

4. EXCEPTIONS TO THE RIGHT OF ACCESS

Overview

This chapter covers

- the mandatory and discretionary exceptions to the right of access;
- the harms test;
- the exercise of discretion;
- how to apply each exception; and
- when an exception does not apply.

4.1 Introduction

Section 6(1) of the *FOIP Act* allows any person a right of access to records in the custody or under the control of a public body, including a record containing personal information about the individual requesting the information.

This right of access does not apply to records that are excluded under **section 4** of the Act or where a provision of other legislation takes precedence over the *FOIP Act*. The exclusions from the Act are discussed in section 1.5 of Chapter 1 and the paramountcy provision in **section 5** is explained in section 1.6 of Chapter 1.

The right of access is also subject to limited and specific exceptions that are set out in **sections 16 to 29** of the Act. The exceptions in the *FOIP Act* all have specific criteria that need to be fulfilled before an exception may be applied.

This chapter explains the various exceptions that require or allow a public body to refuse to disclose information to an applicant who makes a request under the Act.



A basic principle of the *FOIP Act* is to give the public access to the records of a public body. Any exceptions to the right of access should be applied in a limited and specific way to provide as much access to information as possible.

Generally, an applicant has a right of access to all or part of any record that is the subject of the request. Refusal to disclose all or part of a record will occur only where the Act provides a specific exception that applies to all or part of a record.

A record cannot be withheld simply because it may contain sensitive or embarrassing information. As well, access cannot be denied because disclosure may expose the public body to liability. Each record must be carefully reviewed, in consultation with public body staff knowledgeable about the record's content and context, to determine whether an exception in the Act applies.

Public bodies should interpret the exception provisions narrowly. Only the specific information to which an exception applies may be withheld under that exception. If

the records are subject to the Act and no exception applies, the information must be disclosed.

More than one exception may apply to all or part of a record. A public body should take into account all relevant factors when considering whether an exception to an applicant's right of access applies to a record. No further exceptions can be applied once the Information and Privacy Commissioner has made a decision on those that have been applied. However, the Commissioner will apply any mandatory exceptions that have not been applied by the public body (see *IPC Order 98-020*).

The exceptions may apply to requests for general information and to requests from an individual for his or her own personal information.

The majority of requests for review to the Commissioner under **section 65** of the Act arise from refusal to provide access. Public bodies should be prepared to document and defend their decisions not to disclose specific information.

Mandatory and discretionary exceptions

There are two types of exceptions under the Act – mandatory exceptions and discretionary exceptions.

Mandatory exceptions

Mandatory exceptions begin with the phrase “the head of a public body must refuse to disclose.” If information falls within a mandatory exception, a public body must refuse to disclose all or part of the record as required. Public bodies must review all of the criteria and weigh all of the relevant factors relating to a mandatory exception before deciding whether the exception applies.

The only case where information that falls within a mandatory exception *can* be disclosed is where **section 32** of the Act requires disclosure in the public interest. In this case **section 32** overrides the exception. For further information on disclosure in the public interest, see Chapter 6.

The mandatory exceptions to disclosure are as follows:

- disclosure would be harmful to the business interests of a third party (**section 16(1)**);
- the information is about a third party and is in a tax record (**section 16(2)**);
- disclosure would be an unreasonable invasion of a third party's personal privacy (**section 17**);
- the information is in a law enforcement record and its disclosure would be an offence under an Act of Canada (**section 20(4)**);
- the information would reveal Cabinet or Treasury Board confidences (**section 22**);
- records relating to an audit by the Chief Internal Auditor that are created by or for the Chief Internal Auditor (**section 24(2.1)(a)**);
- disclosure would reveal information about an audit by the Chief Internal Auditor (**section 24(2.1)(b)**) and

- the information is subject to legal privilege and relates to a person other than a public body (**section 27(2)**).

In addition, information must not be disclosed if the disclosure is prohibited by another enactment (Act or regulation) of Alberta that prevails despite the *FOIP Act* (**section 5**) (see section 1.6 of Chapter 1 on paramountcy).

Discretionary exceptions

Discretionary exceptions to the right of access permit a public body to decide whether or not to withhold all or part of a record. Discretionary exceptions commence with the phrase “the head of a public body may refuse to disclose.” There are eleven discretionary exceptions:

- disclosure harmful to individual or public safety (**section 18**);
- confidential evaluations (**section 19**);
- disclosure harmful to law enforcement (**section 20(1)**);
- disclosure harmful to intergovernmental relations (**section 21**);
- local public body confidences (**section 23**);
- advice from officials (**section 24(1)**);
- disclosure harmful to the economic or other interests of a public body (**section 25**);
- testing and audit procedures (**section 26**);
- legal and other privileged information of a public body (**section 27**);
- disclosure harmful to the conservation of heritage sites, etc. (**section 28**); and
- information that is or will be available to the public (**section 29**).

A decision to apply a discretionary exception requires two steps:

- a factual determination must be made as to whether information falls within the category of information that may be withheld from disclosure; and
- the head of the public body must exercise his or her discretion as to whether information should be withheld.

Exercise of discretion

The exercise of discretion is fundamental to applying the Act. It requires the head, or staff member delegated to exercise the discretion of the head, to weigh all factors in determining whether or not information that qualifies for a discretionary exception should be withheld.

The exercise of discretion is not a mere formality. The public body must be able to show that the records were reviewed, that all relevant factors were considered and, if the decision is to withhold the information, that there are sound reasons to support the decision.

In *IPC Order 2000-021*, the Commissioner stated that legislated discretion amounts to the power to make a decision that cannot be determined to be right or wrong in an objective sense. Discretion amounts to the power to choose a particular course of

action for good reasons and in good faith, after the decision-maker has considered the relevant facts and circumstances; the applicable law, including the objects of the Act; and the proper application of the law to the relevant facts and circumstances.

If there is a request for review, the Commissioner decides whether or not an exception applies in a particular circumstance. If a discretionary exception has been properly applied, the Commissioner cannot overrule the head's decision. The Commissioner can, however, require the head to reconsider a decision if it appears that the obligation to exercise discretion has been disregarded, or where discretion has been exercised without due care and diligence or for an improper or irrelevant purpose (see *IPC Order 96-017*).

It is up to the head of a public body to determine whether or not to apply a discretionary exception. If the public body exercises its discretion and decides not to apply a certain exception when it is processing the applicant's request, the Commissioner has no authority to consider the application of that exception at the request of an affected party (*IPC Order F2003-018*).

Some factors that should be taken into account when exercising discretion include:

- the general purposes of the Act (i.e. public bodies should make information available to the public, and individuals should have access to personal information about themselves);
- the wording of the discretionary exception and the interests which the exception attempts to protect or balance;
- whether the applicant's request may be satisfied by severing the record and providing the applicant with as much information as is reasonably practicable;
- the historical practice of the public body with respect to the release of similar types of records;
- the nature of the record and the extent to which the record is significant or sensitive to the public body;
- whether the disclosure of the information will increase public confidence in the operation of the public body;
- the age of the record;
- whether there is a definite and compelling need to release the record; and
- whether Commissioner's Orders have ruled that similar types of records or information should or should not be disclosed.

(See *IPC Order 96-017*.)



A public body must not replace the exercise of discretion under Part 1 of the Act with a blanket policy that certain types of information will not be released. Public bodies can develop guidelines to assist in the exercise of discretion, provided they are not interpreted as binding rules. Whether an exception is mandatory or discretionary, the public body must consider whether section 32 of the Act (disclosure in the public interest) requires release of the information.

Harms test

Some exceptions (both mandatory and discretionary) are based on a harms test. This generally provides that access to all or part of a record may or must be refused if disclosure could reasonably be expected to harm a particular public or private interest. The general test for harm under the Act is whether there is a reasonable expectation of harm flowing from disclosure of the specific information at issue (see *IPC Order 2000-006*).

IPC Order 96-003 established a specific test for harm under **section 20**. This test has been applied to other provisions of the *FOIP Act* that refer to harm, such as **sections 16, 18, 21 and 25**. Under this three-part test,

- there must be a reasonable expectation of probable harm;
- the harm must constitute damage or detriment, and not mere inconvenience; and
- there must be a causal connection between disclosure and the anticipated harm.

The evidence must demonstrate a probability of harm from disclosure and not just a well-intentioned but unjustifiably cautious approach to the avoidance of any risk whatsoever because of the sensitivity of the matters at issue. The likelihood of harm must be genuine and conceivable.

The harm must pass a general threshold of damage or detriment, not mere interference or hindrance. The threshold may vary depending on the nature of the harm that may result from disclosure. The harm must be specific to the context of the request. For example, there must be evidence of a direct and specific threat to an individual or a specific harm flowing from the disclosure of the information or record in order to apply **section 18** (harm to health or safety) to withhold records or information from an applicant.

For a detailed discussion of the concept of harm, see IPC FOIP Practice Note 1: *Applying “Harms” Tests*.

Other tests

A public body can refuse to disclose information if the disclosure would *reveal* information that belongs to a certain class, such as advice from officials, Cabinet confidences, or the substance of deliberations of *in camera* meetings. In such cases there is no need to address the harm that the disclosure may cause, although this may be a factor in exercising discretion.

Application of exceptions

There is a general process that should be followed in applying all exceptions. There are five basic steps.

Step 1: Preliminary examination

Meet with public body staff to understand the content of the record(s) and the context and significance of the record(s) at the time they were created and at the time of the request. Undertake a general review of the record(s) to determine which exceptions

may apply and to gauge the complexity of the case and the notices that will be required as part of the process.

Step 2: Detailed review

Review the record(s) line by line to consider more thoroughly the nature and extent of the exceptions involved. Identify information that may be subject to mandatory exceptions where a public body has no discretion to disclose information, and information to which no exception applies. Serve any required notices.

Step 3: Exercise of discretion

Where discretion is permitted, undertake any necessary consultation and decide, with respect to information where exceptions apply, whether any or all of the information will be withheld.

Multiple discretionary exceptions may be applied to the same record, where there is sufficient justification for doing so.

Step 4: Severing

Sever that part of the record(s) to which the public body has decided that it is necessary to refuse access. This will leave a record with a number of blank spaces annotated with references to the section(s) of the Act applied to sever the record. If a sequence of pages has been severed completely, a public body should not disclose a number of blank pages. Instead it may disclose a single page listing the records and the exceptions applied in each case.

Step 5: Response to applicant

Prepare a response to the applicant following the guidelines provided in Chapter 3. Many exceptions require careful consideration. Reference should be made to the detailed advice provided in this chapter on the application of each of the specific exceptions.

The processes associated with these steps are discussed in Chapter 3.

Claiming additional exceptions

A public body may claim additional exceptions to disclosure after providing a response to an applicant as long as the applicant is notified of the exceptions with enough time to make representations during an inquiry (see *IPC Order 99-033*). The Commissioner will not allow the late application of an exception if this would allow the public body to make a broad after-the-fact justification for its original exercise of discretion to withhold information (see *IPC Order 2000-023*).

Time limitation on the application of certain exceptions

Some exception provisions state that the exception does not apply to information in a record that has been in existence for longer than a stated period of time. The exceptions that include a time limitation are **section 16** (third party business information in the archives of a public body), **section 17(2)(i)** (personal information of individual deceased for more than 25 years), **section 20** (harm to law

enforcement), **section 21** (harm to intergovernmental relations), **section 22** (Cabinet confidences), **section 23** (local public body confidences) **section 24(1)** (advice from officials) and **section 24(2.1)** (records of an audit by the Chief Internal Auditor of Alberta).

To determine whether a time limitation applies to a record or information, the public body would compare the number of years stated in the limitation provision with the day and month on the face of the record. For example, **section 21(4)** states that **section 21** does not apply to information that has been in existence in a record for 15 years or more. Therefore, at least 15 years must have elapsed since the record was created.

Where the date the record was created is not obvious, the public body would have to examine the context of the record, other documents that may be in proximity to the record in a file or which may refer to the record and other facts that may help provide a date. Information in a record that fits within an exception under the Act but which is older than the stated time limitation in the exception must be disclosed unless another exception applies to it.

4.2 Disclosure Harmful to Business Interests of a Third Party

Section 16(1) creates a mandatory exception for information which, if disclosed, would reveal certain types of third party business information supplied in confidence, and could also result in one or more specified harms.

Section 16(1)(a) to **(c)** provides a three-part test. The information in question must

- be of a type set out in **section 16(1)(a)**;
- be supplied explicitly or implicitly in confidence by the third party (**section 16(1)(b)**); and
- meet one of the harms or other conditions set out in **section 16(1)(c)**.

Type of information

Section 16(1)(a) This provision states that the head of a public body must refuse to disclose information that would reveal

- a trade secret; or
- commercial, financial, labour relations, scientific or technical information of a third party (**section 16(1)(a)**).

When interpreting **section 16(1)(a)**, the following definitions should be kept in mind:

Third party business information is *explicitly* revealed if the information disclosed is itself third party business information or if it makes direct reference to third party business information.

Third party business information is *implicitly* revealed if the information disclosed allows a reader to draw an accurate inference about third party business information (see *IPC Orders 96-013* and *98-013*).

Section 16(1)(a) cannot be applied to information that has already been disclosed, such as information in a part of a proposal that has been disclosed, or information that is not proprietary information of the third party. (See also *IPC Order F2002-002*.)

In deciding whether information in a record falls within **section 16(1)(a)**, the Information and Privacy Commissioner will not rely on the title, but on the content of the record (*IPC Orders 96-013* and *2000-017*), taking into consideration the nature of the information and context in which it appears (*IPC Orders 98-006* and *2001-008*).

Section 1(s) *Trade secret* is defined in **section 1(s)** of the Act as information, including a formula, pattern, compilation, program, device, product, method, technique or process,

- that is used, or may be used, in business or for any commercial purpose;
- that derives independent economic value, actual or potential, from not being generally known to anyone who can obtain economic value from its disclosure or use;
- that is the subject of reasonable efforts to prevent it from becoming generally known; and
- the disclosure of which would result in significant harm or undue financial loss or gain.

Information must meet all of these criteria to be considered a trade secret. The fact that others may benefit from the disclosure of the information does not mean that there is independent economic value in the secrecy of the information (*IPC Order F2004-006*).

Information that is generally available through public sources (e.g. corporate annual reports) would not usually qualify as a trade secret under the Act. A third party must be able to prove ownership or a proprietary interest in a trade secret or must be able to prove a claim of legal right to the information (e.g. a licence agreement) in order for that information to qualify for the exception.

Section 1(r) *A third party* is defined in **section 1(r)** of the Act as any person, group of persons or organization other than the applicant (i.e. the person making an access request) or a public body. A third party may be an individual, sole proprietorship, partnership, corporation, unincorporated association or organization, non-profit group, trade union, syndicate, or trust. For example, a contractor providing catering and support services to a public body was found to be a third party to an access request for the contractor's proprietary information (see *IPC Order 99-008*).

Even if one of the members of a partnership is a public body, the partnership may still be a third party under the *FOIP Act* (see *IPC Order 2000-005*).

Employees may also be third parties in certain situations. Individuals interviewed during an investigation related to an employee's misconduct and termination were found to be third parties with respect to their personal information (see *IPC Order 98-008*).

Commercial information includes the contract price as well as information that relates to the buying, selling or exchange of merchandise or services (see *IPC Order 96-013*). Commercial information may also include a third party's associations, history,

references, bonding and insurance policies (see *IPC Orders 97-013* and *2001-021*) as well as pricing structures, market research, business plans, and customer records. The names and titles of key personnel and contract managers is commercial information when the information relates to how the third party proposes to organize its work (*IPC Order F2003-004*).

An agreement between two business entities may contain commercial information (see *IPC Order 2001-019*), but the fact that the records requested by an applicant are agreements between two business entities is not determinative of whether **section 16(1)** applies (*IPC Order 2000-017*).

Where a contract contains some third party commercial or financial information, it does not necessarily follow that the entire contract can automatically be withheld under **section 16**. Each provision of a contract must be examined to determine whether it contains, or would reveal, proprietary information that was supplied in confidence to a public body (*IPC Order F2008-019*). At the same time, records need to be viewed as a whole to determine they have the aggregate effect of revealing commercial information (*IPC Orders 98-006* and *F2003-004*).

A business letterhead is not commercial information (*IPC Order 98-006*). A business's GST number may be commercial or financial information (*IPC Order F2008-019*).

Financial information is information regarding the monetary resources of a third party, such as the third party's financial capabilities, and assets and liabilities, past or present (see *IPC Orders 96-018* and *2001-008*). Common examples are financial forecasts, investment strategies, budgets, and profit and loss statements.

Labour relations information relates to the management of personnel by a person or organization, whether or not the personnel are organized into bargaining units. Labour relations information includes relationships between workers, working groups and their organizations as well as managers, employers and their organizations (see *IPC Order 2000-003*). Labour relations information also includes relationships within groups and organizations and collective relations between a public body and its employees.

A dispute between a school board and a school council is not a labour relations dispute, since school council members are not employees of a school board (*IPC Order 2001-010*). A post-secondary institution's internal complaint process for employee disputes about employment obligations is a labour relations dispute-resolution process (*IPC Order F2003-009*).

Common examples of labour relations information are hourly wage rates, personnel contracts and information on negotiations regarding collective agreements.

Scientific information is information exhibiting the principles or methods of science (*IPC Order 2000-017*). Applying this definition, the Commissioner decided that operating manuals forming part of a photo radar contract between a public body and a third party contained scientific and technical information (*IPC Order 2000-017*).

Technical information is information relating to a particular subject, craft or technique (*IPC Order 2000-017*). Examples are system design specifications and plans for an engineering project.

Supplied in confidence

Section 16(1)(b) **Section 16(1)(b)** covers information provided voluntarily by a third party and information provided by a third party under law or some other form of compulsion.

The information would normally have to be supplied by a third party and not compiled by the public body. For example, a report created by an inspector visiting a plant would not qualify as being supplied by the third party. **Section 16(1)(b)** does not cover information that is generated jointly through negotiation with the public body (see *IPC Order 96-013*). However, there may be exceptions where the information supplied to the public body during negotiations remains relatively unchanged in an agreement or could be inferred from an agreement (see *IPC Order 2000-005*).

A letter created by a public body might contain information that would qualify for this exception if it reproduces or analyzes information supplied by a third party in such a way as to reveal the information itself (see *IPC Order 99-007*). In *IPC Order 99-040*, although some of the information withheld consisted of analyses created by the public body and had not been supplied directly by a third party, the information was inextricably linked with information supplied by the third parties, so the confidentiality provision applied.

Financial or commercial information will also be seen as supplied by a third party in confidence if it is originally supplied to a public body in confidence and that public body then supplies the information in confidence to a second public body (see *IPC Order 2001-008*).

The fact that a public body may have released third party information that was intended to have been kept confidential does not limit the third party's ability to claim that the information was supplied in confidence (see *IPC Orders 96-013* and *99-017*).

In confidence usually describes a situation of mutual trust in which private matters are related or reported.

Implicitly, in the context of **section 16(1)(b)**, means that both parties understand that the information is being supplied in confidence. There may be no actual statement of confidentiality, no written agreement or other physical evidence of the understanding that the information will be kept confidential. In such cases, all relevant facts and circumstances need to be examined to determine whether or not there was an understanding of confidentiality. Some of the relevant facts and circumstances would be how the information was provided, the purpose for which the information was provided, and how the information was managed, secured or distributed by or within the public body.

Explicitly, in the context of **section 16(1)(b)**, means that the request for confidentiality has been clearly expressed, distinctly stated or made definite.

There may be documentary evidence that shows that the information was supplied on the understanding that it would be kept confidential. However, it is also acceptable for a statement of confidentiality to be given orally. For the purposes of an inquiry, the person who gave the statement and the person to whom it was made may both offer evidence that the statement was made at the time the information was given.

In *IPC Order 99-018*, the Commissioner established a test for confidentiality that has been cited in many subsequent Orders. He stated that a third party must, from an objective point of view, have a reasonable expectation of confidentiality with respect to the information that was supplied. Furthermore, it is necessary to consider all the circumstances of the case, including whether the information was

- communicated to the public body on the basis that it was confidential and that it was to be kept confidential;
- treated consistently in a manner that indicates a concern for its protection from disclosure by the third party prior to being communicated to the public body;
- not otherwise disclosed or available from sources to which the public has access; or
- prepared for a purpose which would not entail disclosure.

In *IPC Order 2001-019*, the Commissioner agreed that a third party had supplied information in confidence on the evidence that City Council passed a motion acknowledging that a memorandum of understanding was confidential, the document contained a confidentiality clause, the memorandum was negotiated in confidence and confidentiality had been maintained. The Commissioner has recommended that public bodies and private service providers contracting with public bodies ensure that their contracts state whether the parties intend the transaction to be confidential (see *IPC Order 2000-009*).

In *IPC Order 2000-010*, the Commissioner did not find sufficient evidence that a consultant had supplied information in confidence. The confidentiality clause in the contracts required the consultant to treat information received by him as confidential. The clause did not require the public body to treat the information supplied by the consultant as confidential.

In *IPC Order F2003-018*, the Commissioner disagreed with the claim that a report on health and safety audits performed by the applicant was intended to be confidential. There was no sworn or documentary evidence to support the argument that the report was supplied on an implicitly confidential basis. Rather, the evidence indicated that the independent review was part of a cooperative and collaborative dispute resolution process with the applicant.

A boilerplate confidentiality clause on a fax cover sheet is not an indicator that information in the record is supplied in confidence (see *IPC Orders F2004-021* and *F2005-011*).

Managing Contracts under the FOIP Act: A Guide for Government of Alberta Contract Managers and FOIP Coordinators, published by Access and Privacy, Service Alberta, recommends that bidders be encouraged to identify any parts of their submissions that are provided in confidence. If the disclosure of certain information

would be harmful to the business interests of prospective contractors, this should be noted in the document itself or in a covering letter.



It is not sufficient simply to accept a third party's stamp that documents are confidential or an assertion in third party representations that information was supplied in confidence. There must be evidence to support the assertion or marking and to prove that the information has been treated consistently in a confidential manner. (See IPC Order F2008-019.)

As part of their ongoing business, public bodies should regularly review their understandings with third parties concerning the provision of information in confidence.

Effect on business interests

Section 16(1)(c) In applying **section 16(1)(c)**, there must be objective grounds for believing that one of the results listed below will occur as a consequence of disclosing the information. It must be shown that disclosure of the information would

- significantly harm the third party's competitive position;
- interfere significantly with the third party's negotiating position;
- result in similar information no longer being supplied to the public body;
- result in undue financial loss or gain to any person or organization; or
- reveal information concerning the resolution of a labour relations dispute.

Harm significantly the competitive position of a third party

Section 16(1)(c)(i) *Harm significantly* in this provision means that disclosure of the information will damage or cause detriment to the third party's competitive position and that the damage or detriment will have considerable impact on the third party.

In order to assess the significance of the harm, a public body should review, among other things

- the nature of the information;
- the third party's representations regarding the harm involved;
- an objective appraisal of that harm, including any monetary or other value placed on it, if this can be determined; and
- the impact on the third party and its ability to withstand this.

Applying the harms test set out in *IPC Order 96-003*, a decision to refuse access under this exception should be supported by detailed evidence showing that the expectation of harm is reasonable and the harm is probable. The evidence must show that

- there is a clear cause and effect relationship between the disclosure and the alleged harm;

- the expected harm amounts to damage or detriment and not simply hindrance or minimal interference; and
- the likelihood of harm from disclosure of the specific information is genuine and conceivable, and not merely speculative; it is not sufficient to show that there is a potential for harm simply because the information is sensitive.

In *IPC Order 2001-019*, the Commissioner agreed that the competitive position of the third party would be harmed because the record in question set out the party's strategic position with respect to its dealings with one public body and this was intended to serve as a blueprint for the third party's proposed and ongoing commercial relationships with other similar public bodies.

In *IPC Order F2002-002*, the Commissioner rejected the argument that disclosure of information in a third party's proposal regarding the company's history and general information about its projects and plans would significantly harm the competitive position of the third party.

Interfere significantly with the negotiating position of a third party

Section 16(1)(c)(i) This provision allows for situations where disclosure of third party information would have a major impact on ongoing or future negotiations. Completed negotiations are not normally subject to the exception unless there is a good probability that the particular strategies will be used in the future and the disclosure of information relating to completed negotiations would reveal these strategies.

Examples of information to which this provision may apply include negotiating positions, options, instructions and pricing criteria, and points used in negotiations. (See *IPC Order 2001-008*.)

Result in similar information no longer being supplied to the public body

Section 16(1)(c)(ii) This provision allows for situations where the disclosure of a third party's confidential business information is likely to have a negative effect on the ability of the public body to obtain similar information in the future. This provision is applicable only in cases where there is a continuing public interest in the particular information being supplied. If this is the case, a public body can consider whether disclosure would discourage either the particular third party or another third party from voluntarily supplying information to it or other public bodies.

A third party may assert that it will no longer provide information if it may be disclosed under the *FOIP Act*. However, the public body is required to come to a reasonable decision as to whether or not this will be the case. It is unlikely that similar information will no longer be supplied where the third party has a financial or other incentive to continue supplying the information or where it is legally required. (See *IPC Order 96-018*.)

If a public body can order certain records to be supplied to it under an enactment (e.g. the *Occupational Health and Safety Act*), the records cannot be withheld under **section 16(1)(c)(ii)** of the *FOIP Act* (see *IPC Order 2000-014*).

Section 16(1)(c)(ii) might be applicable to the supply of pricing information by a group of third parties which serves to effectively regulate pricing of products, or

information on leases and rental values of commercial properties in order to apply market-value assessments across a city.

Result in undue financial loss or gain to any person or organization

Section 16(1)(c)(iii) For this provision to apply, there must be objective grounds for believing that disclosing the information would result in an undue loss or gain measured in monetary or monetary-equivalent terms (e.g. loss of revenue, loss of corporate reputation or loss of good will).

The undue financial loss or gain may apply to the public body that has custody or control of the information in question, the third party that supplied the information or any other person or organization.

There must be objective grounds for believing that the loss or gain contemplated by this exception would actually result from disclosure. A public body should be prepared to present detailed and convincing evidence of the facts that led to the expectation that the undue financial loss or gain would occur if the information were disclosed. A link is required between the disclosure of specific information and the result that is expected from the disclosure.

For example, in *IPC Order 96-013*, the Commissioner did not find sufficient evidence showing that disclosure of certain clauses in a contract between the public body and third party would affect the legal relations between the parties or that the parties' existing rights would be different after disclosure.

Reveal labour relations information

Section 16(1)(c)(iv) This provision allows for the non-disclosure of information that would reasonably be expected to *reveal* either of two specific kinds of labour relations information of a third party:

- *information supplied to* an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute; or
- *the report of* an arbitrator, mediator, labour relations officer or person or body appointed to resolve or inquire into a labour relations dispute.

This provision could apply to the information that was supplied to, or the report of, the person inquiring into the dispute. In either of these cases, the information would have been collected, compiled or created by that person in the course of the dispute resolution process.

This provision could also apply to information that would *reveal* information supplied to the person inquiring into the dispute, or contained in the report of that person. This could include information that makes reference to the positions of the parties in an arbitration process, an account of an interview with a mediator or notes for, or a draft of, the report. Other examples include notes relating to deliberations on the report of a labour relations officer, or any other information that would allow a reader to draw an accurate inference about the information supplied to, or in the report of, a person inquiring into a labour relations dispute.

A *report* may consist of a record providing information or opinions, or a formal statement or account of the results of an analysis of information.

The recording of mere observation or a simple statement of fact would not generally be covered by this provision. The provision requires that an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute create the report.

An *arbitrator* is a neutral person chosen by the parties to a dispute to hear their arguments and give judgment between them. The parties may submit themselves voluntarily or under a compulsory agreement to the arbitrator's decision.

A *mediator* is a person who facilitates discussion between parties who disagree, with the aim of reconciling them.

The mediation does not have to be successful for the person appointed to resolve a dispute to be considered a mediator. Even if the record in question is not considered to be the report of a mediator, the report can still be considered to be the report of a person appointed to resolve or inquire into a labour relations dispute under **section 16(1)(c)(iv)**. (See *IPC Order 2000-003*.)

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

Other persons or bodies appointed to resolve or inquire into a labour relations dispute includes any person or body appointed by any level of government or any public body; for example, Cabinet appointments, ministerial appointments, appointments by the council, board or the chief executive officer of a public body.

One example of other persons or bodies appointed to resolve or inquire into a labour relations dispute would be the ministerial appointment of a disputes inquiry board to attempt to resolve a dispute involving a school board. Another example would be the designation by the Director of the Labour Relations Board of a person requested by parties to a dispute as an officer of the Board.

Tax information

Section 16(2) This exception provides that a public body must refuse to disclose information about a third party that was collected on a tax return or collected for the purpose of determining tax liability or collecting a tax. This is a mandatory exception. The public body cannot disclose the information unless required to do so by law or by **section 32** (disclosure in the public interest). An example of a required disclosure would be the provision of a tax certificate by municipalities under the authority of the *Municipal Government Act*.

Information collected on a tax return is information on a form used to determine taxes to be paid for municipal, education, provincial or federal purposes, and includes corporate, business and personal tax information of a third party (see also section 4.3 of this chapter).

Collected for the purpose of determining tax liability means collected for the purpose of determining whether a person or organization owes past, present or future taxes to a school board, a municipality or the provincial or federal government.

Collected for the purpose of collecting a tax means collected by authorities for the purpose of collecting due or overdue taxes for a school jurisdiction, municipality or the provincial or federal government.

The type of information to which **section 16(2)** may apply includes tax data derived from tax forms, audits of a business intended to determine whether taxes are owed, and information about directors of a bankrupt corporation gathered to determine who should be liable for taxes that are in arrears.

In *IPC Order 2000-024*, the Commissioner ruled that the exception to disclosure of tax information applied to the names and mailing addresses of property owners on an assessment roll because the information was collected for the purpose of determining property tax liability or for collecting property taxes.

Section 16(2) may not be used to withhold an applicant's own tax information, since this is not information about a third party.

Section 16(2) may be used in relation to information concerning royalties or obtained in the process of collecting royalties. However, such royalties must have a statutory basis as a tax. Where there is doubt about the nature of a royalty, legal advice should be sought.

When the exception does not apply

Section 16(3) A public body may not withhold information under **section 16(1)** or **(2)** if any of the conditions set out in **section 16(3)** are applicable.

If the third party consents

Section 16(3)(a) A public body cannot withhold requested information under this exception when the third party concerned has consented to disclosure, although other exceptions may be applied to the information. Consent should be in writing. In order for consent to be valid, it must refer to a specific disclosure.

For example, a public body cannot infer that the third party has consented to the disclosure in response to a FOIP request simply because the third party knew that the public body might be obliged to disclose certain records during hearings of an administrative tribunal (see *IPC Order 2001-021*). Also, the acceptance of the terms and conditions of an Request For Proposal process, including the Minister's right to publish summary cost information, does not constitute consent under **section 16(3)** (see *IPC Order F2002-002*).

If the third party neither consents nor objects to the disclosure, the public body must assess the appropriate application of this exception. It always remains the responsibility of the public body to make the final decision, taking into consideration all relevant circumstances.

A third party may consent to the disclosure of some but not all of the information in which the third party has a business interest.

For further discussion of consent see Chapter 5 which deals with third party notices, and FOIP Bulletin No. 10: *Third Party Notice*, published by Access and Privacy, Service Alberta.

If an enactment of Alberta or Canada authorizes or requires disclosure

Section 16(3)(b) The information must be disclosed where disclosure is provided for in other provincial legislation or in federal legislation. For example, the *Environmental Protection and Enhancement Act* lists information that the Department of Environment must, or is authorized to, disclose to the public (see *IPC Order F2005-030*).

If the information relates to a non-arm's length transaction between a public body and another party

Section 16(3)(c) This provision, which is intended to make transactions between public bodies and other parties more transparent, applies in circumstances where a public body is a direct participant in a transaction and is working with the other party.

Section 16(3)(c) applies to provincial government public bodies and local public bodies.

The definition of a non-arm's length transaction in **section 4(4)** of the Act is not applicable to this section. In this case, a *non-arm's length transaction* is a transaction in which one of the parties may be influenced in its bargaining by something other than individual self-interest, or one of the parties may have sufficient leverage or influence to exercise control or pressure on the free will of the other (see *IPC Order 98-013*).

An example would be an agreement between a corporation and the Government of Alberta to invest in and pursue a project together.

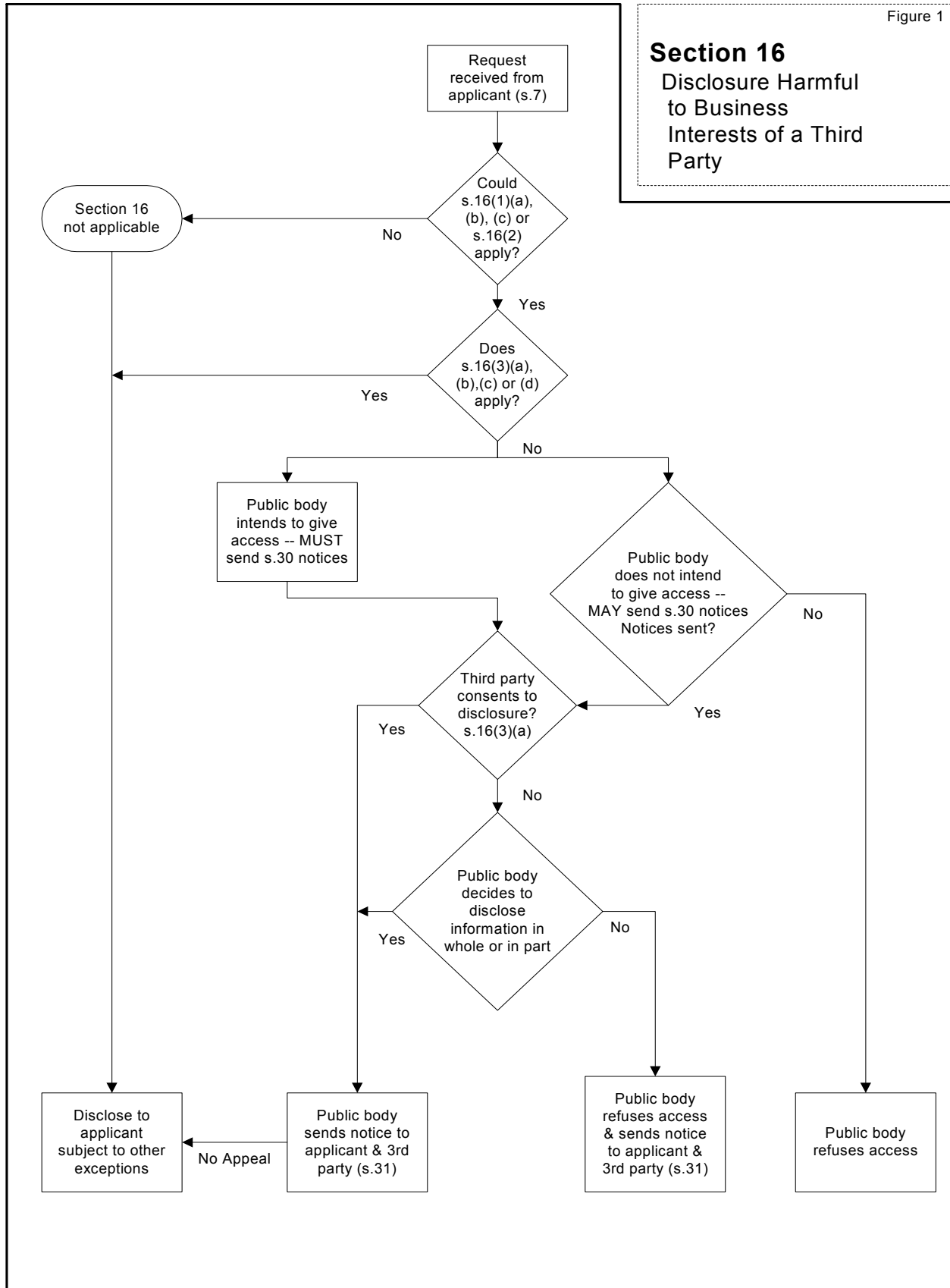
If the information is in a record in the archives of a public body and has been in existence for 50 years or more

Section 16(3)(d) This provision recognizes that the sensitivity of business information decreases with time, and so does the injury that might occur to the business interests of a third party as a result of disclosure. The fact that such information resides in the Provincial Archives or in the archives of a public body means that the information is considered of historical value. The Act therefore makes it available for research after the passage of 50 years.

Disclosure of third party business information from the Provincial Archives or the archives of a public body can take place earlier, that is, after 25 years from the date of the record, if the disclosure would not be harmful to the business interests of a third party. See **section 43(1)(b)(i)** and section 10 of Chapter 7 for a further discussion on disclosure of information in archives.

Application of exception

A number of steps are involved in considering whether or not information qualifies for an exception to disclosure under **section 16**. These steps are set out in Figure 1.



4.3 Disclosure Harmful to Personal Privacy

Section 17 of the Act protects the privacy of individuals whose personal information may be contained within records responsive to a FOIP request made by someone else. In the exception, the individual the information is about is referred to as a *third party*. Third party personal information must not be disclosed when this would constitute an unreasonable invasion of the third party's privacy.

The exception applies only to identifiable individuals and not to groups, organizations or corporations (*IPC Order F2003-004*). Employees of a company contracted by a public body are third parties (*IPC Order F2004-024*).



Whenever a request for records includes third party personal information, as defined in section 1(n) of the Act, the public body must determine whether disclosure would be an unreasonable invasion of the third party's personal privacy.

Definition of personal information

A detailed explanation of the definition of personal information in **section 1(n)** is provided in section 1.3 of Chapter 1. The examples given are non-exhaustive and do not define personal information in its entirety. Other examples include photographic images, e-mail addresses and an individual's membership in business, professional or benevolent organizations or labour unions.

To qualify as personal information under the Act, information must be written, photographed, recorded, or stored in some manner. However, for the purposes of **Part 2** of the Act, disclosure of previously recorded personal information can include oral transmission by telephone or in person. The individual may be named in the record or it may be possible to ascertain or deduce the identity of the individual from the contents of the record. Public bodies need to consider the context of a record to determine whether an individual may be identifiable to an applicant who may or may not be aware of a given set of circumstances.

The Information and Privacy Commissioner has decided that information related to a sole proprietorship is not personal information (*IPC Order F2002-006*).

Exception for personal information

Section 17(1) **Section 17(1)** establishes a mandatory exception to disclosure for personal information if the disclosure would be an unreasonable invasion of a third party's personal privacy. When this is the case, the public body must refuse to release the information.

Disclosure not an unreasonable invasion of a third party's privacy

Section 17(2) **Section 17(2)** sets out those circumstances where disclosure of personal information is *not* considered to be an unreasonable invasion of a third party's personal privacy.

In these circumstances, a public body may not rely on **section 17** to refuse disclosure of personal information. However, other sections of the Act should still be considered when making a decision about disclosure.

Section 17(2) states that disclosure of personal information is not an unreasonable invasion of an individual's personal privacy if

- the third party has, in the prescribed manner, consented to or requested the disclosure;
- there are compelling circumstances affecting anyone's health or safety, and written notice of the disclosure is given to the third party;
- an Act of Alberta or Canada authorizes or requires the disclosure;
- the information is about the third party's classification, salary range, discretionary benefits or employment responsibilities as an officer, employee or member of a public body;
- the disclosure reveals financial and other details of a contract to supply goods or services to a public body;
- the disclosure reveals the nature of a licence, permit or other similar discretionary benefit that has been granted to a third party by a public body and relates to either a commercial or professional activity or to real property;
- the disclosure reveals details of a discretionary benefit of a financial nature granted to the third party by a public body;
- the personal information is about an individual who has been dead for 25 years or more; or
- the disclosure is not contrary to the public interest and reveals only the following information about a third party:
 - enrolment in a school of an educational body or in a program offered by a post-secondary educational body,
 - attendance at or participation in a public event or activity related to a public body, including a graduation ceremony, sporting event, cultural program or club, or field trip, or
 - receipt of an honour or award granted by or through a public body.

The provisions of **section 17(2)** are discussed in more detail below.

Consent to or request for disclosure

Section 17(2)(a) The exception to disclosure does not apply where the individual either consents to or requests the disclosure. This consent or request must be in the prescribed manner and must be specific. Consent in such circumstances normally comes after third party consultation. Implied consent is not sufficient to satisfy this condition.

The requirements for valid consent are set out in **section 7** of the FOIP Regulation. **Section 7** allows for consent to be in writing, in electronic form or given orally.

When a public body consults with a third party and the third party consents to the disclosure of his or her personal information, the information cannot be withheld under **section 17**. However, the public body should review the other exceptions to disclosure in the Act to see whether the information may or must be withheld under one of those exceptions (see *IPC Order 2000-029*).

A public body may decide not to disclose a third party's personal information without consulting with the third party. If the applicant requests a review by the Information

and Privacy Commissioner, the Commissioner may issue a notice to the third party at that time (**section 67(1)(a)(ii)** of the *FOIP Act*).

Consent can be provided to the public body on behalf of the individual by certain persons and under certain conditions as set out in **section 84** of the Act. The exercise of rights by others is discussed in detail in section 2.5 of Chapter 2.

Compelling circumstances affecting anyone's health or safety

Section 17(2)(b) This provision applies only when there are compelling circumstances affecting the health or safety of any person. To rely on this provision a public body must be able to show that disclosure of the information requested is likely to have a direct bearing on the compelling health or safety matter (see *IPC Orders 97-002, 98-007 and 2001-001*).

Depending upon the urgency of the compelling circumstances, it may be necessary to consider disclosing third party personal information in the public interest under **section 32** prior to the time that a response to a request is due under **Part 1** of the Act.

In applying **section 17(2)(b)**, the public body is required to give written notice of disclosure to the third party whose personal information the public body is disclosing. **Model Letter R** in Appendix 3 may be used in these situations. See **section 83** and section 2.6 of Chapter 2 regarding the manner of giving notices.

Act of Alberta or Canada authorizes or requires disclosure

Section 17(2)(c) It is not an unreasonable invasion of personal privacy to disclose personal information if disclosure is authorized or required by a provincial or federal statute. In applying the exception, a public body must first consider whether the section of the other statute specifically applies to certain information in the record and then only disclose that part of the record containing the relevant information.

Classification, salary range, discretionary benefits or employment responsibilities of public officials

Section 17(2)(e) The disclosure of certain employment information about officers, employees or members of public bodies is not an unreasonable invasion of personal privacy. The rationale is that more information should be available about individuals who are paid out of public funds (see *IPC Order F2004-014*).

Section 17(2)(e) applies to employer–employee (contract *of* service) relationships, as opposed to fee-for-services or independent contractor (contract *for* service) relationships, which fall within **section 17(2)(f)** (*IPC Order F2004-014*).

Classifications, salary ranges and discretionary benefits are characteristic of an employer-employee relationship, whereas fixed duration and fixed price or fixed number of hours to be worked are typical of a fee-for-services contract.

Classify means to assign (a thing) to a class or category (*IPC Order F2005-016*).

Employee is defined in **section 1(e)** of the Act as including a person who performs a service for the public body as an appointee, volunteer or student or under a contract or agency relationship with a public body.

Volunteer means a person who voluntarily takes part in an enterprise or offers to undertake a task and a person who works for an organization voluntarily and without pay. *Voluntary* means done, acting or able to act of one's free will; not constrained or compulsory, intentional; unpaid (*IPC Order F2002-006*).

The definition of "employee" includes all individuals appointed to boards or committees, individuals providing voluntary services on behalf of a public body, students who volunteer or are participating in a work-experience program and individuals employed under a personal service contract. For example, a person that undertook to review certain audits was considered a volunteer, and therefore an "employee" of the public body, for the purposes of the Act (*IPC Order F2002-006*).

Employment responsibilities. Section 17(2)(e) establishes that the disclosure of information about an employee's actual job classification and responsibilities is not an unreasonable invasion of an individual's personal privacy.

Employment responsibilities encompasses those duties than an individual is charged with performing as an officer, employee or member of a public body (*IPC Order F2005-016*).

A job title or position is information about employment responsibilities (*IPC Order F2003-002*).

A description of an employee's employment responsibilities, which is personal information, is to be distinguished from information that records the employee's execution of his or her duties. What an employee has done in his or her professional or official capacity is not personal information, unless the information is evaluative or is otherwise of a "human resources" nature, or there is some other factor which gives it a personal dimension (i.e. makes the information "about" the individual) (*IPC Orders F2004-026, F2006-030, F2007-029 and F2008-019*).

Section 17(2)(e) does not permit the disclosure of information about an employee's performance or conduct, such as an annual performance evaluation or an investigation into an employee's conduct (*IPC Order 97-002*).

Salary range. Under **section 17(2)(e)**, it is not an unreasonable invasion of personal privacy to disclose the salary range for an employment position.

Salary means a fixed regular payment made by an employer to an employee (*IPC Order F2004-014*).

Range means a series representing variety or choice; a selection (*IPC Order F2005-016*).

An actual salary is not a salary range and therefore cannot be disclosed under **section 17(2)(e)** (*IPC Order F2005-016*). An exact salary may nevertheless be disclosed where, upon consideration of all relevant factors (**section 17(5)**), it is determined that the disclosure would not be an unreasonable invasion of the third party's privacy (see *IPC Orders F2006-007, F2006-008 and F2008-010*).

Where no salary range exists, a public body should consider creating one in order to support disclosure of information that promotes accountability for the expenditure of public funds.

A salary increment that is based on an assessment of the employee's performance is not information about the employee's salary or a salary range, nor is it a discretionary benefit. The increment is an evaluation and its disclosure is presumed to be an unreasonable invasion of personal privacy under **section 17(4)(f)** (*IPC Order F2007-015*).

Discretionary benefits. **Section 17(2)(e)** establishes that the disclosure of a discretionary benefit provided on an individual basis, rather than in accordance with a plan, scale or formula, including any allowance with monetary value that the public body chooses to provide, is not an unreasonable invasion of an individual's privacy.

(See the discussion under **section 17(2)(g)** for the meaning of the words "benefit" and "discretionary.")

Section 17(2)(e) is intended to capture a range of discretionary benefits that flow from the employment relationship (*IPC Order 2001-020*). The provision requires the discretionary benefit to be received by the third party in his or her capacity as an officer, employee, or member of a public body. Therefore, **section 17(2)(e)** did not apply to the discretionary benefits in a settlement agreement that were being provided to the third party in his capacity as a *former* employee (*IPC Order F2007-025*).

Section 17(2)(e), unlike **section 17(2)(h)**, does not require the benefit to be provided by a public body; the benefit may be provided by another entity (*IPC Order F2007-025*).

In *IPC Order F2003-002*, it was decided that it was not an unreasonable invasion of a personal privacy to disclose the supplementary pension formula and clauses relating to the administration of the pension benefits in a severance agreement. The portions of the severance agreement that could be disclosed were discretionary benefits because the City had a choice as to whether it would grant the benefits. The City was ordered to withhold the name, retirement date and signature of each pension recipient. (See also *IPC Orders 98-014* and *98-018*.)

In *IPC Order 2001-020*, a severance package was considered to be an employment-related discretionary benefit for the purposes of **section 17(2)(e)**. The Information and Privacy Commissioner held that the severance package in that case was a beneficial payment or advantage that flowed from the employment relationship to the employee whether it was actually paid before the relationship formally ended and whether it was required by law.

In *IPC Order F2006-007*, the amount of vacation time and pay, termination notice and pay, disability insurance benefits and pension plan benefits of a senior official were discretionary benefits flowing from the employment relationship (see also *IPC Orders F2006-008* and *F2007-025*).

Contracts to supply goods and services to a public body

Section 17(2)(f) The disclosure of financial and other details about the supply of goods and services to a public body is not an unreasonable invasion of privacy, even when these details may be personal information (see *IPC Order F2004-014*). The rationale is that the public is entitled to know from whom and for what amount such services were purchased (see *IPC Order F2004-024*). This is an important part of public accountability.

Financial details relates to the amounts paid under the contract.

Other details include the names of the parties, the subject of the contract and standard boilerplate terms and conditions. Other details would not include résumés of employees of contractors that may be attached as an appendix to the contract.

Contract to supply goods and services refers to an agreement concluded by a public body with a third party to buy or sell products, merchandise, or services, as well as to an agreement entered into by a public body in relation to employment or performance of work-related duties. It does not apply where a public body provides money to a third party to provide contracted services to a party other than a public body (see *IPC Order 98-004*).

Whether an employment contract falls under **section 17(2)(f)** or **section 17(2)(e)** will depend on the terms of the contract and the nature of the relationship between the public body and the third party (*IPC Order F2008-010*). **Section 17(2)(f)** applies to fee-for-services or independent contractor (contract *for* service) relationships whereas **section 17(2)(e)** applies to employer–employee (contract *of* service) relationships (*IPC Order F2004-014*).

In releasing this type of information, public bodies should ensure that they are not disclosing information that may be subject to **section 16**, a mandatory exception for disclosure of information which would be harmful to third party business interests.

Licence, permit or similar discretionary benefit relating to a commercial or professional activity or to real property

Section 17(2)(g) The disclosure of information about discretionary benefits granted by a public body to a third party is not an unreasonable invasion of personal privacy. The intent of this provision is to ensure accountability on the part of public bodies with respect to monetary and other benefits that fall within its discretion. Disclosure under this provision is limited to licences, permits or other discretionary benefits relating to a commercial or professional activity, or to real property.

Licence or *permit* means authorization to carry out an activity, such as operating a particular establishment, or carrying on a professional or commercial activity.

Commercial activity means an activity that relates to the buying, selling or exchange of merchandise or services.

Examples of licences or permits that fall within this provision include business licences, teaching permits, taxi licences, and building and development permits.

Licences or permits for commercial activity do not include licences or permits for solely recreational activities (*IPC Order F2002-011*).

Benefit means a favourable or helpful factor or circumstance, or an advantage. For example, a grazing lease on public land falls within the definition of benefit (*IPC Order 98-014*).

Other similar discretionary benefit in **section 17(2)(g)** implies that the licence or permit must also have the character of a discretionary benefit (*IPC Order 98-018*).

Discretionary refers to the power of a decision-maker to determine whether, or how, to exercise a power or grant a benefit.

In *IPC Order 98-018*, it was decided the granting of grizzly bear hunting licences was not discretionary. The licences were granted as a result of a random draw, not on the basis of applying a set of criteria.

The power to suspend, cancel or reinstate a licence or permit is an indication that the licence or permit is a discretionary benefit. So too is the power to limit or allocate permits by setting formulae or limiting numbers (see *IPC Orders 98-014* and *98-018*).

In *IPC Order F2002-011*, the Commissioner found that an “allocation” granted to an outfitter-guide was a permit that had the characteristics of being a discretionary benefit. A transfer, including a lease, of an allocation was not a licence or permit but was a similar discretionary benefit. It was determined that information about the nature of an allocation included information on the number of allocations held by an individual, the area, species, and manner of hunting, the acquisition, transfer and reversion of allocations, and the renewal and transfer fees. Under **section 17(2)(g)**, this information could be disclosed.



Disclosure under this provision must be limited to the name of the person to whom the licence, permit or discretionary benefit is provided, and the nature of the benefit. It must not include personal information supplied in support of the application for the benefit (see *IPC Investigation Report F2002-IR-006*).

Discretionary benefit of a financial nature

Section 17(2)(h) This provision enables disclosure of information that reveals details of a discretionary financial benefit granted to an individual by a public body.

A discretionary benefit of a financial nature is any monetary allowance that the public body may decide to provide (e.g. a scholarship or a grant).

Grant means to “give” or “confer” discretionary benefits in situations where there is no requirement by the grantor to provide such benefits (*IPC Order F2007-025*).

Details of a financial discretionary benefit are not limited to the amount paid to the third party, but include the third party’s name, the reasons for providing the benefit and any consideration given to the public body in exchange for granting the benefit.

Section 17(2)(h) does not apply to information regarding eligibility for income assistance or social benefits, or regarding the determination of individual benefit levels since these benefits are discretionary; they are calculated according to entitlement formulae.

Also, **section 17(2)(h)** does not apply to discretionary benefits that are received by a third party in his or her capacity as an officer, employee or member of a public body since these benefits are covered by **section 17(2)(e)**. **Section 17(2)(h)** does apply to discretionary benefits in a settlement agreement reached with a public body where the benefits are being provided to the third party in his capacity as a *former* employee (*IPC Order F2007-025*).



Section 17(2)(h) does not apply to background personal information required by the public body or provided voluntarily by an individual applying for a benefit.

Individual dead for 25 years or more

Section 17(2)(i) This provision puts a time limit on the protection of privacy after death. The *FOIP Act* protects the personal information of an individual who has been dead less than 25 years, with certain exceptions. Once an individual has been dead 25 years or more, release of his or her personal information is deemed not to be an unreasonable invasion of the individual's privacy. The provision is particularly important for permitting historical and genealogical research.

The onus is on the applicant to produce evidence, such as a death certificate, that an individual has been dead for 25 years or more. For more information on disclosure to a relative of a deceased person, see section 7.7 of Chapter 7. See also FOIP Bulletin No. 16: *Personal Information of Deceased Persons*, published by Access and Privacy, Service Alberta.

Disclosure not contrary to the public interest

Section 17(2)(j) and 17(3) The *FOIP Act* allows a public body to disclose categories of third party personal information specified in **section 17(2)(j)**, without consultation and without consent, if the disclosure is not contrary to the public interest. Under this provision, unless an individual has previously requested non-disclosure of his or her information, a public body could disclose class photos, lists of graduates or names of visitors in the Legislature Gallery, for example. The records may be current or historical.

It is not an unreasonable invasion of a third party's personal privacy to disclose personal information if

- the personal information fits within one of the listed categories of information;
- the disclosure is not contrary to the public interest; and
- the individual the personal information is about has not requested that the information not be disclosed.

Not contrary to the public interest in **section 17(2)(j)** may be understood as not inconsistent with long-term community values, or with the good of society at large.

A public body is not required to find that a disclosure *promotes* a public interest simply that disclosure is *not contrary to* the public interest. The test for what is “not contrary to the public interest” is different from the test in **section 32(1)(b)**, which provides for disclosure of information that is *clearly in the public interest*, or **section 93(4)(b)**, which allows a public body to excuse fees where an access request *relates to a matter of public interest*.

When considering a request to which **section 17(2)(j)** may apply, a public body must take into account the circumstances surrounding the request. A public body may decide that a disclosure would be contrary to the public interest on the basis of its knowledge of risks to its clientele or the nature of the request. For example, if the requested information could be used to commit a criminal act or harm an individual or property, then it is likely to be contrary to the public interest to disclose the information.

In *IPC Investigation Report F2002-IR-001*, the Commissioner’s Office said that a public body must take into account the expectations that an ordinary person might have for how his or her privacy will be respected. A school district was found to have contravened **Part 2** of the *FOIP Act* by posting a student’s test results on a school bulletin board without the parents’ consent. The school district could not rely on **section 40(1)(b)** in conjunction with **section 17(2)(j)** to disclose the information. Given the consensus of outside authorities that public disclosure of test results should be avoided, the school district should have contacted the student and his parents prior to disclosing the results.



When determining whether information should be disclosed, public bodies should consider whether any other exception in the Act applies to the information.

Section 17(2)(j) and **section 17(3)** provide for the *disclosure* of specified recorded personal information that it was authorized to collect in the first place. A public body cannot rely on these provisions to *collect* personal information.

Enrolment in a school, or in a program of a post-secondary educational body

Section 17(2)(j)(i) This provision allows a school board, charter school or regional authority (all as defined in the *School Act*) to confirm that an individual is or was enrolled in a school under its jurisdiction. A post-secondary educational body can confirm that an individual is or was enrolled in a specific program at that institution. An educational body may also provide lists or class photographs of the individuals currently or formerly enrolled in a particular school or post-secondary program (e.g. the students in a particular high school or the students in a particular apprenticeship program). This information is often requested to organize school or program reunions.



This provision does not allow disclosure of whether an individual is physically in attendance at a school or post-secondary institution at a particular time. Nor does it allow disclosure of an individual's timetable of studies or other personal information related to his or her educational program, or personal information unrelated to enrolment, such as the individual's home address.

Attendance at or participation in a public event or public activity

Section 17(2)(j)(iii) This provision allows a public body to disclose a record of the names of individuals who are recorded as having attended or participated in a public event or activity.

A public event related to a public body means something of importance that happens or takes place, is of a public nature, and is related to a public body.

A public activity related to a public body means a particular occupation or pursuit that is staged in public and is related to a public body.

Related to a public body means connected with the public body's mandate and functions and organized or sponsored by the public body.

An event or activity would be considered *public* if it was open to the public in general, or to a section of the public. The event or activity may be completely open and accessible to the public without charge, or access may be restricted because of the nature of the event or activity, for example, through ticket sales.

The fact that an event or activity that took place on the premises of a public body was observable by a member of the public does not make it a public event or activity.

Section 17(2)(j)(iii) does not apply to

- events or activities that are organized or sponsored by a third party that rented a facility owned by a public body;
- events that were not authorized or sponsored by a public body; or
- activities of arm's-length bodies such as "Foundations" or "Friends."

Receipt of an honour or award granted by or through a public body

Section 17(2)(j)(iv) This provision allows the disclosure of information concerning the *receipt* of an honour or award. This means that the individual must have actually received the honour or award. **Section 17(2)(j)(iv)** does not allow disclosure of an offer of, or qualification for, an honour or award if the honour or award was not presented, or if the honour or award was declined. The honour or award must be granted by a public body (e.g. a degree, scholarship, or merit award) or be granted through a public body on behalf of some other institution or person (e.g. a prize or award sponsored by a private-sector organization which is granted by a post-secondary institution on the basis of the recipient's performance in the institution's programs).

A public body can disclose the information that a particular honour or award has been granted to a particular individual and can disclose a list of names of individuals who

have received a particular honour or award. Disclosure of a photograph of an individual named as a recipient of a current or past award would also be allowed, if the photograph was collected for the purpose of the awards program, or if disclosure of another photograph would be consistent with the purpose for which the photograph was collected.

The provision does not allow disclosure of personal information unrelated to the receipt of the award, such as the recipient's educational history.

Request for non-disclosure of personal information

Section 17(3) **Section 17(3)** allows an individual to request that information described in **section 17(2)(j)** not be disclosed under that provision.



If a request for non-disclosure is made, it would be an unreasonable invasion of that individual's personal privacy to disclose any of the information that the individual has requested not be disclosed under section 17(2)(j). This may include all or part of the information referred to in section 17(2)(j).

A public body is not expected to seek an individual's consent to disclose personal information to which **section 17(2)(j)** applies. In addition, the Act's provision for third party consultation does not apply in this situation (**section 30(2)**).

However, a public body is expected to have a process in place for notifying individuals that they have the right under the *FOIP Act* to request non-disclosure so that they can exercise the right if they wish. Notice of this right can be given in the same way and at the same time as information is given about the collection of personal information. The notice may be given orally, on a form, or in a brochure or other publication.

Public bodies must ensure that procedures are in place so that requests for non-disclosure can be honoured and that no inadvertent disclosure of personal information takes place.

For a more detailed discussion of **sections 17(2)(j)** and **17(3)**, see FOIP Bulletin No. 4: *Disclosure of Personal Information "Not Contrary to the Public Interest,"* published by Access and Privacy, Service Alberta.

Presumption of unreasonable invasion of privacy

Section 17(4) **Section 17(4)** sets out particular types of personal information the disclosure of which is *presumed* to be an unreasonable invasion of a third party's personal privacy. The decision-maker proceeds from the assumption that disclosure would be an unreasonable invasion of personal privacy unless there is sufficient evidence to the contrary. In determining whether disclosure would be an unreasonable invasion of the third party's personal privacy, the head of the public body must consider the factors in **section 17(5)**, as well as any other relevant circumstances.

Section 17(4) provides that disclosure of personal information is presumed to be an unreasonable invasion of a third party's privacy if the personal information

- relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;
- is an identifiable part of a law enforcement record, except to the extent that disclosure is necessary to dispose of the law enforcement matter or to continue an investigation;
- relates to eligibility for income assistance or social services benefits or to the determination of benefit levels;
- relates to an individual's employment or educational history;
- was collected on a tax return or gathered for the purpose of collecting a tax;
- consists of an individual's bank account information or credit card information;
- consists of personal recommendations or evaluations, character references or personnel evaluations;
- consists of the third party's name when
 - it appears with other personal information about the third party; or
 - the disclosure of the name itself would reveal personal information about the third party; or
- indicates the third party's racial or ethnic origin, or religious or political beliefs or associations.

These types of personal information tend to be particularly sensitive. In interpreting this provision, the following explanations should be considered.

Medical, psychiatric or psychological information

Section 17(4)(a) This provision covers records relating to an individual's physical, mental or emotional health, including, for example, diagnostic, treatment and counselling information. Public bodies that are also custodians under the *Health Information Act* need to comply with the access request and disclosure provisions of that Act when dealing with health information.

Section 17(4)(a) applies to medical and psychological information appearing in records of disciplinary decisions (*IPC Order F2008-009*). The provision does not apply to fitness requirements for a specialized position (e.g. Chief of Police) (*IPC Order F2005-016*).

Information that is an identifiable part of a law enforcement record

Section 17(4)(b) This provision applies to individually identifying information in law enforcement records.

Law enforcement is defined in **section 1(h)** of the *FOIP Act*. Under this definition, as interpreted by the Commissioner, *law enforcement record* means a record concerning policing or a record concerning a police, security or administrative investigation or proceeding that leads or could lead to a penalty or sanction; in this latter case, the investigation or proceeding must concern the contravention of a statute or regulation that provides for the penalty or sanction (*IPC Orders 2000-019* and *2000-023*). The

definition also includes the complaint that gave rise to a law enforcement investigation.

Section 17(4)(b) applies, for example, to records concerning investigations (including the complaints) and proceedings relating to offences under the *Criminal Code* (Canada), offences under other federal and provincial statutes and regulations and contraventions of municipal bylaws, where the applicable statute, regulation or bylaw provides for a penalty or sanction. Examples of a penalty or sanction include imprisonment, a fine, revocation of a licence, or an order requiring a person to cease an activity.

This provision does not apply to administrative investigations that do not involve contraventions of law, such as an investigation into a breach of an employment policy, which may result in disciplinary action. This kind of information is likely to be protected under other provisions of **section 17(4)**.

Disclosure to an applicant of a third party's personal information in a law enforcement record is not presumed to be an unreasonable invasion of privacy if disclosure is necessary to dispose of the law enforcement matter or to continue the investigation. **Section 17(4)(b)** recognizes that a public body that is in possession of evidence relating to a law enforcement matter must have the power to disclose that evidence to the police, another law enforcement agency and to Crown counsel or other persons responsible for prosecuting the offence or imposing a penalty or sanction.

In *IPC Order F2003-005*, **section 17(4)(b)** did not apply to records created during an internal investigation that related to the enforcement of a post-secondary institution's sexual harassment policy rather than a law.

For further information on law enforcement, see FOIP Bulletin No. 7: *Law Enforcement*, published by Access and Privacy, Service Alberta.

Information that relates to eligibility for income assistance or social service benefits

Section 17(4)(c) This provision relates to monetary benefits provided by municipal, federal or provincial governments to augment an individual's earnings, as well as non-monetary contributions that help supplement earnings from another source. Disclosure of such information is presumed to be an unreasonable invasion of personal privacy.

For personal information to fall under **section 17(4)(c)**, it must relate to eligibility for income assistance or social service benefits or to the determination of benefit levels.

Relate means that a connection or association must be established between the personal information and the eligibility or determination (*IPC Order 98-004*).

Eligibility means whether a person qualifies to receive income assistance or social service benefits (*IPC Order 98-004*).

Employment or educational history

Section 17(4)(d) *Employment history* in **section 17(4)(d)** is a broad, general phrase that covers information pertaining to an individual's work record (*IPC Order 2001-020*).

Employment history is a complete or partial chronology of a person's working life such as might appear in a résumé or personnel file. A written account of a workplace incident or event will not be considered to be part of employment history unless the event or incident is important enough to merit an entry in the personnel file. **Section 17(4)(d)** will apply only to those records that might appear in a personnel file (*IPC Orders F2003-005 and F2004-015*).

Notes made during a workplace investigation were not employment history as they would not normally be included in a personnel file. The results or conclusions of an investigation may be part of a personnel file and therefore be part of a person's employment history (*IPC Orders F2004-015, F2008-014 and F2008-015*).

A record that a formal disciplinary hearing occurred, even if it was discontinued or concluded in favour of the employee, would likely be part of a personnel file and there would be employment history (*IPC Order F2008-009*).

The amount of an individual's salary is not employment history as a salary is not an event and would not form part of a chronology of a person's working life (*IPC Orders F2006-007 and F2008-010*).

An employee number and the year of retirement is employment history (*IPC Order F2004-028*).

The termination date of a current contract is not employment history because the term is still in the future and could not be considered "history" (*IPC Order F2006-008*).



This presumption of unreasonable invasion of privacy does not apply to some employment information about officers, employees and members of public bodies such as position descriptions, salary ranges and discretionary benefits. For more information on employment information of public officials, see **section 17(2)(e)** above.

Educational history refers to any information regarding an individual's schooling and formal training, including names of schools, colleges or universities attended, courses taken, and results achieved.



The presumption of unreasonable invasion of privacy does not apply to certain information about enrolment in a school or program or the receipt of honours or awards. For more information about disclosure not contrary to the public interest, see **section 17(2)(j)** above.

Personal information collected on a tax return or gathered for the purpose of collecting a tax

Section 17(4)(e) This provision applies to personal information in a form used to calculate or report tax to be paid.

Gathered for the purpose of collecting a tax means collected by authorities for the purpose of collecting due or overdue municipal, education, federal, or provincial taxes.

Bank account and credit card information

Section 17(4)(e.1) This provision expressly refers to an individual's bank account and credit card information. Other information about an individual's financial history, such as assets, liabilities and credit history, falls within the definition of personal information and is also subject to the unreasonable invasion of privacy test. **Section 17(4)(e.1)** is intended to address concerns about the handling of electronic credit transactions and the possible misuse of credit card numbers.

In *IPC Orders F2008-014* and *F2008-015*, the Commissioner found that **section 17(4)(e.1)** applied to credit card statements that related to the third party's use of a government-issued credit card for personal use. Disclosure of some of the information was desirable for subjecting the activities of the Government of Alberta to public scrutiny. This weighed in favour of disclosing the third party's name, the dates of the transactions, and the amount of each purchase. Public scrutiny did not require disclosure of the vendors' names and locations and other transaction identifiers.

Personal recommendations or evaluations, character references or personnel evaluations

Section 17(4)(f) Personal recommendations and evaluations, as well as character references, are regularly collected by public bodies to assess an individual's employment potential. A formal process of conducting the assessment or evaluation is implied. However, recommendations and character references are also required in situations that do not involve employment. For example, references are generally required by landlords; character references are generally required before placing an individual in a position of trust.

Personnel evaluations arise most often in the employment context and include job performance appraisals and absenteeism reports.

In order for **section 17(4)(f)** to apply, the recommendations, evaluations or references must be about an identifiable individual and must be provided by someone other than that individual.

The following criteria are relevant in determining whether personal information constitutes either "personal evaluations" or "personnel evaluations".

- Was an assessment made either according to measurable standards or based upon professional judgment? (Professional judgment would be based on knowledge, training and experience.)

- Was the particular evaluation done by a person who had authority to do that evaluation?

(*IPC Orders 97-002, F2008-014 and F2008-015*)

In *IPC Order F2002-010* **section 17(4)(f)** was found to apply to third party information that was included in a complaint about a teacher's supervision of a special-needs student at a school.

In *IPC Order F2007-015*, a salary increment was determined to be an evaluation because the increment was based on an assessment of the employee's performance.

Name of individual with other personal information or that would reveal other personal information

Section 17(4)(g) The disclosure of a third party's name is presumed to be an unreasonable invasion of that party's personal privacy when the name appears with other personal information about the third party (**section 17(4)(g)(i)**). In some cases, the disclosure of the name itself would reveal other personal information about the third party (**section 17(4)(g)(ii)**), such as his or her ethnic origin.

Section 17(4)(g) requires the record to contain a third party's name. The Commissioner has found that initials are not a name (*IPC Order 99-010*).

In *IPC Order F2003-018*, the Commissioner determined that disclosure of the names of a third party service provider's employees in a cover letter attached to a report was presumed to be an unreasonable invasion of the employees' privacy. The Commissioner found that the names either appeared with other personal information or would reveal personal information about the employees.

In *IPC Order F2004-026*, the Commissioner stated that **section 17(4)(g)(i)** did not apply to information that recorded the execution of an employee's work duties when that information was not evaluative or of a human resources nature, or did not otherwise have a personal dimension to it. In such circumstances, the information is not personal information. The Commissioner also stated that the names of employees were personal information, but the fact that the employees were acting in their representative capacities was a relevant circumstance that weighed in favour of disclosure.

The disclosure of the signature of a third party acting in his or representative or official capacity (e.g. a Commissioner of Oaths) is not an unreasonable invasion of the third party's personal privacy (see *IPC Orders F2000-005, F2005-016 and F2007-025*).

Racial or ethnic origin or religious or political beliefs or associations

Section 17(4)(h) Disclosure of an individual's racial or ethnic origin or religious or political beliefs or associations is presumed to be an unreasonable invasion of the third party's personal privacy.

Racial origin means information identifying common descent that connects a group of persons (e.g. Mongolian race or Caucasian descent).

Ethnic origin is similar to racial origin in that it identifies a common descent that connects a group of persons but extends to other common attributes such as language, culture or country of origin.

Religious or political beliefs or associations refers to an individual's opinions about religion or a political party, an individual's membership or participation in a church, a religious organization or political party or an individual's association or relationship with a church, a religious organization (including native spirituality), or a political party.

Circumstances relevant to the determination of unreasonable invasion of privacy

Section 17(5) **Section 17(5)** of the Act provides that, in determining whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy under **section 17(1)** or **(4)**, a public body must consider all the relevant circumstances, including the following.

- Is the disclosure desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to public scrutiny?
- Is the disclosure likely to promote public health and safety or the protection of the environment?
- Is the personal information relevant to a fair determination of the applicant's rights?
- Will the disclosure assist in researching or validating the claims, disputes or grievances of aboriginal people?
- Will the third party be exposed unfairly to financial or other harm?
- Was the personal information supplied in confidence?
- Is the personal information likely to be inaccurate or unreliable?
- Could the disclosure unfairly damage the reputation of any person referred to in the record requested by the applicant?
- Was the personal information originally provided by the applicant?

This list is not exhaustive. In applying **section 17(5)**, a public body is required to consider not only the factors listed in the provision but all the relevant circumstances. It must consider the sensitivity of the personal information in the context in which it was collected or compiled and the circumstances governing its continued protection or disclosure.

There is a growing body of Commissioner's Orders identifying relevant circumstances that are not specifically listed in the Act. These include:

- the fact that personal information is available to the public (e.g. *IPC Orders 98-001* and *F2004-015*);
- the fact that the names, titles or signatures of individuals were provided by them in their formal representative or professional capacity (e.g. *IPC Orders 2001-013*, *F2000-005* and *F2005-016*)

- the fact that the records contain only business contact information that is publicly available (*IPC F2004-026*);
- that disclosure of the information would promote the objective of providing Albertans with an open, transparent and accountable government (*IPC Order 2000-026*);
- the fact that the personal information concerned a lawsuit involving an elected official whose legal fees had been paid from public funds (*Adjudication Order No. 4*);
- the fact that a regulation of Alberta authorizes the disclosure (*IPC Order F2008-012*);
- the fact that the third party refused to consent to the disclosure of his or her personal information (e.g. *IPC Orders 97-011* and *F2008-010*); and
- the fact that the third parties are public officials (*IPC Order F2007-007*).

An applicant's prior knowledge of a third party's personal information in requested records is generally *not* a relevant circumstance (e.g. *IPC Order 96-008*).

Circumstances weighing in favour of disclosure

Section 17(5)(a) Public scrutiny. In some cases, the desirability of public scrutiny of the internal workings of a public body will prevail over the protection of personal privacy (see *IPC Order 97-002*). Public scrutiny is not necessarily limited to instances where wrongdoing is alleged or where it is alleged that the public body's normal practices and procedures are not being followed. It may be appropriate to disclose some personal information in order to demonstrate that the law is being properly enforced or that public policy is being carried out.

Public scrutiny of government or public body activities under **section 17(5)(a)** requires some public component, such as public accountability, public interest and public fairness (*University of Alberta v. Pylypiuk*, (2002), A.J. No. 445 (Alta. Q.B.)).

Disclosure of certain information is essential to public accountability, for example, the terms under which a police commission hires and expends public funds for a chief of police (*IPC Order F2005-016*) and the terms under which senior officials are hired by public bodies, particularly where the official is appointed to represent the province or is the chief of staff (*IPC Orders F2006-007* and *F2006-008*).

Section 17(5)(b) Public health, safety and protection of the environment. These public interests weigh in favour of disclosure for the purpose of assuring protection of the general public interest.

Public health refers to the wellbeing of the public at large.

The test is whether the level of physical, mental or emotional health of all or a significant part of the public would be maintained or improved by the disclosure of particular personal information.

Public safety refers to the safety or well-being of all or a significant part of the public.

The test is whether disclosure of personal information would reduce the community's exposure to a particular risk or danger.

Protection of the environment refers to guarding or defending all components of the earth – including air, land, and water; all layers of the atmosphere; all organic and inorganic matter and the interacting natural systems that include components of these things – from degradation through illegal or improper use.

Section 17(5)(b) is only one relevant circumstance that a public body needs to consider when determining whether disclosure of personal information is an unreasonable invasion of a third party's privacy. This circumstance alone should not be used to justify the disclosure of personal information that would clearly fall within **section 17(2)(b)**. Under that provision, if there are compelling circumstances affecting anyone's health or safety, disclosure of personal information is not an unreasonable invasion of privacy, provided notice of the disclosure is given to the third party.

The disclosure by a municipality of names and addresses of residents to a drilling company that is preparing a disaster plan as part of its requirements for an application before the Energy Resources Conservation Board would not be an unreasonable invasion of personal privacy under **sections 17(2)(c)** and **17(5)(b)**. However, the residents would have to receive written notice of the disclosure.

Section 17(5)(c) Determination of an applicant's rights. There may be occasions where the applicant requires access to personal information about someone else in order to assist in determining his or her own rights. Motives for requesting information are not normally relevant to the processing of a request. However, if it appears that the personal information is being requested in order to assist in determining the applicant's rights, it will be necessary for the applicant to confirm that this is the case. The interests of the applicant and the privacy interests of the third party will then have to be weighed to decide whether disclosure of personal information is essential to a fair determination of the applicant's rights.

Disclosure under this provision requires that the information be relevant to a *fair determination of the applicant's rights*. The Information and Privacy Commissioner set out the criteria for this determination in *IPC Order 99-028*. The criteria are

- the right in question must be a legal right drawn from the concepts of common law or statute;
- the right must be related to an existing or contemplated proceeding;
- the personal information being sought must have some bearing on the determination of the right in question; and
- the personal information must be required to prepare for the proceeding or to ensure an impartial hearing.

Applicant's rights refers to any claim, entitlement, privilege or immunity of the applicant who is requesting someone else's information. For example, disclosure of third party personal information may be necessary so that an individual can initiate legal proceedings to prove his or her inheritance rights.

Fair refers to administrative fairness, which is comprised of the right to know the case to be met and the right to make representations (*IPC Order F2008-012*).

An applicant's desire to pursue civil action met the requirements of the test in *IPC Order 99-028*. In a subsequent Order, however, the Commissioner gave little weight to this factor because all relevant information, other than the third party's identity, had already been disclosed to the applicant (*IPC Order F2002-010*).

Section 17(5)(c) will not apply where the applicant is claiming a moral right to the information, rather than a legal right under statute or common law (*IPC Order F2005-001*).

If an applicant has agreed to waive future claims on a matter, the applicant has no rights to be determined and cannot rely on this provision to pursue the matter (see *IPC Order 98-008*).

Section 17(5)(d) *Research on or validation of the claims, disputes or grievances of aboriginal people.* There may be a need to disclose personal information about individuals in order to research the background and expedite the settlement of wider rights for aboriginal people.

Validating means confirming a legally sufficient conclusion or one that has merit, based on the facts presented.

The phrase *claims, disputes and grievances* is interpreted broadly to include controversies, debates and differences of opinion regarding a range of issues, and is not restricted to differences over land claims or treaty or membership status.

Aboriginal people means people whose racial origins are indigenous to Canada and includes Indian, Métis and Inuit people.

Circumstances weighing against disclosure

Section 17(5)(e) *Exposure to financial or other harm.* There may be circumstances where disclosure of personal information may mean that the individual involved will be exposed unfairly to monetary loss or injury of a similar nature. The exposure would *not* be unfair, for example, where a third party writes a letter to a public body and would only be unfairly exposed to financial harm if his or her allegations were unsubstantiated (see *IPC Order 2000-026*).

Threat of a civil suit by the applicant against the third party weighed heavily against disclosure in *IPC Order F2002-010*. Disruption of family relationships or damage to the reputation of deceased individuals may also constitute harm (see *IPC Order 98-007*).

In *IPC Order F2004-016*, it was determined that harm could result from disclosure of the names of third parties who commented on the applicant's personal behaviour and work performance. Evidence indicated that the applicant would likely use the information to contact the third parties to discuss his termination of employment.

Section 17(5)(f) *Personal information supplied in confidence.* There are circumstances where personal information is supplied in a setting of trust and in the confidence that it will not be disclosed. Sometimes this understanding is more implicit than explicit and, in

such circumstances, the public body should attempt to protect the personal privacy of the third party. (For a detailed analysis of the meaning of “supplied in confidence”, see the discussion of **section 16(1)(b)** of the Act in this chapter.)

Some factors to consider when determining whether or not personal information was supplied in confidence are

- the existence of a statement or agreement of confidentiality, or lacking this, evidence of an understanding of confidentiality;
- the understanding of a third party as set out in his or her representations as a result of third party notice;
- past practices in the public body, particularly with regard to keeping similar personal information confidential;
- the type of personal information, especially its sensitivity and whether it is normally kept confidential by the third party; and
- the conditions under which the information was supplied by the third party, voluntarily or through informal request by the public body or under compulsion of law or regulation, and the expectations created by the collection process.

The burden of determining whether or not information was supplied in confidence lies with the public body.



Public bodies should ask their clients and organizations with which they are dealing to mark as confidential any records or parts of records containing personal information which are being supplied in confidence.

However, it is not sufficient for a public body to simply accept the stamp or assertion of a third party for confidentiality. There must be evidence to support the assertion and to prove that the personal information has been treated consistently in a confidential manner.

In *IPC Order 2000-029*, the Commissioner found that a policy assuring confidentiality does not allow a public body to withhold a third party’s personal information even if the third party supplied his or her personal information on the basis of that policy (e.g. references supplied by a third party for the purpose of admission to graduate school). The same is true of a contract.

In *IPC Order F2007-008*, the author of an e-mail intended for his identity to become public and therefore had no expectation of confidentiality. In *IPC Order F2008-012*, a physician sent an e-mail to the chief of staff of a hospital about the applicant. The physician had no reasonable expectation of confidentiality with respect to the e-mail because the e-mail could be disclosed to the applicant under the medical staff bylaws.

In *IPC Orders F2006-007* and *F2006-008*, the fact that a Treasury Board Directive required the disclosure of the salaries and benefits of senior officials meant that the third parties did not have a reasonable expectation that their salaries would be kept confidential.

There is a reasonable expectation of privacy with respect to a home address that has been provided to a public body within the context of an employment relationship (*IPC Order F2008-010*).

Section 17(5)(g) *Inaccurate or unreliable personal information.* A public body may have inaccurate personal information in its custody or under its control for a variety of reasons. The personal information may have been incorrectly recorded at the time of collection or compilation or it may have become inaccurate with the passage of time or as a result of a change in circumstances.

For these or other reasons, the public body may be unsure of the reliability of personal information. Such personal information should be disposed of under approved records disposition processes. Otherwise, no personal information should be disclosed from such records unless the individual concerned has consented and verified that the information is correct.

Section 17(5)(h) *Unfair damage to reputation.* If disclosure of personal information will unfairly damage the reputation of an individual, it should not be disclosed (see *IPC Order 97-002*).

Unfairly means without justification, legitimacy or equity.

Damage the reputation of a person means to harm, injure or adversely affect what is said or believed about the individual's character. An example of information which, if disclosed, would unfairly damage a person's reputation would be allegations of sexual harassment against an individual before an internal investigation is concluded.

This factor would weigh against the disclosure of personal information of employees in a situation where they had not been found to have acted improperly and could not defend themselves publicly (see *IPC Order 2001-001*).

The disclosure of unsubstantiated allegations may unfairly damage an individual's reputation (*IPC Order 97-002*). The damage may be less when the allegations are proven to be unsubstantiated following a formal inquiry than when the allegations have not been formally addressed (*IPC Order F2008-009*).

In *IPC Order F2006-030*, the Commissioner stated that the possibility that the disclosure of information could give rise to unfounded allegations of impropriety was not sufficient for **section 17(5)(h)** to apply.

Other circumstances to consider

Section 17(5)(i) *Personal information originally provided by the applicant.* The applicant may have provided information about an individual because the individual was in the applicant's care or custody at the time.

In most cases, **section 17(5)(i)** weighs in favour of disclosure of personal information. An example would be personal information provided to a public body by an applicant who had guardianship or trusteeship of an individual and the information was provided as a part of that responsibility (see *IPC Order 98-004*).

However, in some cases, **section 17(5)(i)** does not weigh in favour of disclosure. In *IPC Order 2000-019*, although the applicant provided the personal information of a

third party to the public body, there was a change of circumstances between the applicant and the third party. This resulted in adverse interests between the parties that led the Information and Privacy Commissioner to conclude that this factor weighed against disclosure of the personal information to the applicant.

Existence of record

Section 12(2)(b) In some instances, disclosure of the mere fact that a public body maintains a record on a third party may be an unreasonable invasion of a third party's privacy.

Section 12(2)(b) of the Act provides that a public body may, in response to an applicant, refuse to confirm or deny the existence of a record containing personal information about a third party, if disclosing the existence of the information would be an unreasonable invasion of the third party's personal privacy.

An example would be when an applicant requests information about whether a specific individual has had a complaint lodged against him or her under a certain bylaw. If the public body locates such records and withholds them under **section 17**, informing the applicant that the records are being withheld would, by itself, tell the applicant that a complaint has been lodged against the individual.

Most public bodies will use this provision in rare instances. However, public bodies that hold sensitive personal information, such as medical or financial information, may routinely refuse to confirm or deny the existence of records containing personal information about a third party.



When the existence of a record is neither confirmed nor denied, the response to the applicant required under section 12(1) must incorporate a statement regarding the applicant's right of review, as provided for in Model Letter J in Appendix 3.

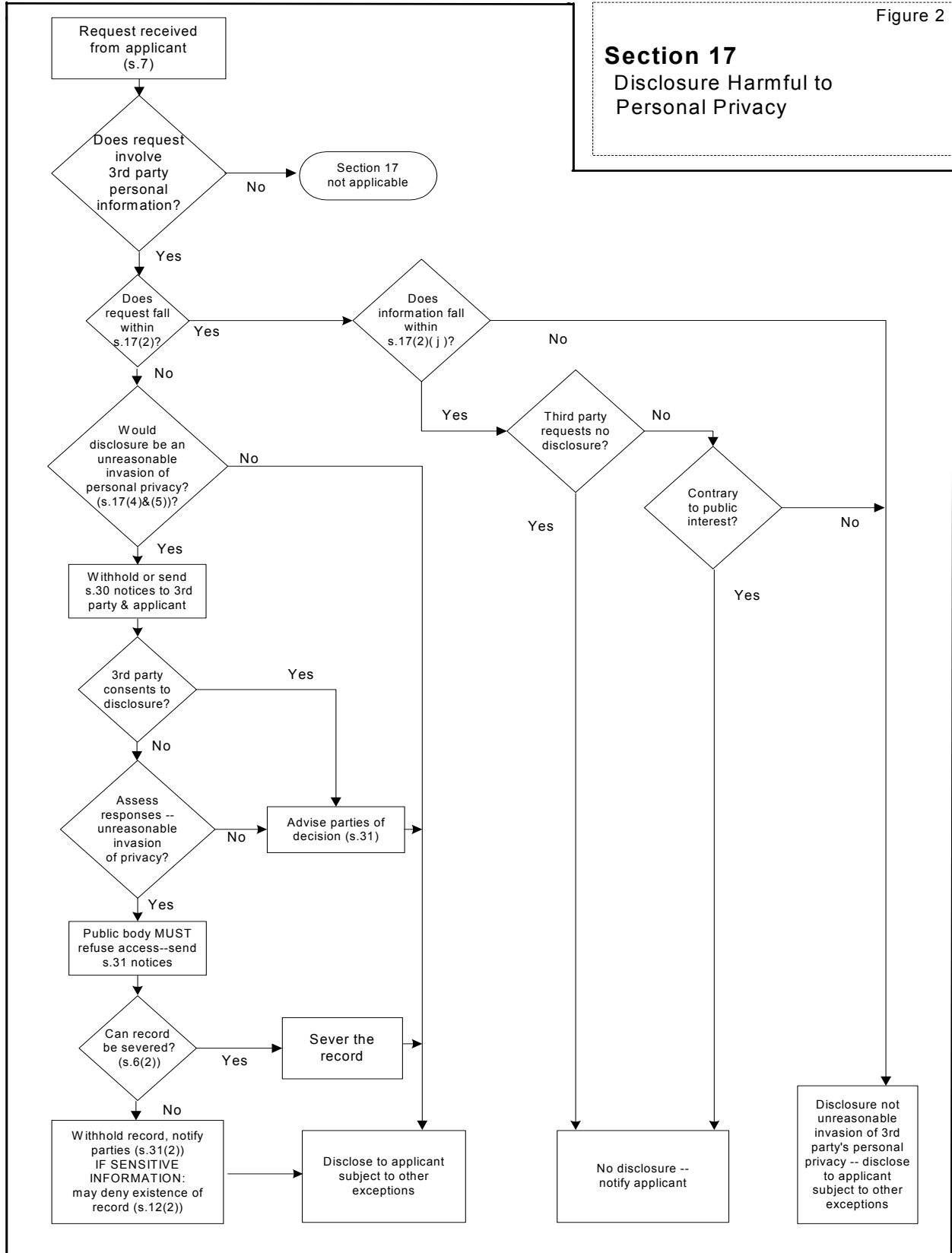
A refusal to confirm or deny the existence of a record is a significant limit to the right of access. If an applicant asks the Information and Privacy Commissioner to review a refusal to confirm or deny the existence of a record, the public body will be required to provide detailed and convincing reasons as to why **section 12(2)** was applied.

Before refusing to confirm or deny the existence of a record, a public body is expected to determine whether or not any record exists in order to properly fulfil its duty to assist the applicant (see *IPC Order 98-009*). A public body may not be required to conduct a search where if a responsive record was found it would necessarily contain information that would be an unreasonable invasion of personal privacy to disclose (*IPC Order F2009-002*).

Each case must involve the exercise of discretion, not the application of a blanket policy by the public body.

Application of exception

The application of **section 17** is set out in Figure 2. A detailed explanation of the procedures relating to third party notice that apply to this exception is provided in Chapter 5.



4.4

**Disclosure
Harmful to
Individual or
Public Safety**
Harm to another's health or safety or interference with public safety

Section 18(1) allows the head of a public body to exercise discretion to refuse to disclose information to an applicant if that disclosure could reasonably be expected to

- threaten anyone else's safety or physical or mental health (**section 18(1)(a)**); or
- interfere with public safety (**section 18(1)(b)**).

The exception may extend to an applicant's own personal information as well as to information about third parties.

In order to determine whether a threat to the safety, mental or physical health of any person exists, a public body must apply the harms test set out in *IPC Order 96-003* (see *IPC Order F2003-010*). There must be evidence of a reasonable expectation of probable harm; the harm must constitute damage or detriment; and there must be a causal connection between disclosure and the anticipated harm.

Threaten means to expose to risk or harm, and *safety* implies relative freedom from danger or risks.

Mental health refers to the functioning of a person's mind in a normal state.

Physical health refers to the well-being of an individual's physical body.

Interference with public safety would occur where the disclosure of information could reasonably be expected to hamper or block the functioning of organizations and structures that ensure the safety and well-being of the public at large.

The mental or physical health of a person would be threatened if information were disclosed to an applicant that would cause severe stress.

Individual safety could be threatened if information were released that allowed someone who had threatened to kill or injure the individual to locate him or her. Examples of individuals whose safety might be threatened would include an individual fleeing from a violent spouse, a victim of harassment or a witness to harassment, an employee who has been threatened during a work dispute or harassment case, and an individual in a witness protection program.

Mental or physical health might be threatened if information were disclosed to the applicant that could cause an individual to become suicidal or that could result in verbal or physical harassment or stalking.

In *IPC Order F2004-029*, the Adjudicator found that disclosure would result in a reasonable expectation of harm to the safety of others if investigation files relating to the applicant's complaints against police officers were disclosed. There was considerable evidence of the applicant's violent tendencies, severe mental illness and apparent lack of treatment, breach of previous court orders preventing contact with others, and frequent threats towards employees in the criminal justice system. The Adjudicator noted, however, that being difficult, challenging, troublesome, persistent, having intense feelings about injustice or, to some extent, using offensive language does not necessarily bring **section 18** into play.

Only in very rare cases will **section 18** apply to an entire record (*IPC Order F2004-029*).

Harm to the applicant's health or safety

Section 18(2) specifically allows discretion to refuse to disclose to an applicant his or her own personal information if the disclosure could reasonably be expected to result in immediate and grave harm to the applicant's health or safety. The decision must be supported by the opinion of a physician, a regulated member of the College of Alberta Psychologists, a psychiatrist or any other appropriate expert, depending on the circumstances of the case.

Immediate and grave harm to an applicant's health or safety means serious physical injury or mental trauma or danger to the applicant that could reasonably be expected to ensue directly from disclosure of the personal information.

The exception in **section 18(2)** is rarely used. Application of the exception must be based on a reasonable expectation that immediate and substantial harm would result from the disclosure of information to the individual.

An example where this exception may be relevant is where an individual with a long and difficult history of mental instability might suffer grave mental or physical trauma if certain diagnoses were made available to him or her without the benefit of medical or mental health intervention.

Under **section 6** of the FOIP Regulation, the head of a public body may disclose information relating to the mental or physical health of an individual to a medical or other expert for an opinion on whether disclosure of this information could reasonably be expected to result in grave and immediate harm to the individual's safety or mental or physical health.

When using this section, the public body must have an agreement in place to ensure that the expert maintains the confidentiality of the information. If a copy of any record is provided to the expert, it must be returned to the public body or disposed of in accordance with the agreement.

If a public body intends to disclose personal information relating to an individual's mental or physical health to a person who is a custodian under the *Health Information Act* (HIA), the public body should include a clause in the agreement stating that the information disclosed under the agreement is personal information subject to the *FOIP Act* (not HIA).

Though the intent of **section 18(2)** is to ensure that the applicant does not receive personal information that might cause immediate and grave trauma, efforts should be made to provide to the applicant as much of his or her own personal information as possible.

After obtaining the expert opinion, the public body may require the applicant to examine the requested record in person, and in the presence of someone who can clarify the information and assist the applicant in understanding it. That person may be a medical or other expert, a member of the applicant's family, or some other person approved by the public body (**section 6(5)** of the FOIP Regulation).

Information about individual health or safety supplied in confidence

Section 18(3) allows a public body to refuse to disclose information that reveals the identity of an individual who has provided confidential information about a threat to someone's safety or mental or physical health.

This discretionary exception allows a public body to protect the identity of experts and of informants who provide such information. Examples of individuals whose identity might have to be protected include a person reporting abuse under the *Protection for Persons in Care Act*, or a person reporting suicidal tendencies of a student.

Existence of record

In some instances, disclosure of the mere fact that a public body maintains a record may reasonably be expected to threaten someone else's safety, interfere with public safety, or even cause harm to the applicant.

Section 12(2)(a) of the Act provides that a public body can refuse to confirm or deny the existence of a record containing information described in **section 18**.



When the existence of a record is neither confirmed nor denied, the response to the applicant, as required under section 12(1), must incorporate a statement regarding the applicant's right of review as provided for in Model Letter J in Appendix 3.

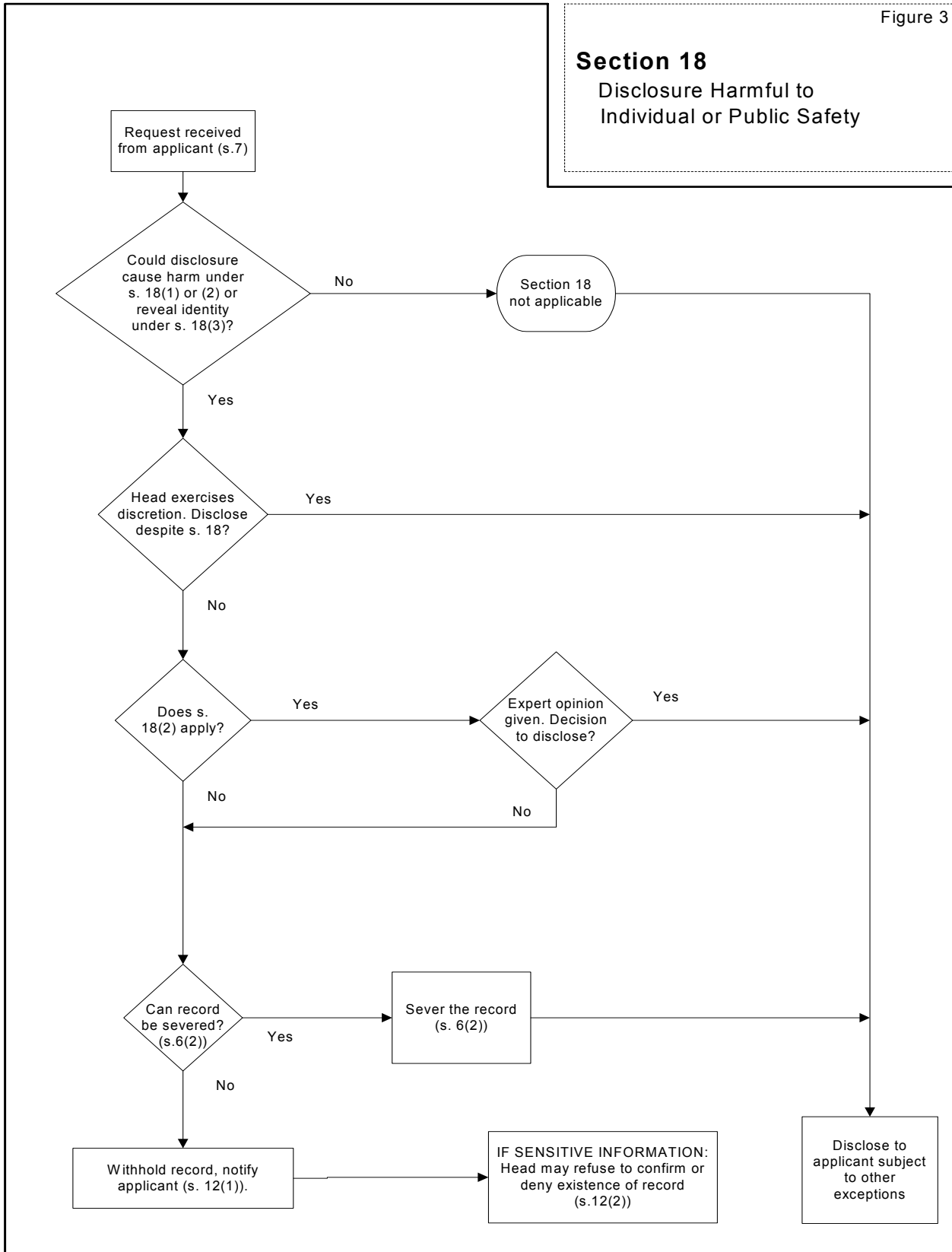
For more information on neither confirming nor denying the existence of a record, see section 4.3 of this chapter.

Application of exception

Figure 3 contains a flowchart setting out the application of **section 18**.

Figure 3

Section 18
Disclosure Harmful to Individual or Public Safety



4.5 Confidential Evaluations

Section 19 of the Act provides that a public body may refuse to disclose to an applicant confidential evaluative information or opinions, such as an opinion in an employment reference, in certain circumstances.

Section 19 is a discretionary exception and applies only when an individual is requesting his or her own personal information. The exception applies to both the applicant's own personal information and the personal information of the individual supplying the evaluation or opinion. The exception is intended to preserve the candour of the evaluative information or opinions.

Confidential evaluations for employment, contracts or other benefits

Section 19(1) The application of **section 19(1)** is subject to a three-part test:

- information must be evaluative or opinion material;
- information must be compiled for the purpose of determining the applicant's suitability, eligibility or qualifications for employment, or for the awarding of contracts or other benefits by a public body; and
- information must be provided, explicitly or implicitly, in confidence.

(See *IPC Orders 98-021* and *2000-029*.)

This provision protects the process where information is compiled about an individual in order to assess his or her suitability for either employment or the awarding of contracts or other benefits. This may involve information on his or her personal strengths or weaknesses, or eligibility (fitness or entitlement), or qualifications (attainments and accomplishments). The exception applies only to the selection process and not to evaluative processes relating to other aspects of employment or the awarding of contracts or benefits.

Employment refers to selection for a position as an employee of a public body, as defined in the Act (**section 1(e)**).

Contracts refer to agreements relating to both personal services and the supply of goods and services.

Other benefits refer to benefits conferred by a public body through an evaluative process. The term includes research grants, scholarships and prizes. It also includes appointments required for employment in a particular job or profession such as a bailiff or special constable (see *IPC Order 98-021*).

The term is not intended to refer to admission to programs of study, student or low-income housing, or benefits based solely on objective criteria.

For example, a post-secondary educational institution cannot withhold access to an applicant's reference letter regarding admission to a graduate program (see *IPC Order 2000-029*). However, the same institution could withhold a reference letter provided in confidence for the purpose of a competition for a post-doctoral position, which is a paid research position, not an educational program (*IPC Order F2002-027*).

For this exception to apply, the personal information must be contained in a confidential evaluation or opinion provided to the public body. If the public body has compiled a summary of confidential evaluations or references, the summary would also qualify for this exception (see *IPC Order 98-021*).

Examples of confidential evaluations to which **section 19(1)** may apply include:

- a verbatim transcription of a reference check of an employment candidate;
- a summary of a mix of telephone and written reference checks compiled by a public body employee;
- recorded comments from a third party who is not a referee for a candidate but makes the comments in the same employment context in which a reference letter would be provided (*IPC Order F2003-007*); and
- handwritten notes taken by an interviewer during the recruitment process (*IPC Order F2004-022*).

An analysis of an interview with a prospective candidate or of all reference checks prepared by the public body would not qualify for this exception. Factual information such as statistics on absenteeism would also not be withheld under this exception.

Confidential information for employee evaluation

Section 19(2) and (3) **Section 19(2)** provides an exception to disclosure for personal information of participants in a formal employee evaluation process concerning the applicant.

The application of **section 19(2)** is subject to a three-part test:

- the information must be provided by a participant in a formal employee evaluation process concerning the applicant;
- the information must be provided, explicitly or implicitly, in confidence; and
- the information must be personal information that identifies or could reasonably identify the participant (*IPC Order F2006-025*).

Participant is defined in **section 19(3)** as including a peer, subordinate or client of the applicant. It does not include the applicant's supervisor or superior. **Section 19(3)** may apply to an external assessor in an academic promotion process (*IPC Order F2006-025*).

Public bodies that incorporate "360 degree" evaluations into performance appraisals may withhold the names and positions of subordinates or colleagues, or the identity of students or clients of the applicant.

Section 19(2) is distinct from **section 19(1)**. **Section 19(2)** is not intended to allow the withholding of the evaluative or appraisal information itself. However, in certain situations, such as those involving a very small review group, some or all of the evaluative comments may reasonably be expected to reveal the identity of the reviewer and may be withheld under **section 19(2)**. (See *IPC Order F2006-025*.)

Reference checks relating to a current employee who is a candidate in an employment competition are not considered to be made for the purpose of a performance review

but rather to determine the individual's suitability, eligibility or qualifications for employment in another position. Information provided by the employee's current supervisor would not be considered information for a formal evaluation process as contemplated under **section 19(2)**. This information should be considered under **section 19(1)** (*IPC Order F2002-008*).

Information provided in confidence

For either **section 19(1)** or **section 19(2)** to apply, the information must be provided with either an explicit or implicit understanding that it will be held in confidence. This intention that confidentiality will be maintained may be explicitly stated in the record itself or in an agreement governing the process, or implied by the circumstances under which the information has been collected.

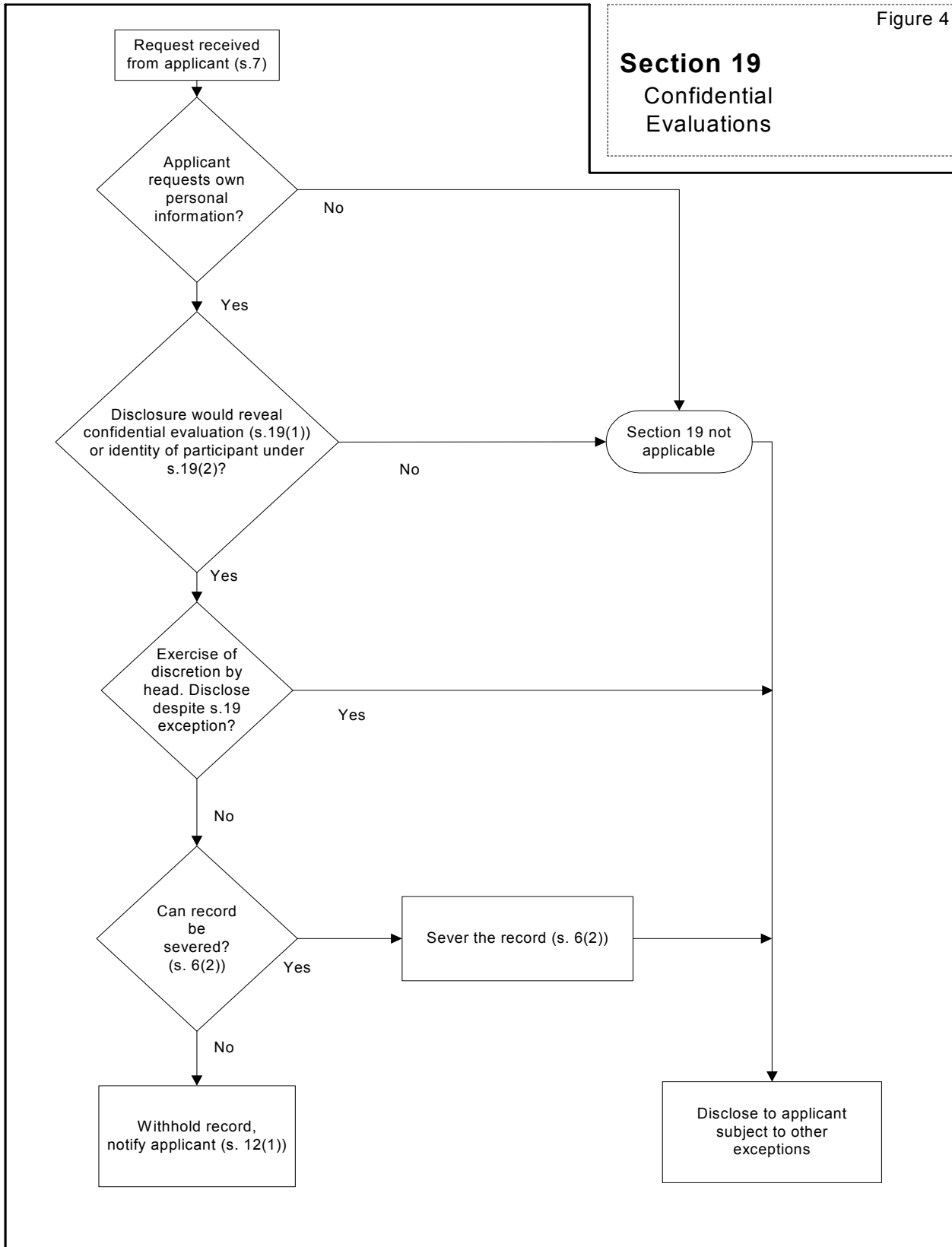
Where confidentiality is implied, there must be objective grounds to support the assumption of confidentiality. It is not sufficient for the submitting party simply to stamp documents "Confidential." Public bodies are encouraged to have written policies regarding whether certain processes are considered to be confidential, and procedures in place to protect the anonymity of individuals involved in such processes.

Although an evaluation may have been provided in confidence, a public body may still exercise its discretion to disclose the evaluation if no other exception applies.

Some factors that may be considered when determining whether information was supplied in confidence are set out in section 4.2 of this chapter.

Application of exception

Figure 4 contains a flowchart setting out the application of **section 19**.



4.6
Disclosure
Harmful to Law
Enforcement

Section 20 of the Act deals with the application of exceptions to protect both law enforcement activities and information in certain law enforcement records. It contains a number of discretionary exceptions, and a mandatory exception requiring public bodies to refuse to disclose information if this would be an offence under an Act of Canada. For a more detailed discussion of this exception, see FOIP Bulletin No. 7: *Law Enforcement*, published by Access Privacy, Service Alberta.

Definition of law enforcement

Law enforcement is defined in **section 1(h)** of the Act as

- policing, including criminal intelligence operations;
- a police, security or administrative investigation, including the complaint that gives rise to the investigation, that leads or could lead to a penalty or sanction, including a penalty or sanction imposed by the body conducting the investigation or by another body to which the results of the investigation are referred; or
- proceedings that lead or could lead to a penalty or sanction, including a penalty or sanction imposed by the body conducting the investigation or by another body to which the results of the investigation are referred.

Policing refers to the activities of police services. This means activities carried out under the authority of a statute regarding the maintenance of public order, detection and prevention of crime or the enforcement of law (see *IPC Order 2000-027*).

Criminal intelligence is information relating to a person or group of persons. It is compiled by police services to anticipate, prevent or monitor possible criminal activity. Intelligence-gathering is sometimes a separate activity from the conduct of investigations. Intelligence 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.

Investigation has been defined, in general, as a systematic process of examination, inquiry and observation (*IPC Orders 96-019 and F2002-024*).

A *law enforcement investigation* is an investigation that leads or could lead to a penalty or sanction. The phrase *lead or could lead* in this definition allows for investigations to be considered law enforcement even if they do not ultimately result in proceedings before a court or tribunal.

The Information and Privacy Commissioner has ruled that, for the purposes of the *FOIP Act*, the investigation must be one that can result in a penalty or sanction imposed under a statute or regulation (*IPC Order 2000-023*, affirming *IPC Order 96-006*). The Office of the Commissioner has interpreted this restriction to include penalties or sanctions imposed under a bylaw enacted under a statute (*IPC Investigation Report F2002-IR-009*).

The *penalty or sanction* may include a fine, imprisonment, revocation of a licence, an order to cease an activity, or expulsion from an educational institution.

An investigation relating to a breach of contract or a contravention of a policy by an employee will not normally constitute a law enforcement activity, since these actions would not result in a penalty or sanction under a statute or regulation.

For example, in *IPC Order 2000-019*, the Commissioner said that although an investigation of a breach of employment duties was an administrative investigation carried out under section 25 of the *Public Service Act*, the disciplinary action that could result would not be law enforcement because the duties were not set out in an enactment that provides for penalties or sanctions in the event of a breach.

Under **section 1(h)** of the Act, an investigation includes the complaint that triggers the investigation. This means that the initial complaint receives the same consideration, if protection from disclosure is required, as the rest of the investigation.

The law enforcement exception may be applied when a body other than the one carrying out the investigation has authority to impose the penalty or sanction. This includes a body such as the RCMP or another federal agency that is not a public body, as defined in the *FOIP Act*.

To apply the law enforcement exception, public bodies will need to ensure that a specific authority to investigate is in place and that the investigation can lead to a penalty or sanction being imposed. Three types of investigations are specifically included: police, security and administrative investigations.

A *police investigation* is one carried out by the police, or other persons who carry out a policing function that involves investigations. For example, a police investigation may include an investigation by a special constable appointed under the *Police Act*, or by a person responsible for investigating possible regulatory offences under a federal or provincial enactment such as the *Criminal Code (Canada)* or the *Traffic Safety Act*.

A *security investigation* includes an activity carried out by, for, or concerning a public body and relates to the security of the organization and its clients, staff, resources, or the public. Security includes the work that is done to secure, ensure safety or protect from danger, theft or damage. A security investigation will fall within the scope of the law enforcement exception only if it is conducted under the authority of a statute, regulation, bylaw or other legislative instrument which includes a penalty or sanction for the offence investigated.

An *administrative investigation* is a formal investigation carried out to enforce compliance or to remedy non-compliance with standards, duties and responsibilities. These standards, duties and responsibilities must be defined under an Act, regulation, bylaw or other legislative instrument, which must also include a penalty or sanction for the non-compliance under investigation.

The regular day-to-day review and monitoring of employee performance, including employee grievances, would generally not be considered an administrative investigation for the purposes of the Act's definition of law enforcement. A civil action for monetary damages or recovery of a debt, or an internal employment-related investigation does not fall within this section.

Investigations performed under the authority of a federal or provincial Act or regulation that can result in a prosecution would generally be considered to be part of law enforcement. The specific facts of the matter would determine whether it was a police, security or administrative investigation.

Examples of administrative investigations include

- an inspection under the *Water Act (IPC Order F2002-024)*
- an investigation by Environment Canada into the discharge from a landfill site owned by a municipality (*IPC Order F2005-013*)
- an investigation under the *Traffic Safety Act* and the Operator Licensing and Vehicle Control Regulation to determine whether an individual could safely operate a motor vehicle (*IPC Investigation Report F2007-IR-004*)
- a complaint made and an investigation conducted under the *Protection of Persons in Care Act (IPC Order F2005-009)*

A public body need not carry out the investigation for that investigation to meet the definition. The investigation might be carried out by a police service on behalf of the public body. If the requested records are not within the custody or control of the public body to which the request is made, that public body is not required to search for responsive records in the custody or under the control of another public body (see *IPC Order 2001-013*).

Proceedings include an action or submission to any court, judge or other body having authority, by law or by consent, to make decisions concerning a person's rights. This includes administrative proceedings before agencies, boards and tribunals.

Exception for law enforcement information

Section 20(1) is a discretionary exception. It provides that a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

- harm a law enforcement matter;
- prejudice the defence of Canada or of any foreign state allied to or associated with Canada;
- disclose activities suspected of constituting threats to the security of Canada within the meaning of the *Canadian Security Intelligence Service Act (Canada)*;
- harm the effectiveness of investigative techniques and procedures currently used, or likely to be used, in law enforcement;
- reveal the identity of a confidential source of law enforcement information;
- 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;
- interfere with or harm an ongoing or unsolved law enforcement investigation, including a police investigation;
- reveal any information relating to prosecutorial discretion;

- deprive a person of the right to a fair trial or impartial adjudication;
- reveal a record that has been confiscated from a person by a peace officer in accordance with a law;
- facilitate the escape from custody of an individual who is being lawfully detained;
- facilitate the commission of an unlawful act or hamper the control of crime;
- reveal technical information relating to weapons or potential weapons;
- harm the security of any property or system, including a building, a vehicle, a computer system or a communications system; or
- reveal information in a correctional record supplied, explicitly or implicitly, in confidence.

The application of the exception under several of the provisions of **section 20(1)** is subject to a test for harm. See section 4.1 of this chapter for a discussion of the harms test and IPC FOIP Practice Note 1: *Applying “Harms” Test*.

Harm a law enforcement matter

Section 20(1)(a) This provision permits a public body to refuse disclosure of information that may result in harm to law enforcement activities.

Harm implies damage or detriment (see *IPC Order 2001-010* for a discussion of the meaning of harm generally). The harm threshold is designed to protect law enforcement while preserving the public’s right of access to some types of law enforcement information.

A public body contemplating a decision to withhold information needs to be able to demonstrate that there is a reasonable likelihood of harm if the specific information is disclosed. The likelihood of harm will depend, in part, on the sensitivity of the law enforcement information.

To invoke this exception, a public body must establish a direct link between the disclosure of specific law enforcement information and the harm that is expected to result from the disclosure. It cannot simply claim harm to law enforcement in general (see *IPC Order 96-003*).

A public body does not need to demonstrate that actual harm will result or that actual harm resulted from similar disclosures in the past. However, past experience is a valuable indicator of the expected harm.

Generally, this provision is used to protect law enforcement investigations that are active. It may also be used to protect the confidentiality of the process through which complaints are received.

Prejudice the defence of Canada or of any foreign state allied to or associated with Canada

Section 20(1)(b) This provision allows a public body to refuse disclosure of information that could reasonably be expected to be detrimental to national defence or to Canada’s international relations with respect to defence matters.

Prejudice in this context refers to detriment to national defence. The test for prejudice is not as demanding as the test for harm.

Defence of Canada means any activity or plan relating to the defence of Canada, including improvements in the nation's ability to resist attack.

An *allied state* is one with which Canada has concluded formal alliances or treaties.

An *associated state* is one with which Canada may be linked for trade or other purposes outside the scope of a formal alliance.

Public bodies in Alberta hold only limited information related to national defence. However, the presence of military installations within the province and cooperation between the federal and provincial governments for emergency planning are matters that could fall within the scope of this exception.

Disclose activities suspected of constituting threats to the security of Canada

Section 20(1)(b.1) This provision allows a public body to withhold information that could disclose activities suspected of constituting threats to the security of Canada within the meaning of the *Canadian Security Intelligence Service Act* (Canada). Threats to the security of Canada include

- espionage or sabotage, or supporting activities, against Canada or detrimental to the interests of Canada;
- foreign-influenced activities detrimental to the interests of Canada that are clandestine or deceptive or involve a threat to any person;
- activities within or relating to Canada that threaten or use acts of serious violence against persons or property for the purpose of achieving a political, religious or ideological objective; and
- activities directed toward undermining the constitutionally established system of government in Canada by covert unlawful acts or violence.

These activities do not include lawful advocacy, protest or dissent, unless carried on in conjunction with any of the listed activities.

Espionage is any activity carried out by spies or related to spying.

Sabotage is malicious or wanton destruction, usually, but not always, directed against property. Property may include computers, computer programs and data.

Section 20(1)(b.1) permits a public body to refuse to disclose information that could reasonably be expected to disclose activities that are *suspected* of constituting threats to the security of Canada. The public body is not required to meet the harms test to apply this exception.

Examples of information to which this exception may apply include information relating to suspected activities intended to cause serious damage to critical infrastructure in the public or private sector, such as bombings of oil field installations, and information concerning local security planning for a meeting of heads of state or an international sporting event.

A public body wishing to rely on this exception to disclosure should consult with other government departments or agencies that specifically deal with threats of this nature.

Harm the effectiveness of investigative techniques and procedures

Section 20(1)(c) This provision permits a public body to refuse disclosure of information that could harm the effectiveness of investigative techniques used, or likely to be used, in law enforcement.

Section 20(1)(c) recognizes that unrestricted access to law enforcement techniques could reduce their usefulness, effectiveness and success.

Investigative techniques and procedures means techniques and procedures used to conduct an investigation or inquiry for the purpose of law enforcement (*IPC Order F2007-005*)

Since this exception is subject to the harms test, a public body cannot rely on **section 20(1)(c)** to refuse to disclose basic information about well-known investigative techniques, such as wire-tapping, fingerprinting and standard sources of information about individuals' addresses, personal liabilities, real property, etc. (*IPC Orders 99-010 and F2003-005*).

If a technique or procedure is generally known to the public, disclosure would not normally compromise its effectiveness (*IPC Order 2000-027*).

The exception is more likely to apply to new technologies in electronic monitoring or surveillance equipment used for a law enforcement purpose. The exception extends to techniques and procedures that are *likely to be used*, in order to protect techniques and technology under development and new equipment or procedures that have not yet been used.

Reveal the identity of a confidential source

Section 20(1)(d) This provision enables a public body to refuse to disclose information that reveals the identity of a confidential source of law enforcement information. The fact that the information, if disclosed, could reveal the identity of a confidential source is sufficient to apply this exception. The information need not be law enforcement information. There is no need to demonstrate that harm could come to the source.

Identity includes the name and any identifying characteristics, symbols and numbers relating to the source.

A *confidential source* is someone who supplies law enforcement information, as defined in the Act, to a public body with the reasonable expectation that his or her identity will remain secret. Employees, whether directly employed or under contract, cannot be *sources* because they are a part of a public body and are supplying information as part of their jobs (see *IPC Order 99-010*).

Where a public body can demonstrate that there is a confidential source of information and that the information supplied by the source is law enforcement information, the public body must then determine whether the particular information requested could permit the applicant or anyone else to identify the source. Since it is

often difficult to determine whether information can be linked to establish identification, caution should be exercised in releasing any information connected to a confidential source.

If the identity of a confidential source of law enforcement information appeared in a law enforcement record, disclosure of the individual's identity would be a presumed unreasonable invasion of personal privacy under **section 17(4)(b)**. A public body would have to determine whether the factors in **section 17(5)**, as well as any other relevant circumstances, weigh in favour of disclosing the identity. The presumption of unreasonable invasion would not arise when the disclosure of the identity of the confidential source of law enforcement information is necessary to dispose of the law enforcement matter or to continue an investigation.

The public body could apply the discretionary exception under **section 20(1)(d)** as an additional exception. It is a good practice to apply all applicable discretionary exceptions initially so that the public body is not prohibited from doing so later in a review process.

If police informer privilege applies, the identity of the informant is considered to be privileged information and must not be disclosed since it is subject to **section 27(2)**, a mandatory exception to disclosure. For further information on police informer privilege, see section 4.13 of this chapter.

Reveal criminal intelligence relating to organized criminal activities

Section 20(1)(e) This provision allows a public body to refuse disclosure of information that could reveal criminal intelligence that has a reasonable connection with the detection, prevention or suppression of

- organized criminal activities; or
- serious and repetitive criminal activities.

Criminal intelligence is information relating to a person or group of persons compiled by law enforcement agencies to anticipate, prevent or monitor possible criminal activities.

Intelligence-gathering is often unrelated to the investigation of a specific offence. For example, intelligence may be used for future investigations, for activities aimed at preventing the commission of an offence, and for ensuring the security of individuals or organizations. Intelligence may be drawn from investigations of previous incidents that may or may not have resulted in the trial and conviction of the person under surveillance.

Organized criminal activities occur when a group of individuals come together with the intent of committing crimes or when they conspire together to commit crimes. There is a degree of organization or deliberate planning involved, which is not the case with random criminal acts. Examples may include the activities of gangs and automobile theft rings, smuggling narcotics, and transporting illegal immigrants.

Serious and repetitive criminal activities occur when the same person, or group of persons, commit serious crimes repeatedly. The criminal activity has to be one that carries a heavy penalty or has a major impact on society or individuals. Examples

include serial bank robberies, dealings in illegal drugs and ongoing industrial sabotage.

This exception does not require an expectation of harm. A public body wishing to rely on this exception would have to be able to demonstrate a rational relationship between the information collected and the operations for which that information may be used.

Interfere with or harm an ongoing or unsolved investigation

Section 20(1)(f) This provision allows a public body to refuse to disclose information that could either interfere with or harm an ongoing or unsolved investigation.

Interfere with is a less stringent test than the harms test under **section 20(1)(a)**. It includes hindering or hampering an ongoing investigation and anything that would detract from an investigator's ability to pursue the investigation.

The exception applies to ongoing or active investigations and those where investigative activity has ceased but the crime remains unsolved. This includes investigations where a prosecution has not resulted, but does not include those where charges were dropped. An example would be an unsolved murder or a fraud investigation. An investigation has been found to be ongoing where the public body had not yet decided whether to seek a prosecution (*IPC Order F2005-026*) and where the Crown Prosecutor has the files and is considering whether to proceed with charges (*IPC Order F2004-023*).

The public body must demonstrate the harm that would result from disclosure (see the discussion of **section 20(1)(a)** above), or the way in which disclosure would interfere with or hinder the investigation.

Reveal information relating to the exercise of prosecutorial discretion

Section 20(1)(g) This provision allows a public body to refuse to disclose information related to the exercise of discretion by Crown Counsel or a special prosecutor with regard to prosecuting an offence.

Prosecutorial discretion means the exercise of a prosecutor's discretion related to his or her power to prosecute, negotiate a plea, withdraw charges, enter a stay of proceedings, and appeal a decision or verdict (see *IPC Orders 2001-011, 2001-030* and *2001-031*). Prosecutorial discretion involves the ultimate decision as to *whether* a prosecution should be brought, continued or ceased, and *what* the prosecution ought to be for, that is, the nature and extent of the prosecution and the Attorney General's participation in it (*IPC Order F2006-005*, citing the Supreme Court of Canada in *Krieger v. Law Society of Alberta* [2002] 3 S.C.R. 372).

The exercise of prosecutorial discretion may be with respect to offences under the *Criminal Code* (Canada) and any other enactment of Canada for which the Minister of Justice and Attorney General for Alberta may initiate and conduct a prosecution. Prosecutorial discretion may also be exercised with respect to offences under an enactment of Alberta, including prosecution of provincial regulatory offences.

Most records relating to this exception will be in the custody or under the control of Alberta Justice. Copies of records or notes reflecting the discretion exercised may be in the files of other public bodies, especially police services.

The fact that information is in a Crown Prosecutor's files does not necessarily mean that the information relates to the exercise of prosecutorial discretion. The substance, not location, of the information is determinative (*IPC Order F2007-021*).

Section 20(2) states that this exception does not apply to information that has been in existence for 10 years or more. For a discussion on the application of time limitations to exceptions, see section 4.1 of this chapter. Information that would qualify for exception under **section 20(1)(g)** but which is 10 or more years old must be disclosed unless another exception applies to it.

Deprive of the right to a fair trial or impartial adjudication

Section 20(1)(h) This provision enables a public body to refuse to disclose information that could reasonably be expected to deprive a person of the right to a fair trial or impartial adjudication. The exception applies to a person.

Person includes an individual, a corporation, a partnership and the legal representatives of a person.

Fair trial refers to a hearing by an impartial and disinterested tribunal that renders judgment only after consideration of the evidence, the facts, the applicable law and arguments from the parties.

Impartial adjudication means a proceeding in which the parties' legal rights are safeguarded and respected.

This exception applies not only to civil and criminal court actions but also to proceedings before tribunals established to adjudicate individual and collective rights. Examples of proceedings before tribunals include hearings before the Labour Relations Board, and hearings of human rights panels.

In applying the exception, the public body must present specific arguments about how and why disclosure of the information in question could deprive a person of the right to a fair trial or hearing. Commencement of a legal action is not by itself enough to support the application of this exception.

Reveal a record confiscated by a peace officer

Section 20(1)(i) This provision permits a public body to refuse disclosure that would reveal a record that has been seized from a person by a peace officer in accordance with the law.

Section 20(1)(i) applies to records confiscated from individuals, corporations and partnerships, and their representatives.

A *peace officer* is defined in section 1(j) of the *Police Act* to mean a person employed for the purposes of preserving and maintaining the public peace. Other laws set out what the term *peace officer* means in relation to those laws (e.g. *Peace Officer Act*). A peace officer could include a mayor, sheriff or sheriff's officer, warden, correctional officer, and any other officer or employee of a penitentiary, prison or

correctional centre. It also includes a police officer, police constable and a special constable.

The record must have been confiscated under the authority of a law. An example would be business records of a company seized by a peace officer investigating suspected tax fraud.

Facilitate escape from custody

Section 20(1)(j) This provision allows a public body to refuse disclosure of information if the disclosure could reasonably be expected to facilitate the escape from custody of a person who is lawfully detained.

Lawfully detained means being held in custody pursuant to a valid warrant or other authorized order. Persons lawfully detained would include:

- persons in custody under federal or provincial statute;
- young persons in open or secure custody or pre-trial detention under the *Alberta Youth Justice Act*;
- persons involuntarily committed to psychiatric institutions; and
- parole violators held under a warrant.

The exception also extends to individuals remanded in custody (i.e. charged but not yet tried or convicted). It does not apply to individuals released under bail supervision.

An example of information protected by this exception is the building plans for a correctional facility.

In order to apply this exception, the public body must establish a reasonable expectation that disclosure of the information could facilitate an escape from custody. In *IPC Order F2007-005*, there was no evidence that disclosure of a training video relating to a police canine unit could facilitate an escape.

Facilitate the commission of an unlawful act

Section 20(1)(k) This provision permits a public body to refuse to disclose information that would be of use in committing a crime or that could hamper the control of crime. Examples include information about techniques, tools and instruments used for criminal acts, names of individuals with permits for guns, the location of police officers, and the location of valuable assets belonging to a public body.

A public body must be prepared to demonstrate how or why disclosing the information in question could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime. Also, the Commissioner may examine whether, on the face of the records, there is a reasonable possibility that disclosure of the information would result in the alleged consequence (*IPC Order F2004-032*).

Reveal technical information relating to weapons

Section 20(1)(l) This provision enables a public body to refuse to disclose information that could reasonably be expected to make the applicant or others aware of technical

information relating to weapons or to materials that have the potential to become weapons. For example, this exception would cover information on how to make a bomb.

Harm the security of property and systems

Section 20(1)(m) This provision permits a public body to refuse to disclose information that could reasonably be expected to harm the security of any property or system, including a building, a vehicle, a computer system, and a communications system. This exception is subject to the harms test (see the discussion of the harms test in section 4.1 of this chapter).

Security generally means a state of safety or physical integrity. The security of a building includes the safety of its inhabitants or occupants when they are present in it. Examples of information relating to security include methods of transporting or collecting cash in a transit system, plans for security systems in a building, patrol timetables or patterns for security personnel, and the access control mechanisms and configuration of a computer system.

Section 20(1)(m) has been applied where disclosure of information could be expected to harm the security of communication systems and codes used by the Calgary Police Service in relation to its law enforcement records (*IPC Order F2005-001*). The exception did not apply to a chapter of a police procedural manual where the information relating to the execution of search warrants was common knowledge (*IPC Order F2004-032*).

Reveal information in a confidential correctional record

Section 20(1)(n) This provision enables a public body to refuse to disclose all or part of a record that could reasonably be expected to reveal information in a correctional record supplied explicitly or implicitly in confidence.

A *correctional record* refers to information collected or compiled while an individual, either an adult or young person, is in the custody or under the supervision of correctional authorities or their agents as a result of legally imposed restrictions. It includes records relating to

- imprisonment;
- parole;
- probation;
- community service orders;
- bail supervision; and
- temporary absence permits.

The correctional record itself need not be in the custody or control of the public body. The exception may apply if the information would reveal information that is in the correctional record. The information may be an extract from the record or a summary of the record. To qualify for the exception, the information must have been supplied in confidence. This means that there is an agreement or understanding between the parties or some longstanding practice governing how the information will be treated.

This may be explicit, in that it has been agreed to in writing, or implicit, in that both parties assume the confidentiality.

It is not sufficient to simply mark the information as being received in confidence. There must be evidence that a condition of confidentiality is a normal part of the process of supplying the information. For more information on confidentiality, see section 4.3 of this chapter.

Exposure to civil liability or harm to the proper custody or supervision of an individual

Section 20(3) **Section 20(3)** is also a discretionary exception. It allows non-disclosure of information that could expose an individual to civil liability or could harm the proper custody or supervision of an individual under correctional supervision.

Exposure to civil liability

Section 20(3)(a) **Section 20(3)(a)** allows a public body to refuse to disclose information to an applicant if the information is in a law enforcement record and the disclosure could reasonably be expected to expose the author of the record, or an individual quoted or paraphrased in the record, to civil liability.

This exception protects law enforcement officials, and those providing information to them, from civil suit as a result of disclosure of records made in the course of carrying out law enforcement activities (see *IPC Order 2001-027*).

Harm to the proper custody or supervision of an individual under the control of a correctional authority

Section 20(3)(b) **Section 20(3)(b)** allows a public body to refuse disclosure of information about the history, supervision or release of a person who is in custody or under the supervision of a correctional authority. The exception applies only if disclosure could reasonably be expected to harm the proper custody or supervision of that person. The same harms test is required as for **section 20(1)(a)**, discussed above.

History means information about the person such as an employment record or medical information.

Supervision refers to the overseeing of a person.

The provision applies to adults and young persons still subject to control by correctional authorities or their agents as a result of legally imposed restrictions on their liberty. This includes individuals in prison, on parole, on probation, on a temporary absence permit, under bail supervision or performing community service work. The exception allows discretion to except specific information about someone in custody or under supervision.

Examples include information regarding security arrangements for the transfer of a prisoner between facilities, whether or not a prisoner is in a public hospital, and the appointment of a probation officer.



This exception cannot be used to deny access to an applicant who is no longer in custody and is seeking his or her own personal information.

Disclosure is an offence under an Act of Canada

Section 20(4) **Section 20(4)** is a mandatory exception. It provides that a public body must refuse to disclose information to an applicant if the information is in a law enforcement record and the disclosure would be an offence under an Act of Canada.

Law enforcement record means any recorded information relating to law enforcement as defined in the Act.

A disclosure is an *offence under an Act of Canada* if a federal statute prohibits the disclosure and makes it an offence. An offence under a federal regulation or other subordinate legislation does not fall within this category.

Examples of such Acts are

- the *Youth Criminal Justice Act* (Canada), which makes it an offence to knowingly disclose certain court, police, government and other records relating to young offenders except as authorized by that Act;
- the *Security of Information Act* (Canada), which prohibits disclosure of information that could prejudice the security of the country; and
- the *Criminal Code* (Canada), which prohibits the release of wiretap transcripts.

When the exception does not apply

Section 20(5) **Section 20(5)** of the Act provides that **section 20(1)** and **section 20(3)** do not apply to

- a report prepared in the course of routine inspections by an agency that is authorized to enforce compliance with an Act of Alberta (**section 20(5)(a)**); or
- a report, including statistical analysis, on the degree of success achieved in a law enforcement program, unless disclosure of the report could reasonably be expected to interfere with or harm the matters referred to in **section 20(1)** or **20(3)**.

The intent of **section 20(5)** is to encourage disclosure of reports and statistics about law enforcement programs.

Routine inspections involve scheduled inspections by public officials to ensure that standards or other regulatory requirements are being met. They take place without specific allegations or complaints having been made. Examples include inspections under the *Safety Codes Act*, public health inspections, fire inspections, liquor licensing inspections, and safety inspections on trucks or school buses under the *Traffic Safety Act*.

Such reports are usually factual in nature and report the conditions found by the inspector. They may include advice or other information that could be excepted under other sections of the Act.

Reports and statistics on the success of law enforcement programs should be routinely disclosed whenever possible. Only if the contents of the report could interfere with or harm any of the matters set out in the preceding sections would information be withheld. This would be done by severing the appropriate parts of the report.

Examples of statistical law enforcement reports include information on programs such as “Crimestoppers” and “Checkstop,” statistics on elevator safety inspections, and reports on matters such as the success in preventing abuse of handicapped parking stalls.

Completed investigations

Section 20(6) **Section 20(6)** of the Act provides that, after a police investigation is completed, a public body may disclose the reasons for the decision not to prosecute

- to a person who knew of and was significantly interested in the investigation, including a victim or a relative or friend of a victim (**section 20(6)(a)**); or
- to any other member of the public, if the fact of the investigation was made public (**section 20(6)(b)**).

There is no general requirement to disclose information about decisions not to prosecute unless the investigation itself was made public. To apply **section 20(6)(b)**, there would have to be evidence of this fact, such as a newspaper report about the investigation or a news release.

The provision relates only to police investigations and not to the whole field of law enforcement.

Existence of record

Section 12(2) There are situations in which the disclosure of the mere existence of a record could result in harm to law enforcement. For example, disclosure of the existence of investigation records or criminal intelligence may indicate that enforcement activities are being undertaken and this, in itself, could harm those activities.

Section 12(2)(a) of the Act provides that a public body may, in response to an applicant, refuse to confirm or deny the existence of a record containing information described in **section 20**.

In order to rely on **section 12(2)(a)**, a public body must first consider what interest would be protected by withholding the record under **section 20** and then consider whether refusing to say if such information exists would promote or protect the same interest. In other words, the public body must be able to show that disclosure of whether the information exists or not would result in one of the negative consequences in **section 20** (*IPC Orders F2006-012, F2006-013 and F2006-015*).

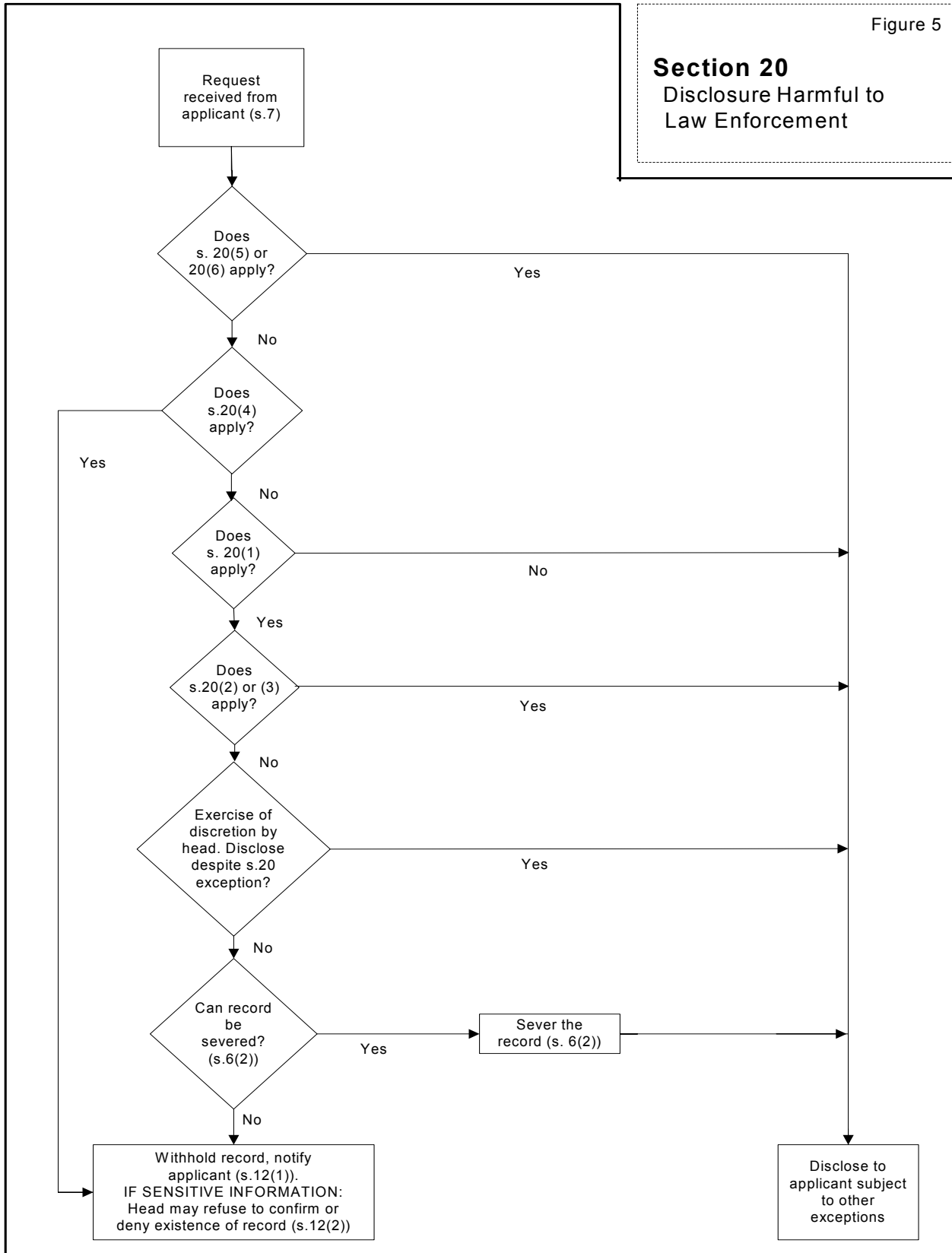


When the existence of a record is neither confirmed nor denied, the response to the applicant, as required under section 12(1)(c) of the Act, must include a statement regarding the applicant’s right of review. (See Model Letter J in Appendix 3.)

See section 4.3 of this chapter (“Existence of a record”) for a discussion of **section 12(2)(b)**.

Application of exception

Figure 5 contains a flowchart setting out the application of **section 20**.



4.7 Disclosure Harmful to Intergovernmental Relations

Section 21 provides that a public body may refuse to disclose information that could harm intergovernmental relations or the intergovernmental supply of information. This is a discretionary exception.

This exception has two parts, one dealing with harm to relations and the other with information given in confidence.

Section 21(1) allows a public body to refuse access if disclosure could reasonably be expected to

- harm relations between the Government of Alberta or its agencies and any of the following or their agencies:
 - the Government of Canada or a province or territory of Canada,
 - a local government body, as defined in the *FOIP Act* (see section 1.1. of Chapter 1),
 - an aboriginal organization that exercises government functions,
 - the government of a foreign state, or
 - an international organization of states (**section 21(1)(a)**);

or

- reveal information supplied explicitly or implicitly in confidence by a government, local government body or an organization listed above or its agencies (**section 21(1)(b)**).

Consultation

Consultation regarding whether or not to invoke this exception should normally take place between the FOIP Coordinator of the public body and officials in comparable positions in external government bodies.



Where the federal or foreign governments, aboriginal organizations or international organizations are involved, consultations must be conducted in cooperation with Alberta International and Intergovernmental Relations or Alberta Aboriginal Relations.

Where local governments are involved, consultation would occur with the appropriate public body, as indicated by the nature of the records. Public bodies that will need to consult on a regular basis should establish practices and contact points to expedite the process.

Harm to intergovernmental relations

- Section 21(1)(a)** This provision applies to information that if disclosed could reasonably be expected to harm relations between the Government of Alberta and the listed external government entities. The exception may apply to information that relates to current or future relations.

Relations is intended to cover both formal negotiations and more general exchanges and associations between the Government of Alberta and other governments or their agencies.

Harm means damage or detriment to negotiations and general associations and exchanges. To satisfy the harms test, there must be a reasonable probability that disclosure would harm and not merely hinder, impede or minimally interfere with the conduct of intergovernmental relations or negotiations.

Although information exchanged between provincial and federal ministers may be sensitive, in order to apply **section 21(1)(a)**, a government body must be able to provide evidence or an argument that disclosure would harm relations between the Government of Alberta and the Government of Canada (see *IPC Order 2001-006*).

The term *Government of Alberta* has a broader sense here than an individual provincial government department or agency. The exception has a different and higher-level coverage, in that *government* is intended to convey the sovereign power of the state in carrying out its will and functions. Public bodies wishing to invoke **section 21(1)(a)** must demonstrate that the conduct of intergovernmental relations of the Government of Alberta, and not just those of the public body, would be harmed by the disclosure.

The exception relates to government bodies external to the Government of Alberta, to certain aboriginal organizations and to local government bodies.

The exception also covers any of their agencies (i.e. corporate bodies or persons designated by any of the listed external government organizations). For example, the Department of National Defence is an agency of the Government of Canada, UNESCO is an agency of the United Nations, and an economic development agency is an agency of a local government.

The provision covers not only *provincial governments* but also *territorial governments* (e.g. the Government of the Yukon) and their agencies.

An *aboriginal organization* refers to the council of a band as defined in the *Indian Act* (Canada) and any organization established to negotiate or implement, on behalf of aboriginal people, a treaty or land claim with the federal government. This definition in relation to treaties and land claims does not limit the subject matter of the records to which the exception may apply. The particular records need not deal with treaties or land claims. An example of other types of records may be the results of achievement tests of students in band schools.

A *foreign state* refers to the government of any foreign nation or state, including the component state governments of federated states.

An *international organization of states* refers to any organization with members representing and acting under the authority of the governments of two or more states. Examples include the United Nations and the International Monetary Fund.

An example of information that might qualify for this exception is notes of private discussions between officials of a city, its twinned counterpart in a developing

country, the province and the country concerned, where no agreement has been reached between the parties to make the discussions public.

Disclosure of information

Section 21(2) **Section 21(2)** of the Act states that information referred to in **section 21(1)(a)** may be disclosed only with the consent of the Minister responsible for the *FOIP Act* (i.e. the Minister of Service Alberta) in consultation with the Executive Council.



Where a public body wishes to disclose information that qualifies for the exception set out in section 21(1)(a), it must prepare a submission describing the information and setting out the circumstances and reasons why it wishes to disclose this information.

The submission should be prepared in consultation with

- Alberta International and Intergovernmental Relations, where records concerning the federal government, foreign governments or international organizations are involved;
- Alberta Aboriginal Relations, where records concerning aboriginal organizations, such as First Nations, are involved; or
- Alberta Municipal Affairs or other relevant department, where local governments are involved, and

with the other government, as appropriate.

This submission must then be signed by the head of the public body and submitted to the Minister of Service Alberta for consideration. If, after discussing the matter with the public body and with other appropriate departments, the Minister of Service Alberta believes that disclosure should take place, the Minister and the head of the relevant Alberta Government department will jointly sponsor the submission to the Executive Council for consideration. After this consultation, the Minister will either consent to, or deny, the application.

Information supplied in confidence

Section 21(1)(b) This provision provides for the non-disclosure of information that could reasonably be expected to reveal information received in confidence from one of the bodies specified in **section 21(1)(a)**. A decision that a confidence would be revealed is enough to satisfy the test here. It is not necessary that the harms test set out in **section 21(1)(a)** also be met (*IPC Order F2004-018*).

In order to be covered by **section 21(1)(b)**, the information must have been supplied in circumstances that clearly place an obligation on the public body to maintain confidentiality.

In confidence usually describes a situation of mutual trust in which private matters are related or reported. Criteria for determining whether information has been given, explicitly or implicitly, in confidence are provided in section 4.2 of this chapter.

The public body has the burden of proving that the information was submitted in confidence.

Examples of information that may be supplied in confidence include:

- information exchanged between the Canadian Security Intelligence Service and municipal police forces;
- correspondence about and transcripts of a confidential meeting of the western Premiers; and
- negotiating strategies relating to a federal, provincial and municipal infrastructure program.

A public body's awareness that the information may be disclosed during a future disciplinary hearing or criminal prosecution does not affect the understanding that the information was supplied to the public body in confidence (*IPC Order F2004-018*).

Where multiple governments supplied information to a database that was only accessible to authorized users (including an Alberta Government department) under the terms of an agreement that facilitates the enforcement of consumer legislation, and the agreement contained express consent and privacy provisions, the Information and Privacy Commissioner found that the information was supplied explicitly in confidence (*IPC Order 2001-037*).

Disclosure of information

Section 21(3) **Section 21(3)** of the Act provides that a public body may disclose information supplied in confidence only with the consent of the government (provincial, territorial or foreign), the local government body, the organization or the agency that supplied the information. If consent has not been obtained, **section 21(3)** precludes disclosure (*IPC Order 96-004*).

Consultation with the other party or parties providing the information should take place between officials who are authorized to make decisions about the disclosure. The consent of the government, local government body, organization or agency that provided the information should be in writing.

Time limitation

Section 21(4) This provision states that **section 21** does not apply to information that has been in existence in a record for 15 years or more. For a further discussion on the application of time limitations to exceptions, see section 4.1 of this chapter.

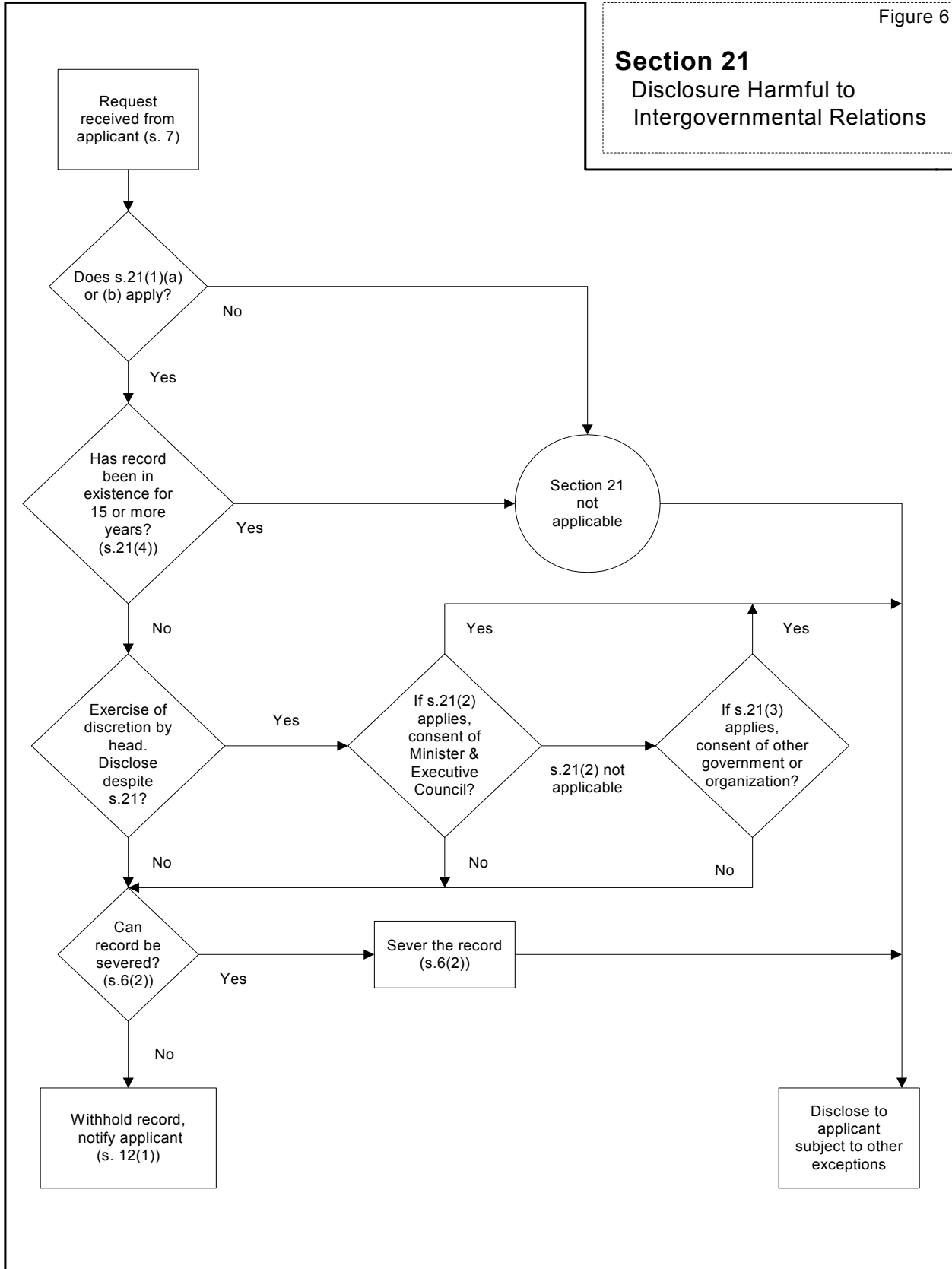
Information qualifying for exception under **section 21** but which is 15 or more years old must be disclosed unless another exception applies to it.

Application of exception

Figure 6 contains a flowchart setting out the application of **section 21**.

Figure 6

Section 21
Disclosure Harmful to
Intergovernmental Relations



**4.8
Cabinet and
Treasury Board
Confidences**

Section 22(1) sets out a mandatory exception for information that would reveal the substance of deliberations of the Executive Council or any of its committees. The exception also applies to the Treasury Board or any of its committees. A public body must refuse to disclose to an applicant any advice, recommendations, policy considerations or draft legislation or regulations submitted to or prepared for submission to these bodies.

Executive Council is commonly known as the provincial Cabinet and refers to the ministers and the Premier acting collectively.

Section 22(1) does not apply to information submitted to or prepared for submission to an individual member of the Executive Council, unless the individual minister is carrying out the direction of Cabinet or is acting as a Cabinet committee.

Treasury Board refers to the Treasury Board itself, not the department of the same name. The role of the Treasury Board is set out in the *Financial Administration Act*.

Committees of the Executive Council include the Agenda and Priorities Committee, certain standing committees, except for Cabinet Policy Committees, and ad hoc committees struck to deal with specific issues.

Committees of the Treasury Board refers to similar committees.

Cabinet Policy Committees (CPCs) are not considered Cabinet committees. When information flows among Cabinet, Treasury Board and CPCs, it is often difficult to distinguish the origins and purpose of particular information. In dealing with CPC records, or records created for CPCs, **sections 22, 24** (advice and recommendations) and **4(1)(q)** (which excludes some CPC information from the scope of the Act) must be applied in concert with each other.

Advice includes the analysis of a situation or issue that may require action and the presentation of options for future action, but not the presentation of facts.

Recommendations includes suggestions for a course of action as well as the rationale for a suggested course of action.

Policy considerations refers to matters taken into account in deciding on a course or principle of action.

Draft legislation or regulations refers to preliminary versions of legislative instruments, such as draft Acts, regulations to be enacted pursuant to statutory authority, and Orders to be enacted under the authority of the Lieutenant Governor in Council (O.C.s).

The listing of categories of information and records to which **section 22(1)** may apply (advice, recommendations, policy considerations, and draft legislation or regulations) is not exhaustive. These are examples of types of information that would be likely to reveal deliberations of the Executive Council, Treasury Board or their committees.

The purpose of the exception for Cabinet and Treasury Board confidences is to preserve the unique role of Cabinet institutions and conventions within the framework of parliamentary government in Alberta. This role is based on the

principle of collective ministerial responsibility to the Legislature and the people of the province for the actions of the government.

To facilitate this collective decision-making, Cabinet deliberations have traditionally been kept confidential. This permits full and frank discussions around the Cabinet table. The confidentiality of the decision-making process also allows for the appropriate timing of announcements of decisions.

Because **section 22** deals with the Cabinet process, the Office of the Executive Council makes all decisions as to whether information meets the criteria for applying the exception with respect to the Executive Council or its committees. The Department of Treasury Board makes all decisions as to whether information meets the criteria for applying the exception with respect to the Treasury Board or its committees. The requirement to consult with the Department of Treasury Board applies only to information that would reveal the substance of deliberations of the Treasury Board or its committees, not to information that the Treasury Board requires departments to prepare, such as business plans.



Consultation on confidences of the Executive Council must be conducted through the office of the FOIP Coordinator, Office of the Executive Council. Consultation on confidences of the Treasury Board must be conducted through the FOIP Coordinator, Department of Treasury Board.

Reveal the substance of deliberations

Section 22(1) The exception to disclosure for Cabinet and Treasury Board confidences applies to information “that would reveal the substance of deliberations.”

Substance means the essence, the material or essential part of a deliberation (see *IPC Orders 97-010* and *99-002*).

Deliberation means the act of weighing and examining the reasons for and against a contemplated action or course of conduct or a choice of acts or means (see *IPC Orders 97-010* and *99-002*).

Information would *explicitly* reveal the substance of deliberations if the information itself contained the essence or material part of the deliberations, for example, a transcript, a report, or a summary.

Information would *implicitly* reveal the substance of deliberations if the information could reasonably be combined with other information to reveal the essence or material part of the deliberations.

To qualify for this exception, the record or information must deal with issues that will be or have been discussed by the Executive Council, the Treasury Board or one of the committees of either body. In addition, the public body must demonstrate that the records would reveal the substance of the deliberations. It is not sufficient for the public body to merely speculate that the records would *likely* reveal the substance of the Cabinet’s discussions (*IPC Order F2004-026* and *F2007-013*).

Section 22(1) does not apply to records that make reference to past and future Cabinet meetings but which do not reveal the substance of Cabinet deliberations at those meetings (see *IPC Order 99-040*).

Where a public body has not provided a record for the purpose of submission to Cabinet, the public body cannot rely on this exception, because disclosure of the records would not reveal the substance of Cabinet deliberations (see *IPC Order 2001-008*). **Section 22(1)** would not apply to the names of persons who prepared the material for Cabinet or the dates or topics of the deliberations unless that information would, in itself, reveal the substance of the deliberations (*IPC Orders F2004-026*).

Examples of records that would reveal the substance of deliberations of the Executive Council, Treasury Board or one of their committees are

- agendas, minutes and related documents of Executive Council meetings;
- letters and memoranda referring to deliberations upon or decisions taken by ministers but not made public (although these may have been sent to ministerial colleagues or senior public servants);
- briefing material, exclusive of background facts, placed before the Executive Council, the Treasury Board or one of their committees;
- a draft or final submission to the Executive Council or the Treasury Board, excluding background facts (see *IPC Order 2000-013*);
- a memorandum (including e-mail) from the Secretary to Cabinet ministers discussing Cabinet decisions;
- a memorandum (including e-mail) from a deputy minister to an assistant deputy minister or chief executive officer or other senior officer dealing with issues that will be or have been deliberated upon by the Executive Council, the Treasury Board or one of their committees;
- a record of discussions between senior officials about issues that will be or have been deliberated upon by the Executive Council, the Treasury Board or one of their committees; and
- a briefing note from a deputy minister or chief executive officer to a minister concerning what will be, or has been, discussed in Executive Council, the Treasury Board or one of their committees.

When the exception does not apply

Section 22(2) sets out various circumstances where **section 22(1)** does not apply.

Information in a record in existence for 15 years or more

Section 22(2)(a) The exception in **section 22(1)** applies only to records or portions of records that have been in existence less than 15 years. Other exceptions may apply to particular information in these records.

15 years means the period from a particular month and day to a corresponding month and day 15 years later.

Information in a record of a decision made by Executive Council or any of its committees on an appeal

Section 22(2)(b) Where the Executive Council or one of its committees functions as an appeal body under an Act and makes a decision, the decision and any recorded reasons for the decision are available to the public. Other portions of the record, such as the advice and recommendations supporting the deliberative process leading to a decision, remain subject to **section 22(1)**.

Background facts

Section 22(2)(c) The exception for Cabinet and Treasury Board confidences does not apply to information in a record if the purpose of the information is to present background facts to the Executive Council, Treasury Board, or any of their committees, for consideration in making a decision and if

- the decision has been made public;
- the decision has been implemented; or
- five years or more have passed since the decision was made or considered.

This provision permits the disclosure of information prepared specifically with the intent of presenting factual information (i.e. explanations of situations, as opposed to advice, recommendations, or policy considerations or analysis) to the Executive Council, the Treasury Board or any of their committees.

Background facts means facts that provide explanatory or contextual information. Background facts are usually found in attachments to submission documents and are intended to assist Cabinet in its deliberations. For example, if a record was not prepared to present recommendations or proposals to Cabinet but rather for a use unrelated to the Cabinet deliberative process (such as newspaper clippings, tables of statistics or reports prepared for use within a department), and provided to Cabinet for information only, it could not be excepted under **section 22(1)** simply because it was attached to a memorandum distributed to Cabinet (*IPC Order 97-010*). Information that would reveal the substance of deliberations of the Executive Council, the Treasury Board, or any of their committees, such as summaries of background materials that highlight issues and key implications for deliberations, would not constitute background facts for the purposes of this provision. The background facts remain subject to **section 22(1)** (see *IPC Order 2000-013*).

Section 22(2)(c) does not allow public bodies to except background facts from disclosure if one of three criteria apply.

First, the exception for Cabinet and Treasury Board confidences does not apply to background facts if the decision has been made public.

A decision *has been made public* if it has been communicated to the public in an authorized way. Communication to the public in an authorized way would include communication in a statement by a minister, a statement or release by a communications officer, a statement in Question Period, a presentation in the Legislative Assembly, or a letter or statement to the media. A “leak” of information is not considered an authorized disclosure of information.

Second, the exception for Cabinet and Treasury Board confidences does not apply to information providing background facts if the decision has been implemented.

A decision *has been implemented* if the decision has been put into effect (see, for example, *IPC Order 99-040*). A decision is not considered to have been implemented if the decision remains subject to approval or is not final. A decision has been implemented if it has been acted upon, even if action with respect to the subject of the decision is not complete.

For example, if the Treasury Board decided to go forward with a government-wide spending cut, implementation would commence when a plan of action was communicated to departments. At that time, the background facts would cease to be protected by **section 22(1)**.

In cases where decisions are reconsidered, clarified, amended, reversed or delayed, the exception does not apply to background facts if the decision that has subsequently been reconsidered has either been made public or implemented. However, other provisions of the Act may prevent disclosure.

The Commissioner has noted that, in applying **section 22(2)(c)**, it is necessary to examine the context in which a record containing background facts was presented to Cabinet. The fact that a decision on a particular subject has been made public does not mean that background facts respecting a related decision can be disclosed. One must consider precisely what decision was being deliberated when the background facts were submitted to Cabinet (see *IPC Order 97-010*).

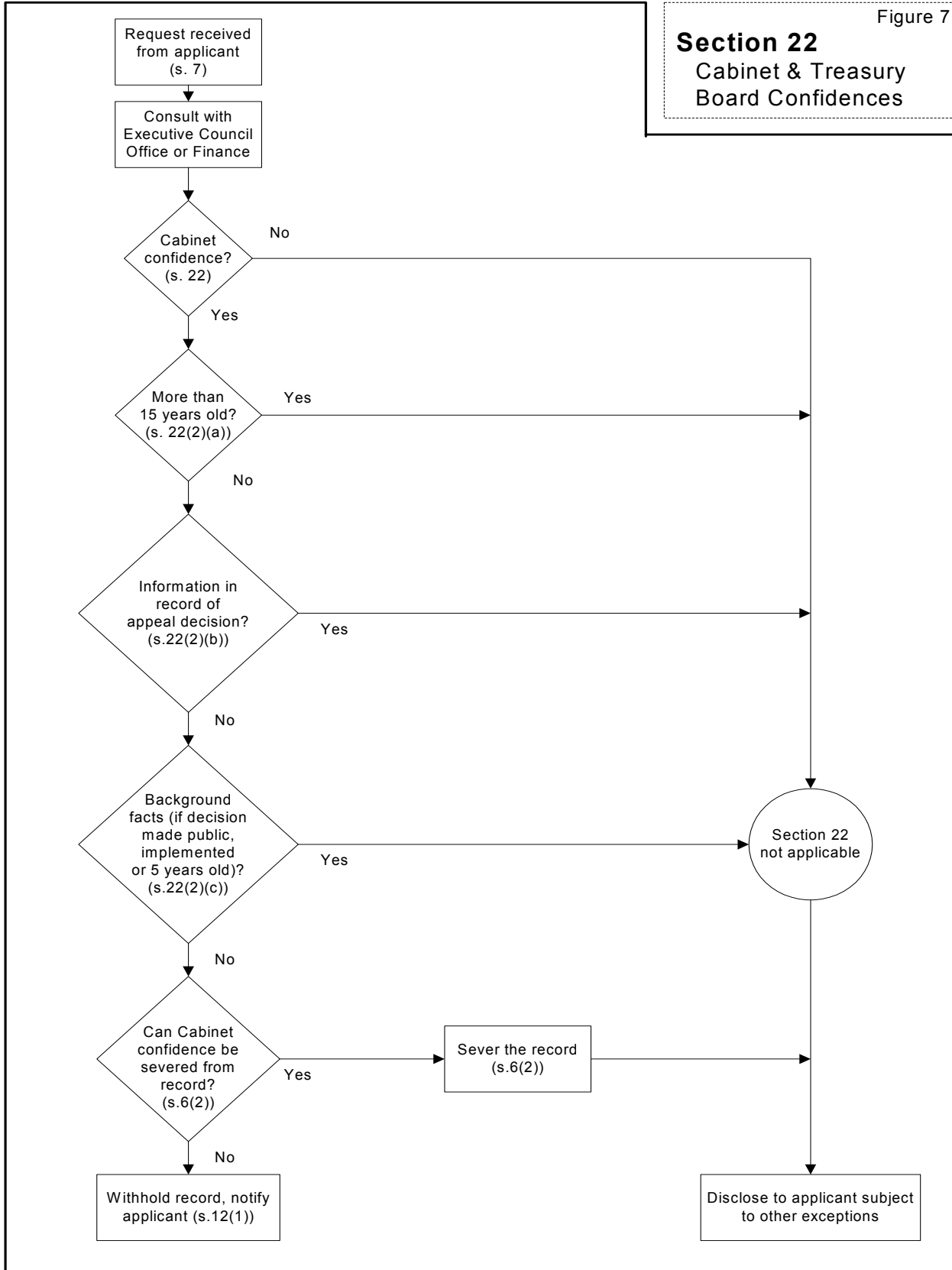
Third, the exception for Cabinet and Treasury Board confidences does not apply to background facts if 5 or more years have passed since the decision was made or considered.

5 years refers to a time period from a particular month and day to a corresponding month and day 5 years later.

This exception to the general rule of confidentiality for Cabinet and Treasury Board deliberations applies regardless of whether or not a decision has been made public or has been implemented. If the background facts were presented to the Executive Council, the Treasury Board or any of their committees for consideration in making a decision, and 5 years have elapsed, the exception to disclosure for the background information under **section 22(1)** does not apply. However, as noted above with respect to the meaning of “background facts,” it is necessary to consider whether factual information falls within the meaning of background facts or whether the factual information would reveal the substance of deliberations.

Application of exception

Figure 7 contains a flowchart setting out the application of **section 22**.



**4.9
Local
Public Body
Confidences**

Section 23(1) of the Act provides that a local public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal

- a draft of a resolution, bylaw or other legal instrument by which the local public body acts; or
- the substance of deliberations of a meeting of its elected officials or governing body or a committee of its governing body, if an Act or a regulation under the *FOIP Act* authorizes the holding of that meeting in the absence of the public.

Section 23 is a discretionary exception.

For example, an applicant may request a copy of a memorandum sent by the chair of a committee of a college board to committee members. The memorandum in question discusses a number of administrative matters and also discusses an issue that the committee must discuss at a forthcoming meeting that will not be open to the public. The information relating to this latter issue may be severed from the record if it would reveal the substance of deliberations of the committee on a matter specified in the FOIP Regulation or in the local public body's governing Act as one that may be considered *in camera*. The applicant would receive the remainder of the record unless other exceptions applied to it.

Draft resolution, bylaw or other legal instrument

Section 23(1)(a) This provision extends to legal instruments of a local public body the same protection extended to provincial government legislation and regulations in **section 24(1)(e)**.

Draft means a version of the resolution, bylaw or other legal instrument that has not been finalized for consideration in public by the local public body.

The exception may be applied to the whole draft record or to individual sections or clauses. An example would be a preliminary version of a land use bylaw drafted by a staff member for the consideration of a municipal council.

A *resolution* means a formal expression of opinion or will of an official body or public assembly, adopted by a vote of those present. The term is usually employed to denote the adoption of a motion such as an expression of opinion, a change to rules or a vote of support or censure.

For example, an official of a school district may draft a resolution setting out amended rules for the operation of individual schools. This amendment to the rules goes through several internal drafts before it is presented to the school board for discussion and consideration for approval. All versions other than the version that is submitted to the board may be withheld under this provision.

A *bylaw* means a rule adopted by a local public body with bylaw-making powers, such as a municipal council.

Other legal instrument by which a local public body acts is intended to cover other legal or formal written documents, other than resolutions or bylaws, that relate to the internal governance of a local public body or the regulation of the activities over which it has jurisdiction.

While drafts may be withheld under this exception, the final version of the bylaw, resolution or other legal instrument cannot.

Substance of deliberations of *in camera* meetings

Section 23(1)(b) *Substance* means the essence or essential part of a discussion or deliberation (see *IPC Order 97-010*).

Deliberation means the act of weighing and examining the reasons for and against a contemplated act or course of conduct. It also includes an examination of choices of direction or means to accomplish an objective (see *IPC Order 97-010*).

Meeting means an assembly or gathering at which the business of the local public body is considered. It includes both the meeting in its entirety and a portion of a meeting (see **section 1(4)** of the FOIP Regulation).

Elected officials means those individuals publicly elected through a balloting process to conduct the business of the local public body.

Governing body means the assembly of persons that is responsible for the administration of the local public body.

In relation to a post-secondary educational institution, the term *governing body* is defined in **section 4(2)** of the *FOIP Act*, as meaning

- the board of governors or general faculties council of a university, as described in the *Post-secondary Learning Act*; or
- the board of governors or academic council of a public college or technical institute, as described in the *Post-secondary Learning Act*.

Committee of its governing body means a group of people who have been designated by the governing body of the local public body to act on its behalf and consider a particular issue or subject (e.g. a collective bargaining or negotiating committee). A committee may be composed of elected officials or appointed members of the local public body.

In order for information relating to a meeting held *in camera* to qualify for this exception,

- the disclosure of information would have to reasonably be expected to reveal the substance of deliberations of a meeting of the public body's elected officials or of the public body's governing body or a committee of its governing body; and
- the holding of the meeting in the absence of the public
 - is authorized by an Act of Alberta (not a regulation, rule or bylaw made under that Act); or
 - is in accordance with **section 18** of the FOIP Regulation.

Under **section 23(1)(b)** of the Act, if there is no specific provision relating to *in camera* meetings in the Act that establishes and governs a local public body, then information may be excepted from disclosure only if the subject matter considered in

the absence of the public concerns, and is limited to, a matter specified in **section 18** of the FOIP Regulation, namely

- security of the property of the public body;
- personal information of an individual, including an employee of the public body;
- the proposed or pending acquisition or disposition of property by or for the public body;
- labour relations or employee negotiations;
- a law enforcement matter (as defined in **section 1(h)** of the Act), litigation or potential litigation, including matters before administrative tribunals; or
- consideration of a request for access to information under the *FOIP Act* if the governing body or committee is itself designated as the head of the local public body.

Section 18 of the FOIP Regulation applies, for example, to post-secondary educational bodies, which do not have provisions relating to *in camera* meetings in their governing legislation. It does not apply to public bodies subject to the *Municipal Government Act*, which has its own provision related to the holding of *in camera* meetings.

In *IPC Order 2001-040*, a bylaw of a police commission was found to be a regulation, not an Act that authorized the holding of a meeting of the commission in the absence of the public. However, the Acting Commissioner found that **section 18(1)** of the FOIP Regulation applied to the holding of the *in camera* meetings that were the subject of an applicant's request. The Acting Commissioner also held that the records of those meetings fell within the scope of the exception in **section 23(1)(b)**.

In *IPC Order F2004-015*, the Commissioner found that it was unclear whether a certain committee of the Board of Trustees had the authority under section 70 of the *School Act* to meet in private. The Committee could not rely on **section 18(1)** of the FOIP Regulation for authorization to meet in public because the subject matter of the meeting did not fall within one of the prescribed categories.

In the absence of the public means in the absence of the public at large. A meeting may still be considered to be held in the absence of the public if it is attended by a member of a local public body who is not an elected official, member of the governing body or member of a committee of the governing body.

A meeting that may be held *in camera*, but to which certain members of the public are specifically invited to discuss sensitive issues pertaining to their property or themselves or their rights, is a meeting held in the absence of the public. However, a meeting that is permitted to be held *in camera*, but to which is made open to the public, is not a meeting held in the absence of the public.

A meeting open to the public, which no members of the public happen to attend, is also not a meeting held in the absence of the public.

Common types of records relating to *in camera* meetings that may be protected are agendas, minutes, notes made by participants, and other records that document the substance of deliberations within such meetings.

Records that may be the subject of discussions, such as a report detailing an investigation into a complaint against a teacher, or a proposal from a company for tax concessions in return for a development project, could not normally be withheld under this exception. However, the substance of deliberations about such documents may be withheld. This information will usually be part of other records and will have to be severed from them.

When the exception does not apply

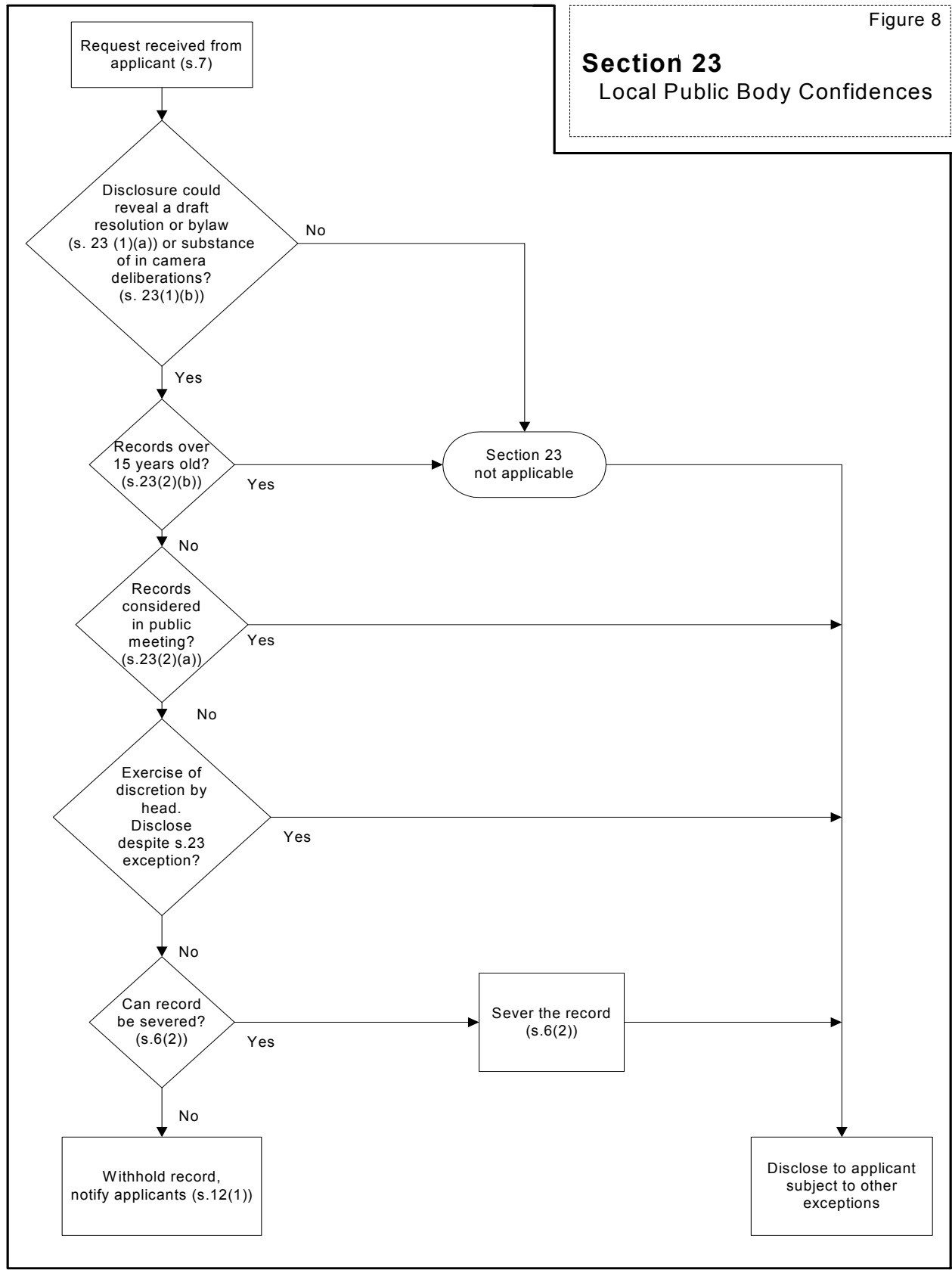
Section 23(2)(a) The exception in **section 23(1)(a)** does not apply where the draft of the resolution, bylaw or other legal instrument has been considered in a meeting open to the public. This means that, if a particular draft is discussed in a public meeting, there is no reason to deal with the information under an exception. Prior or subsequent drafts that are not considered in a public meeting can still be withheld under this exception.

Section 23(2)(b) The exception in **section 23(1)(b)** does not apply where the subject matter of the deliberation has been considered in a meeting open to the public. This means that, where a local public body has not explicitly excluded the public from the meeting, the exception cannot be applied.

The exception cannot be applied to any information referred to in **section 23(1)(a)** and **(b)** if it is in a record that has been in existence for 15 years or more. See section 4.1 of this chapter for a discussion of the application of time limitations.

Application of exception

Section 23 is applied in a series of steps that are outlined in the flowchart in Figure 8.



**4.10
Advice from
Officials**

Section 24(1) is a discretionary exception that is intended to foster the candid exchange of views in the deliberative process involving senior officials and heads of public bodies, and their staff, as well as among officials themselves. This exception also protects the deliberative process involving senior officials of public bodies and the governing bodies of local public bodies.

This exception applies to information generated during the decision-making process, not to the decision itself (*IPC Order 96-012*).

Section 24 was amended in 2006 by the addition of a mandatory exception for records in the custody of a public body that relate to an audit by the Chief Internal Auditor of Alberta (**section 24(2.1)**). This exception to disclosure is separate from the limited exclusion for audit records in the custody of the Chief Internal Auditor in **section 6(7)**.

Classes of information to which section 24(1) may apply

Section 24(1) provides that a public body may refuse to disclose information if the disclosure could reasonably be expected to reveal

- advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council (**section 24(1)(a)**);
- consultations or deliberations involving
 - officers or employees of a public body,
 - a member of the Executive Council, or
 - the staff of a member of the Executive Council (**section 24(1)(b)**);
- positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the Government of Alberta or a public body, or considerations that relate to those negotiations (**section 24(1)(c)**);
- plans relating to the management of personnel or the administration of a public body that have yet to be implemented (**section 24(1)(d)**);
- the contents of draft legislation, regulations and orders of members of the Executive Council or the Lieutenant Governor in Council (**section 24(1)(e)**);
- the contents of agendas or minutes of meetings of the governing body, or a committee of a governing body, of an agency, board, commission, corporation, office or other body that is designated as a public body in **Schedule 1** of the FOIP Regulation or in a FOIP (Ministerial) Regulation (**section 24(1)(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 (**section 24(1)(g)**); or
- the contents of a formal research or audit report that is incomplete unless no progress has been made on the report for at least 3 years (**section 24(1)(h)**).

The exception is discretionary. Discretion needs to be exercised in determining whether or not disclosure of a particular record or part of a record could reasonably be expected to reveal particular information about either the process itself or the matters being discussed.

In determining whether or not to invoke the exception, public bodies should undertake a three-step process. They should

- determine whether the information requested falls within one of the classes of information to which the exception to disclosure may apply;
- if it does, then determine whether or not disclosure of the information could reasonably be expected to reveal the particular class of information involved; and
- exercise discretion as to whether or not to disclose the record or part of the record based on whether or not disclosure would affect deliberative processes in the future.

The exercise of discretion regarding this type of advisory information should be based on the impact the disclosure can reasonably be expected to have on the public body's ability to carry out similar internal decision-making processes in the future. Consideration should be given to whether disclosure of the information in this instance would

- make advice less candid and comprehensive;
- make consultations or deliberations less frank;
- hamper the policy-making process;
- have a negative effect on the ability of a public body or the government to develop and maintain strategies and tactics for present or future negotiations; or
- undermine the public body's ability to undertake personnel or administrative planning.

Such determinations can only be made on a case-by-case basis, bearing in mind the magnitude of the process involved, the procedures for decision-making that have been followed, and the sensitivity of the particular information. Public bodies should take into account the effect disclosure would have on all steps of a decision-making process and not just the immediate interests regarding the particular information in question.

Information about deliberative processes is revealed if the information makes direct reference to those processes, or if it allows an accurate inference to be made about those processes.

The Act sets out eight specific areas that allow for the possible non-disclosure of information. Each of these areas is discussed in detail below.

Advice, proposals, recommendations, analyses or policy options

Section 24(1)(a) This exception is intended to allow for candour during the policy-making process, rather than providing for the non-disclosure of all forms of advice (see *IPC Order 99-001*) or all records related to the advice (*IPC Order 99-040*).

This exception applies to these advisory functions at all levels in a public body. It also applies to advice and recommendations obtained from outside the public body, including advice and recommendations received under a contractual or other advisory arrangement (see *IPC Order F2005-012*). However, it does not apply to unsolicited documents sent to a public body by special interest groups for lobbying purposes (see

IPC Order 2001-002) or to records created by a third party participating in a general stakeholder consultation (see *IPC Orders F2004-021* and *F2008-008*).

The exception provides specific coverage for advice, proposals, recommendations, analyses, and policy options developed by or for a member of the Executive Council.

Advice includes the analysis of a situation or issue that may require action and the presentation of options for future action, but not the presentation of facts.

Recommendations includes suggestions for a course of action as well as the rationale for a suggested course of action.

Proposals and *analyses or policy options* are closely related to advice and recommendations and refer to the concise setting out of the advantages and disadvantages of particular courses of action.

The Information and Privacy Commissioner has defined all these terms as types of advice. The Commissioner's criteria for advice are that it should be

- sought or expected, or be part of the responsibility of a person by virtue of that person's position;
- directed towards taking an action, including making a decision; and
- made to someone who can take or implement the action.

See *IPC Orders 96-006* and *2001-002* for further explanation of the definition of advice.

The Commissioner has determined that a statement of fact that is not directed toward action to be taken does not qualify as advice under **section 24(1)(a)** (see *IPC Order 97-007*).

If the factual information is sufficiently interwoven with other advice that it cannot reasonably be considered separate or distinct, it may be withheld under this exception (see *IPC Order 99-001*).

Section 24(1)(a) would not normally apply to the details of a study or background paper where factual information is presented to describe certain issues, problems or events. Rather, it applies to the statements of advice or recommendations that set out or analyze possible directions or options in dealing with an issue or problem, to establish a policy or to make a decision.

For example, **section 24(1)(a)** could be applied to a report prepared by an investigation panel to advise a senior official on how to handle a complaint (see *IPC Orders F2003-014* and *F2003-016*).

There are cases where the disclosure of advice could reveal information that would cause damage to the internal decision-making processes of a public body. Disclosure could also affect the public body's overall ability to effectively manage programs and activities. At the same time, there are also cases where the disclosure of advice would have little or no effect on the overall administration or operation of the affected program or activity.

Section 24(1)(a) would not apply where the disclosure of information would not reasonably be expected to reveal advice or recommendations. For example, the disclosure of documents discussed at a meeting of a Cabinet Policy Committee that is open to the public would not *reveal* advice (see *IPC Order 2001-002*). The exception also would not apply to the names of correspondents, dates, subject lines that do not reveal advice, or information that reveals that a person participated in a discussion about a particular subject matter but does not indicate anything substantive about their involvement (*IPC Order F2004-026*).

Consultations or deliberations

Section 24(1)(b) This provision allows discretion to refuse access to those records or parts of records containing consultations or deliberations involving officers or employees of a public body, a minister or a minister's staff.

A *deliberation* for the purposes of this exception is a discussion of the reasons for and against a future action by an employee or officer of a public body (see *IPC Order 96-006*).

Deliberations include information indicating that a decision-maker relied on the knowledge or opinions of particular persons (see *IPC Order F2004-026*).

A *consultation* is a very similar activity where the views of one or more employees are sought about the appropriateness of a specific proposal or potential action (see *IPC Orders 96-006* and *F2003-016*).

Consultations include correspondence between third party advisors and government departments which was conveyed to the public body by a government department as background information to enable the public body to provide advice (e.g. when officials are asked to comment on advice already developed by other officials) (*IPC Order F2004-026*).

This discretionary exception is provided for the purpose of permitting the frank exchange of views among a number of individuals whose employment responsibilities include a consultative function. Within public bodies, consultations and deliberations are normally carried on in an organized manner through the exchange of hard copy memoranda and proposals and e-mail.

Agendas and minutes of meetings are also documents that may reveal consultations and deliberations. There is no blanket exception for such records, but consultative and deliberative material may be severed from these records.

Section 24(1)(b) covers consultations or deliberations at all levels in a public body and also those involving a minister or his or her staff.

The exception does not apply to records created and provided to the public body by a third party participating in a general stakeholder consultation. The third party is simply providing its own comments. This differs from the situation where a specific stakeholder, with particular knowledge, expertise or interest in a topic, has been asked to provide advice, recommendations or analysis (*IPC Orders F2004-021* and *F2008-008*).

The exception also will not apply to the names of correspondents, dates, subject lines that do not reveal advice, or information that reveals that a person participated in a discussion about a particular subject matter but does not indicate anything substantive about his or her involvement (*IPC Order F2004-026*).

Positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations

Section 24(1)(c) This provision covers the strategies, plans, approaches and bargaining positions that have been employed or are contemplated for the purposes of contractual and other negotiations. **Section 24(1)(c)** applies to individual public bodies and to the Government of Alberta as a whole. Access to such information can be refused even after particular negotiations have been completed.

Positions and plans refers to information that may be used in the course of negotiations.

Procedures, criteria, instructions and considerations are much broader in scope, covering information relating to the factors involved in developing a particular negotiating position or plan.

Examples of the type of information that could be covered by this exception are the various positions developed by government or local public body negotiators in relation to labour, financial and commercial contracts.

Section 24(1)(c) extends to situations where an agent retained for these purposes carries out negotiations on behalf of the government or a public body.

Plans relating to the management of personnel or administration of the public body that have not yet been implemented

Section 24(1)(d) This provision covers plans relating to the internal management of public bodies, including information about the relocation or reorganization of government departments and agencies, as well as reorganization within local public bodies.

The provision applies only within a limited time frame. Once a plan has been implemented, the information relating to it can no longer be withheld under this exception (see *IPC Order F2007-022*).

Management of personnel refers to all aspects of the management of human resources of a public body that relate to the duties and responsibilities of employees (*IPC Investigation Report 2001-IR-006*). This includes staffing requirements, job classification, recruitment and selection, employee salary and benefits, hours and conditions of work, leave management, performance review, training, separation and layoff. For the Government of Alberta, the term includes the government-wide network managed through Corporate Human Resources. It also includes the management of personal service contracts (i.e. contracts *of* service) but not the management of consultant, professional or other independent contractor contracts (i.e. contracts *for* service).

Administration of a public body comprises all aspects of a public body's internal management, other than personnel management, that are necessary to support the

delivery of programs and services. Administration includes business planning, financial operations, and contract, property, information, and risk management.

Implementation means the point when the implementation of a decision begins. For example, if a public body decides to go forward with an internal budget cut or restructuring of departments, implementation commences when this plan of action is communicated to its organizational units.

Although a final plan that has been implemented cannot be withheld under this exception, the options that were considered before deciding on the plan need not be disclosed. Plans that were never implemented can be withheld for 15 years (**section 24(2)(a)**). A public body may decide to withhold plans that were not implemented if, for example, there is reason to believe that injury or harm to the efficiency of the operation of the public body could reasonably be expected to result from disclosure.

Contents of draft legislation, regulations and orders

Section 24(1)(e) This provision covers bills, regulations and orders of members of the Executive Council or the Lieutenant Governor in Council while they are being drafted and formulated in preparation for introduction to the Legislature, for publication or for public consultation. This provision covers all the drafts and not just the final draft of legislation, regulations and ministerial orders.

Section 24(1)(e) will not apply if disclosing the information would not reveal the substantive contents of the draft legislation. For example, in *IPC Order F2004-026*, **section 24(1)(e)** did not apply to the names of the individuals who prepared or commented on the legislation, the dates of the drafts and comments or several headings and subject-lines in communications about the drafts.

For draft bylaws and other legal instruments of local public bodies, see section 4.9 of this chapter.

Contents of agendas or minutes of meetings of the governing body of a designated public body

Section 24(1)(f) This exception applies only to those public bodies listed in **Schedule 1** of the FOIP Regulation or designated as a public body by a FOIP (Ministerial) Regulation.

Section 24(1)(f) allows a public body to withhold agendas and minutes of meetings because the meetings to which they relate provide the focus for decision-making within these types of bodies. The exception can be applied only to the records of the governing body or a committee of the governing body of the public body.

Section 24(1)(f) covers only agendas and minutes of meetings, and not the background reports or studies used in a meeting. Background information cannot be withheld under this exception.

Pending policy and budgetary decisions

Section 24(1)(g) This provision covers 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. **Section 24(1)(g)** allows public

bodies to prevent premature disclosure of a policy or budgetary decision (see, for example, *IPC Order F2005-004*).

Once a policy or budgetary decision has been taken and is being implemented, the information can no longer be withheld under this exception. A decision is being implemented once those expected to carry out the activity have been authorized and instructed to do so.

Formal research or audit reports that are incomplete

Section 24(1)(h) This provision covers the contents of formal research and audit reports that, in the opinion of the head of the public body, are incomplete. The exception allows public bodies to withhold, for a limited period, information that could be misleading, inaccurate or incomplete.

A formal research or audit report is one that has been compiled in accordance with procedures intended to ensure the validity of the research or audit process. The research or audit is carried out in accordance with a recognized methodology.

Audit is defined as a financial or other formal and systematic examination or review of a program, portion of a program or activity (**section 24(3)**).

Incomplete means that the report is in preliminary or draft format, or is under review for consistency with the terms of reference for the report or for accuracy or completeness.

For this exception to apply, there should be some evidence that the research or audit report has not been finalized. For example, if a consultant's research report had been accepted by a public body and payment made in full without any indication that the report had not fulfilled the requirements of the contract, the report would probably be complete. A report submitted by an auditor to officials of a public body for review and discussion prior to its formal presentation would be incomplete.

Section 24(1)(h) applies only within a limited time frame. Once the report is accepted as complete, it cannot be withheld under this exception. If the report is submitted but no further progress is made on it for a period of 3 years, it cannot be withheld under this exception.

Progress implies some activity designed to finalize or complete the report, not simply a review of its contents with no subsequent action.

When the exception does not apply

Section 24(2) provides some specific cases where the exception in **section 24(1)** does not apply.

Information in existence 15 years or more

Section 24(2)(a) Any information contained within a record which has been in existence for 15 years or more cannot be withheld under **section 24(1)**. See section 4.1 of this chapter for a discussion of the application of time limitations. Other exceptions may still apply to the information.

Statements of the reasons for decisions made in the exercise of a discretionary power or an adjudicative function

Section 24(2)(b) This provision makes it clear that **section 24(1)** cannot be used to withhold formal judgments, including the reasons for reaching those judgments. The provision applies when the decision has already been made and is not merely contemplated.

Reasons for decision mean the motive, rationale, justification or facts leading to a decision.

Exercise of discretionary power refers to making a decision that cannot be determined to be right or wrong in an objective sense.

Adjudicative function means a function conferred upon an administrative tribunal, board or other non-judicial body or individual that has the power to hear and rule on issues involving the rights of people and organizations. Examples would be a school board hearing an appeal under the *School Act*, or a hearing by an assessment review board.

Reasons for decisions of this type cannot be withheld under **section 24(1)** despite the fact that the decisions may contain advice or recommendations prepared by or for a minister or a public body.

Results of product or environmental testing

Section 24(2)(c) This provision limits the scope of **section 24(1)** by excluding the results of product or environmental testing carried out by or for a public body from the exception to disclosure. In order for **section 24(2)(c)** to apply, the testing has to be complete or have had no progress made on it for at least 3 years.

Examples of the test results contemplated by **section 24(2)(c)** would information on products such as air filters or the results of environmental testing at a landfill or testing of a building's air quality.

Section 24(2)(c) does not apply to testing done

- for a fee as a service to a person other than a public body; or
- for the purpose of developing methods of testing or testing products for possible purchase.

Examples of test results to which **section 24(1)** therefore may apply, are the results of commercial product testing and soil testing. **Section 24(1)** may also apply if the testing was done for the purpose of developing methods of testing, for example, the development of a new methodology for recycling tires. There would have to be evidence in such cases that methodology development was the sole purpose of the testing.

Section 24(1) also covers test results where testing was done by a public body in order to determine whether or not to purchase a product.

Statistical surveys

Section 24(2)(d) This provision limits the scope of **section 24(1)** by excluding statistical surveys from the exception to disclosure.

Statistics is the science of collecting and analyzing numerical data and the systematic presentation of such facts.

Statistical surveys are general views or considerations of subjects using numerical data.

Where statistical surveys appear with information that can be withheld under **section 24(1)**, the excepted information should be severed and the statistical survey disclosed.

An example of a statistical survey would be a study of growth rates in various forested areas of northern Alberta. Such a study could not be withheld under **section 24(1)** even though it may be part of a larger document dealing with reform of forestry law, regulation or policy.

Results of background scientific or technical research in connection with the formulation of a policy proposal

Section 24(2)(e) This provision limits the scope of **section 24(1)** by excluding from the exception to disclosure background research undertaken as the basis of formulating a policy proposal.

Background research encompasses a wide range of study, review and fieldwork aimed at analyzing and presenting an overview of issues.

For this provision to apply, the research has to be completed or have had no progress made on it for at least 3 years.

Section 24(2)(e) applies to research that is scientific (conducted according to the principles of objective research) or technical (based on a particular technique or craft) and directed toward policy formulation. In order for information to be considered background research under this provision, it must be connected with the development of some specific policy. This would clearly be the case if, for example, a policy proposal referred directly to the research on which the proposal was based.

Normally the research methodology, data and analysis cannot be withheld under **section 24(1)**. However, advice and recommendations contained in the same record as the background research or prepared separately by or for a public body or a minister could be withheld.

Instructions or guidelines issued to public body officers or employees

Section 24(2)(f) This provision limits the scope of **section 24(1)** by excluding from the exception to disclosure information used by officials in interpreting legislation, regulations or policy. **Section 24(2)(f)** also excludes information used by officials in exercising the discretion given to them under an Act of the Legislature or a bylaw of a local public body.

Generally, an official or employee in a position to provide interpretation or policy direction will have issued the instruction or guideline.

Substantive rule or policy statement used to interpret legislation or administer a public body program or activity

Section 24(2)(g) This provision expands on **section 24(2)(f)**. It excludes from the scope of **section 24(1)** the basic interpretations of the law, regulations and policy under which a public body operates its programs and activities.

This provision complements **section 89(1)** of the Act, which requires that public bodies have in place facilities to enable the public to examine any manual, handbook or other guideline used in decision-making processes that affect the public.

Records relating to an audit by the Chief Internal Auditor of Alberta

Section 24(2.1) **Section 24(2.1)** creates a mandatory exception to disclosure for records and information relating to an audit by the Chief Internal Auditor of Alberta.

The Chief Internal Auditor of Alberta provides independent, objective assurance and advisory services to government departments to improve the effectiveness, efficiency and economy of government operations.

Section 24(2.1)(a) requires a public body to refuse to disclose records relating to a audit that are *created by or for* the Chief Internal Auditor. This would include any record that was provided to the public body by the Chief Internal Auditor relating to an audit, including correspondence, meeting notes, reports and management letters relating to the audit. Because the records must be created by or on behalf of the Chief Internal Auditor, **section 24(2.1)(a)** would not apply to records created by the public body at the request of the Chief Internal Auditor.

Section 24(2.1)(b) requires a public body to refuse to disclose information that would *reveal information about* an audit by the Chief Internal Auditor. Program records that were considered in the course of an internal audit or records that were compiled for the Chief Internal Auditor would not fall within this provision unless the records themselves reveal information about the audit.

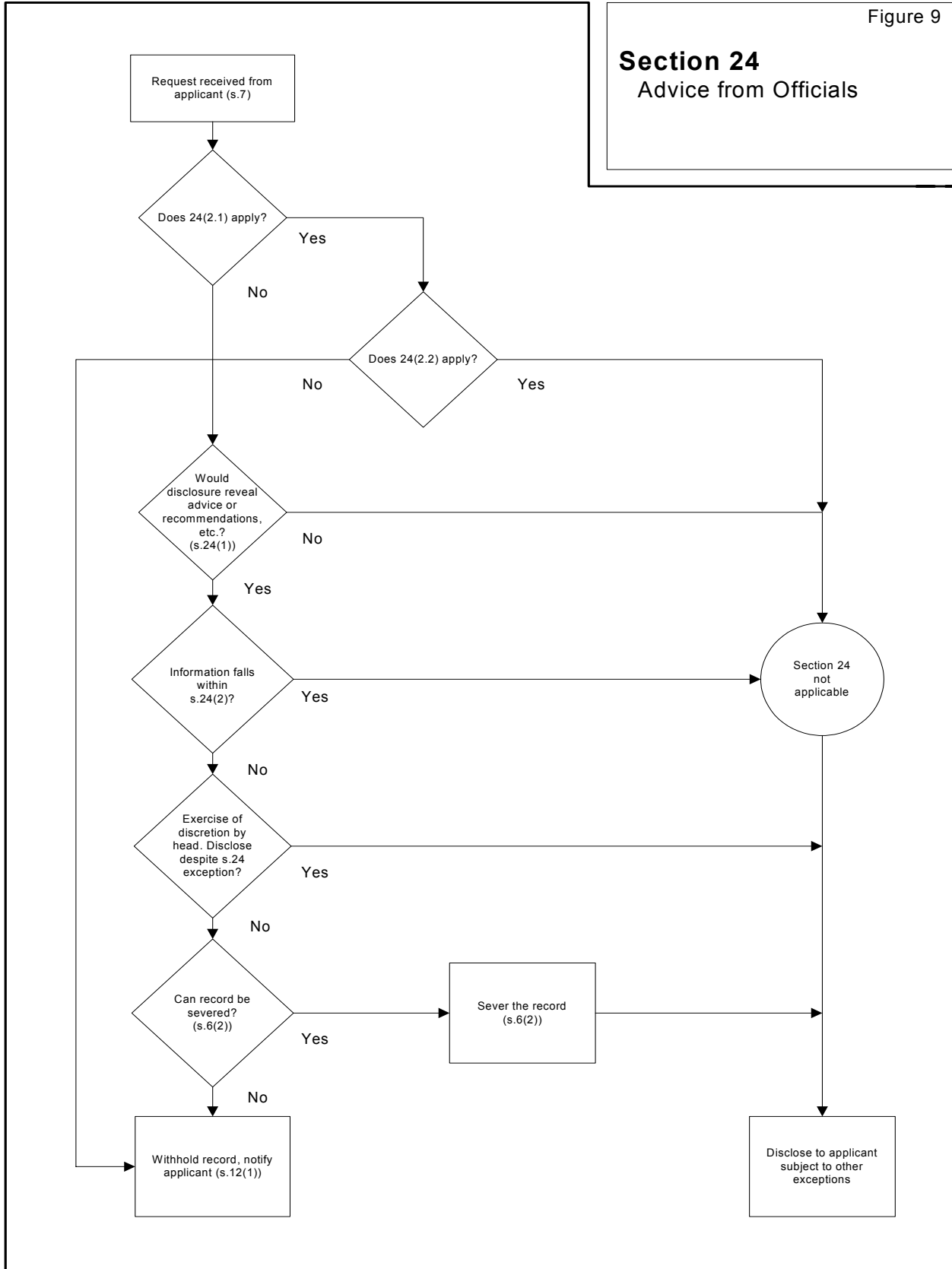
Section 24(2.2) The exception in **section 24(2.1)** does not apply

- if 15 years or more has elapsed since the audit to which the record relates was completed (**section 24(2.2)(a)**), or
- if the audit to which the record relates was discontinued or if no progress has been made on the audit for 15 years or more (**section 24(2.2)(b)**).

These time limitations on the exception are the same as those for the exclusion in **section 6(8)**.

Application of exceptions

Figure 9 contains a flowchart setting out the steps for applying **section 24**.



**4.11
Disclosure
Harmful to
Economic and
Other Interests
of a Public
Body**

Section 25(1) of the Act provides that a public body may refuse to disclose information if the disclosure could reasonably be expected to harm the economic interest of a public body or the Government of Alberta as a whole, or the ability of the Government to manage the economy (see e.g. *IPC Orders 96-012* and *96-013*).

Section 25 is a discretionary exception. The information that can be withheld under this exception includes

- trade secrets of a public body or the Government of Alberta (**section 25(1)(a)**);
- financial, commercial, scientific, technical or other information in which a public body or the Government of Alberta has a proprietary interest or a right of use and that has, or is reasonably likely to have, monetary value (**section 25(1)(b)**);
- information the disclosure of which could reasonably be expected to
 - result in financial loss to,
 - prejudice the competitive position of, or
 - interfere with contractual or other negotiations of the Government of Alberta or a public body (**section 25(1)(c)**); and
- information obtained through research by an employee of a public body, the disclosure of which could reasonably be expected to deprive the employee or the public body of priority of publication (**section 25(1)(d)**).

The exception refers to the Government of Alberta as a whole. This recognizes that public bodies, individually or collectively, may hold significant amounts of financial and economic information that is critical to the management of the provincial economy. **Section 25(1)** ensures that, where harm would result from disclosure of information, the information may be withheld.

Harms test

In order to use the exception, a public body must have objective grounds for believing that disclosure will likely result in harm. In order to determine whether there is a reasonable expectation of harm, the test established in *IPC Order 96-003* must be satisfied. This test is discussed in the introduction to this chapter (section 4.1).

The context in which a public body operates should be taken into account in determining whether it is reasonable to expect that harm will result from the disclosure of the information. In applying this exception, public bodies should take into account not just the specific harm that could occur as a result of disclosure of the information (i.e. **section 25(1)(a) to (d)**) but also whether the broader economic interests of the public body or the Government of Alberta would be harmed.

Economic interests refers to both the broad interests of a public body and, for provincial public bodies, of the government as a whole, in managing the production, distribution and consumption of goods and services. The term also covers financial matters such as the management of assets and liabilities by a public body and the public body's ability to protect its own or the government's interests in financial transactions.

The *financial interests* of the Government of Alberta include the ability to collect taxes and generate revenues.

Harm to these interests includes damage or detriment to the economic policies or activities for which a single public body is responsible, as well as harm to policies and programs that affect the overall economy of the province. Harm to these interests also includes monetary loss or loss of assets with monetary value.

Examples of information to which the exception in **section 25** may apply include

- information on a public body's investment strategies which could affect its interests or future financial position;
- information in budget preparation documents which could result in segments of the private sector taking actions affecting the ability of the government or a local public body to meet economic goals;
- information about licensing and inspection practices of a public body which could affect the amount of revenue collected; and
- information about a trade deal, a development plan or strategy or an economic negotiation that has not been completed.

Section 25(1) does not prevent the release of information that reveals a liability that might lead to a lawsuit against a public body for alleged wrongdoing.

In most cases, the public body whose economic interests are involved will be the public body with custody or control of the record(s) requested. In some instances, however, a public body may hold information about another public body whose economic interests may be affected by disclosure. Consultation is essential between the two bodies in such situations when use of **section 25(1)** is being considered.

The exception may also be claimed for the Government of Alberta in the broad, corporate sense. The term Government of Alberta has a broader sense here than an individual government department or agency.

The phrase *ability to manage the economy* refers to the responsibility of the Government of Alberta to manage the province's economic activities by ensuring that an appropriate economic infrastructure is in place, and by facilitating and regulating the activities of the marketplace. This depends on a range of activities, including fiscal and economic policies, taxation, and economic and business development initiatives.

Types of information

The types of information listed in **section 25(1)** are illustrative only and may not cover all types of information, which, if disclosed, could reasonably be expected to cause harm to economic interests. At the same time, inclusion in one of the categories in **section 25(1)** is not by itself sufficient to allow a public body to refuse access. Application of this exception is subject to the harms test.



A public body must have reasonable grounds to expect harm as a result of disclosure in order to apply the exception.

Trade secrets

Section 25(1)(a) *Trade secret* is defined in **section 1(s)** of the Act as meaning information, including a formula, pattern, compilation, program, device, product, method, technique or process

- that is used, or may be used, in business or for any commercial purpose;
- that derives independent economic value, actual or potential, from not being generally known to anyone who can obtain economic value from its disclosure or use;
- that is the subject of reasonable efforts to prevent it from becoming generally known; and
- the disclosure of which would result in significant harm or undue financial loss or gain.

Information must meet all of these criteria to be considered a trade secret. Information that is generally available through public sources (e.g. published research reports) would not usually qualify as a trade secret under the Act.

A public body must own the trade secrets or must be able to prove a claim of legal right in the information (e.g. a licence agreement) in order to apply the exception. Normally, this will mean that the trade-secret information has been created by employees of the public body as part of their jobs, or by a contractor as part of a contract with the public body.

For example, software developed by a public body or special testing equipment which has been kept secret or confidential would have economic value. Disclosure of the specifications could reasonably be expected to result in improper benefit and the information could probably qualify as a trade secret. On the other hand, details of a minor technical adjustment to equipment that has been inspired by an article in a trade journal would not be withheld under this exception.

Section 25(1)(a) does not apply to trade secrets of a third party. Requirements relating to the protection of these trade secrets are dealt with in **section 16(1)(a)**. See section 4.2 of this chapter.

Financial, commercial, scientific, technical or other information where there is a proprietary interest

Section 25(1)(b) The exception in this provision is subject to a three-part test. In order for the exception to apply, all of the following conditions must be met:

- the information must be financial, commercial, scientific, technical or other information;
- the public body or the Government of Alberta must have a proprietary interest or a right of use; and

- the information must have, or be reasonably likely to have, monetary value.

The following definitions have been taken from IPC Orders dealing with **section 16**.

Commercial information means information relating to the buying, selling or exchange of merchandise or services. This includes third party associations, past history, references and insurance policies (see *IPC Order 98-006*) and pricing structures, market research, business plans, and customer records (see *IPC Order 96-013*). To determine whether the information in question is commercial information, the record needs to be viewed as a whole (see *IPC Order 98-006*). An agreement between two business entities may contain commercial information (see *IPC Order 2001-019*).

Financial information is information regarding the monetary resources of a third party, such as the third party's financial capabilities, and assets and liabilities, past or present (see *IPC Orders 96-018* and *2001-008*). Common examples are financial forecasts, investment strategies, budgets, and profit and loss statements (see *IPC Order 96-013*).

Scientific information is information exhibiting the principles or methods of science (see *IPC Order 2000-017*). The information could include designs for a product and testing procedures or methodologies.

Technical information is information relating to a particular subject, craft or technique (see *IPC Order 2000-017*). Examples are system design specifications and the plans for an engineering project.

The second part of the test for this exception requires that the public body or the Government of Alberta have a *proprietary interest* in the information. This means that the public body or the government must be able to demonstrate rights to the information. For example, a municipality may have a proprietary interest in geographical information systems mapping data or statistical data.

The third part of the test is whether the information has or is reasonably likely to have monetary value. *Monetary value* may be demonstrated by evidence of potential for financial return to the public body or government. An example of information that is reasonably likely to have monetary value might include a course developed by a teacher employed by a school board.

Financial loss, prejudice to competitive position, or interference with negotiations

Section 25(1)(c) This exception applies to information the disclosure of which could reasonably be expected to result in financial loss to, prejudice the competitive position of, or interfere with contractual or other negotiations of the Government of Alberta or a public body.

Section 25(1)(c) provides similar protection for business enterprises in the public sector as is provided for private sector third parties under **section 16(1)(c)**. To claim the exception, a public body must have objective grounds for believing that one of the harms listed will result from disclosure.

In the case of *financial loss*, there must be reasonable grounds to believe that disclosure of information in the specific record would result in direct monetary or equivalent loss. This includes loss of revenue, loss of reputation or loss of good will in the marketplace. The loss cannot be speculative nor can it be loss expected as a result of a “ripple effect” (see *IPC Order 98-020*).

In the case of *prejudice to competitive position*, a public body must have a reasonable expectation that disclosure of the information is capable of being used by an existing or potential competitor to reduce the public body’s or the government’s share of a market. The exception may be claimed whether or not there is currently a competitor in the marketplace (*IPC Order 97-005*).

Interfere with contractual or other negotiations means to obstruct or make much more difficult the negotiation of a contract or other sort of agreement between the public body or the government and a third party. The expectation of interference with negotiations as a result of disclosure must be reasonable and the negotiations have to be specific, not simply possible negotiations of a general kind in the future (see *IPC Order 98-005*).

Examples of where **section 25(1)(c)** has been found to not apply include the following.

- Disclosure of the hourly rate of, and hours worked by, fee-for-service instructors of a post-secondary institution. There was no risk of economic harm to the institution since the applicant (the academic faculty association) was bound by a confidentiality clause to not distribute the information to other institutions or instructors (*IPC Order F2004-014*).
- Disclosure of the salary and benefits set out in an employment contract of a senior official. The disclosure of the specific information would not, in itself, harm the ability of the Government or the public body to negotiate future contracts since any job candidate could develop a negotiating strategy from the salary and benefits information available in ministry annual reports (*IPC Orders F2006-007 and F2006-008*).
- Disclosure of the number, types and outstanding amounts of student loans sold to a collection agency, which would only give the applicant general information (*IPC Order 2000-009*).

The following are examples of where **section 25(1)(c)** has applied.

- Disclosure of unpublished information about required and recommended course books of post-secondary institutions to an applicant who intended to open a used book store. The disclosure would negatively impact the sale of used books by the institutions (*IPC Order F2006-023*).
- Disclosure of records relating to a post-secondary institution’s fund-raising activities, which would damage its relationship with private-sector participants and prejudice its position in existing and future revenue-generating projects (*IPC Order F2004-012*).

Research information where employee or public body could be deprived of priority of publication

Section 25(1)(d) Public bodies employ a wide range of researchers, including professional scientists, technicians and social scientists. Their reputations are often dependent on the research they publish.

The fact that the employees have a professional reputation is of considerable value to public bodies that employ them. In addition, their research often has monetary and program value for the public bodies. For these reasons, the Act protects the priority of publication for all types of research.

Examples include scientific and technical research carried out at research institutes or universities; historical research connected with the designation or preservation of historical or archaeological resources; and epidemiological and other medical studies carried out in health care bodies. A public body would have to be able to provide some proof that publication is expected to result from the research or that similar research in the past has resulted in publication.

When the exception does not apply

Section 25(2) provides that a public body must not refuse to disclose under **section 25(1)** the results of product or environmental testing carried out by or for a public body, unless the testing was done

- for a fee as a service to a person, other than the public body (**section 25(2)(a)**); or
- for the purpose of developing methods of testing or testing products for possible purchase (**section 25(2)(b)**).

The intent of the provision is to ensure that a public body does not withhold information resulting from product or environmental testing carried out either by the employees of a public body or on its behalf by another organization. Examples include information on products such as air filters, environmental test results on water quality or air quality and commercial product testing and soil testing.

Information can be withheld when the public body performs the testing, for a fee, as a service to a private citizen or private corporate body.

The information may also be withheld if the testing was done for the purpose of developing testing methods, such as a new methodology for tire recycling. There would have to be evidence in such cases that methodology development was the sole purpose of the testing.

The exception can also be used to withhold test results compiled to determine whether or not a public body would purchase a product.

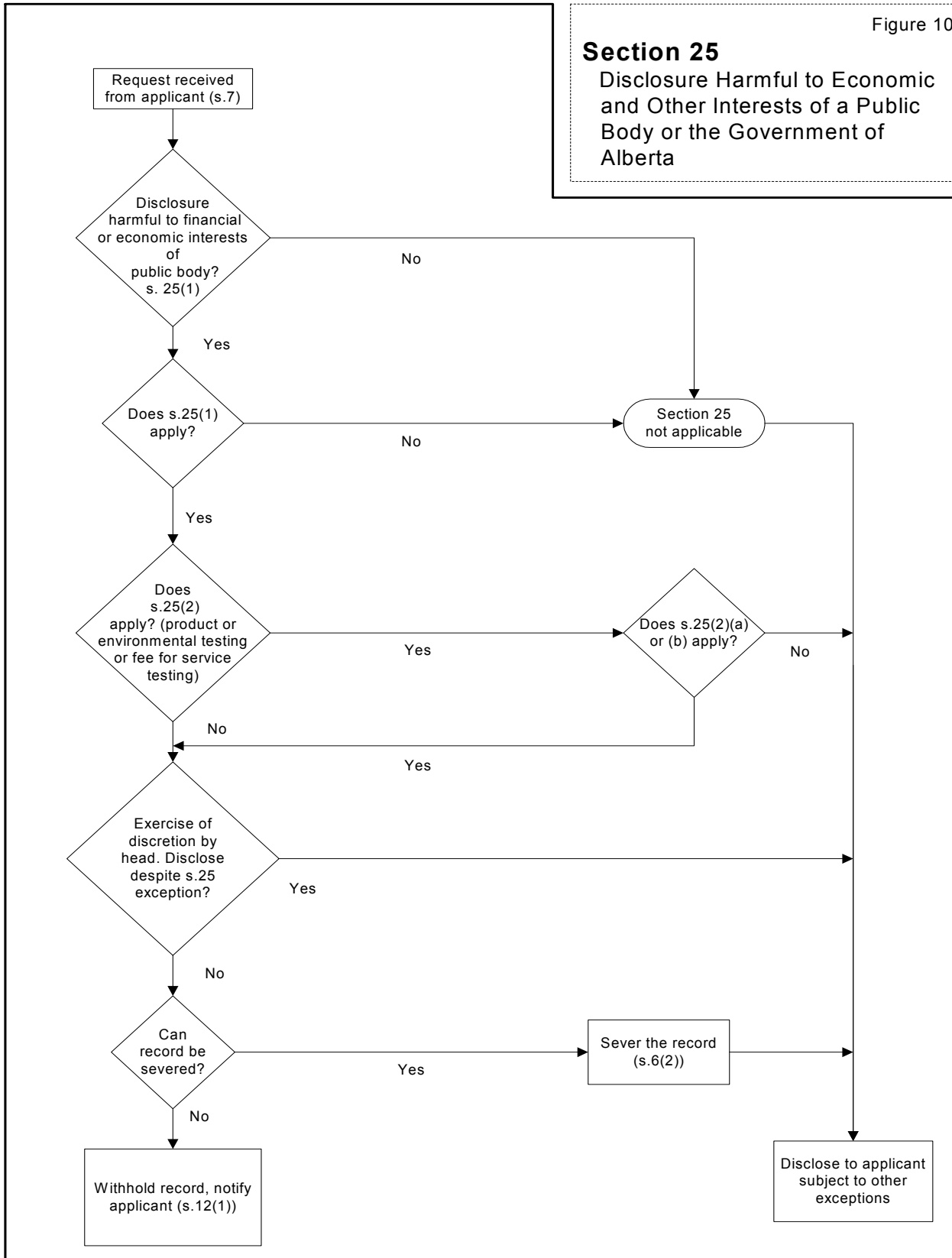
In all three circumstances, the harms test in **section 25(1)** still has to be met before the information can be withheld.

Applying the exception

Figure 10 contains a flowchart setting out the steps for applying **section 25**.

Figure 10

Section 25
 Disclosure Harmful to Economic
 and Other Interests of a Public
 Body or the Government of
 Alberta



4.12 Testing Procedures

Section 26 of the Act provides that a public body may refuse to disclose information relating to

- testing or auditing procedures or techniques (**section 26(a)**);
- details of specific tests to be given or audits to be conducted (**section 26(b)**); or
- standardized tests used by a public body, including intelligence tests (**section 26(c)**).

The exception applies only if the disclosure could reasonably be expected to prejudice the use or results of particular tests or audits.

Section 26 is a discretionary exception.

This exception provides protection for the procedures and techniques involved in testing and auditing. It also protects details relating to specific tests to be given or audits to be conducted.

The terms *test* and *audit* cover a wide range of activities. Examples include environmental testing, staffing examinations, personnel audits, financial audits, and program audits. Specific mention is made in **section 26(c)** of standardized tests, such as intelligence tests. Other standardized tests include psychological tests and aptitude tests, which are often used in educational bodies.

The exception may be applied where disclosure of a specific test to be given or audit to be conducted, or one that is currently in process, would invalidate the results. This applies even if there is no intention to use the test or audit again in the future.

The exception may also apply where there is an intention to use the testing or auditing procedure in the future, and disclosure would result in unreliable results being obtained and the test or audit having to be abandoned as a result. Test questions that are regularly used – for example, in making staffing decisions – may be excepted from disclosure.

For example, **section 26** was found to apply to standardized interview questions, evaluation keys and an essay written by the applicant because their disclosure could prejudice the utility of such tests in future police recruitment processes (*IPC Order F2004-022*).

Information relating to a test or an audit that has been used in the past, but which is neither in process nor to be used in the future, cannot be withheld under this exception.

Section 26 does not allow public bodies to withhold the results of tests or audits, including the results of standardized tests. Public bodies should consider in advance how they will handle issues that might arise from the disclosure of test results that contain sensitive information or would likely be open to misinterpretation by a non-expert.

**4.13
Privileged
Information**

Section 27 of the Act is an exception to disclosure of information that allows a public body to withhold information that is subject to a legal privilege, or relates to the provision of legal services or the provision of advice or other services by the Minister of Justice and Attorney General or a lawyer.

Section 27(1) provides that a public body may refuse to disclose information that

- is subject to any type of legal privilege, including solicitor–client privilege and parliamentary privilege;
- relates to the provision of legal services and is prepared by or for specified individuals; or
- relates to the provision of advice or other services contained in correspondence between specified individuals.

Section 27(2) requires that a public body refuse to disclose information that is subject to a legal privilege where that information relates to a person other than the public body.

Section 27(3) states that only the Speaker of the Legislative Assembly may determine whether information is subject to parliamentary privilege.

The intent of **section 27** is to ensure that information privileged at law, as well as other similar information in the custody or under the control of a public body, is protected from disclosure in much the same way as an individual’s information would be by his or her own lawyer.

Indicators

The following is a non-exclusive list of indicators that, if present, suggest that **section 27** might apply:

- the record is a letter, fax, e-mail or other correspondence to or from the public body’s lawyer, including a lawyer at Alberta Justice and Attorney General (for government departments and agencies);
- the record is attached to correspondence to or from a lawyer;
- the record is a lawyer’s briefing note or working paper;
- the record is a communication between employees of a public body, or between employees of a third party, quoting legal advice given by a lawyer;
- the record is a note documenting legal advice given by a lawyer or a statement of account from a lawyer that details the services provided by the lawyer;
- the information was provided by a confidential informant;
- the information relates to an existing or contemplated lawsuit;
- the information relates to a criminal prosecution;
- the information is contained in correspondence to or from the Minister of Justice and Attorney General or correspondence to or from an agent of the Minister of Justice and Attorney General;
- the record relates to a public body’s investigation of a third party; or
- the record relates to the operations of the Legislative Assembly.



If one or more of these indicators exist, **section 27** may apply. Public bodies should consider consulting with legal counsel when a record contains information that may qualify for exception under **section 27** and the public body is unsure whether to claim its legal privilege. The first step is to determine whether legal privilege applies. The next step is to decide whether the privilege should be waived.

Privileged information

Legal privilege

Section 27(1)(a) **Section 27(1)(a)** gives a public body the discretion to refuse to disclose information that is subject to any type of legal privilege. There are several types of legal privilege. They include

- solicitor–client privilege;
- litigation privilege;
- common interest privilege;
- parliamentary privilege;
- police informer privilege;
- case-by-case privilege for private records and for Crown records;
- settlement negotiation privilege; and
- statutory privilege.

If one of these privileges applies, the information may be withheld under **section 27(1)(a)**.

Public bodies should note that, since **section 27(1)(a)** is a discretionary exception, the Information and Privacy Commissioner will not raise it as an exception to disclosure if the public body does not.

Solicitor–client privilege. This privilege applies to a record when

- the record is a communication between a lawyer and the lawyer’s client;
- the communication entails the seeking or giving of legal advice; and
- the record is intended to be confidential by the parties (see *IPC Orders 96-017* and *96-021*).

Legal advice means a legal opinion about a legal issue, and a recommended course of action, based on legal considerations, regarding a matter with legal implications (see *IPC Order 96-017*).

In *IPC Order 96-020*, the Commissioner said that solicitor–client privilege will apply to a continuum of communications or legal advice, including not only telling the client the law, but also giving advice as to what should be done in the relevant legal context. The facts of each case will be important to determine what functions performed by a lawyer for his or her client would fall within the continuum of legal advice.

Solicitor–client privilege applies to attachments to communications between a solicitor and his or her client when the attachments are part of the continuum of the legal advice (see *IPC Orders 98-004* and *99-005*).

In order to apply solicitor–client privilege, the public body must be able to provide evidence of the confidential legal advice sought or given and evidence of who sought the advice or to whom it was given (see *IPC Order 2000-019*).

The presence of an agent does not destroy solicitor–client privilege, as long as the communication through the agent meets the test for solicitor–client privilege (see *IPC Order 97-003*).

Lawyers' bills of accounts are presumed to be subject to solicitor–client privilege. However, the presumption can be rebutted by showing that there is no reasonable possibility that an inquirer, aware of background information available to the public, could use the information about the amount of fees paid to deduce or acquire any communication protected by solicitor–client privilege.

In *IPC Order F2007-014*, it was found that disclosure of the total amount of the bill, the law firm's letterhead and the name and address of the client would not reveal privileged communications. In *IPC Order F2007-025*, solicitor–client privilege applied to the date the legal service was provided, the description of the service provided, the breakdown of the fees and the identity of the lawyer providing the service. However, the total amount of the bill and the letterhead of the law firm could be disclosed.

The Commissioner has established a protocol as to how records for which solicitor–client privilege has been claimed will be dealt with during a review. The *Solicitor–Client Privilege Adjudication Protocol* is available on the Commissioner's website.

Litigation privilege. This privilege applies to records created or obtained by a client for the use of the client's lawyer in existing or contemplated litigation. Litigation privilege also applies to records created by a third party, or obtained from a third party on behalf of the client, for the use of the client's lawyer in existing or contemplated litigation.

To apply litigation privilege a public body must show that

- there is a third party communication, which may include
 - communications between the client (or the client's agents) and third parties for the purpose of obtaining information to be given to the client's lawyer to obtain legal advice,
 - communications between the solicitor (or the solicitor's agents) and third parties to assist with the giving of legal advice, or
 - communications which are created at their inception by the client, including reports, schedules, briefs, documentation, etc.;
- the maker of the record or the person under whose authority the record was made intended the record to be confidential; and

- the “dominant purpose” for which the record was prepared was to submit it to a legal advisor for advice and use in litigation. The “dominant purpose” test consists of three requirements:
 - the documents must have been produced with existing or contemplated litigation in mind;
 - the documents must have been produced for the dominant purpose of existing or contemplated litigation; and
 - if litigation is contemplated, the prospect of litigation must be reasonable (see *IPC Orders 97-009* and *F2003-005*).

Litigation privilege will not apply if the records in question do not involve correspondence with a solicitor or show any intention to obtain legal advice (see *IPC Order 2001-018*).

Litigation privilege no longer applies once litigation has been concluded (see *IPC Orders 98-017* and *2001-025*). However, solicitor–client privilege may continue to apply to some of the records.

Common interest privilege. This privilege exists when records are provided among parties where several parties have a common interest in anticipated litigation. The privilege exists when one party consults with a lawyer on an issue of common interest and shares or exchanges the legal opinion with other parties with the same interest (see *IPC Orders 97-009* and *2001-018*).

Parliamentary privilege. This is a unique class privilege that extends to members of the Legislative Assembly immunity to do their legislative work.

Section 27(3) requires that the Speaker of the Legislative Assembly determine whether information is subject to this privilege.



When a public body believes that all or part of a requested record may be subject to parliamentary privilege, it must provide notice to the Speaker of the Legislative Assembly. The notice must include a description of the contents of the record and a request that the Speaker determine whether or not parliamentary privilege applies to some or all of the information. The decision of the Speaker must be followed.

Model Letter K in Appendix 3 may be used to request a determination from the Speaker. The Commissioner has said that if the Speaker decides that parliamentary privilege applies to a record, the Commissioner cannot review a public body’s decision to withhold that record. (See **section 65(5)(b)** of the Act and *IPC Order 97-017*.)

Police informer privilege. This privilege, also referred to as confidential informant privilege, applies to information that might identify an informer. The privilege protects individuals who choose to act as confidential informants from the possibility of retribution. This protection in turn encourages others to divulge pertinent

information to authorities. (See *IPC Order 96-020* for a discussion of the *R. v. Leipert* case, in which the Supreme Court of Canada affirmed that “informer privilege” is a legal privilege).

This privilege is subject to only one exception: “innocence at stake.” To raise this exception, there must be a basis on the evidence for concluding that disclosure of the informer’s identity is necessary to demonstrate the innocence of someone in a criminal proceeding.

Case-by-case privilege. This is a privilege that is found to exist for information in a particular case. In each case, the decision-maker must determine whether the public interest favours disclosure or non-disclosure of the record (see *IPC Order 96-020*).

Case-by-case privilege applied to Crown records (sometimes called Crown privilege). These records contain information relating to government activities or operations, and decisions at the highest level of government, such as Cabinet decisions concerning national security. In order to establish that a case-by-case privilege for Crown records exists, a public body must base an argument for public interest immunity on the following criteria:

- the nature of the policy concerned;
- the particular contents of the records;
- the level of the decision-making process;
- the time when a record or information is to be revealed;
- the importance of producing the records in the administration of justice, with particular consideration to:
 - the importance of the case;
 - the need or desirability of producing the records to ensure that the case can be adequately and fairly represented; and
 - the ability to ensure that only the particular facts relating to the case are revealed; and
- any allegation of improper conduct by the executive branch towards a citizen.

In Alberta, section 11 of the *Proceedings Against the Crown Act* and section 34 of the *Alberta Evidence Act* govern the procedure for raising Crown privilege.

Case-by-case privilege applied to private records. Private records are a third party’s records in which there is a reasonable expectation of privacy. Examples of private records may include medical or therapeutic records, private diaries and social worker activity logs. It does not matter who has possession of the information, but rather whose information it is (*IPC Order 96-020*).

A set of four criteria, called Wigmore’s test, is used to determine, on a case-by-case basis, whether the public interest favours disclosure or non-disclosure of private records. In order to establish that a case-by-case privilege applies to a private record, a public body must provide evidence that the private record meets the following four criteria:

- the communications originated in a confidence that they would not be disclosed;

- this element of confidentiality is essential to the full and satisfactory maintenance of the relationship between the parties;
- the relationship must be one which, in the opinion of the community, ought to be diligently fostered; and
- the injury that would result to the relationship from the disclosure of the communications would be greater than the benefit gained by granting an applicant's request for access to the information under the *FOIP Act*.

In *IPC Order F2008-012*, case-by-case privilege did not apply to communications between a physician and the hospital's chief of staff about a colleague's ability to perform his job. The communications did not originate in confidence, and maintaining confidence would undermine the open and transparent complaint resolution process that had been established for disputes between medical staff. Also, the relationship between a confidential complainant and the chief of staff was not one that should be diligently fostered.

Settlement negotiation privilege. This privilege applies to the discussions leading up to a resolution of a dispute in the face of litigation. It promotes the settlement of lawsuits. To apply settlement negotiation privilege, a public body must show that

- litigation exists or is contemplated;
- the communication was made with the express or implied intention that it would not be disclosed to the court in the event negotiations failed; and
- the purpose of the communication is to attempt to effect a settlement (see *IPC Order F2005-030*).

The privilege does not extend to the settlement agreement itself (*IPC Orders F2005-030* and *F2007-025*).

Statutory privilege. This is a legal privilege established by an act or by a regulation. Information that is subject to statutory privilege may be withheld under **section 27(1)(a)**.

Information relating to the provision of legal services

Section 27(1)(b) **Section 27(1)(b)** is broader in scope than **section 27(1)(a)** (see *IPC Order F2003-017*). **Section 27(1)(b)** gives a public body the discretion to withhold information that is prepared by or for the Minister of Justice and Attorney General, his or her agent or lawyer, or an agent or lawyer of a public body in relation to a matter involving the provision of legal services.

The Commissioner has said that, in order for the exception to apply, the information in the records must contain "information prepared" – as those words are commonly understood – by or for an agent or lawyer of the Minister of Justice and Attorney General or of a public body, and the records must indicate that the information was prepared by or for such a person (see *IPC Order 99-027*).

The term *legal services* includes any law-related service performed by a person licensed to practise law (see *IPC Order 96-017*).

For example, in *IPC Order 98-016*, some of the records under review were memoranda written to file by Crown prosecutors assigned to the file. They contained a Crown prosecutor's own comments on the case, noting weaknesses, problems with respect to witnesses, etc. They were prepared by lawyers of the Minister of Justice in relation to the criminal prosecution of the applicant. The Commissioner held that **section 27(1)(b)** applied to those records.

Information relating to the provision of advice or other services

Section 27(1)(c) In order for **section 27(1)(c)** to apply, two criteria must be met:

- the information must be correspondence between any person and the Minister of Justice and Attorney General, his or her agent or lawyer, or an agent or lawyer of a public body; and
- the information in the correspondence must relate to a matter involving the provision of advice or other services by the Minister of Justice and Attorney General, his or her agent or lawyer, or an agent or lawyer of a public body (*IPC Order 98-016*).

A memorandum or note from one employee of a public body to another summarizing a conversation between that employee and the public body's lawyer may meet the two criteria in **section 27(1)(c)** (see *IPC Order 96-019*).

Letters between Crown prosecutors and the RCMP containing requests or suggestions regarding the file, including advice to the RCMP with respect to what charges ought to be laid, were found by the Commissioner to meet both criteria. The letters were prepared specifically in relation to the prosecution of the applicant, and the prosecution of criminal charges is a service provided by the Crown Prosecutors' Office (see *IPC Order 98-016*).

Privileged information of a third party

Section 27(2) A public body must refuse to disclose information that is subject to a legal privilege where that information relates to a person other than the public body. For **section 27(2)** to apply, there must first be a finding that the information in question is covered by **section 27(1)(a)** (see *IPC Order 96-021*). If **section 27(1)(a)** applies, and the information relates to a person other than the public body, **section 27(2)** prohibits a public body from disclosing that information.

Records in which a public body has discussed or otherwise reproduced a third party's privileged information may also be covered by this exception (see *IPC Order 97-009*).

Even if a record of this nature was disclosed before the coming into force of the Act, a public body must now apply **section 27(2)** and withhold the record if the record is within the scope of the exception (see *IPC Order 97-009*).

If the criteria in **section 27(1)(a)** are not met, there is no privilege, and **section 27(2)** cannot apply (see *IPC Order 99-027*).

If information subject to **section 27(1)(a)** (e.g. privileged information relating to a public body) and to **section 27(2)** (e.g. privileged information relating to an employee

of the public body (third party)) is intertwined, **section 27(2)** (the mandatory exception for privileged information related to a third party) applies to all of the information (*IPC Order F2002-007*).

Waiver of privilege

If a legal privilege applies to a record, only the party entitled to the privilege may waive it. In order for a waiver to be effective, the party entitled to the privilege must have voluntarily relinquished the right to require that the document remain confidential.

Waiver of privilege depends on intention (*IPC Order 97-009*). Waiver is established when the party entitled to the privilege

- knows of the existence of the privilege, and
- demonstrates a clear intention to forego the privilege.

(*Adjudication Order No. 3*.)

The party claiming waiver of privilege has the burden of proof (*Adjudication Order No. 3*).

There are several indicators that, if present, suggest that a legal privilege has been waived. They include the following:

- an express declaration that the privilege is waived;
- the party entitled to the privilege does not restrict the use of the privileged record by the person to whom it is sent;
- part of a record containing solicitor–client privilege is released or privilege is not claimed for the entire communication on a page (for deemed waiver in such a case, see *IPC Order 96-017*); or
- the record is copied to a third party (as a “cc”) (except where common interest privilege exists – see *IPC Order 97-009*).

It is possible to waive a privilege for a limited purpose. For example, a person may deliver a privileged document to a third party with the intention that no one other than that third party views the document. In that situation the person may be found to have waived the privilege with respect to that third party but not with respect to any other third party.

Privilege is not waived when an individual is obliged to comply with a public body’s requirements under penalty of enforcement proceedings for non-compliance (see *IPC Order 98-017*).

Providing copies of privileged records to other employees within a public body will not waive privilege (see *IPC Order F2003-017*).

Failure by the party entitled to privilege to respond to a third party notice given under the *FOIP Act* does not constitute a waiver of privilege (*Adjudication Order No. 3*).

A public body's disclosure of records in the public interest (**section 32**) does not mean that the public body has waived privilege for all associated records (*Adjudication Order No. 3*).

Exercise of discretion under section 27

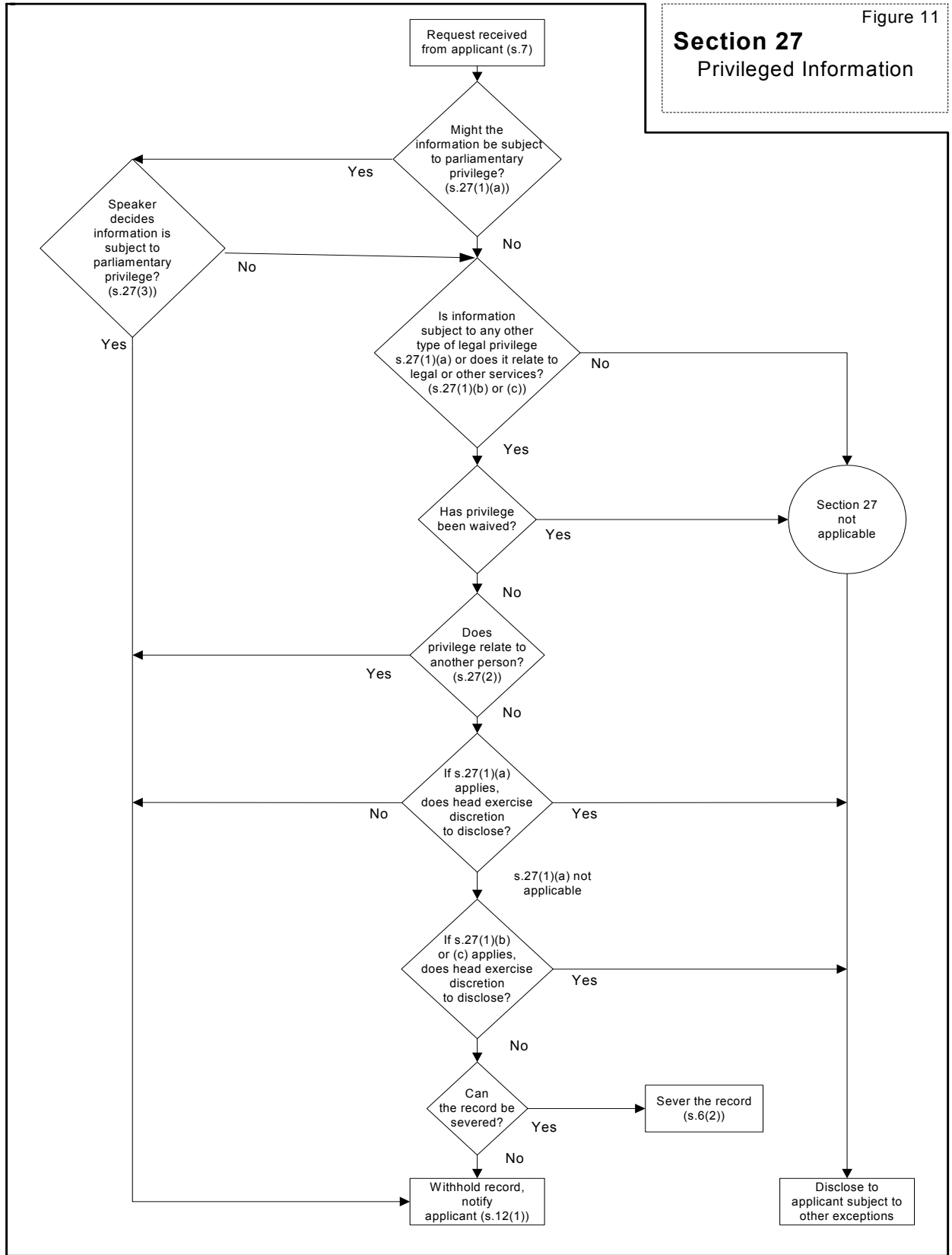
Section 27(1) is a discretionary exception. Even if it applies to a record, a public body may choose to disclose it. **Section 27(2)** is a mandatory exception. If it applies to a record or information, a public body must not disclose that record or information.

Severing of information from privileged records

Section 6(2) of the Act allows an applicant to request access to part of a record if that information can reasonably be severed from the record. However, **section 6(2)** does not apply to allow severing of documents for which a legal privilege in **section 27(1)(a)** is claimed (see *IPC Order 96-017*). If a legal privilege is claimed for a record, the privilege normally must be applied to the entire record and none of the information in that document may be disclosed.

Applying the exception

Figure 11 contains a flowchart setting out the steps for applying **section 27**.



**4.14
Disclosure
Harmful to
Historic
Resources or
Vulnerable
Forms of Life**

Section 28 provides that a public body may refuse to disclose information if the disclosure could reasonably be expected to result in damage to or interfere with the conservation of

- any historic resource as defined in section 1(f) of the *Historical Resources Act*; or
- any rare, endangered, threatened or vulnerable form of life.

Section 28 is a discretionary exception.

For the exception to apply, there must be objective grounds to believe that disclosure is likely to result in damage to historic resources or interference with conservation measures.

Damage refers to destruction, disturbance, alteration, deterioration or reduction in the value of an historic resource.

Historic resources

Section 28(a) The provision enables a public body to withhold information about historic resources, which, if disclosed, could result in damage to these resources or interference with conservation measures. If a public body has records that might fall within this exception, it may consult with the ministry responsible for the *Historical Resources Act* (Alberta Culture and Community Spirit) in making a decision on disclosure.

The *Historical Resources Act* defines *historic resources* as any work of nature or of humans that is primarily of value for its palaeontological, archaeological, prehistoric, historic, cultural, natural, scientific or aesthetic interest, including, but not limited to, a palaeontological, archaeological, prehistoric, historic, or natural site, structure or object.

Examples include designated municipal historic resources, designated registered historic resources in private ownership, museum collections, and archaeological and palaeontological sites revealed during a historic resources impact assessment.

Rare, endangered, threatened or vulnerable forms of life

Section 28(b) In **section 28(b)**, the following general definitions apply.

A *rare form of life* is any species of flora or fauna that is in a special category because it does not occur in great abundance in nature, either because it is not prolific or its population or range has been adversely affected by modern civilization.

An *endangered form of life* is any species of flora or fauna that is threatened with extinction throughout all or a significant portion of its natural range.

A *threatened form of life* is any species of flora or fauna that is likely to become endangered in Canada or Alberta if the factors affecting its vulnerability are not reversed.

A *vulnerable form of life* is any species of flora or fauna that is of concern because it is naturally scarce or likely to become threatened as a result of disclosure of specific information about it.

**4.15
Information
that is or will
be Available to
the Public**

Section 29 provides that a public body may refuse to disclose information

- that is readily available to the public;
- that is available for purchase by the public; or
- that is to be published or released to the public within 60 days after the applicant's request is received.

Section 29 is a discretionary exception.

Readily available to the public

Section 29(1)(a) This provision enables a public body to refuse to disclose information that is readily available to the public.

Readily available to the public means currently accessible to the general public. For example, the information may be available through a website, in a public library, in a public directory or in a manual available to the public for copying (see *IPC Order F2002-023*). Access may involve a modest cost, such as copying charges.

If an applicant requests information to which this exception applies, the public body must tell the applicant how the information may be accessed. Examples of information that may be readily available to the public include annual reports of public bodies; information about the membership of governing bodies of public bodies; and statutes, regulations and bylaws.

Available for purchase by the public

Section 29(1)(a.1) This provision enables a public body to refuse to disclose information that is currently available for purchase by the public. This exception allows the public body to follow its normal procedures for selling information, if the public body has a policy of doing so, or to make a decision to publish particular information. The Act is not intended to replace existing procedures for access to information (**section 3(a)**).

Available for purchase by the public means that a publication is generally available for purchase from the public body or a government or other bookstore. The information must be available to the general public, not only to a limited group such as realtors or an interest group (see *IPC Order 98-004*).

If an applicant requests information to which this exception applies, the public body must tell the applicant where the publication may be purchased. Examples of information available for public purchase include maps, research reports, catalogues, manuals and electronic or print subscription services.

Where records are annotated by a public body, they become new records. If the new records are not publicly available, then **section 29(1)(a)** will not apply (see *IPC Order 2001-009*).

To be published or released within 60 days

Section 29(1)(b) This provision allows a public body to decide whether or not to withhold information that will be published or released within 60 days of the applicant's request.

Published means made available for public sale or made available at no cost, to the public through print or electronic media, including posting on a website.

Released to the public means made available to the public at large either through active dissemination channels or through provision of the information at specific locations (e.g. public libraries).

Situations arise when a request is made for information that is about to be published. There may be a number of reasons to withhold the information under **section 29(1)(b)**. For example, where a publication is required to be tabled in the Legislature, it may be appropriate for the Minister or head to exercise his or her discretion not to release the information first through the *FOIP Act*. It may also be reasonable to not disclose the information through the *FOIP Act* if the information is scheduled to be released in conjunction with a public event or public announcement or is to be published within 60 days of the applicant's request.

The exception covers only the manuscript being published and not related data or research and background material. These records have to be dealt with separately, if requested, or if the applicant does not believe that the request is satisfied by receipt of the publication.

Section 29(1)(b) may only be applied if there are no legal impediments to publishing, such as **Part 2** of the *FOIP Act*.

The 60 days for publication or release is from the date of receipt of the applicant's request and not from the date when a response is made to the request. It is important that a public body ensure that the requested records will be published or released to the public within the 60-day time frame established by the provision.

A public body does not have to consult with, or provide notice to, third parties with respect to information that is available to the public or will be published or released within 60 days of the applicant's request (**section 30(1.1)**). It is presumed in these cases that the public body has already considered any confidentiality or privacy matters related to the information before deciding to make it publicly available.

Notification of applicant

Section 29(2) **Section 29(2)** requires the public body to notify an applicant of the publication or release of information that the head has refused to disclose under **section 29(1)(b)**.

Such notification should provide

- the date of publication or release;
- the specific location where the applicant can have access;
- how access will be given;
- the purchase price, if applicable; and
- any other information that the public body is required to give the applicant under **section 12(1)** of the Act.

If there is no charge for the publication, the public body could simply provide a copy to the applicant on publication.

If information is not published or released

Section 29(3) If the information is not published or released within 60 days after the applicant's request is received, the public body must reconsider the request. This must be done as if it were a new request received on the last day of that period, and access to the information must not be refused under **section 29(1)(b)**.

This means that on the 60th day the public body is required to consider the applicant's request as a new request with 30 days to respond, dating from that day. The public body cannot employ the **section 29** exception in any consideration of the new request.

