discussed in Chapter 2, under *Key Definitions*.

"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), a minister, etc.

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:

- 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 **enactmen**t; or

- 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.

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.[287]

"Defence" means the act of defending from or resisting attack.[288]

"Defence of Canada" means any activity or plan relating to the defence of Canada and includes activities that improve Canada's resistance to attack.

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[287] The Concise Oxford Dictionary, 9th Edition.

[288] The Concise Oxford Dictionary, 9th Edition.

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.[289]

"Espionage" is the practice of spying or of using spies to secretly collect and report information on the activities, movements, etc. of an enemy, competitor, etc.[290]

"Sabotage" is deliberate damage to productive capacity, especially as a political act.[291]

"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.

289 The Concise Oxford Dictionary, 9th Edition.

290 The Concise Oxford Dictionary, 9th Edition.

291 The Concise Oxford Dictionary, 9th Edition.

■ 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.[292]

"Effectiveness" in this context means ensuring the investigative technique or procedure continues to have its desired effect;[293] 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.

[292] The Concise Oxford Dictionary, 9th Edition.

[293] The Concise Oxford Dictionary, 9th Edition.

2. "Investigative technique or procedure"

An "investigation" is a systematic inquiry or search.[294] A "technique" is a means or method of achieving a purpose.[295] A "procedure" is a way of carrying out or performing an activity.[296]

"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;
- investigations or inspections that could result in a penalty or sanction being imposed or that are otherwise conducted to enforce an **enactment**; or
- 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, etc.

294 The Concise Oxford Dictionary, 9th Edition.

295 The Concise Oxford Dictionary, 9th Edition.

296 The Concise Oxford Dictionary, 9th Edition.

■ 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.[297]

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;

[297] The Concise Oxford Dictionary, 9th Edition.

- the information disclosed would permit accurate inferences to be drawn respecting the criminal intelligence;[298] or

- 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. As 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.

3. "Criminal intelligence"

"Criminal intelligence" may be described as information gathered by a **law enforcement** agency in a covert manner with respect 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.[299]

Criminal intelligence can relate to a person, group of persons 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.

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298 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): http://ipc.on.ca/images/Findings/Attached_PDF/P-226.pdf.

299 Ontario Information and Privacy Commissioner Order M-202 (Re Metropolitan Police Services Board, Oct. 15, 1993): http://www.ipc.on.ca/images/Findings/Attached_PDF/M-202.pdf.

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 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;[300] threaten. "Safety" means the condition of being safe; freedom from danger or risks.[301] "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.[302] "**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**; or
- proceedings that result or could result in a penalty or sanction or that are otherwise conducted for the purpose of enforcing an **enactment**.

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300 The Concise Oxford Dictionary, 9th Edition.

301 The Concise Oxford Dictionary, 9th Edition.

302 The definition "law enforcement" is discussed in Chapter 2, under *Key Definitions*.

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.[303]

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.

[303] *The Interpretation Act* of Manitoba, section 17 and the Schedule of Definitions. *The Interpretation Act*, C.C.S.M. c. I80 can be found at: http://web2.gov.mb.ca/laws/statutes/ccsm/i080e.php.

■ 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 where 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 to prevent, a fair trial or impartial adjudication. "Person" means a natural person (human being) and includes a corporation and the heirs, executors, administrators or other legal representatives of a person.[304]

"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.[305]

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.[306]

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.

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304 *The Interpretation Act* of Manitoba, section 17 and the Schedule of Definitions. *The Interpretation Act*, C.C.S.M. c. I80, can be found at: http://web2.gov.mb.ca/laws/statutes/ccsm/i080e.php.

305 Black's Law Dictionary, 6th Edition.

306 Black's Law Dictionary, 6th Edition.

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 been commenced 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;

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.[307]

"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;

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[307] *The Interpretation Act* of Manitoba, section 17 and the Schedule of Definitions. *The Interpretation Act*, C.C.S.M. c. I80, can be found at: http://web2.gov.mb.ca/laws/statutes/ccsm/i080e.php.

(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; and

(e) a person appointed under any Act for the enforcement of that Act.[308]

[308] *The Interpretation Act* of Manitoba, section 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.[309] For example, a **public body** would be able to withhold construction plans for a maximum security facility under this exception.[310]

"Escape" means the departure or deliverance out of custody of a person who was lawfully imprisoned before he or she is entitled to liberty by process of law.[311]

"Custody" may mean actual imprisonment or physical detention or the power, legal or physical, of imprisoning or of taking manual possession.[312] "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 persons who are lawfully detained in custody include:

- persons in custody under a federal or provincial statute or regulation or a municipal bylaw;

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309 Ontario Information and Privacy Commissioner Order P-187 (Re Ministry of Government Services, July 13, 1990).

310 Ontario Information and Privacy Commissioner Order P-187 (Re Ministry of Government Services, July 13, 1990).

311 Black's Law Dictionary, 6th Edition.

312 Black's Law Dictionary, 6th Edition.

- persons remanded in custody by a court, who are charged but not yet found guilty or are not yet sentenced;

- young persons 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;

- persons 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"

"Facilitate" in the context of clause 25(1)(i) means to make easier or less difficult.[313]

"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 hinder[314] the control of crime. Crime is conduct which society's laws prohibit.[315]

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313 Ontario Information and Privacy Commissioner Order P-187 (Re Ministry of Government Services, July 13, 1990) (in the context of "facilitate escape from custody").

314 The Concise Oxford Dictionary, 9th Edition.

315 The Dictionary of Canadian Law.

■ 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' as it protects a type or kind of information.

The exception would cover information such as how to make a bomb.

■ 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.[316] "Custody" may mean actual imprisonment or physical detention or the power, legal or physical, of imprisoning or of taking manual possession.[317]

"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 persons who are lawfully detained in custody include:

- persons in custody under a federal or provincial statute or regulation or a municipal bylaw;
- persons remanded in custody by a court, who are charged but not yet found guilty or are not yet sentenced;
- young persons 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;

316 The Concise Oxford Dictionary, 9th Edition.

317 Black's Law Dictionary, 6th Edition.

- persons 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.[318] Adults and young persons subject to control by a correctional authority or its agents due to 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; or
- individuals performing community service work.

[318] Black's Law Dictionary, 6th Edition.

■ 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;

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' as 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 the custody or under the supervision of a correctional authority or its agents.

"Supplied" means the information in the **record** has been provided or furnished[319] to the **public body** and includes information which has been supplied voluntarily or because of a legal requirement (for example, where 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.

[319] The Concise Oxford Dictionary, 9th Edition.

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,[320] past practices followed with respect to such information, stated policies, a confidentiality provision in another statute,[321] etc.

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 respecting the protected information; [322] or
- the information disclosed could be combined with other information to reveal the protected information.

[320] Ontario Information and Privacy Commissioner Order P-274 (Re Ministry of Correctional Services, Feb. 21, 1992): http://www.ipc.on.ca/images/Findings/Attached_PDF/P-274.pdf.

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

[322] 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): http://ipc.on.ca/images/Findings/Attached_PDF/P-226.pdf.

■ 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.

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 persons 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**; or

- 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).[323]

The **record** need not be created for the purpose of **law enforcement**, provided that it is submitted to or used by the **public body** for a **law enforcement** purpose.

[323] 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.[324]

The "conduct" of legal proceedings is the management, direction, carrying on of legal proceedings.[325]

A "legal proceeding" is any civil or criminal proceeding or inquiry in which evidence is or may be given, and includes an arbitration;[326] any proceeding authorized or sanctioned by law, and brought or instituted for the acquiring of a right or the **enforcement** of a remedy.[327]

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 been or may be commenced will usually not be enough to justify relying on this exception.

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[324] The Concise Oxford Dictionary, 9th Edition.

[325] Black's Law Dictionary, 6th Edition.

[326] The Dictionary of Canadian Law.

[327] Black's Law Dictionary, 6th Edition.

Note: Clause 4(i) of FIPPA states that FIPPA does not apply to a **record** relating to a prosecution or an inquest if all proceedings respecting the prosecution or inquest have not been completed.[328]

[328] Section 4 is discussed in Chapter 2, under *Records That Do Not Fall Under FIPPA*.

■ 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**; or
- 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**.[329]

The **record** need not be created for the purpose of **law enforcement**, provided that 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 which prohibit disclosure are:

[329] See the discussion of the definition "law enforcement" in *Key Definitions*, Chapter 2.

- the provisions in the *Youth Criminal Justice Act* that prohibit disclosure of certain court, police and government records relating to young offenders except as authorized by that Act;

- the prohibition respecting disclosure of information under the *Official Secrets Act (Canada)*;

- the prohibition respecting 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 respecting **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.

■ 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);

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, conduct, etc.[330]

"Statistics" is the science of collecting and analysing 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.[331] "Statistical analysis" means an examination of facts in a numerical format.

[330] The Concise Oxford Dictionary, 9th Edition.

[331] The Concise Oxford Dictionary, 9th Edition.

■ 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**.

A "**law enforcement** agency" is any agency responsible for **law enforcement** as that term is defined in subsection 1(1) of FIPPA:

- an agency responsible for enforcing an **enactment** (a statute or a regulation);
- an agency responsible for policing;
- an agency that carries out investigations or inspections that could result in a penalty or sanction being imposed or that are otherwise conducted to enforce an **enactment**; or
- an agency that carries out proceedings that result or could result in a penalty or sanction or are otherwise conducted for the purpose of enforcing an **enactment**.[332]

Examples of such agencies include the Royal Canadian Mounted Police and the Winnipeg Police Service which carry out policing activities; Revenue Canada; the Manitoba Securities Commission; the Liquor Control Commission; the Office of the Fire Commissioner; the Manitoba Human Rights Commission; the Employment Standards Division of the Manitoba Department of Family Services and Labour; and any other office or agency responsible for the enforcement of a statute or regulation.

[332] See the discussion of the definition "law enforcement" in Chapter 2, under Key Definitions.

■ Section 25: Related Provisions in FIPPA

Subsection 1(1) (Definitions):	**"applicant"** **"enactment"** **"head"** **"law enforcement"** **"public body"**
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 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**

SECURITY OF PROPERTY - [SECTION 26]

Summary of the Exception

Section 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.

Section 26 is a discretionary exception to the right of access under section 7 of the Act, as the **head** of the **public body** "may" refuse to disclose the requested **record** if the exception applies.

Section 26 contains a 'reasonable expectation of harm' test.

■ Scope of the Security of Property Exception - [Section 26]

> **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.

Section 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 (but not limited to) a building, a vehicle, an electronic information system or a communications system.

1. Discretionary exception

Section 26 contains a discretionary exception to the right of access under section 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 the exception in section 26 applies to information in the requested **record**; and
- must then consider whether it is appropriate to release the information, even though the exception in section 26 applies.[333]

[333] See *Exercising a Discretion* earlier in this Chapter.

2. Severing - subsection 7(2)

The term information, rather than the term **record**, is used in section 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, 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).[334]

3. "Reasonable expectation of harm"

The exception in section 26 contains a 'reasonable expectation of harm' test.[335]

The **head** of the **public body** must determine whether disclosure of the information could "reasonably be expected" to cause the harm described in section 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.[336]

To "threaten", in the context of section 26, means to be likely to injure; to be a source of danger to; to endanger actively.[337]

"Security" generally means a condition of safety from attack or danger[338] or a state of physical integrity. The security of a building would include the safety of the occupants as well as the integrity of the physical structure and the security of adjoining or connecting structures.

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334 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.

335 See *Reasonable Expectation of Harm* earlier in this Chapter.

336 The Concise Oxford Dictionary, 9th Edition.

337 The Compact Edition of the Oxford English Dictionary.

338 The Concise Oxford Dictionary, 9th Edition.

5. "Of any property or system"

The exception in section 26 protects the security of "any property or system".

The exception is not limited to the types of property and systems listed in section 26 (a building, a vehicle, an electronic information system or a communications system) as the word "including" is used.

Common examples of information that, if disclosed, could harm or threaten the security of property or a system include:

- plans for the security system in a building;
- password information respecting information systems.

■ Section 26: Related Provisions in FIPPA

Subsection 1(1) (Definitions):	**"applicant"** **"head"** **"public body"**
Subsection 7(2)	**Severing information**
Subsection 12(1)	**Contents of response**
Clause 24(a)	**Mental or physical health or safety of another person**
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**

SOLICITOR- CLIENT 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 solicitor-client privilege,
- has been prepared by or for an agent or lawyer of a **public body** in relation to a legal matter, or
- is contained in correspondence respecting 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 of access under section 7 of the Act.

Subsection 27(2) requires the **head** of a **public body** to refuse to disclose information that is subject to a solicitor-client privilege of a person other than the **public body**.

Subsection 27(2) is a mandatory exception to the right of access under section 7 of the Act.

The exceptions in subsection 27(1) and 27(2) are 'class exceptions' as they protect a type or kind of information in a **record**.

■ Exception to Disclosure: Solicitor-Client Privilege of the Public Body - [Subsection 27(1)]

Solicitor-client privilege
27(1) The **head** of a **public body** may refuse to disclose to an **applicant**

(a) information that is subject to solicitor-client 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) provides 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 solicitor-client privilege,
- has been prepared by or for an agent or lawyer of a **public body** in relation to a legal matter, or
- is contained in correspondence respecting a legal matter between an agent or lawyer for a **public body** and any other person respecting a legal matter.

The exceptions in subsection 27(1) are 'class exceptions' as 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

Subsection 27(1) contains discretionary exceptions to the right of access under section 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 27(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 27(1) applies.[339]

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, 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).[340]

But, in the case of "solicitor-client privilege", the severing principle must be applied in a manner that recognizes the full extent of the privilege.[341] 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.

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339 See *Exercising a Discretion*, earlier in this Chapter.

340 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.

341 See, for example, *The Minister of Justice v. Blank*, 2007 FCA 87 (Federal Court of Appeal): http://www.canlii.org/en/ca/fca/doc/2007/2007fca87/2007fca87.pdf.

■ Solicitor-Client Privilege - [Clause 27(1)(a)]

> **27(1)** The **head** of a **public body** may refuse to disclose to an **applicant**
>
> (a) information that is subject to solicitor-client 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 the common law solicitor-client privilege.

1. 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….[342]

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

[342] *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23; [2010] 1 S.C.R. 815 (Supreme Court of Canada), paragraph 53. http://tinyurl.com/95xb2f3.

> 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. …
>
> ……. 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 his or her 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. …[343]

"Solicitor-client privilege", in the context of subsection 27(1) of FIPPA, is interpreted as including both 'legal advice' privilege and 'litigation privilege'.[344] That is, for the purposes of subsection 27(1) of FIPPA "solicitor-client privilege" means:

- 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 assistance; this branch of the privilege applies whether or not litigation is contemplated; (legal advice or solicitor-client communication privilege); and

- papers and materials created or obtained especially for the lawyer's brief for litigation, whether existing or contemplated ('litigation privilege').[345]

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[343] *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.

[344] See *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 (Supreme Court of Canada), paragraphs 3, 4 and 5. http://tinyurl.com/abbqrg8.

[345] Information and Privacy Commissioner Order P-49 (Re Ministry of Community and Social Services, April 10, 1989): http://www.ipc.on.ca/images/Findings/Attached_PDF/P-49.pdf.
Also see Ontario Information and Privacy Commissioner Order PO-2704 (Re Ministry of Health and Long-Term Care, July 31, 2008): http://www.ipc.on.ca/images/Findings/po-2704.pdf.

The common law privilege and the exception in clause 27(1)(a) apply to

- Crown Counsel and Crown Prosecutors employed by the Manitoba Department of Justice,
- legal counsel on the staff of a **government agency** or other **public body**;[346] and
- private bar legal counsel retained to act on behalf of the government or a **public body**.

Clause 27(1)(a) of FIPPA 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.[347]

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.[348]

A request by senior legal personnel within the Department of Justice that other lawyers review the law and the facts and provide an opinion, as well as the opinion itself, come within the ambit of the solicitor-client privilege.[349]

A letter drafted by legal counsel as suggested correspondence for signature by an official in a client department also falls within the exceptions to disclosure protecting solicitor-client privilege.[350]

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346 See, for example, *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31, [2004] 1 S.C.R. 809 (Supreme Court of Canada). http://tinyurl.com/azf7mw5.

347 *Pollock v. Manitoba (Minister of Justice)* (1995), 103 Man. R. (2d) 64 (Manitoba Court of Queen's Bench) at page 68.

348 *Pollock v. Manitoba (Minister of Justice)* (1995), 103 Man. R. (2d) 64 (Manitoba Court of Queen's Bench) at page 68.

349 *Pollock v. Manitoba (Minister of Justice)* (1995), 103 Man. R. (2d) 64 (Manitoba Court of Queen's Bench) at page 68.

350 *Sigurdson v. The Minister of Conservation*, [2002] M.J. No. 390 (Manitoba Court of Queen's Bench, Schwartz, J.).

2. Waiver of solicitor-client privilege

The right to the common law solicitor-client privilege belongs to the client, not the solicitor, and may be waived by the client.

It is consistent with the nature of the common law privilege that the exception to disclosure in clause 27(1)(a) is discretionary; the **head** of the **public body** may exercise his or her 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 upon. Usually, a **public body** will be considered to have waived solicitor-client privilege if the information has 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 to be an implied waiver of the privilege for other purposes.

Advice from legal counsel should be sought when seeking to rely on the solicitor-client 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 if all proceedings respecting the prosecution or inquest have not been completed.[351]

[351] Section 4 is discussed in Chapter 2, under *Records That Do Not Fall Under FIPPA*.

■ Exception to Disclosure: Information Prepared by or for an Agent or Lawyer - [Clause 27(1)(b)]

Solicitor-client privilege
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 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)(b) protects certain information prepared by or for:

- a Crown Counsel, Crown Prosecutor or other lawyer retained by the Minister of Justice and Attorney-General, including a private sector lawyer;
- a staff lawyer of, or private sector lawyer retained by, the **public body**; or
- an agent of the Minister of Justice 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;[352]

- the investigation or prosecution of an offence.

  An "investigation" is a systematic inquiry or search.[353]

[352] Ontario Information and Privacy Commissioner Order P-210 (Re Ministry of Attorney General, Dec. 19, 1990.): http://www.ipc.on.ca/images/Findings/Attached_PDF/P-210.pdf.

[353] The Concise Oxford Dictionary, 9th Edition.

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.[354]

"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** relating to a prosecution or an inquest if all proceedings respecting the prosecution or inquest have not been completed.[355]

[354] Black's Law Dictionary, 6th Edition.

[355] Section 4 is discussed in Chapter 2, under *Records That Do Not Fall Under FIPPA*.

■ Exception to Disclosure: Correspondence Between an Agent or Lawyer and Another Person - [Clause 27(1)(c)]

Solicitor-client privilege
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 or Crown Prosecutor or other lawyer retained by the Minister of Justice and Attorney-General, including a private sector lawyer;
- a staff lawyer of, or private sector lawyer retained by, the **public body**; or
- an agent of the Minister of Justice 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.

The correspondence 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.[356]

- the investigation or prosecution of an offence.

  An "investigation" is a systematic inquiry or search.[357]

  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.[358]

  "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 provides that FIPPA does not apply to a **record** relating to a prosecution or an inquest if all proceedings respecting the prosecution or inquest have not been completed.[359]

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356 Ontario Information and Privacy Commissioner Order P-210 (Re Ministry of Attorney General, Dec. 19, 1990.): http://www.ipc.on.ca/images/Findings/Attached_PDF/P-210.pdf.

357 The Concise Oxford Dictionary, 9th Edition.

358 Black's Law Dictionary, 6th Edition.

359 Section 4 is discussed in Chapter 2, under *Records That do Not Fall Under FIPPA*.

■ Exception to Disclosure: Solicitor-Client Privilege of Other Persons - [Subsection 27(2)]

Third party's solicitor-client privilege
27(2) The **head** of a **public body** shall refuse to disclose to an **applicant** information that is subject to a solicitor-client privilege of a person other than the **public body**.

At times, privileged legal documents of other persons come into the custody or under the control of a **public body**. Subsection 27(2) requires a **public body** to protect this information if it is subject to solicitor-client privilege.

The exception to disclosure in subsection 27(2) is mandatory, as the **head** "shall" refuse to disclose this information.

The exception is a 'class exception' as it protects a type or kind of information.

The term information, rather than the term **record**, is used in subsection 27(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).[360]

"Solicitor-client privilege", in the context of subsection 27(1) of FIPPA, is interpreted as including both 'legal advice' privilege and 'litigation privilege'.[361] That is, for the purposes of subsection 27(1) of FIPPA "solicitor-client privilege" means:

- 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 assistance; this branch of the privilege applies whether or not litigation is contemplated; and

[360] For a discussion of severing and subsection 7(2) see *The Exceptions Apply to Information in a Record - Severing* in the Introduction to this Chapter and *Severing a Record* in Chapter 4.

[361] *See Blank v. Canada (Minister of Justice)*, 2006 SCC 39 (Supreme Court of Canada), paragraphs 3, 4 and 5. http://tinyurl.com/abbqrg8.

- papers and materials created or obtained especially for the lawyer's brief for
- litigation, whether existing or contemplated ('litigation privilege').[362]

Advice from legal counsel should be sought if there is any question whether information is subject to solicitor-client privilege of a person other than the **public body**.

[362] Ontario Information and Privacy Commissioner Order P-49 (Re Ministry of Community and Social Services, April 10, 1989): http://www.ipc.on.ca/images/Findings/Attached_PDF/P-49.pdf.

■ Section 27: Related Provisions in FIPPA

Subsection 1(1) (Definitions):	**"applicant"** **"head"** **"public body"**
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 - [SECTION 28]

Summary of the Exception

The exceptions in subsection 28(1) are designed to protect diverse economic, financial and other interests of the Government of Manitoba or a **public body**.

Subsection 28(1) contains discretionary exceptions to the right of access under section 7 of FIPPA, as 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' as 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)]

> **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 Government of Manitoba, including the following information:

The Government of Manitoba 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 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,** or
- the Government of Manitoba in the broad, 'corporate' sense.

1. Relationship to section 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 of access under section 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**; and
- must then consider whether it is appropriate to release the information, even though an exception in subsection 28(1) applies.[363]

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).[364]

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[363] See *Exercising a Discretion* earlier in this Chapter.

[364] 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.

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.

Consultation among the **public bodies** affected is advisable to determine whether the harm contemplated by the exception could result.

5. "Of.... the Government of Manitoba"

The exceptions in subsection 28(1) also protect the interests of the Government of Manitoba in the broad 'corporate' sense.

The phrase "Government of Manitoba" is broader than the concept **"public body"**. 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.[365] The Government of Manitoba is Her Majesty the Queen, acting for the Province of Manitoba.[366]

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 Government of Manitoba is responsible and that affect the overall economy or interests of the Province of Manitoba.

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[365] Black's Law Dictionary, 6th Edition.

[366] *The Interpretation Act* of Manitoba, section 17 and the Schedule of Definitions. *The Interpretation* Act, C.C.S.M. c. I80, can be found at: http://web2.gov.mb.ca/laws/statutes/ccsm/i080e.php

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 Government of Manitoba - Opening Wording of Subsection 28(1)

> **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 Government of Manitoba, 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.[367]

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. [368]

2. Economic interests

"Economics" means the science of the production and distribution of wealth; the condition of a country etc. as regards material prosperity.[369] "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.[370]

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[367] See *Reasonable Expectation of Harm* earlier in this Chapter.

[368] The Concise Oxford Dictionary, 9th Edition.

[369] The Concise Oxford Dictionary, 9th Edition.

[370] The Concise Oxford Dictionary, 9th Edition.

"Economic interests" relate to the broad interest of the Government of Manitoba 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.

3. "Financial interests"

"Financial" interests relate to the management of money and monetary resources.[371] 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, etc.

4. "Negotiating position"

To "negotiate" means to confer with others in order to reach a compromise or agreement.[372] A "negotiating position" can relate to contractual negotiations, negotiations relating to the settlement of a lawsuit, etc.

5. "Of a public body or the Government of Manitoba"

The exception in the opening wording of subsection 28(1) protects economic or financial interests or the negotiating position of:

- the **public body** which has received the request for access,
- another **public body**, and
- the interests of the Government of Manitoba in the broad, 'corporate' sense.[373]

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371 The Concise Oxford Dictionary, 9th Edition.

372 The Concise Oxford Dictionary, 9th Edition.

373 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 Government of Manitoba;

1. Meaning of "trade secret"

The exception to disclosure in clause 28(1)(a) is a 'class exception' as it protects a type or kind of information.

The term "trade secret" has been described as follows:

> The term "trade secret" refers to some identifiable business or technical information which is kept private for the purpose of 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); and specialized compilations of information that, in sum, are not publicly known and have unique value on that account.[374]

[374] *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. http://www.law.ualberta.ca/alri/docs/fr46.pdf.

In summary:

"trade secret" means information including but not limited to a formula, pattern, compilation, programme, method, technique or 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.. [375]

2. "Of a public body or the Government of Manitoba"

"Trade secret" of a **public body** or the Government of Manitoba means that a **public body** or the 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** which has received the request for access,
- another **public body**, or
- the Government of Manitoba in the broad, 'corporate' sense.[376]

[375] 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.

[376] 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 Government of Manitoba 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' as they protect a type or kind of information.

"Financial information" is information relating to finance - money and the monetary resources of a person, company, etc.[377] Examples include information on pricing practices, profit and loss data, overhead and operating expenses. [378]

"Commercial information" is information related to or connected with trade or commerce,[379] with the buying, selling or exchange of merchandise or services.[380] Examples include price lists, lists of suppliers and customers, market research surveys and other similar information relating to the commercial operation of a business.[381] The term "commercial information" can apply to both profit-making enterprises and non-profit enterprises.[382]

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377 The Concise Oxford Dictionary, 9th Edition.

378 Ontario Information and Privacy Commissioner Order P-80 (Re Ministry of Health, July 26, 1989). http://www.ipc.on.ca/images/Findings/Attached_PDF/P-80.pdf.

379 Ontario Information and Privacy Commissioner Order P-179 (Re Ministry of Health, June 20, 1990). http://ipc.on.ca/images/Findings/Attached_PDF/P-179.pdf.

380 Ontario Information and Privacy Commissioner Order P-493 (Re Ministry of Municipal Affairs, July 9, 1993). http://ipc.on.ca/images/Findings/Attached_PDF/P-493.pdf.

381 Order P-16, Ontario Information and Privacy Commissioner (Re Ministry of Agriculture and Food, Sept. 8, 1988).

"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.[383]

"Technical information" usually refers to information of or involving or concerned with the mechanical arts and applied sciences.[384] 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.[385]

The "other information" referred to in the exception is information in which a **public body** or the Government of Manitoba 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 which would arise through ownership or through contractual rights. A "right of use" would arise through contractual rights or a licensing agreement.

http://www.ipc.on.ca/images/Findings/Attached_PDF/P-16.pdf.

382 Order P-493, Ontario Information and Privacy Commissioner (Re Ministry of Municipal Affairs, July 9, 1993). http://ipc.on.ca/images/Findings/Attached_PDF/P-493.pdf

383 Order P-454, Ontario Information and Privacy Commissioner (Re Ontario Native Affairs Secretariat, May 7, 1993): http://www.accessandprivacy.gov.on.ca/english/order/prov/p-454.html.

384 The Concise Oxford Dictionary, 9th Edition.

385 Order P-444, Ontario Information and Privacy Commissioner (Re Ministry of Health, April 2, 1993): http://www.ipc.on.ca/images/Findings/Attached_PDF/P-444.pdf.

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 Government of Manitoba (in the broad 'corporate' sense) has a proprietary interest or right of use.[386]

[386] 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 Government of Manitoba;

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 Government of Manitoba 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.[387] 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.

[387] See "*Reasonable Expectation of Harm*" in the Introduction to this Chapter.

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, loss of reputation, loss of goodwill in the marketplace).

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.[388]

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.[389]

"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 Government of Manitoba.[390]

To "negotiate" means to confer with others in order to reach a compromise or agreement.[391] "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.

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388 The Concise Oxford Dictionary, 9th Edition.

389 The Concise Oxford Dictionary, 9th Edition.

390 The Concise Oxford Dictionary, 9th Edition.

391 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 Government of Manitoba"

The exceptions in clause 28(1)(c) protect the **public body** which has received the request for access, another **public body** and the Government of Manitoba in the broad 'corporate' sense from the harm contemplated in paragraphs 28(1)(c)(i), (ii) and (iii).[392]

[392] 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: 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; or

1. "Innovative scientific or technical information obtained through research"

The exception to disclosure in clause 28(1)(d) is a 'class exception' as it protects a type or kind of information.

"Innovative" means a new method or idea or something changed or altered.[393]

"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.[394]

"Technical information" usually refers to information of or involving or concerned with the mechanical arts and applied sciences.[395] 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.[396]

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393 The Concise Oxford Dictionary, 9th Edition.

394 Ontario Information and Privacy Commissioner Order P-454 (Re Ontario Native Affairs Secretariat, May 7, 1993). http://www.accessandprivacy.gov.on.ca/english/order/prov/p-454.html.

395 The Concise Oxford Dictionary, 9th Edition.

396 Ontario Information and Privacy Commissioner Order P-444 (Re Ministry of Health, April 2, 1993). http://www.ipc.on.ca/images/Findings/Attached_PDF/P-444.pdf.

"Research" means the systematic investigation into and study of materials, sources, etc. in order to establish facts and reach new conclusions and an endeavour to discover new or to collate old facts, etc. by scientific study or by a course of critical investigation.[397]

2. "Employee of a public body or the Government of Manitoba"

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 Government of Manitoba".

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**.

[397] 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)

> **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….

The opening wording of clause 28(1)(e) contains two exceptions; both contain a reasonable expectation of harm test.

(i) "Result in an undue loss or benefit to a person"

An "undue" loss or benefit is a loss or benefit which is excessive, disproportionate; not suitable; not owed.[398] The loss or benefit need not 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.[399]

(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.[400] "Pending" means awaiting decision or settlement, undecided; about to come into existence.[401] 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.

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398 The Concise Oxford Dictionary, 9th Edition.

399 The Interpretation Act of Manitoba, section 17 and the Schedule of Definitions. *The Interpretation Act*, C.C.S.M. c.I80, can be found at: http://web2.gov.mb.ca/laws/statutes/ccsm/i080e.php.

400 The Concise Oxford Dictionary, 9th Edition.

401 The Concise Oxford Dictionary, 9th Edition.

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.[402] The circumstances must be carefully assessed, and the determination must be based on objective grounds.

[402] 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 source of revenue, contemplated change in government borrowing, etc.).

The exceptions in paragraphs 28(1)(e)(i) to (iv) are 'class exceptions' as 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)]

> **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, section 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.[403]

"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.[404]

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
- for the purpose of testing products for possible purchase.

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.

[403] The Concise Oxford Dictionary, 9th Edition.

[404] The Concise Oxford Dictionary, 9th Edition.

■ Section 28: Related Provisions in FIPPA

Subsection 1(1) (Definitions):	**"applicant"** **"employee"** **"head"** **"public body"**
Subsection 7(2)	**Severing information**
Subsection 12(1)	**Contents of response**
Clause 18(1)(a)	**Trade secret of a third party**
Clause 18(3)(d)	**Results of a product or environmental test**
Clause 23(1)(c)	**Positions, etc. developed for contractual or other negotiations**
Clause 23(1)(f)	**Disclosure of a pending policy or budgetary decision**
Clause 23(2)(d)	**Results of a product or environmental test**

TESTING PROCEDURES, TESTS AND AUDITS - [SECTION 29]

Summary of the Exception

The exceptions to disclosure in section 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.

Section 29 contains discretionary exceptions to the right of access under section 7 of the Act.

The exceptions in section 29 contain a 'reasonable expectation of harm' test.

■ Scope of the Exception: Testing Procedures, Tests and Audits - [Section 29]

> **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 section 29 protect procedures and techniques involved in testing and auditing and details relating 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

Section 29 contains discretionary exceptions to the right of access under section 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 section 29 applies to information in the requested **record**; and
- must then consider whether it is appropriate to release the information, even though an exception in section 29 applies.[405]

[405] See *Exercising a Discretion* earlier in this Chapter.

2. Severing - subsection 7(2)

The term information, rather than the term **record**, is used in section 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, 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).[406]

3. Reasonable expectation of harm

The exceptions in section 29 contain a 'reasonable expectation of harm' test.[407]

The **head** of the **public body** must determine whether disclosure of the information could "reasonably be expected" to cause the harm described in section 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"

The exception in section 29 protects the testing or auditing procedure. The exception applies to specific types of information: testing or auditing procedures or 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 or audits or the results of testing or auditing, access may be refused.

Section 29 does not provide a basis for refusing to disclose the results of test or audits.

"Prejudice" in the context of section 29 means to impair the validity of[408] the testing or auditing procedures or techniques, or of the results of the test or audit.

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406 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.

407 See *Reasonable Expectation of Harm* earlier in this Chapter.

408 The Concise Oxford Dictionary, 9th Edition.

An "audit" is an official examination of accounts or a systematic review.[409]

The terms "test" and "audit" can include staffing tests, financial audits, program audits, etc.

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 provides that FIPPA does not apply to "a question that is to be used on an examination or test".[410]

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**.

[409] The Concise Oxford Dictionary, 9th Edition.

[410] Section 4 is discussed in Chapter 2, under *Records That Do Not Fall Under FIPPA*.

■ Section 29: Related Provisions in FIPPA

Subsection 1(1) (Definitions):	**"applicant"** **"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**

CONFIDENTIAL EVALUATIONS ABOUT THE APPLICANT - [SECTION 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 where that information has been provided by someone else in confidence for the purpose of determining the **applicant's** suitability, eligibility or qualifications for employment or for the purpose of 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*.[411]

Subsection 30(1) is a discretionary exception to the right of access under section 7 of the Act.

The exception in subsection 30(1) is a 'class exception' as it protects a type or kind of information.

[411] Subsection 30(2) was added to FIPPA by *The Freedom of Information and Protection of Privacy Amendment Act*, S.M. 2008 c. 40. The amending Act can be found at: http://web2.gov.mb.ca/laws/statutes/2008/c04008e.php.

■ Scope of the Exception for Confidential Evaluations - [Section 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 Personal Investigations Act*.

The exception to disclosure in subsection 30(1) is a 'class exception' as 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 information**[412] about the **applicant**;

(ii) the **personal information** has been provided explicitly or implicitly in confidence by someone other than the **applicant**;

[412] The term "personal information" is defined in subsection 1 of FIPPA and is discussed in Chapter 2, under *Key Definitions*.

The exception only applies where 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 advisable 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 information is provided and received,[413] past practices followed with respect to such information, stated policies, etc.

(iii) the **personal information** has been provided

- for purposes of determining the **applicant's** suitability, eligibility or qualifications for employment, or
- for the purpose of awarding a contract.

"Suitability" means fitness for the purpose, appropriateness.[414] "Eligibility" means fitness or entitlement.[415] "Qualifications" means accomplishments fitting a person for a position or purpose.[416]

A contract referred to in subsection 30(1) can be a contract for goods, for services or for both goods and services.

(iv) 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)].[417]

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413 Ontario Information and Privacy Commissioner Order P-274 (Re Ministry of Correctional Services, Feb. 21, 1992) (made in the context of third party privacy). http://www.ipc.on.ca/images/Findings/Attached_PDF/P-274.pdf.

414 The Concise Oxford Dictionary, 9th Edition.

415 The Concise Oxford Dictionary, 9th Edition.

416 The Concise Oxford Dictionary, 9th Edition.

417 *The Personal Investigations Act*, C.C.S.M. c. P34, can be found at: http://web2.gov.mb.ca/laws/statutes/ccsm/p034e.php.

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 as to whether *The Personal Investigations Act* applies to the **public body**, and what **personal information** is available under it.

2. Discretionary exception

Subsection 30(1) is a discretionary exception to the right of access under section 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 the exception in subsection 30(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 subsection 30 applies.[418]

3. Severing - subsection 7(2)

The term information, rather than the term **record**, is used in subsection 30(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).[419]

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[418] See *Exercising a Discretion* earlier in this Chapter.

[419] 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.

■ Section 30: Related Provisions in FIPPA

Subsection 1(1) (Definitions):	**"applicant"** **"head"** **"personal information"** **"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 17(2)(h)	**Personal recommendations or evaluations, character references or personnel evaluations**

PRESERVATION OF HERITAGE RESOURCES AND LIFE FORMS - [SECTION 31]

Summary of the Exception

Section 31 contains two types of discretionary exceptions to disclosure:

1. Subsection 31(1) provides 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) provides 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 relating 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' as it protects a type or kind of information.

■ 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 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) provides 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*;[420]
- 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; or
- interfere with the preservation, protection or conservation of any rare, endangered, threatened or vulnerable life form, including plants, vertebrates and invertebrates.

[420] *The Heritage Resources Act*, C.C.S.M. c. H39.1, can be found at: http://web2.gov.mb.ca/laws/statutes/ccsm/h039-1e.php.

1. Discretionary exceptions

Subsection 31(1) contains discretionary exceptions to the right of access under section 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 31(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 31(1) applies.[421]

2. Reasonable expectation of harm

The exceptions in subsection 31(1) contain a 'reasonable expectation of harm' test.[422]

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, 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).[423]

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421 The requirements to be met when exercising a discretion are discussed earlier in this Chapter, under *Exercising a Discretion*.

422 See *Reasonable Expectation of Harm* earlier in this Chapter.

423 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.

4. "Heritage resource" - clause 31(1)(a)

A "heritage resource" is defined in section 1 of *The Heritage Resources Act* of Manitoba:

> "heritage resource" includes
>
> (a) a heritage site,
> (b) a heritage object, and
> (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) any object designated as a heritage object by the Lieutenant Governor in Council under subsection 43(2);

The terms "archaeological object", "palaeontological 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 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 but is not limited to plants, vertebrates and invertebrates.

A "vertebrate" is an animal that has a spinal column, such as a mammal, bird reptile, amphibian or fish. [424]

An "invertebrate" is an animal that does not have a spinal column, such as a crayfish or crab, an insect, spiders and mites, a 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.[425] 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, etc.

"Endangered" means placed in danger.[426] 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, can be designated as endangered by federal or provincial legislation, etc.

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[424] The Concise Oxford Dictionary, 9th Edition.

[425] The Concise Oxford Dictionary, 9th Edition.

[426] The Concise Oxford Dictionary, 9th Edition.

"Threatened" in the context of clause 31(1)(b) means likely to be injured; to be in danger.[427] 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, can be designated as threatened by federal or provincial legislation, etc.

"Vulnerable" means may be wounded or harmed.[428] 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.[429]

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.[430]

"Conservation" means preservation, keeping safe from harm or damage, especially for future use.[431] 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.

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427 The Compact Edition of the Oxford English Dictionary.

428 The Concise Oxford Dictionary, 9th Edition.

429 The Concise Oxford Dictionary, 9th Edition.

430 The Concise Oxford Dictionary, 9th Edition.

431 The Concise Oxford Dictionary, 9th Edition.

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' as it protects a type or kind of information - information relating to a contemplated designation under *The Heritage Resources Act* of:

- a heritage site;
- a municipal heritage site; or
- a heritage object.

A "contemplated" designation is an intended designation;[432] 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 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*:

[432] The Concise Oxford Dictionary, 9th Edition.

"heritage object" includes

(a) an archaeological object,
(b) a palaeontological object,
(c) a natural heritage object, and
(d) any object designated as a heritage object by the Lieutenant Governor in Council under subsection 43(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 of access under section 7 of the Act, 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 31(2) applies to information in the requested **record**; and
- must then consider whether it is appropriate to release the information, even though the exception in subsection 31(2) applies.[433]

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 to the remainder of the **record** (unless an exception in another section of FIPPA applies to it).[434]

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[433] See *Exercising a Discretion* earlier in this Chapter.

[434] 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.

■ Section 31: Related Provisions in FIPPA

Subsection 1(1) (Definitions):	**"applicant"** **"head"** **"public body"**
Subsection 7(2)	**Severing information**
Subsection 12(1)	**Contents of response**

INFORMATION THAT WILL BE AVAILABLE TO THE PUBLIC - [SECTION 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 90 days after the **applicant's** access request under Part 2 of FIPPA is received.

Clause 32(2)(a) requires the **head** to notify the **applicant** when the information becomes available.

Clause 32(2)(b) states that, if the exception is relied upon and the information is not published or released within 90 days, the **applicant's** request must be treated as a new request received on the last day of the 90 day period. The **head** cannot rely on the exception in subsection 32(1) again when reconsidering the access request.

Subsection 32(1) contains a discretionary exception to the right of access under section 7 of FIPPA.

The exception in subsection 32(1) is a 'class exception' as it protects a type or kind of information.

■ Scope of Exception: Information that will be Available to the Public - [Subsections 32(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 90 days after the **applicant's** request is received.

Notification when information becomes available

32(2) **When** the **head** of a **public body** has refused to disclose information under subsection (1), the **head** shall

(a) notify the applicant when the information becomes available; and

(b) if the information is not available to the public within 90 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 90 day period and not refuse access to the information under subsection (1).

1. Scope of the exception

The exception in subsection 32(1) is a 'class exception' as it protects 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.

In order 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 90 days from the date the **applicant's** request is received.

This exception only applies 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) 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 the location where he or she can have access, how access will be given and of the cost of the information (if any).

If the requested information is not published or made available to the public within 90 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 90th day. The **head** has 30 days to respond to the request, starting from the 90th day (unless there are grounds to extend this time period under section 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 not 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 exception

Subsection 32(1) contains a discretionary exception to the right of access under section 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 the exception in subsection 32(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 subsection 32(1) applies.[435]

[435] The requirements to be met when exercising a discretion are discussed earlier in this Chapter, under *Exercising a Discretion*.

3. Severing - subsection 7(2)

The term information, rather than the term **record**, is used in subsection 32(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 a portion of the information in a **record**, only that portion 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).[436]

[436] 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.

■ Section 32: Related Provisions in FIPPA

Subsection 1(1) (Definitions):	**"applicant"** **"head"** **"public body"**
Clause 3(a)	**Act does not replace procedures for access to information normally available to the public**
Subsection 6(2)	**Part 2 (Access to information) does not apply to publicly available information**
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**