Office of the
Saskatchewan Information
and Privacy Commissioner

Guide to FOIP

The Freedom of Information and Protection of Privacy Act

Chapter 4

Exemptions from the Right of Access

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Overview

This Chapter explains the various exemptions that a government institution may rely on to deny access to records or information to an applicant who has made an access to information request. For more on making an access to information request, see the *Guide to FOIP,* Chapter 3, "Access to Records."

What follows is non-binding guidance. Every matter should be considered on a case-by-case basis. This guidance is not intended to be an exhaustive authority on the interpretation of these exemptions. Government institutions may wish to seek legal advice when deciding on exemptions to apply. Government institutions should keep section 61 of FOIP in mind. Section 61 places the burden of proof for establishing that access to a record may or must be refused on the government institution. For more on the burden of proof, see the *Guide to FOIP,* Chapter 2, "Administration of FOIP." **This is a guide**.

This chapter covers:

- Interpretation of Exemptions.
- Class and Harm Based Exemptions.
- Mandatory and Discretionary Exemptions.
- Exercise of Discretion.
- Public Interest Overrides.
- Guidance on each of the exemptions in Part III of FOIP.

The tests, criteria and interpretations established in this Chapter reflect the precedents set by the current and/or former Information and Privacy Commissioners in Saskatchewan through the issuing of Review Reports. Court decisions from Saskatchewan affecting The Freedom of Information and Protection of Privacy Act (FOIP) will be followed. Where this office has not previously considered a section of FOIP, the Commissioner looked to other jurisdictions for guidance. This includes other Information and Privacy Commissioners' Orders, Reports and/or other relevant resources. In addition, court decisions from across the country are relied upon where appropriate.

This Chapter will be updated regularly to reflect any changes in precedent. This office will update the footer to reflect the last update. Using the electronic version directly from our website will ensure you are always using the most current version.

Interpreting Exemptions

Section 5 of FOIP establishes a right of access by any person to records in the possession or control of a government institution, subject to limited and specific exemptions, which are set out in FOIP. For more on the right of access, see the *Guide to FOIP*, Chapter 3, "Access to Records."

Generally, an applicant has a right to access all or part of any record that is the subject of an access to information request. Refusal to disclose all or part of a record should occur only where FOIP provides a specific exemption. If the record or information is subject to FOIP and no exemption applies, the information or record must be disclosed.

The rule of statutory interpretation enunciated by Driedger in *The Construction of Statutes* (2nd ed., 1983), was adopted by Justice Kalmakoff in *Leo v Global Transportation Hub Authority* (2019) as follows:

> [17] Applying the exemptions set out in FOIP involves, in large part, an exercise in statutory interpretation. The modern principle of statutory interpretation is that the words in an Act are to be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act, and the intention of the legislative body: *Tran v Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50 at para 23 [2017] 2 SCR 289; *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 SCR 27.[1]

Driedger also says in *The Construction of Statutes* that:

> 3. If the words are apparently obscure or ambiguous, then a meaning that best accords with the intention of Parliament, the object of the Act and the scheme of the Act, but one that the words are reasonably capable of bearing, is to be given them.[2]

Regard must also be had for the provisions of *The Legislation Act,* which provides:

> **2-10**(1) The words of an Act and regulations authorized pursuant to an Act are to be read in their entire context, and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act and the intention of the Legislature.

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[1] *Leo v Global Transportation Hub Authority*, 2019 SKQB 150 at [17]. See also section 2-10 of *The Legislation Act*, S.S. 2019, Chapter L-10.2.

[2] Driedger, E. 1983 *Construction of Statutes*, 2nd Edition, Butterworth-Heinemann at p. 105.

(2) Every Act and regulation is to be construed as being remedial and it to be given the fair, large and liberal interpretation that best ensures the attainment of its objects.[3]

The Supreme Court of Canada has stated various approaches to the interpretation of statutes. In his dissenting judgement in *Singleton v. Canada (2001)*, Justice LeBel discussed and summarized three approaches utilized in recent cases. They are the words-in-total-context approach, the teleological (or purposive) approach and the plain meaning approach. He rationalized the three approaches in this way:

> If the "plain meaning" approach is to make any sense at all, it surely cannot mean that we are always to ignore context when interpreting statutory language. Rather, it must be understood to say that although context is always important, sweeping considerations of general statutory purpose cannot outweigh the specific statutory language chosen by Parliament. It is an acknowledgement that Parliament's purpose can be complex. Rather than finding a single purpose for the Act as a whole and using it to interpret the clear language of specific provisions, we should use such broad purposes only as a context to help elucidate the meaning of specific statutory language. Understood in this way, it is not inconsistent with the basic thrust of the words-in-total-context approach.[4]

The Supreme Court of Canada accepted the "words-in-total-context" approach to statutory interpretation when considering a denial of access to information in *Merck Frosst Canada Inc. v. Canada (Minister of National Health), (2000)*:

> The test for the application of the exemption in paragraph 20(1)(c) is that of a "reasonable expectation of probable harm". In *Canada Packers Inc. v. Canada*, [1989] F.C. 47, the Federal Court of Appeal interpreted this disposition as follows, at page 60:
>
> > …The words-in-total-context approach to statutory interpretation which this court has followed in *Lor-Wes Contracting Ltd. v. The Queen*, [1986] 1 F.C. 346: (1985), 60 N.R. 321 and *Cashin v. Canadian Broadcasting Corp*., [1983] 3 F.C. 494 requires that we view the statutory language in these paragraphs in their total context, which must here mean particularly in the light of the purpose of the Act as set out in section 2. Subsection 2(1) provides a clear statement that the Act should be interpreted in the light of the principle that government information should be available to the public and that exceptions to the public's right of access should be "limited and specific".[5]

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[3] *The Legislation Act*, S.S. 2019, Chapter L-10.2 at subsection 2-10.
[4] *Singleton v. Canada,* [2002] 2 SCR 1046, 2001 SCC 61 (CanLII) at [68]. Also see *Northern Thunderbird Air Ltd. v. Royal Oak & Kemess Mines Inc.,* 2002 BCCA 58 (CanLII) at [19].
[5] *Merck Frosst Canada (Minister of National Health)*, 2000 CanLII 16042 (FC) at [13].

A number of presumptions, including the principle against absurdity articulated by the Supreme Court of Canada in *Rizzo v. Rizzo Shoes Ltd. (Re), (1998)*, also informs statutory interpretation:

> [27] ...It is a well-established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to [Pierre-Andre Cote, *The Interpretation of Legislation in Canada* (2nd ed. 1991)] an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to some interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile (Sullivan, *Construction of Statutes supra* at p. 88).[6]

Limited & Specific

The right of access is subject to limited and specific exemptions that are set out in Part III of FOIP. This includes sections 13 to 23 of FOIP. It also includes the withholding personal information provision at subsection 29(1) in Part IV of FOIP.

Canadian courts agree that exemptions are the exception and disclosure is the general rule, with any doubt being resolved in favour of disclosure.[7] The basic policy of the Act is that "disclosure, not secrecy is the dominant objective of the Act".[8]

The Supreme Court of Canada has interpreted access to information laws as quasi-constitutional. It follows that as fundamental rights, the rights to access and to privacy are interpreted generously, while the exceptions to these rights must be understood strictly.[9] For more on FOIP's quasi-constitutional status, see the *Guide to FOIP*, Chapter 1, "Purposes and Scope of FOIP."

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[6] *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 SCR 27 at [27].
[7] *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 SCR 23, 2012 SCC 3 (CanLII) at [95] and *Corporate Express Canada Inc. v Memorial University of Newfoundland*, 2015 NLCA 52 (CanLII) at [20].
[8] *General Motors Acceptance Corp. of Canada v. Saskatchewan Government Insurance* [1993] S.J. No. 601 at [11], Office of the Saskatchewan Information and Privacy Commissioner (SK OIPC) Review Report F-2006-001 at [11].
[9] Remarks of the Right Honourable Beverley McLachlin, P.C., Chief Justice of Canada, *Access to Information and Protection of Privacy in Canadian Democracy*, May 5, 2009, also cited in SK OIPC Review Report F-2010-002 at [44].

Each record must be carefully reviewed to determine whether an exemption applies. Government institutions should interpret the exemptions narrowly and only apply an exemption to the specific information in a record to which the exemption applies. More than one exemption may apply to all or part of a record. For more on redacting or severing information, see the *Guide to FOIP*, Chapter 3, "Access to Records."

The majority of requests for review to the Commissioner under section 49 of FOIP arise from refusal to provide access. Government institutions should be prepared to document and support their decisions to withhold information.

Balancing Interests

When considering what exemptions to apply, government institutions must balance the right of access against denying it in order to protect other interests.

In *John Doe v Ontario (Finance), (2014)*, the Supreme Court of Canada concisely summarized the legislative purpose of access to information statutes such as FOIP:

> [1] Access to information legislation serves an important public interest: accountability of government to the citizenry. An open and democratic society requires public access to government information to enable public debate on the conduct of government institutions.
>
> [2] However, as with all rights recognized in law, the right of access to information is not unbounded. All Canada access to information statutes balance access to government information with the protection of other interests that would be adversely affected by otherwise unbridled disclosure of such information.[10]

In *Merck Frosst Canada Ltd. v Canada (Health), (2012)*, the Supreme Court of Canada commented on the balancing act inherent in access to information. In that case, third party interests were at issue:

> [1] Broad rights of access to government information serve important public purposes. They help to ensure accountability and ultimately, it is hoped, to strengthen democracy. "Sunlight", as Louis Brandeis put it so well, "is said to be the best of disinfectants" ("What Publicity Can Do", *Harper's Weekly*, December 20, 1913, 10, at p. 10).
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> [2] Providing access to government information, however, also engages other public and private interests. Government, for example, collects information from third parties for

[10] Also cited in *Leo v Global Transportation Hub Authority*, 2019 SKQB 150 at [18].

> regulatory purposes, information which may include trade secrets and other confidential commercial matters. Such information may be valuable to competitors and disclosing it may cause financial or other harm to the third party who had to provide it. Routine disclosure of such information might even ultimately discourage research and innovation. Thus, too single-minded a commitment to access to this sort of government information risks ignoring these interests and has the potential to inflict a lot of collateral damage. There must, therefore, be a balance between granting access to information and protecting these other interests in relation to some types of third party information.
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> [3] The need for this balance is well illustrated by these appeals. They arise out of requests for information which had been provided to government by a manufacturer as part of the new drug approval process. In order to get approval to market new drugs, innovator pharmaceutical companies, such as the appellant Merck Frosst Canada Ltd. ("Merck"), are required to disclose a great deal of information to the government regulator, the respondent Health Canada, including a lot of material that they, with good reason, do not want to fall into their competitors' hands. But competitors, like everyone else in Canada, are entitled to the disclosure of government information under the *Access to Information Act*, R.S.C. 1985, c. A-1 ("Act" or "*ATI*").
>
> [4] The Act strikes a careful balance between the sometimes competing objectives of encouraging disclosure and protecting third party interests. While the Act requires government institutions to make broad disclosure of information, it also provides exemptions from disclosure for certain types of third party information, such as trade secrets or information the disclosure of which could cause economic harm to a third party. It also provides third parties with procedural protections. These appeals concern how the balance struck by the legislation between disclosure and protection of third parties should be reflected in the interpretation and administration of that legislation.

Furthermore, Justice Gabrielson described the balancing act in *Hande v University of Saskatchewan*, (2019) as follows:

> [15] As can be seen, the Act attempts to strike a balance between the public's right to access information which the Government of Saskatchewan (or a body holding delegated authority from the government) has to ensure accountability to persons affected by the information and the corresponding need to protect the privacy of individuals or other legitimate interests that may be impacted by the release of such material. It starts with the proposition that a person has access to all government records subject to limitations established by the Act. The limitations are set out in Part III of the Act which is entitled "Exemptions". The exemptions define circumstances under which the head of a government or a government institution is required to refuse access to information

contained in a record. Part IV of the Act, which is entitled "Protection of Privacy" deals with balancing the right of access to information with the protection of the interests of the individual in their own personal information.[11]

Class and Harm - Based Exemptions

Exemptions under FOIP fall into two types – class-based and harm-based exemptions.

Class-based Exemptions

Class-based exemptions apply where the information falls within the class of information described in the exemption, and there is no reference to any consequence (or harm) that might result from the release of the information. Class-based exemptions presuppose that the information is inherently sensitive and that an injury or prejudice would automatically flow from release.[12] Examples include section 16 of FOIP which protects cabinet documents. For class-based exemptions, the government institution must show that the information in question falls within the class of records described in the exemption.

Class-based exemptions in FOIP include:

- Section 13;
- Section 14;
- Parts of section 15;
- Section 16;
- Section 17;
- Parts of section 18;
- Parts of section 19; and
- Section 22.

[11] *Hande v University of Saskatchewan*, QBG 1222 of 2018, May 21, 2019 at [15].
[12] Government of Canada, Department of Justice, Resource, *Strengthening the Access to Information Act,* https://www.justice.gc.ca/eng/rp-pr/csj-sjc/atip-aiprp/atia-lai/p5.html, accessed June 7, 2019.

Harm-based Exemptions

Harm-based exemptions, on the other hand, are based on a determination by the government institution that it is reasonable to expect that some injury, harm, or prejudice will occur if the information is released.[13] Examples include subsection 19(1)(c) of FOIP which contemplates three different types of harm to a third party – financial loss or gain, prejudice to competitive position or interference with contractual or other negotiations.

Harm-based exemptions in FOIP include:

- Parts of section 15;
- Parts of section 18;
- Parts of section 19;
- Section 20; and
- Section 21.

For harm-based exemptions to apply there must be objective grounds for believing that disclosing the information could result in the harm alleged. The government institution (or third party) does not have to prove that the harm is probable but needs to show that there is a likelihood the harm will occur if any of the information or records were released.

In *British Columbia (Minister of Citizens' Service) v. British Columbia (Information and Privacy Commissioner), (2012),* Justice Bracken confirmed that it is the release of the information itself that must give rise to a reasonable expectation of harm.

The Supreme Court of Canada in *Ontario (Community Safety and Correctional Service) v. Ontario (Information and Privacy Commissioner), (2014)* set out the standard of proof for harms-based provisions as follows:

> This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the

[13] Government of Canada, Department of Justice, Resource, *Strengthening the Access to Information Act,* https://www.justice.gc.ca/eng/rp-pr/csj-sjc/atip-aiprp/atia-lai/p5.html, accessed June 7, 2019.

nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences"…

Mandatory & Discretionary Exemptions

The basis on which the exemptions are applied by the government institution also varies. In some cases, it is mandatory that the exemption be applied. In other cases, the head of the government institution has discretion as to whether to apply the exemption.[14]

The Legislation Act, SS 2019, c L-10.2 provides the following clarification on the terms "shall", "must" and "may":

2-30(1) In the English version of an enactment:

(a) **"shall"** shall be interpreted as imperative;

(b) **"must"** shall be interpreted as imperative; and

(c) **"may"** shall be interpreted as permissive and empowering.

Mandatory Exemptions

A mandatory exemption is one where the government institution has no, or a more limited, discretion regarding whether or not to apply the exemption. That is, if the information is covered by the exemption and the conditions for the exercise of discretion do not exist, then it must not be disclosed. Mandatory exemptions can be contrasted with discretionary exemptions, where the head of the government institution must turn their mind actively to the question of whether or not the information should be protected or released.[15]

Mandatory exemptions begin with the phrase "A head **shall** refuse…"

Shall is to be interpreted as imperative.[16]

The four mandatory exemptions in FOIP are as follows:

- Records from other governments (section 13);

[14] Government of Canada, Department of Justice, Resource, *Strengthening the Access to Information Act,* https://www.justice.gc.ca/eng/rp-pr/csj-sjc/atip-aiprp/atia-lai/p5.html, accessed June 7, 2019.
[15] Government of Canada, Department of Justice, Resource, *Strengthening the Access to Information Act,* https://www.justice.gc.ca/eng/rp-pr/csj-sjc/atip-aiprp/atia-lai/p5.html, accessed June 7, 2019.
[16] *The Legislation Act*, S.S. 2019, Chapter L-10.2 at ss. 2-30.

- Cabinet documents (section 16);
- Third party business information (section 19); and
- Personal information (subsection 29(1)).

The government institution must weigh all the criteria, factors and tests relating to the mandatory exemption before deciding whether the exemption applies.

Information that falls within a mandatory exemption can be disclosed in some circumstances. For instance, where there is consent to release (e.g., 13(1) of FOIP), authority to release without consent (e.g., subsection 29(2) of FOIP), enough time has passed (16(2)(a) of FOIP) or there is a public interest override. For more on public interest overrides, see *Public Interest Override* later in this Chapter.

Discretionary Exemptions

Discretionary exemptions offer discretion for the government institution. In other words, disclosure can still occur even where a discretionary exemption is found to apply.

Discretionary exemptions begin with the phrase "A head **may** refuse…"

May is to be interpreted as permissive and empowering.[17]

Fish J. provided guidance in the Supreme Court of Canada decision *Blank v. Canada (Minister of Justice) (2006)*, when dealing with a discretionary exemption in the federal *Access to Information Act*. In the majority judgment for the Court, he observed that:

> The language of [the solicitor-client exemption] is, moreover permissive. It provides that the Minister *may* invoke the privilege. This permissive language promotes disclosure by encouraging the Minister to refrain from invoking the privilege unless it is thought necessary to do so in the public interest. And it thus supports an interpretation that favours *more* government disclosure, not *less*.[18]

[17] *The Legislation Act*, S.S. 2019, Chapter L-10.2 at ss. 2-30.
[18] *Blank v. Canada (Minister of Justice)*, [2006] 2 SCR 319, 2006 SCC 39 (CanLII) at [52]. Cited in SK OIPC Review Report LA-2007-001 at [58].

All of the remaining exemptions in Part III of FOIP are discretionary exemptions. This includes:

- Information injurious to intergovernmental relations or national defence (section 14);
- Law enforcement and investigations (section 15);
- Advice from officials (section 17);
- Economic and other interests (section 18);
- Testing procedures, tests, and audits (section 20);
- Danger to health or safety (section 21); and
- Solicitor-client privilege (section 22).

A decision to apply a discretionary exemption requires two steps:

1. The head must determine whether the exemption applies; and

2. If it does, the head must go on to ask whether, having regard to all relevant interests, including public interest in disclosure, disclosure should be made.[19]

To determine the first step, the tests provided in this guide can be a starting point. For the second step, the following guidance on the exercise of discretion can assist.

Exercise of Discretion

The exercise of discretion is fundamental to applying FOIP. 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 can be released despite a discretionary exemption being found to apply.

Exercise of discretionary power means making a decision that cannot be determined to be right or wrong in an objective sense.[20]

A discretion conferred by statute must be exercised consistently with the purposes underlying its grant. It follows that to properly exercise this discretion, the head must weigh the considerations for and against disclosure, including the public interest in disclosure.[21]

[19] *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 at [66].
[20] SK OIPC Resource, *Dictionary: Terms & Phrases in FOIP, LA FOIP & HIPA* at p. 15.
[21] *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 at [46].

Some factors that should be considered when exercising discretion include:

- The general purposes of the Act (i.e., government institutions should make information available to the public, and individuals should have access to personal information about themselves).
- The wording of the discretionary exemption and the interests which the exemption 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 government institution 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 government institution.
- Whether the disclosure of the information will increase public confidence in the operation of the government institution.
- The age of the record.
- Whether there is a definite and compelling need to release the record.
- Whether the Commissioner's recommendations have ruled that similar types of records or information should be released.[22]

Taking a "blanket approach" to applying exemptions may demonstrate that the government institution has not exercised its discretion or has exercised it improperly. Although it may be proper for a decision maker to adopt a policy under which decisions are made, it is not proper to apply this policy inflexibly to all cases. In order to preserve the discretionary aspect of a decision, the head must take into consideration factors personal to the applicant and must ensure that the decision conforms to the policies, objects, and provisions of the Act.[23]

The Supreme Court of Canada ruling *Ontario (Public Safety and Security) v. Criminal Lawyers' Association, (2010)* confirmed the authority of the Information and Privacy Commissioner of Ontario to quash a decision not to disclose information pursuant to a discretionary exemption and to return the matter for reconsideration to the head of the public body.[24]

[22] SK OIPC Review Report 305-2016 at [35], Office of the Privacy Commissioner of Canada Resource, *Access to Information and Privacy, Process and Compliance Manual* at pp. 62 and 63.
[23] SK OIPC Investigation Report LA-2010-001 at [36], SK OIPC Review Reports F-2006-001 at [69], F-2014-001 at [66].
[24] Referenced in SK OIPC Review Report 305-2016 at [36].

The Supreme Court also considered the following factors to be relevant to the review of discretion:

- The decision was made in bad faith.
- The decision was made for an improper purpose.
- The decision took into account irrelevant considerations.
- The decision failed to take into account relevant considerations.[25]

When a government institution exercises its statutory discretion in a manner that results in information being withheld from disclosure, that discretion is properly reviewed by the Commissioner.[26] During a review of a discretionary exemption, the Commissioner may recommend that the head of the government institution reconsider its exercise of discretion if the Commissioner feels one of these factors played a part in the original decision to withhold records. However, the Commissioner will not substitute their own discretion for that of the head.[27]

IPC Findings

In Review Report 305-2016, the Commissioner recommended the head of Executive Council reconsider the use of discretion in withholding an email under subsection 17(1)(a) of FOIP. In making this recommendation, the Commissioner noted that the advice in the email was not about a proposed policy or direction of the government organization but rather the best way to communicate a particular message to public servants. It did not appear that Executive Council took into account the nature of the record and the extent to which the record was significant or sensitive to Executive Council.

In Review Report 086-2018, the Commissioner recommended the Ministry of Health reconsider its exercise of discretion in withholding a record that would reveal the content of draft or subordinate legislation (subsection 17(1)(e) of FOIP). In making this recommendation, the Commissioner noted that the record was 14 years old, and the specific piece of legislation had been amended five times since the record was created.

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[25] *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 at [71], referenced in SK OIPC Review Report 305-2016 at [37]. The Offices of the Information and Privacy Commissioners of British Columbia, Alberta and Ontario have also relied on these four factors.
[26] *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 at [68] to [74]. Referenced in the Office of the British Columbia Information and Privacy Commissioner (BC IPC) Decision F10-08 at [41].
[27] SK OIPC Review Report 305-2016 at [38].

Public Interest Override

FOIP does not contain an overarching public interest override which would require that information be disclosed in all cases where the general public interest in disclosure outweighs the specific interest which is intended to be protected by the exempting provision. Rather, the public interest in disclosure is addressed on a case-by-case basis only in connection with two exemptions in FOIP.[28] These are subsections 19(3) and 29(2)(o).

The purpose of adding a public interest override includes promoting democracy by increasing public participation. When considering a public interest override, the government institution should create a list of factors in favour of withholding and public interest factors for releasing. This will help when it comes to assessing the relative weight of the factors.[29]

Generally, a government institution should not consider factors such as embarrassment, loss of confidence in the government, potential misunderstanding or that release could result in unnecessary confusion and debate.[30]

Subsection 19(3)

Third party information

19(3) Subject to Part V, a head may give access to a record that contains information described in subsection (1) if:

(a) disclosure of that information could reasonably be expected to be in the public interest as it relates to public health, public safety or protection of the environment; and

(b) the public interest in disclosure could reasonably be expected to clearly outweigh in importance any:

(i) financial loss or gain to;

(ii) prejudice to the competitive position of; or

(iii) interference with contractual or other negotiations of;

a third party.

[28] Government of Canada, Department of Justice, Resource, *Strengthening the Access to Information Act,* https://www.justice.gc.ca/eng/rp-pr/csj-sjc/atip-aiprp/atia-lai/p5.html, accessed June 7, 2019.
[29] Office of the Newfoundland and Labrador Information and Privacy Commissioner (NFLD IPC), Resource, *Guidelines for Public Interest Override* at pp. 2 and 3.
[30] NFLD IPC Resource, *Guidelines for Public Interest Override* at pp. 2 and 3.

Subsection 19(3) of FOIP is a discretionary provision for the release of third-party information in circumstances where the head of the government institution forms the opinion that disclosure "could reasonably be in the public interest as it relates to public health, public safety or protection of the environment". For more on this provision, see subsection 19(3) later in this Chapter.

IPC Findings

The Commissioner considered subsection 19(3) of FOIP in Review Report 043-2015. An applicant made an access to information request to the Ministry of Environment for the "2012 and 2013 Water and Air Quality Compliance Reports". The Ministry withheld portions of the two reports citing subsections 19(1)(b) and (c) of FOIP (third party information). Upon review, the Commissioner found that subsection 19(1)(c) of FOIP applied to portions of the reports. Further, the Commissioner found that the public interest resulting from disclosure of the information would outweigh in importance any financial loss or prejudice to the competitive position of the third party. As such, the Commissioner found that subsection 19(3) of FOIP applied. The Commissioner recommended release.

Subsection 29(2)(o)

Disclosure of personal information

29(2) Subject to any other Act or regulation, personal information in the possession or under the control of a government institution may be disclosed:

…

(o) for any purpose where, in the opinion of the head:

(i) the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure; or

(ii) disclosure would clearly benefit the individual to whom the information relates;

Subsection 29(2)(o) of FOIP is a discretionary provision for the release of personal information without consent in circumstances where the head of the government institution forms the opinion that the public interest "clearly outweighs any invasion of privacy" or where disclosure would "clearly benefit the individual to whom the information relates." For more on this provision, see the *Guide to FOIP*, Chapter 5, "Third Party Information" or Chapter 6, "Protection of Privacy."

Where a government institution intends to rely on this provision to release personal information in response to an access to information request, notification is required to the individual to whom the information relates pursuant to the third-party notification requirements outlined at subsection 34(1)(b) of FOIP.

IPC Findings

The Commissioner considered the equivalent subsection in *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP) in Investigation Report 092-2015 to 095-2015. The investigation involved the collection and disclosure of a care aide's personal information. The Commissioner found that there was a public interest in the release of the information and that the public interest outweighed any invasion of privacy.

Section 13: Records From Other Governments

Records from other governments

13(1) A head shall refuse to give access to information contained in a record that was obtained in confidence, implicitly or explicitly, from:

(a) the Government of Canada or its agencies, Crown corporations or other institutions;

(b) the government of another province or territory of Canada, or its agencies, Crown corporations or other institutions;

(c) the government of a foreign jurisdiction or its institutions; or

(d) an international organization of states or its institutions;

unless the government or institution from which the information was obtained consents to the disclosure or makes the information public.

(2) A head may refuse to give access to information contained in a record that was obtained in confidence, implicitly or explicitly, from a local authority as defined in the regulations.

Subsection 13(1) of FOIP is a mandatory class-based provision. It permits refusal of access to information in records received in confidence both formally and informally from other governments including its agencies or institutions. When considering this provision, government institutions should determine whether there is consent to release the information or if the information has been made public by the organization to which the information was obtained.

Subsection 13(1)(a)

Records from other governments

13(1) A head shall refuse to give access to information contained in a record that was obtained in confidence, implicitly or explicitly, from:

(a) the Government of Canada or its agencies, Crown corporations or other institutions;

…

unless the government or institution from which the information was obtained consents to the disclosure or makes the information public.

Subsection 13(1)(a) of FOIP is a mandatory class-based exemption. It permits refusal of access to information in a record where the information was obtained in confidence, implicitly or explicitly from the Government of Canada unless there is consent to release or the information was made public. It includes the Government of Canada's agencies, Crown corporations and other institutions.

The following three-part test can be applied:

1. **Was the information obtained from the Government of Canada or its agencies, Crown corporations or other institutions?**

For this exemption to apply, the agencies in question must qualify as either "*Government of Canada or its agencies, Crown corporations or other institutions*". Because of the possessive pronoun in this clause, "agencies" and "other institutions" should be understood as federal agencies and federal institutions. For "other institutions", it should be either federal government institutions as defined by the federal *Access to Information Act* or institutions controlled by the federal government.[31]

For some assistance, Schedule 1 (Section 3) of the federal *Access to Information Act* provides a list of federal government institutions.

Obtained means to acquire in any way; to get possession of; to procure; or to get a hold of by effort.[32]

[31] SK OIPC Review Report F-2006-002 at [23] and [32].
[32] Originated from Campbell Black, Henry, 1990. *Black's Law Dictionary, 6th Edition*. St. Paul, Minn.: West Group. Adopted by AB IPC in Order 2000-021 at [26]. Adopted in SK OIPC Review Report F-2006-001 at [58] and [59]. Also, found in SK OIPC Review Report F-2006-002 at [39].

A government institution could obtain information either intentionally or unintentionally. It can also include information that was received indirectly provided its original source was the Government of Canada. However, to obtain information suggests that the government institution did not create it. Regardless, the provision is not so much driven by the source of the record to which access is sought as it is by the confidential nature and source of the information it contains. As such, authorship (or who created the record) is irrelevant.[33]

Section 13 of FOIP uses the term "information contained in a record" rather than "a record" like other exemptions in FOIP. Therefore, the exemption can apply to information contained within a record that was authored by the government institution provided the information at issue was obtained from the Government of Canada.

Information means facts or knowledge provided or learned as a result of research or study.[34]

IPC Findings

In Review Report F-2006-002, the Commissioner considered subsection 13(1)(a) of FOIP. The Commissioner found that the analysis conducted by Saskatchewan Research Council (SRC) on samples provided by Environment Canada met the first part of the test because Environment Canada voluntarily supplied samples to SRC and requested that SRC analyze the samples and report back. Although the record was prepared by SRC, it was built upon information provided by Environment Canada.

2. Was the information obtained implicitly or explicitly in confidence?

In confidence usually describes a situation of mutual trust in which private matters are relayed or reported. Information obtained *in confidence* means that the provider of the information has stipulated how the information can be disseminated.[35] In order for confidence to be found, there must be an implicit or explicit agreement or understanding of confidentiality on the part of both the government institution and the party that provided the information.[36]

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[33] *Saskatchewan (Ministry of Health) v West*, 2022 SKCA 18 at [46] and [47].
[34] Pearsall, Judy, *Concise Oxford Dictionary*, *10th Ed.* at p. 727, (Oxford University Press), Cited in SK OIPC Review Report F-2006-002 at [45].
[35] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 104, SK OIPC Review Reports F-2006-002 at [51], H-2008-002 at [73], ON IPC Order MO-1896 at p. 8.
[36] SK OIPC Review Reports F-2006-002 at [52], LA-2013-002 at [57]; ON IPC Order MO-1896 at p. 8.

The expectation of confidentiality must be reasonable and must have an objective basis.[37] Whether the information is confidential will depend upon its content, its purposes, and the circumstances in which it was compiled or communicated (*Corporate Express Canada, Inc. v. The President and Vice Chancellor of Memorial University of Newfoundland*, Gary Kachanoski, *(2014)*).

Once it has been established that the executive branch of government obtained a record from another government in confidence, the continued confidentiality of that record must be presumed, unless the other government has consented to disclosure or has made the information public.[38] In other words, there are no time limits on the confidentiality. Just because a record might be old, it does not lose its confidential nature.

Implicitly means that the confidentiality is understood even though there is no actual statement of confidentiality, agreement or other physical evidence of the understanding that the information will be kept confidential.[39]

Factors to consider when determining whether information was obtained in confidence *implicitly* include (not exhaustive):

- What is the nature of the information. Would a reasonable person regard it as confidential. Would it ordinarily be kept confidential by the government institution or the party that provided the information.[40]
- Was the information treated consistently in a manner that indicated a concern for its protection by the government institution and the party that provided the information from the point it was obtained until the present time.[41]
- Is the information available from sources to which the public has access.[42]
- Does the government institution have any internal policies or procedures that speak to how records such as the one in question are to be handled confidentially.
- Was there a mutual understanding that the information would be held in confidence. **Mutual understanding** means that the government institution and the party that provided the information both had the same understanding regarding the

[37] SK OIPC Review Reports F-2012-001/LA-2012-001 at [32], LA-2013-002 at [49]; ON IPC Orders PO-2273 at p. 7 and PO-2283 at p. 10.
[38] *Saskatchewan (Ministry of Health) v West*, 2022 SKCA 18 at [25].
[39] SK OIPC Review Reports F-2006-002 at [57], F-2009-001 at [62], F-2012-001/LA-2012-001 at [29], LA-2013-002 at [49], F-2014-002 at [47].
[40] BC IPC Orders 331-1999 at [8], F13-01 at [23]; Office of the Nova Scotia Information and Privacy Commissioner (NS IPC) Review Reports 17-03 at [34], 16-09 at [44]; Office of the Prince Edward Island Information and Privacy Commissioner (PEI IPC) Order FI-16-006 at [19].
[41] ON IPC Orders PO-2273 at p. 8, PO-2283 at p. 10.
[42] ON IPC Orders PO-2273 at p. 8, PO-2283 at p. 10.

confidentiality of the information at the time it was provided. If one party intends the information to be kept confidential but the other does not, the information is not considered to have been obtained in confidence. However, mutual understanding alone is not sufficient. Additional factors must exist.[43]

The preceding factors are not a test but rather guidance on factors to consider. It is not an exhaustive list. Each case will require different supporting arguments. The bare assertion that the information was obtained implicitly in confidence would not be sufficient.[44]

Explicitly 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 obtained with the understanding that it would be kept confidential.[45]

Factors to consider when determining if information was obtained in confidence *explicitly* include (not exhaustive):

- The existence of an express condition of confidentiality between the government institution and the party that provided the information.[46]
- The fact that the government institution requested the information be provided in a sealed envelope and/or outlined its confidentiality intentions prior to the information being provided.[47]

The preceding factors are not a test but rather guidance on factors to consider. It is not an exhaustive list. Each case will require different supporting arguments.

Simply labelling documents as "confidential" does not, on its own, make the documents confidential (i.e., confidentiality stamps or standard automatic confidentiality statements at the end of emails). It is just one factor that we consider when determining whether the information was explicitly supplied in confidence.[48]

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[43] *Jacques Whitford Environment Ltd. v. Canada (Minister of National Defence)*, 2001 FCT 556 at [40]; SK OIPC Review Reports F-2006-002 at [52], LA-2013-002 at [58] to [59]; ON IPC Order MO-1896 at p. 8; BC IPC Order F-11-08 at [32].
[44] SK OIPC Review Report LA-2013-002 at [60].
[45] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at pp. 104 and 105.
[46] SK OIPC Review Reports F-2006-002 at [56], LA-2013-003 at [113], F-2014-002 at [47]; PEI IPC Order 03-006 at p. 5; AB IPC Orders 97-013 at [23] to [24], 2001-008 at [54].
[47] SK OIPC Review Reports F-2006-002 at [56], F-2012-001/LA-2012-001 at [29], LA-2013-002 at [49], LA-2013-003 at [113], F-2014-002 at [47]; PEI IPC Order 03-006 at p. 5; AB IPC Order 97-013 at [25].
[48] SK OIPC Review Report F-2012-001/LA-2012-001 at [43].

3. **Is there consent to disclose the information or has the information been made public?**

Subsection 13(1)(a) has a built-in exception. The information contained in the record can be disclosed if the Government of Canada (or its agencies, Crown corporations or other institutions) agrees to its disclosure or if it has made the information public.

Consent in this context means there is an agreement, approval, or permission to disclose the information.[49]

Public in this context means the information in the record is open to view by the public.[50]

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, posted on a website).[51]

Consultation with the other party or parties from which the information was obtained should take place to determine if either consent will be given or if the information has or will be made public.[52]

Subsection 13(1)(b)

Records from other governments

13(1) A head shall refuse to give access to information contained in a record that was obtained in confidence, implicitly or explicitly, from:

…

(b) the government of another province or territory of Canada, or its agencies, Crown corporations or other institutions;

…

unless the government or institution from which the information was obtained consents to the disclosure or makes the information public.

Subsection 13(1)(b) of FOIP is a mandatory class-based exemption. It permits refusal of access to information in a record where the information was obtained in confidence,

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[49] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 380.
[50] Adapted from Garner, Bryan A., 2004. *Black's Law Dictionary, 8th Edition*. St. Paul, Minn.: West Group at p. 1301, relied on in part in *Germain v. Automobile Injury Appeal Commission,* 2009 SKQB 106 (CanLII) at [69] and [72]; cited in part in SK OIPC Investigation Report LA-2012-001 at [14] to [17].
[51] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 208.
[52] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 164.

implicitly or explicitly from another provincial or territorial government in Canada unless there is consent to release or the information was made public. It includes the province or territory's agencies, Crown corporations and other institutions.

The following three-part test can be applied:

1. **Was the information obtained from the government of another province or territory of Canada, or its agencies, Crown corporations or other institutions?**

Obtained means to acquire in any way; to get possession of; to procure; or to get a hold of by effort.[53]

A government institution could obtain information either intentionally or unintentionally. It can also include information that was received indirectly provided its original source was the government of another province or territory of Canada. However, to obtain information suggests that the government institution did not create it. Regardless, the provision is not so much driven by the source of the record to which access is sought as it is by the confidential nature and source of the information it contains. As such, authorship (or who created the record) is irrelevant.[54]

Section 13 of FOIP uses the term "information contained in a record" rather than "a record" like other exemptions. Therefore, the exemption can include information within a record that was authored by the government institution provided the information at issue was obtained from the government of another province or territory of Canada.

Information means facts or knowledge provided or learned as a result of research or study.[55]

[53] Originated from Campbell Black, Henry, 1990. *Black's Law Dictionary, 6th Edition*. St. Paul, Minn.: West Group. Adopted by AB IPC in Order 2000-021 at [26]. Adopted in SK OIPC Review Report F-2006-001 at [58] and [59]. Also, found in SK OIPC Review Report F-2006-002 at [39].
[54] *Saskatchewan (Ministry of Health) v West*, 2022 SKCA 18 at [46] and [47].
[55] Pearsall, Judy, *Concise Oxford Dictionary*, 10th Ed. at p. 727, (Oxford University Press), Cited in Review Report F-2006-002 at [45].

IPC Findings

In Review Report 016-2016, the Commissioner considered whether records created by the Ministry of Health qualified as information obtained from the government of another province or territory of Canada. The records were summaries of specific telephone conversations with counterparts in three other provinces. The Commissioner found that the summaries, although created by the Ministry of Health, constituted information obtained from governments of other provinces of Canada. Therefore, the first part of the test was met.

In Review Report 051-2017, the Commissioner found that the North American Strategy for Competitiveness (NASCO) did not qualify for the first part of the test. While the members of NASCO may have included representatives of governments, NASCO itself was not an entity that acted on behalf of any government of another province, territory of Canada or its agencies, Crown corporations or other institutions. As such, the Commissioner found subsection 13(1)(b) of FOIP did not apply.

2. Was the information obtained implicitly or explicitly in confidence?

In confidence usually describes a situation of mutual trust in which private matters are relayed or reported. Information obtained *in confidence* means that the provider of the information has stipulated how the information can be disseminated.[56] In order for confidence to be found, there must be an implicit or explicit agreement or understanding of confidentiality on the part of both the government institution and the party that provided the information.[57]

The expectation of confidentiality must be reasonable and must have an objective basis.[58] Whether the information is confidential will depend upon its content, its purposes, and the circumstances in which it was compiled or communicated. (*Corporate Express Canada, Inc. v. The President and Vice Chancellor of Memorial University of Newfoundland*, Gary Kachanoski, *(2014)*)

Once it has been established that the executive branch of government obtained a record from another government in confidence, the continued confidentiality of that record must be presumed, unless the other government has consented to disclosure or has made the

[56] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 104; SK OIPC Review Reports F-2006-002 at [51], H-2008-002 at [73]; ON IPC Order MO-1896 at p. 8.
[57] SK OIPC Review Reports F-2006-002 at [52], LA-2013-002 at [57]; ON IPC Order MO-1896 at p. 8.
[58] SK OIPC Review Reports F-2012-001/LA-2012-001 at [32], LA-2013-002 at [49]; ON IPC Orders PO-2273 at p. 7 and PO-2283 at p. 10.

information public.[59] In other words, there are no time limits on the confidentiality. Just because a record might be old, it does not lose its confidential nature.

Implicitly means that the confidentiality is understood even though there is no actual statement of confidentiality, agreement or other physical evidence of the understanding that the information will be kept confidential.[60]

Factors to consider when determining whether information was obtained in confidence *implicitly* include (not exhaustive):

- What is the nature of the information. Would a reasonable person regard it as confidential. Would it ordinarily be kept confidential by the government institution or the party that provided the information.[61]
- Was the information treated consistently in a manner that indicated a concern for its protection by the government institution and the party that provided the information from the point it was obtained until the present time.[62]
- Is the information available from sources to which the public has access.[63]
- Does the government institution have any internal policies or procedures that speak to how records such as the one in question are to be handled confidentially.
- Was there a mutual understanding that the information would be held in confidence. **Mutual understanding** means that the government institution and the party that provided the information both had the same understanding regarding the confidentiality of the information at the time it was provided. If one party intends the information to be kept confidential but the other does not, the information is not considered to have been obtained in confidence. However, mutual understanding alone is not sufficient. Additional factors must exist.[64]

[59] *Saskatchewan (Ministry of Health) v West*, 2022 SKCA 18 at [25].
[60] SK OIPC Review Reports F-2006-002 at [57], F-2009-001 at [62], F-2012-001/LA-2012-001 at [29], LA-2013-002 at [49], F-2014-002 at [47].
[61] BC IPC Orders 331-1999 at [8], F13-01 at [23]; NS IPC Review Reports 17-03 at [34], 16-09 at [44]; PEI IPC Order FI-16-006 at [19].
[62] ON IPC Orders PO-2273 at p. 8, PO-2283 at p. 10.
[63] ON IPC Orders PO-2273 at p. 8, PO-2283 at p. 10.
[64] *Jacques Whitford Environment Ltd. v. Canada (Minister of National Defence)*, 2001 FCT 556 at [40]; SK OIPC Review Reports F-2006-002 at [52], LA-2013-002 at [58] to [59]; ON IPC Order MO-1896 at p. 8; BC IPC Order F-11-08 at [32].

The preceding factors are not a test but rather guidance on factors to consider. It is not an exhaustive list. Each case will require different supporting arguments. The bare assertion that the information was obtained implicitly in confidence would not be sufficient.[65]

Explicitly 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 obtained with the understanding that it would be kept confidential.[66]

Factors to consider when determining if information was obtained in confidence *explicitly* include (not exhaustive):

- The existence of an express condition of confidentiality between the government institution and the party that provided the information.[67]
- The fact that the government institution requested the information be provided in a sealed envelope and/or outlined its confidentiality intentions prior to the information being provided.[68]

The preceding factors are not a test but rather guidance on factors to consider. It is not an exhaustive list. Each case will require different supporting arguments.

Simply labelling documents as "confidential" does not, on its own, make the documents confidential (i.e., confidentiality stamps or standard automatic confidentiality statements at the end of emails). It is just one factor that we consider when determining whether the information was explicitly supplied in confidence.[69]

3. Is there consent to disclose the information or has the information been made public?

Subsection 13(1)(b) has a built-in exception. The information contained in the record can be disclosed if the government of the other province or territory (or its agencies, Crown corporations or other institutions) agrees to its disclosure or if it has made the information public.

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[65] SK OIPC Review Report LA-2013-002 at [60].
[66] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at pp. 104 and 105.
[67] SK OIPC Review Reports F-2006-002 at [56], LA-2013-003 at [113], F-2014-002 at [47]; PEI IPC Order 03-006 at p. 5; AB IPC Orders 97-013 at [23] to [24], 2001-008 at [54].
[68] SK OIPC Review Reports F-2006-002 at [56], F-2012-001/LA-2012-001 at [29], LA-2013-002 at [49], LA-2013-003 at [113], F-2014-002 at [47]; PEI IPC Order 03-006 at p. 5; AB IPC Order 97-013 at [25].
[69] SK OIPC Review Report F-2012-001/LA-2012-001 at [43].

Consent in this context means there is an agreement, approval or permission to disclose the information.[70]

Public in this context means the information in the record is open to view by the public.[71]

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, posted to a website).[72]

Consultation with the other party or parties from which the information was obtained should take place to determine if either consent will be given or if the information has or will be made public.[73]

Subsection 13(1)(c)

Records from other governments

13(1) A head shall refuse to give access to information contained in a record that was obtained in confidence, implicitly or explicitly, from:

…

(c) the government of a foreign jurisdiction or its institutions;

…

unless the government or institution from which the information was obtained consents to the disclosure or makes the information public.

Subsection 13(1)(c) of FOIP is a mandatory class-based exemption. It permits refusal of access to information in a record where the information was obtained in confidence, implicitly or explicitly from the government of a foreign jurisdiction unless there is consent to release or the information was made public.

[70] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 380.
[71] Adapted from Garner, Bryan A., 2004. *Black's Law Dictionary, 8th Edition*. St. Paul, Minn.: West Group at p. 1301, relied on in part in *Germain v. Automobile Injury Appeal Commission,* 2009 SKQB 106 (CanLII) at [69] and [72], cited in part in Investigation Report LA-2012-001 at [14] to [17].
[72] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 208.
[73] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 164.

The following three-part test can be applied:

1. **Was the information obtained from the government of a foreign jurisdiction or its institutions?**

A **foreign jurisdiction** refers to a government or its institutions of any foreign nation or state outside of Canada.[74]

Obtained means to acquire in any way; to get possession of; to procure; or to get a hold of by effort.[75]

A government institution could obtain information either intentionally or unintentionally. It can also include information that was received indirectly provided its original source was the government of a foreign jurisdiction or its institutions. However, to obtain information suggests that the government institution did not create it. Regardless, the provision is not so much driven by the source of the record to which access is sought as it is by the confidential nature and source of the information it contains. As such, authorship (or who created the record) is irrelevant.[76]

Section 13 of FOIP uses the term "information contained in a record" rather than "a record" like other exemptions. Therefore, the exemption can include information within a record that was authored by the government institution provided the information at issue was obtained from the government of a foreign jurisdiction.

Information means facts or knowledge provided or learned as a result of research or study.[77]

IPC Findings

In Review Report 051-2017, the Commissioner found that the North American Strategy for Competitiveness (NASCO) did not qualify for the first part of the test. While the members of NASCO may have included representatives of governments, NASCO itself was not an entity that acted on behalf of, or under the authority of any government of a foreign jurisdiction or its institutions. As such, the Commissioner found subsection 13(1)(c) of FOIP did not apply.

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[74] Adapted from Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 162.
[75] Originated from Campbell Black, Henry, 1990. *Black's Law Dictionary, 6th Edition*. St. Paul, Minn.: West Group. Adopted by AB IPC in Order 2000-021 at [26]. Adopted in SK OIPC Review Report F-2006-001 at [58] and [59]. Also, found in SK OIPC Review Report F-2006-002 at [39].
[76] *Saskatchewan (Ministry of Health) v West*, 2022 SKCA 18 at [46] and [47].
[77] Pearsall, Judy, *Concise Oxford Dictionary, 10th Ed.* at p. 727, (Oxford University Press); Cited in SK OIPC Review Report F-2006-002 at [45].

2. Was the information obtained implicitly or explicitly in confidence?

In confidence usually describes a situation of mutual trust in which private matters are relayed or reported. Information obtained *in confidence* means that the provider of the information has stipulated how the information can be disseminated.[78] In order for confidence to be found, there must be an implicit or explicit agreement or understanding of confidentiality on the part of both the government institution and the party providing the information.[79]

The expectation of confidentiality must be reasonable and must have an objective basis.[80] Whether the information is confidential will depend upon its content, its purposes, and the circumstances in which it was compiled or communicated. (*Corporate Express Canada, Inc. v. The President and Vice Chancellor of Memorial University of Newfoundland*, Gary Kachanoski, *(2014)*)

Once it has been established that the executive branch of government obtained a record from another government in confidence, the continued confidentiality of that record must be presumed, unless the other government has consented to disclosure or has made the information public.[81] In other words, there are no time limits on the confidentiality. Just because a record might be old, it does not lose its confidential nature.

Implicitly means that the confidentiality is understood even though there is no actual statement of confidentiality, agreement, or other physical evidence of the understanding that the information will be kept confidential.[82]

Factors to consider when determining whether information was obtained in confidence *implicitly* include (not exhaustive):

- What is the nature of the information. Would a reasonable person regard it as confidential. Would it ordinarily be kept confidential by the government institution or the party that provided the information.[83]

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[78] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 104; SK OIPC Review Reports F-2006-002 at [51], H-2008-002 at [73]; ON IPC Order MO-1896 at p. 8.
[79] SK OIPC Review Reports F-2006-002 at [52], LA-2013-002 at [57]; ON IPC Order MO-1896 at p. 8.
[80] SK OIPC Review Reports F-2012-001/LA-2012-001 at [32], LA-2013-002 at [49]; ON IPC Orders PO-2273 at p. 7 and PO-2283 at p. 10.
[81] *Saskatchewan (Ministry of Health) v West*, 2022 SKCA 18 at [25].
[82] SK OIPC Review Reports F-2006-002 at [57], F-2009-001 at [62], F-2012-001/LA-2012-001 at [29], LA-2013-002 at [49] and F-2014-002 at [47].
[83] BC IPC Orders 331-1999 at [8], F13-01 at [23]; NS IPC Review Reports 17-03 at [34], 16-09 at [44]; PEI IPC Order FI-16-006 at [19].

- Was the information treated consistently in a manner that indicated a concern for its protection by the government institution and the party that provided the information from the point it was obtained until the present time.[84]
- Is the information available from sources to which the public has access.[85]
- Does the government institution have any internal policies or procedures that speak to how records such as the one in question are to be handled confidentially.
- Was there a mutual understanding that the information would be held in confidence. **Mutual understanding** means that the government institution and the party that provided the information both had the same understanding regarding the confidentiality of the information at the time it was provided. If one party intends the information to be kept confidential but the other does not, the information is not considered to have been obtained in confidence. However, mutual understanding alone is not sufficient. Additional factors must exist in addition.[86]

The preceding factors are not a test but rather guidance on factors to consider. It is not an exhaustive list. Each case will require different supporting arguments. The bare assertion that the information was obtained implicitly in confidence would not be sufficient.[87]

Explicitly 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 obtained with the understanding that it would be kept confidential.[88]

Factors to consider when determining if information was obtained in confidence *explicitly* include (not exhaustive):

- The existence of an express condition of confidentiality between the government institution and the party that provided the information.[89]

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[84] ON IPC Orders PO-2273 at p. 8, PO-2283 at p. 10.
[85] ON IPC Orders PO-2273 at p. 8, PO-2283 at p. 10.
[86] *Jacques Whitford Environment Ltd. v. Canada (Minister of National Defence)*, 2001 FCT 556 at [40]; SK OIPC Review Reports F-2006-002 at [52], LA-2013-002 at [58] to [59]; ON IPC Order MO-1896 at p. 8; BC IPC Order F-11-08 at [32].
[87] SK OIPC Review Report LA-2013-002 at [60].
[88] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at pp. 104 and 105.
[89] SK OIPC Review Reports F-2006-002 at [56], LA-2013-003 at [113], F-2014-002 at [47]; PEI IPC Order 03-006 at p. 5; AB IPC Orders 97-013 at [23] to [24], 2001-008 at [54].

- The fact that the government institution requested the information be provided in a sealed envelope and/or outlined its confidentiality intentions prior to the information being provided.[90]

The preceding factors are not a test but rather guidance on factors to consider. It is not an exhaustive list. Each case will require different supporting arguments.

Simply labelling documents as "confidential" does not, on its own, make the documents confidential (i.e., confidentiality stamps or standard automatic confidentiality statements at the end of emails). It is just one factor that we consider when determining whether the information was explicitly supplied in confidence.[91]

3. Is there consent to disclose the information or has the information been made public?

Subsection 13(1)(c) has a built-in exception. The information contained in the record can be disclosed if the government of the foreign jurisdiction (or its institutions) agrees to its disclosure or if it has made the information public.

Consent in this context means there is an agreement, approval or permission to disclose the information.[92]

Public in this context means the information in the record is open to view by the public.[93]

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, posted on a website).[94]

Consultation with the other party or parties from which the information was obtained should take place to determine if either consent will be given or if the information has or will be made public.[95]

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[90] SK OIPC Review Reports F-2006-002 at [56], F-2012-001/LA-2012-001 at [29], LA-2013-002 at [49], LA-2013-003 at [113], F-2014-002 at [47]; PEI IPC Order 03-006 at p. 5; AB IPC Order 97-013 at [25].
[91] SK OIPC Review Report F-2012-001/LA-2012-001 at [43].
[92] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 380.
[93] Adapted from Garner, Bryan A., 2004. *Black's Law Dictionary, 8th Edition*. St. Paul, Minn.: West Group at p. 1301. Relied on in part in *Germain v. Automobile Injury Appeal Commission,* 2009 SKQB 106 (CanLII) at [69] and [72], cited in part in Investigation Report LA-2012-001 at [14] to [17].
[94] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 208.
[95] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 164.

Subsection 13(1)(d)

Records from other governments

13(1) A head shall refuse to give access to information contained in a record that was obtained in confidence, implicitly or explicitly, from:

...

(d) an international organization of states or its institutions;

unless the government or institution from which the information was obtained consents to the disclosure or makes the information public.

Subsection 13(1)(d) of FOIP is a mandatory class-based exemption. It permits refusal of access to information in a record where the information was obtained in confidence, implicitly or explicitly from international organizations of states or its institutions, unless there is consent to release or the information was made public.

The following three-part test can be applied:

1. **Was the information obtained from an international organization of states or its institutions?**

Information means facts or knowledge provided or learned as a result of research or study.[96]

Obtained means to acquire in any way; to get possession of; to procure; or to get a hold of by effort.[97]

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.[98]

A government institution could obtain information either intentionally or unintentionally. It can also include information that was received indirectly provided its original source was the international organization of states. However, to obtain information suggests that the government institution did not create it. Regardless, the provision is not so much driven by the source of the record to which access is sought as it is by the confidential nature and

[96] Pearsall, Judy, *Concise Oxford Dictionary, 10th Ed.* at p. 727, (Oxford University Press), Cited in SK OIPC Review Report F-2006-002 at [45].
[97] Originated from Campbell Black, Henry, 1990. *Black's Law Dictionary, 6th Edition.* St. Paul, Minn.: West Group. Adopted by AB IPC in Order 2000-021 at [26]. Adopted in SK OIPC Review Report F-2006-001 at [58] and [59]. Also, found in SK OIPC Review Report F-2006-002 at [39].
[98] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition,* Chapter 4 at p. 162.

source of the information it contains. As such, authorship (or who created the record) is irrelevant.[99]

Section 13 of FOIP uses the term "information contained in a record" rather than "a record" like other exemptions. Therefore, the exemption can include information within a record that was authored by the government institution provided the information at issue was obtained from the international organization of states.

2. Was the information obtained implicitly or explicitly in confidence?

In confidence usually describes a situation of mutual trust in which private matters are relayed or reported. Information obtained *in confidence* means that the provider of the information has stipulated how the information can be disseminated.[100] In order for confidence to be found, there must be an implicit or explicit agreement or understanding of confidentiality on the part of both the government institution and the party providing the information.[101]

The expectation of confidentiality must be reasonable and must have an objective basis.[102] Whether the information is confidential will depend upon its content, its purposes, and the circumstances in which it was compiled or communicated. (*Corporate Express Canada, Inc. v. The President and Vice Chancellor of Memorial University of Newfoundland*, Gary Kachanoski, *(2014)*)

Once it has been established that the executive branch of government obtained a record from another government in confidence, the continued confidentiality of that record must be presumed, unless the other government has consented to disclosure or has made the information public.[103] In other words, there are no time limits on the confidentiality. Just because a record might be old, it does not lose its confidential nature.

Implicitly means that the confidentiality is understood even though there is no actual statement of confidentiality, agreement or other physical evidence of the understanding that the information will be kept confidential.[104]

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[99] *Saskatchewan (Ministry of Health) v West*, 2022 SKCA 18 at [46] and [47].
[100] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 104; SK OIPC Review Reports F-2006-002 at [51], H-2008-002 at [73]; ON IPC Order MO-1896 at p. 8.
[101] SK OIPC Review Reports F-2006-002 at [52], LA-2013-002 at [57]; ON IPC Order MO-1896 at p. 8.
[102] SK OIPC Review Reports F-2012-001/LA-2012-001 at [32], LA-2013-002 at [49]; ON IPC Orders PO-2273 at p. 7 and PO-2283 at p. 10.
[103] *Saskatchewan (Ministry of Health) v West*, 2022 SKCA 18 at [25].
[104] SK OIPC Review Reports F-2006-002 at [57], F-2009-001 at [62], F-2012-001/LA-2012-001 at [29], LA-2013-002 at [49], F-2014-002 at [47].

Factors to consider when determining whether information was obtained in confidence *implicitly* include (not exhaustive):

- What is the nature of the information. Would a reasonable person regard it as confidential. Would it ordinarily be kept confidential by the government institution or the party that provided the information.[105]
- Was the information treated consistently in a manner that indicated a concern for its protection by the government institution and the party that provided the information from the point it was obtained until the present time.[106]
- Is the information available from sources to which the public has access.[107]
- Does the government institution have any internal policies or procedures that speak to how records such as the one in question are to be handled confidentially.
- Was there a mutual understanding that the information would be held in confidence. **Mutual understanding** means that the government institution and the party that provided the information both had the same understanding regarding the confidentiality of the information at the time it was provided. If one party intends the information to be kept confidential but the other does not, the information is not considered to have been obtained in confidence. However, mutual understanding alone is not sufficient. Additional factors must exist.[108]

The preceding factors are not a test but rather guidance on factors to consider. It is not an exhaustive list. Each case will require different supporting arguments. The bare assertion that the information was obtained implicitly in confidence would not be sufficient.[109]

Explicitly 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 obtained with the understanding that it would be kept confidential.[110]

Factors to consider when determining if information was obtained in confidence *explicitly* include (not exhaustive):

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[105] BC IPC Orders 331-1999 at [8], F13-01 at [23]; NS IPC Review Reports 17-03 at [34], 16-09 at [44]; PEI IPC Order FI-16-006 at [19].
[106] ON IPC Orders PO-2273 at p. 8, PO-2283 at p. 10.
[107] ON IPC Orders PO-2273 at p. 8, PO-2283 at p. 10.
[108] *Jacques Whitford Environment Ltd. v. Canada (Minister of National Defence)*, 2001 FCT 556 at [40]; SK OIPC Review Reports F-2006-002 at [52], LA-2013-002 at [58] to [59]; ON IPC Order MO-1896 at p. 8; BC IPC Order F-11-08 at [32].
[109] SK OIPC Review Report LA-2013-002 at [60].
[110] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at pp. 104 and 105.

- The existence of an express condition of confidentiality between the government institution and the party that provided the information.[111]
- The fact that the government institution requested the information be provided in a sealed envelope and/or outlined its confidentiality intentions prior to the information being provided.[112]

The preceding factors are not a test but rather guidance on factors to consider. It is not an exhaustive list. Each case will require different supporting arguments.

Simply labelling documents as "confidential" does not, on its own, make the documents confidential (i.e., confidentiality stamps or standard automatic confidentiality statements at the end of emails). It is just one factor that we consider when determining whether the information was explicitly supplied in confidence.[113]

3. Is there consent to disclose the information or has the information been made public?

Subsection 13(1)(d) of FOIP has a built-in exception. The information contained in the record can be disclosed if the international organization of states (or its institutions) agrees to its disclosure or if it has made the information public.

Consent in this context means there is an agreement, approval or permission to disclose the information.[114]

Public in this context means the information in the record is open to view by the public.[115]

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, posted on a website).[116]

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[111] SK OIPC Review Reports F-2006-002 at [56], LA-2013-003 at [113], F-2014-002 at [47]; PEI IPC Order 03-006 at p. 5; AB IPC Orders 97-013 at [23] to [24], 2001-008 at [54].
[112] SK OIPC Review Reports F-2006-002 at [56], F-2012-001/LA-2012-001 at [29], LA-2013-002 at [49], LA-2013-003 at [113], F-2014-002 at [47]; PEI IPC Order 03-006 at p. 5; AB IPC Order 97-013 at [25].
[113] SK OIPC Review Report F-2012-001/LA-2012-001 at [43].
[114] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 380.
[115] Adapted from Garner, Bryan A., 2004. *Black's Law Dictionary, 8th Edition*. St. Paul, Minn.: West Group at p. 1301, relied on in part in *Germain v. Automobile Injury Appeal Commission,* 2009 SKQB 106 (CanLII) at [69] and [72], cited in part in Investigation Report LA-2012-001 at [14] to [17].
[116] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 208.

Consultation with the other party or parties from which the information was obtained should take place to determine if either consent will be given or if the information has or will be made public.[117]

Subsection 13(2)

Records from other governments

13(2) A head may refuse to give access to information contained in a record that was obtained in confidence, implicitly or explicitly, from a local authority as defined in the regulations.

Subsection 13(2) of FOIP is a discretionary class-based exemption. The provision permits refusal of access to information in a record where the information was obtained in confidence, implicitly or explicitly from a local authority.

The following two-part test can be applied:

1. **Was the information obtained from a local authority?**

For assistance, subsection 2(2) of *The Freedom of Information and Protection of Privacy Regulations* (FOIP Regulations) points to the definition of a "local authority" found in subsection 2(1)(f) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP).

Information means facts or knowledge provided or learned as a result of research or study.[118]

Obtained means to acquire in any way; to get possession of; to procure; or to get a hold of by effort.[119]

A government institution could obtain information either intentionally or unintentionally. It can also include information that was received indirectly provided its original source was the local authority. However, to obtain information suggests that the government institution did not create it. Regardless, the provision is not so much driven by the source of the record to

[117] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 164.
[118] Pearsall, Judy, *Concise Oxford Dictionary*, *10th Ed.* at p. 727, (Oxford University Press), Cited in SK OIPC Review Report F-2006-002 at [45].
[119] Originated from Campbell Black, Henry, 1990. *Black's Law Dictionary, 6th Edition.* St. Paul, Minn.: West Group. Adopted by AB IPC in Order 2000-021 at [26]. Adopted in SK OIPC Review Report F-2006-001 at [58] and [59]. Also, found in SK OIPC Review Report F-2006-002 at [39].

which access is sought as it is by the confidential nature and source of the information it contains. As such, authorship (or who created the record) is irrelevant.[120]

Section 13 uses the term "information contained in a record" rather than "a record" like other exemptions. Therefore, the exemption can include information within a record that was authored by the government institution provided the information at issue was obtained from a local authority.

2. Was the information obtained implicitly or explicitly in confidence?

In confidence usually describes a situation of mutual trust in which private matters are relayed or reported. Information obtained *in confidence* means that the provider of the information has stipulated how the information can be disseminated.[121] In order for confidence to be found, there must be an implicit or explicit agreement or understanding of confidentiality on the part of both the government institution and the local authority at the time the information was obtained.[122]

The expectation of confidentiality must be reasonable and must have an objective basis.[123] Whether the information is confidential will depend upon its content, its purposes, and the circumstances in which it was compiled or communicated. (*Corporate Express Canada, Inc. v. The President and Vice Chancellor of Memorial University of Newfoundland*, Gary Kachanoski, (2014))

Implicitly means that the confidentiality is understood even though there is no actual statement of confidentiality, agreement or other physical evidence of the understanding that the information will be kept confidential.[124]

Factors to consider when determining whether information was obtained in confidence *implicitly* include (not exhaustive):

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[120] *Saskatchewan (Ministry of Health) v West*, 2022 SKCA 18 at [46] and [47].
[121] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 104; SK OIPC Review Reports F-2006-002 at [51], H-2008-002 at [73]; ON IPC Order MO-1896 at p. 8.
[122] SK OIPC Review Reports F-2006-002 at [52], LA-2013-002 at [57]; ON IPC Order MO-1896 at p. 8.
[123] SK OIPC Review Reports F-2012-001/LA-2012-001 at [32], LA-2013-002 at [49]; ON IPC Orders PO-2273 at p. 7 and PO-2283 at p. 10.
[124] SK OIPC Review Reports F-2006-002 at [57], F-2009-001 at [62], F-2012-001/LA-2012-001 at [29], LA-2013-002 at [49], F-2014-002 at [47].

- What is the nature of the information. Would a reasonable person regard it as confidential. Would it ordinarily be kept confidential by the government institution or the local authority.[125]
- Was the information treated consistently in a manner that indicated a concern for its protection by the government institution and the local authority from the point it was obtained until the present time.[126]
- Is the information available from sources to which the public has access.[127]
- Does the government institution have any internal policies or procedures that speak to how records such as the one in question are to be handled confidentially.
- Was there a mutual understanding that the information would be held in confidence. **Mutual understanding** means that the government institution and the local authority both had the same understanding regarding the confidentiality of the information at the time it was provided. If one party intends the information to be kept confidential but the other does not, the information is not considered to have been obtained in confidence. However, mutual understanding alone is not sufficient. Additional factors must exist.[128]

The preceding factors are not a test but rather guidance on factors to consider. It is not an exhaustive list. Each case will require different supporting arguments. The bare assertion that the information was obtained implicitly in confidence would not be sufficient.[129]

Explicitly 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 obtained with the understanding that it would be kept confidential.[130]

Factors to consider when determining if information was obtained in confidence *explicitly* include (not exhaustive):

- The existence of an express condition of confidentiality between the government institution and the local authority.[131]

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[125] BC IPC Orders 331-1999 at [8], F13-01 at [23]; NS IPC Review Reports 17-03 at [34], 16-09 at [44]; PEI IPC Order FI-16-006 at [19].
[126] ON IPC Orders PO-2273 at p. 8, PO-2283 at p. 10.
[127] ON IPC Orders PO-2273 at p. 8, PO-2283 at p. 10.
[128] *Jacques Whitford Environment Ltd. v. Canada (Minister of National Defence)*, 2001 FCT 556 at [40]; SK OIPC Review Reports F-2006-002 at [52], LA-2013-002 at [58] to [59]; ON IPC Order MO-1896 at p. 8; BC IPC Order F-11-08 at [32].
[129] SK OIPC Review Report LA-2013-002 at [60].
[130] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at pp. 104 and 105.
[131] SK OIPC Review Reports F-2006-002 at [56], LA-2013-003 at [113], F-2014-002 at [47]; PEI IPC Order 03-006 at p. 5; AB IPC Orders 97-013 at [23] to [24] and 2001-008 at [54].

- The fact that the government institution requested the information be provided in a sealed envelope and/or outlined its confidentiality intentions prior to the information being provided.[132]

The preceding factors are not a test but rather guidance on factors to consider. It is not an exhaustive list. Each case will require different supporting arguments.

Simply labelling documents as "confidential" does not, on its own, make the documents confidential (i.e., confidentiality stamps or standard automatic confidentiality statements at the end of emails). It is just one factor that we consider when determining whether the information was explicitly supplied in confidence.[133]

IPC Findings

In Review Report F-2006-001, the Commissioner considered subsection 13(2) of FOIP. An applicant had requested access to a copy of a fire investigation report for a fire that occurred in November 2002 at an apartment building in the City of Regina. The applicant also sought access to any remedial orders that were given to the building owners. The access request was made to Saskatchewan Corrections and Public Safety. The Commissioner found that the Regina Fire Department was an established department of the City of Regina which qualified as a local authority as defined under section 2 of LA FOIP. However, the Commissioner found that the records were not obtained in confidence from the Regina Fire Department.

[132] SK OIPC Review Reports F-2006-002 at [56], F-2012-001/LA-2012-001 at [29], LA-2013-002 at [49], LA-2013-003 at [113], F-2014-002 at [47]; PEI IPC Order 03-006 at p. 5; AB IPC Order 97-013 at [25].
[133] SK OIPC Review Report F-2012-001/LA-2012-001 at [43].

Section 14: Information Injurious to Intergovernmental Relations or National Defence

Information injurious to intergovernmental relations or national defence

14 A head may refuse to give access to a record, the release of which could reasonably be expected to prejudice, interfere with or adversely affect:

(a) relations between the Government of Saskatchewan and another government; or

(b) the defence or security of Canada or of any foreign state allied or associated with Canada.

Section 14 of FOIP is a harm-based discretionary provision. For this provision to apply there must be objective grounds for believing that disclosing the information could result in the harm alleged.

Injurious means harmful; tending to injure.[134]

Subsection 14(a)

Information injurious to intergovernmental relations or national defence

14 A head may refuse to give access to a record, the release of which could reasonably be expected to prejudice, interfere with or adversely affect:

(a) relations between the Government of Saskatchewan and another government;

Subsection 14(a) of FOIP is a discretionary harm-based exemption. It permits refusal of access in situations where the release of a record could reasonably be expected to prejudice, interfere with or adversely affect relations between the Government of Saskatchewan and another government.

Prejudice in this context refers to detriment to intergovernmental relations.[135]

To **interfere** with means to obstruct or make much more difficult.[136]

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[134] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 938.
[135] Adapted from Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 149.
[136] Adapted from Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 192.

To **adversely affect** is to have a harmful or unfavorable impact.[137]

The term **relations** in this context are intended to cover both formal negotiations and more general exchanges and associations between the Government of Saskatchewan and other governments.[138]

To determine the level of harm, the Supreme Court of Canada in *Ontario (Community Safety and Correctional Service) v. Ontario (Information and Privacy Commissioner), (2014)* set out the standard of proof for harms-based provisions as follows:

> This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences"…

In *British Columbia (Minister of Citizens' Service) v. British Columbia (Information and Privacy Commissioner), (2012),* Justice Bracken confirmed it is the release of the information itself that must give rise to a reasonable expectation of harm.

Government institutions should not assume that the harms are self-evident. The harm must be described in a precise and specific way in order to support the application of the provision.

The expectation of harm must be reasonable, but it need not be a certainty. The evidence of harm must:

- Show how the disclosure of the information would cause harm;
- Indicate the extent of harm that would result; and
- Provide facts to support the assertions made.[139]

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[137] Pearsall, Judy, *Concise Oxford English Dictionary*, *10th Ed.* at p. 19, (Oxford University Press).
[138] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 162.
[139] Treasury Board of Canada Secretariat, *Access to Information Manual, Chapter 11.14.5*. Available at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11_14**.** Accessed August 29, 2019.

Subsection 14(b)

Information injurious to intergovernmental relations or national defence

14 A head may refuse to give access to a record, the release of which could reasonably be expected to prejudice, interfere with or adversely affect:

…

(b) the defence or security of Canada or of any foreign state allied or associated with Canada.

Subsection 14(b) of FOIP is a discretionary harm-based exemption. It permits refusal of access in situations where the release of a record could reasonably be expected to prejudice, interfere with or adversely affect the defence or security of Canada or of any foreign state allied or associated with Canada.

Prejudice in this context refers to detriment to national defence or security.[140]

To **interfere** with means to obstruct or make much more difficult.[141]

To **adversely affect** is to have a harmful or unfavorable impact.[142]

Defence means any activity or plan relating to the defence of Canada (or any foreign state allied or associated with Canada), including improvements to its ability to resist attack.[143]

A **foreign state** in this context refers to any allied or associated foreign nation or state, including the component state governments of federated states.[144]

An **allied state** is one with which Canada has concluded formal alliances or treaties.[145]

An **associated state** is one with which Canada may be linked for trade or other purposes outside the scope of a formal alliance.[146]

To determine the level of harm, the Supreme Court of Canada in *Ontario (Community Safety and Correctional Service) v. Ontario (Information and Privacy Commissioner), (2014)* set out the standard of proof for harms-based provisions as follows:

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[140] Adapted from Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 149.
[141] Adapted from Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 192.
[142] Pearsall, Judy, *Concise Oxford English Dictionary*, *10th Ed*. at p. 19, (Oxford University Press).
[143] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 149.
[144] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 162.
[145] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 149.
[146] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 149.

> This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences"…

In *British Columbia (Minister of Citizens' Service) v. British Columbia (Information and Privacy Commissioner), (2012)*, *Justice* Bracken confirmed it is the release of the information itself that must give rise to a reasonable expectation of harm.

Government institutions should not assume that the harms are self-evident. The harm must be described in a precise and specific way in order to support the application of the provision.

The expectation of harm must be reasonable, but it need not be a certainty. The evidence of harm must:

- Show how the disclosure of the information would cause harm;
- Indicate the extent of harm that would result; and
- Provide facts to support the assertions made.[147]

[147] Treasury Board of Canada Secretariat, *Access to Information Manual, Chapter 11.14.5*. Available at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11_14. Accessed August 29, 2019.

Office of the Saskatchewan Information and Privacy Commissioner. Guide to FOIP, Chapter 4, *Exemptions from the Right of Access*. Updated 8 April 2024.

Section 15: Law Enforcement and Investigations

Law enforcement and investigations

15(1) A head may refuse to give access to a record, the release of which could:

(a) prejudice, interfere with or adversely affect the detection, investigation, prevention or prosecution of an offence or the security of a centre of lawful detention;

(a.1) prejudice, interfere with or adversely affect the detection, investigation or prevention of an act or omission that might constitute a terrorist activity as defined in the *Criminal Code;*

(b) be injurious to the enforcement of:

(i) an Act or a regulation; or

(ii) an Act of the Parliament of Canada or a regulation made pursuant to an Act of the Parliament of Canada;

(c) interfere with a lawful investigation or disclose information with respect to a lawful investigation;

(d) be injurious to the Government of Saskatchewan or a government institution in the conduct of existing or anticipated legal proceedings;

(e) reveal investigative techniques or procedures currently in use or likely to be used;

(f) disclose the identity of a confidential source of information or disclose information furnished by that source with respect to a lawful investigation or a law enforcement matter;

(g) deprive a person of a fair trial or impartial adjudication;

(h) facilitate the escape from custody of an individual who is under lawful detention;

(i) reveal law enforcement intelligence information;

(j) facilitate the commission of an offence or tend to impede the detection of an offence;

(k) interfere with a law enforcement matter or disclose information respecting a law enforcement matter;

(k.1) endanger the life or physical safety of a law enforcement officer or any other person;

(k.2) reveal any information relating to or used in the exercise of prosecutorial discretion;

(k.3) reveal a record that has been seized by a law enforcement officer in accordance with an Act or Act of Parliament;

Office of the Saskatchewan Information and Privacy Commissioner. Guide to FOIP, Chapter 4, *Exemptions from the Right of Access*. Updated 8 April 2024.

(l) reveal technical information relating to weapons or potential weapons; or

(m) reveal the security arrangements of particular vehicles, buildings or other structures or systems, including computer or communication systems, or methods employed to protect those vehicles, buildings, structures or systems.

(2) Subsection (1) does not apply to a record that:

(a) provides a general outline of the structure or programs of a law enforcement agency; or

(b) reports, by means of statistical analysis or otherwise, on the degree of success achieved in a law enforcement program.

Section 15 of FOIP recognizes that there is a strong public interest in protecting documents related to law enforcement: see *Ontario (Public Safety and Security) v Criminal Lawyers' Association*, 2010 SCC 23 at para 44, [2010] 1 SCR 815.[148]

Section 15 of FOIP is a discretionary class-based and harm-based provision. Meaning, it contains both class and harm based exemptions.

For the harm based exemptions, section 15 of FOIP uses the word "could" versus "could reasonably be expected to" as seen in other provisions of FOIP. The threshold for "could" is lower than the threshold for "could reasonably be expected to."[149]

Subsection 15(1)(a)

Law enforcement and investigations

15(1) A head may refuse to give access to a record, the release of which could:

(a) prejudice, interfere with or adversely affect the detection, investigation, prevention or prosecution of an offence or the security of a centre of lawful detention;

...

(2) Subsection (1) does not apply to a record that:

(a) provides a general outline of the structure or programs of a law enforcement agency; or

(b) reports, by means of statistical analysis or otherwise, on the degree of success achieved in a law enforcement program.

[148] Stated in *Leo v Global Transportation Hub Authority*, 2019 SKQB 150 at [22].
[149] SK OIPC Review Reports LA-2007-001 at [117], F-2014-001 at [149].

Subsection 15(1)(a) of FOIP is a discretionary harm-based exemption. It permits refusal of access in situations where release of a record could prejudice, interfere with or adversely affect the detection, investigation, prevention or prosecution of an offence or the security of a centre of lawful detention.

Section 15 of FOIP uses the word **could** versus "*could reasonably be expected to*" as seen in other provisions of FOIP. The threshold for *could* is somewhat lower than a reasonable expectation. The requirement for *could* is simply that the release of the information *could* have the specified result. There would still have to be a basis for asserting the harm could occur. If it is fanciful or exceedingly remote, the exemption should not be invoked.[150] For this provision to apply there must be objective grounds for believing that disclosing the information *could* result in the harm alleged.

Prejudice in this context refers to detriment to the detection, investigation, prevention or prosecution of an offence or the security of a centre of lawful detention.[151]

Interfere with includes hindering or hampering an ongoing investigation and anything that would detract from an investigator's ability to pursue the investigation.[152]

Adversely affect in this context means to have a harmful or unfavorable impact[153] on the detection, investigation, prevention or prosecution of an offence or the security of a centre of lawful detention.

Detection is the act of discovering or revealing something that is hidden or barely perceptible, especially to solve a crime.[154]

Investigation can include police, security or administrative investigations or a combination of these. Investigation has been defined, in general terms, as a systematic process of examination, inquiry and observation.[155]

- A **police investigation** is one carried out by the police, or other persons who carry out a policing function that involves investigations.[156] For example, a police investigation may include an investigation by a special constable appointed under *The Police Act, 1990*.

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[150] SK OIPC Review Reports LA-2007-001 at [117], LA-2013-001 at [35], F-2014-001 at [149].
[151] Adapted from Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 149.
[152] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 152.
[153] Pearsall, Judy, *Concise Oxford English Dictionary*, *10th Ed.* at p. 19, (Oxford University Press).
[154] Garner, Bryan A., 2009. *Black's Law Dictionary, Deluxe 10th Edition*. St. Paul, Minn.: West Group at p. 543.
[155] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 146.
[156] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 146.

- A **security investigation** includes activities carried out by, for, or concerning a government institution and relates to the security of the organization and its clients, staff, resources or the public. It includes the work that is done to secure, ensure safety or protect from danger, theft or damage. In order to qualify, the investigation must lead or could lead to a penalty or sanction imposed under a statute, regulation, bylaw or resolution.[157]
- An **administrative investigation** refers to activities undertaken to enforce compliance or to remedy non-compliance with standards, duties and responsibilities imposed by statute or regulation.[158] For example, investigations under *The Securities Act, 1988* as the Act provides for such investigative powers. A **regulation** is understood to mean a regulation as defined by section 1-2 of *The Legislation Act*.

The government institution must have authority to conduct the investigation and the investigation must lead or could lead to penalties or sanctions (i.e., fines, imprisonment, revocation of a license, an order to cease activities).[159] The penalties or sanctions do not have to be imposed by the investigating body to qualify but can be referred to another body to impose the penalty or sanction (e.g., RCMP).[160]

Prevention means the stopping of something, especially something bad, from happening; to hinder or impede.[161] In the context of subsection 15(1)(a) of FOIP, it means the stopping of an offence.

A **prosecution**, in this context, refers to proceedings in respect of a criminal or quasi-criminal charge laid under an enactment of Saskatchewan or Canada and may include regulatory offences that carry true penal consequences such as imprisonment or a significant fine.[162]

Offence means a violation of the law; a crime.[163]

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[157] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 146.
[158] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 146.
[159] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 145.
[160] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 146.
[161] Garner, Bryan A., 2009. *Black's Law Dictionary, Deluxe 10th Edition*. St. Paul, Minn.: West Group at p. 1380.
[162] ON IPC Order PO-3424-I at [27].
[163] Garner, Bryan A., 2009. *Black's Law Dictionary, Deluxe 10th Edition*. St. Paul, Minn.: West Group at p. 1250.

Security means a state of safety or physical integrity.[164] Security includes securing, ensuring safety or protecting from danger, theft or damage.[165] Security means sufficient security.[166]

Lawful detention means any person held in custody pursuant to a valid warrant or other authorized order. It extends to individuals remanded in custody (charged but not yet tried or convicted). It does not include individuals released under bail supervision.[167]

Centre of lawful detention is a centre where persons are detained when suspected of a crime, awaiting trial, or sentencing, found to be an illegal immigrant or youthful offender, or for political reasons. It can also include a centre where persons are in custody under federal or provincial statute.[168] In general, any person held in custody pursuant to a valid warrant or other authorized order is under lawful detention.[169]

When there is a review by the IPC, the government institution is invited to provide a submission (arguments). The government institution should describe the harm in detail to support the application of the provision. Government institutions should not assume that the harm is self-evident on the face of the records.

A government institution cannot rely on subsection 15(1)(a) of FOIP for a record that:

a) Provides a general outline of the structure or programs of a law enforcement agency; or

b) Reports, by means of statistical analysis or otherwise, on the degree of success achieved in a law enforcement program (see subsection 15(2)).

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[164] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 155.
[165] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 146.
[166] *The Legislation Act*, S.S. 2019, Chapter L-10.2 at ss. 2-29.
[167] Government of Newfoundland and Labrador, resource *Access to Information: Policy and Procedures Manual, October 2017* at p. 130.
[168] Adapted from Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 154. Defines "*Persons lawfully detained*".
[169] Government of Ontario, *Freedom of Information and Protection of Privacy Manual, Chapter 5: Exemptions and Exclusions, Law Enforcement*. Available at https://www.ontario.ca/document/freedom-information-and-protection-privacy-manual/chapter-5-exemptions-and-exclusions. Accessed October 8, 2019.

Subsection 15(1)(a.1)

Law enforcement and investigations

15(1) A head may refuse to give access to a record, the release of which could:

…

(a.1) prejudice, interfere with or adversely affect the detection, investigation or prevention of an act or omission that might constitute a terrorist activity as defined in the *Criminal Code;*

…

(2) Subsection (1) does not apply to a record that:

(a) provides a general outline of the structure or programs of a law enforcement agency; or

(b) reports, by means of statistical analysis or otherwise, on the degree of success achieved in a law enforcement program.

Subsection 15(1)(a.1) of FOIP is a discretionary harm-based exemption. It permits refusal of access in situations where release of a record could prejudice, interfere with, or adversely affect the detection, investigation or prevention of an act or omission that might constitute a terrorist activity.

Section 15 of FOIP uses the word **could** versus "*could reasonably be expected to*" as seen in other provisions of FOIP. The threshold for *could* is somewhat lower than a reasonable expectation. The requirement for *could* is simply that the release of the information *could* have the specified result. There would still have to be a basis for asserting the harm could occur. If it is fanciful or exceedingly remote, the exemption should not be invoked.[170] For this provision to apply there must be objective grounds for believing that disclosing the information *could* result in the harm alleged.

Prejudice in this context refers to detriment to the detection, investigation or prevention of an act or omission that might constitute a terrorist activity.[171]

Interfere with includes hindering or hampering the detection, investigation or prevention of an act or omission that might constitute a terrorist activity.[172]

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[170] SK OIPC Review Reports LA-2007-001 at [117], LA-2013-001 at [35], F-2014-001 at [149].
[171] Adapted from Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 149.
[172] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 152.

Adversely affect in this context means to have a harmful or unfavorable impact[173] on the detection, investigation or prevention of an act or omission that might constitute a terrorist activity.

Detection is the act of discovering or revealing something that is hidden or barely perceptible, especially to solve a crime.[174]

Investigation can include police, security or administrative investigations or a combination of these. Investigation has been defined, in general terms, as a systematic process of examination, inquiry and observation.[175]

- A **police investigation** is one carried out by the police, or other persons who carry out a policing function that involves investigations.[176] For example, a police investigation may include an investigation by a special constable appointed under *The Police Act, 1990*.
- A **security investigation** includes activities carried out by, for or concerning a government institution and relates to the security of the organization and its clients, staff, resources or the public. It includes the work that is done to secure, ensure safety or protect from danger, theft or damage. In order to qualify, the investigation must lead or could lead to a penalty or sanction imposed under a statute, regulation, bylaw or resolution.[177]
- An **administrative investigation** refers to activities undertaken to enforce compliance or to remedy non-compliance with standards, duties and responsibilities imposed by statute or regulation.[178] For example, investigations under *The Securities Act, 1988* as the Act provides for such investigative powers. A ***regulation*** is understood to mean a regulation as defined by section 1-2 of *The Legislation Act*.

The government institution must have authority to conduct the investigation and the investigation must lead or could lead to penalties or sanctions (i.e., fines, imprisonment, revocation of a license, an order to cease activities).[179] The penalties or sanctions do not have

[173] Pearsall, Judy, *Concise Oxford English Dictionary*, *10th Ed.* at p. 19, (Oxford University Press).
[174] Garner, Bryan A., 2009. *Black's Law Dictionary, Deluxe 10th Edition*. St. Paul, Minn.: West Group at p. 543.
[175] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 146.
[176] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 146.
[177] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 146.
[178] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 146.
[179] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 145.

to be imposed by the investigating body to qualify but can be referred to another body to impose the penalty or sanction (e.g., RCMP).[180]

Prevention means the stopping of something, especially something bad, from happening; to hinder or impede.[181] In the context of subsection 15(1)(a.1) of FOIP, it means the stopping of an act or omission that might constitute a terrorist activity.

Omission means a failure to do something.[182]

Terrorist activity is defined at section 83.01 of the *Criminal Code* of Canada. It includes, for example, an act or omission that is committed in or outside Canada that is committed in whole or in part for a political, religious, or ideological purpose, objective or cause.[183]

When there is a review by the IPC, the government institution is invited to provide a submission (arguments). The government institution should describe the harm in detail to support the application of the provision. Government institutions should not assume that the harm is self-evident on the face of the records.

A government institution cannot rely on subsection 15(1)(a.1) of FOIP for a record that:

a) Provides a general outline of the structure or programs of a law enforcement agency; or

b) Reports, by means of statistical analysis or otherwise, on the degree of success achieved in a law enforcement program (see subsection 15(2)).

Subsection 15(1)(b)

Law enforcement and investigations

15(1) A head may refuse to give access to a record, the release of which could:

...

(b) be injurious to the enforcement of:

(i) an Act or a regulation; or

[180] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 146.
[181] Garner, Bryan A., 2009. *Black's Law Dictionary, Deluxe 10th Edition*. St. Paul, Minn.: West Group at p. 1380.
[182] Garner, Bryan A., 2009. *Black's Law Dictionary, Deluxe 10th Edition*. St. Paul, Minn.: West Group at p. 1260.
[183] *Criminal Code,* R.S.C., 1985, c. C-46, Subsection 83.01(b)(i)(A).

(ii) an Act of the Parliament of Canada or a regulation made pursuant to an Act of the Parliament of Canada;

...

(2) Subsection (1) does not apply to a record that:

(a) provides a general outline of the structure or programs of a law enforcement agency; or

(b) reports, by means of statistical analysis or otherwise, on the degree of success achieved in a law enforcement program.

Subsection 15(1)(b) of FOIP is a discretionary harm-based exemption. It permits refusal of access in situations where release of a record could be injurious to the enforcement of an Act or regulation provincially or federally.

The following two-part test can be applied:

1. Which Act or regulation is being enforced?

The main question is under which power was the enforcement conducted. If the government institution cannot advance any Acts or regulations in force in any part of Canada under which the enforcement was conducted, the exemption cannot be claimed.[184]

An **Act or a regulation** means an Act of the Legislature together with any regulations issued thereunder and includes an Ordinance of the Northwest Territories in force in Saskatchewan.[185]

An **Act of Parliament of Canada or a regulation** encompasses all Acts enacted by the Parliament of Canada together with any regulations issued thereunder.[186]

Enforcement is the act or process of compelling compliance with a law, mandate, command, decree or agreement.[187]

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[184] Office of the Information Commissioner of Canada, *Investigator's Guide to Interpreting the ATIA,* https://www.oic-ci.gc.ca/en/investigators-guide-interpreting-act/section-16-law-enforcement-investigations-security, accessed on June 14, 2019. Definition relied on in SK OIPC Review Report F-2014-001 at [127].

[185] See subsection 2-29 of *The Legislation Act*, S.S. 2019, Chapter L-10.2.

[186] Office of the Information Commissioner of Canada, *Investigator's Guide to Interpreting the ATIA,* https://www.oic-ci.gc.ca/en/investigators-guide-interpreting-act/section-16-law-enforcement-investigations-security, accessed on June 14, 2019. Definition relied on in SK OIPC Review Report F-2014-001 at [127].

[187] Garner, Bryan A., 2009. *Black's Law Dictionary, Deluxe 10th Edition*. St. Paul, Minn.: West Group at p. 645.

2. Could release of the record injure enforcement of the Act or regulation?

Section 15 of FOIP uses the word **could** versus "*could reasonably be expected to*" as seen in other provisions of FOIP. The threshold for *could* is somewhat lower than a reasonable expectation. The requirement for *could* is simply that the release of the information *could* have the specified result. There would still have to be a basis for asserting the harm could occur. If it is fanciful or exceedingly remote, the exemption should not be invoked.[188] For this provision to apply there must be objective grounds for believing that disclosing the information *could* result in the harm alleged.

Injury implies damage or detriment.[189]

When there is a review by the IPC, the government institution is invited to provide a submission (arguments). The government institution should describe the harm in detail to support the application of the provision. Government institutions should not assume that the harm is self-evident on the face of the records.

A government institution cannot rely on subsection 15(1)(b) of FOIP for a record that:

a) Provides a general outline of the structure or programs of a law enforcement agency; or

b) Reports, by means of statistical analysis or otherwise, on the degree of success achieved in a law enforcement program (see subsection 15(2)).

Subsection 15(1)(c)

Law enforcement and investigations

15(1) A head may refuse to give access to a record, the release of which could:

…

(c) interfere with a lawful investigation or disclose information with respect to a lawful investigation;

…

(2) Subsection (1) does not apply to a record that:

[188] SK OIPC Review Reports LA-2007-001 at [117], LA-2013-001 at [35], F-2014-001 at [149].
[189] Adapted from definition of 'harm' in Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 148.

(a) provides a general outline of the structure or programs of a law enforcement agency; or

(b) reports, by means of statistical analysis or otherwise, on the degree of success achieved in a law enforcement program.

Subsection 15(1)(c) of FOIP is a discretionary class-based and harm-based exemption. Meaning it contains both a class and harm based component. It permits refusal of access in situations where the release of a record could interfere with a lawful investigation or disclose information with respect to a lawful investigation.

The following two-part test can be applied:

1. Does the government institution's activity qualify as a "lawful investigation?"

A **lawful investigation** is an investigation that is authorized or required and permitted by law.[190]

The government institution should identify the legislation under which the investigation is occurring.

The investigation can be concluded, active and ongoing or be occurring in the future.[191]

It is not limited to investigations that are conducted by a government institution.[192] In other words, it can include investigations conducted by other organizations (e.g., a police investigation).

2. Does one of the following exist?

a) Could release of the information interfere with a lawful investigation?

Section 15 of FOIP uses the word **could** versus "*could reasonably be expected to*" as seen in other provisions of FOIP. The threshold for *could* is somewhat lower than a reasonable expectation. The requirement for *could* is simply that the release of the information *could* have the specified result. There would still have to be a basis for asserting the harm could occur. If it is fanciful or exceedingly remote, the exemption should not be invoked.[193]

[190] First defined in SK OIPC Review Report 93/021 at p. 6. Adopted in SK OIPC Review Report F-2004-006 at [26] and F-2014-001 at [160].
[191] *Leo v Global Transportation Hub Authority*, 2019 SKQB 150 at [24].
[192] *Leo v Global Transportation Hub Authority*, 2019 SKQB 150 at [25].
[193] SK OIPC Review Reports LA-2007-001 at [117], LA-2013-001 at [35], F-2014-001 at [149].

Interfere with includes hindering or hampering an investigation and anything that would detract from an investigator's ability to pursue the investigation.[194]

Interference can occur on concluded, active, ongoing or future investigations.[195]

When there is a review by the IPC, the government institution is invited to provide a submission (arguments). The government institution should describe how and why disclosure of the information in question could interfere with a lawful investigation. Government institutions should not assume that the harm is self-evident on the face of the records.

b) Could release disclose information with respect to a lawful investigation?

It is only necessary for the government institution to demonstrate that the information in the record is information with respect to a lawful investigation to meet this part of the test.

With respect to are words of the widest possible scope; the phrase is probably the widest of any expression intended to convey some connection between two related subject matters.[196]

Section 15 of FOIP uses the word **could** versus "*could reasonably be expected to*" as seen in other provisions of FOIP. The threshold for *could* is somewhat lower than a reasonable expectation. The requirement for *could* is simply that the release of the information *could* have the specified result. There would still have to be a basis for asserting the outcome could occur. If it is fanciful or exceedingly remote, the exemption should not be invoked.[197]

Records that existed before an investigation commenced, such as regular reporting information, may not qualify for the exemption.[198]

A government institution cannot rely on subsection 15(1)(c) of FOIP for a record that:

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[194] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 152.

[195] *Leo v Global Transportation Hub Authority*, 2019 SKQB 150 at [24].

[196] The Supreme Court of Canada (SCC) established the meaning of the phrase "*in respect of*" in *Nowegijick v. The Queen*, [1983] 1 SCR 29, 1983 CanLII 18 (SCC) at [39]. The SCC later applied the same interpretation to the phrase "*with respect to*" in *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 SCR 743, 1999 CanLII 680 (SCC) at [15] to [17]. Summary of this can be found in Gardner, J., and Gardner K. (2016) *Sangan's Encyclopedia of Words and Phrases Legal Maxims*, Canada, 5th Edition, Volume 5, S to Z at p. w-97.

[197] SK OIPC Review Reports LA-2007-001 at [117], LA-2013-001 at [35], F-2014-001 at [149].

[198] SK OIPC Review Report 223-2016 at [36] to [37].

a) Provides a general outline of the structure or programs of a law enforcement agency; or

b) Reports, by means of statistical analysis or otherwise, on the degree of success achieved in a law enforcement program (see subsection 15(2)).

IPC Findings

In Review Report 223-2016, the Commissioner considered subsection 15(1)(c) of FOIP. An applicant had requested access to results from on-site tests and inspections of Husky Pipelines dating back to 2011. The Ministry of Economy withheld the records in full citing in part, subsection 15(1)(c) of FOIP. The records were 26 pages of completed audit forms. The Commissioner found that the first part of the test was met as the investigation was conducted pursuant to *The Oil and Gas Conservation Act*. The Commissioner found that the second part of the test was not met because the pipeline audit forms were created two years prior to the commencement of the investigation. The Commissioner stated that records caught by this exemption should relate to the process of the investigation itself. Records that existed before the investigation commenced, such as regular reporting information, would not qualify. However, government institutions should consider the unique circumstances in each case. There may be circumstances where the exemption would apply to such records.

In Review Report 030-2020, 050-2020, the Commissioner reviewed whether the Ministry of Government Relations (Government Relations) appropriately applied subsection 15(1)(c) of FOIP to records withheld from an applicant. Part of the Commissioner's review considered whether Government Relations' activity qualified as a "lawful investigation" for purposes of the first part of the test for subsection 15(1)(c) of FOIP. Government Relations asserted that the records withheld pursuant to subsection 15(1)(c) of FOIP were created as a result of the ministerial-appointed inspector recommending an inspection be expanded into an inquiry and that a supervisor also be appointed pursuant to section 422 of *The Northern Municipalities Act* during said inquiry. Furthermore, Government Relations asserted that an inspection pursuant to section 417 of *The Northern Municipalities Act* is an investigation into the management, administration or operation of any municipality. The scope of the investigation is set out in the Minister's Order. An inquiry is conducted if it is determined during the inspection that a more in-depth investigation is required, which is what occurred in the Northern Village of Pinehouse. Government Relations further asserted that while these provisions use the word inspection and inquiry, both an inspection and inquiry are an investigation that is authorized and permitted by law, specifically sections 417 and 418 of *The Northern Municipalities Act*. The Commissioner found that based upon the powers provided to an inspector or person of inquiry in *The Public Inquiries Act, 2013*, an inspection or inquiry

under *The Northern Municipalities Act* qualifies as a "lawful investigation" for purposes of subsection 15(1)(c) of FOIP.

Subsection 15(1)(d)

Law enforcement and investigations

15(1) A head may refuse to give access to a record, the release of which could:

…

(d) be injurious to the Government of Saskatchewan or a government institution in the conduct of existing or anticipated legal proceedings;

…

(2) Subsection (1) does not apply to a record that:

(a) provides a general outline of the structure or programs of a law enforcement agency; or

(b) reports, by means of statistical analysis or otherwise, on the degree of success achieved in a law enforcement program.

Subsection 15(1)(d) of FOIP is a discretionary harm-based exemption. It permits refusal of access in situations where release of a record could be injurious to the Government of Saskatchewan or a government institution in the conduct of existing or anticipated legal proceedings.

The following two-part test can be applied:

1. Do the proceedings qualify as existing or anticipated legal proceedings?

Legal proceedings are any civil or criminal proceeding or inquiry in which evidence is or may be given and includes an arbitration.[199] It includes proceedings governed by rules of court or rules of judicial or quasi-judicial tribunals that can result in a judgement of a court or a ruling by a tribunal. Legal proceedings include all proceedings authorized or sanctioned by law and brought or instituted in a court or legal tribunal, for the acquiring of a right or the enforcement of a remedy.[200]

[199] *Canada Evidence Act,* RSC, 1985, c C-5, s. 30(12), Relied on in *Britto v University of Saskatchewan*, 2018 SKQB 92 at [46].
[200] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Appendix 1: Definitions at p. 376, Part of the definition comes from Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.:

Labour grievances qualify as "legal proceedings" for statutory purposes.[201]

To qualify for this exemption, the legal proceedings must be "existing or anticipated" as the provision uses these terms.

Anticipated means more than merely possible.[202] To regard as probable.[203]

2. Could disclosure of the records be injurious to the government institution in the conduct of the legal proceedings?

There must be objective grounds for believing that disclosing the information could result in injury. Section 15 of FOIP uses the word **could** versus "could reasonably be expected to" as seen in other provisions of FOIP. The threshold for could is somewhat lower than a reasonable expectation. The requirement for could is simply that the release of the information could have the specified result. There would still have to be a basis for asserting the harm could occur. If it is fanciful or exceedingly remote, the exemption should not be invoked.[204]

Injury implies damage or detriment.[205] The exemption is designed to protect the government institution from harm in its existing or anticipated legal proceedings.

In order for the release of a record to be injurious to the government institution (or Government of Saskatchewan) "in the context of existing or anticipated legal proceedings", the government institution (or Government of Saskatchewan) would need to be a party to such proceedings.[206]

When there is a review by the IPC, the government institution is invited to provide a submission (arguments). The government institution should describe the harm in detail to support the application of the provision. Government institutions should not assume that the harm is self-evident on the face of the records.

West Group at p. 1458, First adopted by SK OIPC in Review Report LA-2013-001 at [25] and [27], Affirmed in *Britto v University of Saskatchewan*, 2018 SKQB 92 at [44] and [49].

[201] *Park v. The Queen,* 2012 TCC 306 at [65], Relied on in *Britto v University of Saskatchewan*, 2018 SKQB 92 at [47], Also found in Review Reports LA-2013-001 at [23] to [31], LA-2014-004 at [15].

[202] *Britto v University of Saskatchewan*, 2018 SKQB 92 at [58].

[203] *Concise Oxford English Dictionary, 10th Edition, Revised*, 2002, USA: Oxford University Press at p. 56.

[204] SK OIPC Review Reports LA-2007-001 at [117], LA-2013-001 at [35], F-2014-001 at [149].

[205] Adapted from definition of 'harm' in Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 148.

[206] SK OIPC Review Report LA-2013-001 at [32].

Parallel civil court action does not bar or preclude a formal review by the IPC.[207]

Discovery and disclosure provisions of *The Queen's Bench Rules* of Saskatchewan operate independent of any process under FOIP. Subsection 4(c) of FOIP establishes that FOIP does not limit access to information otherwise available by law to parties to litigation. Section 4 also establishes that FOIP complements and does not replace existing procedures for access to records. Therefore, the injury should be above and beyond any prejudice that relates to the production of a relevant, non-privileged document in the usual course of a lawsuit.[208] Where there are concerns or objections to the admissibility of any records in legal proceedings, such concerns could be argued before that tribunal. If a record is prejudicial to a government institution's position, it would have the usual opportunity to make a submission to the tribunal who will then make a determination as it determines appropriate.[209]

In *Britto v University of Saskatchewan, (2018)*, Justice Danyliuk confirmed the above position at paragraph [61] but determined that it did not go far enough. Danyliuk J. added at paragraph [66] that the Act does not trump every potential privilege claim simply because the documents disclosed may later be argued to be inadmissible. The problem is twofold: not only is there potential use and abuse of the disclosed record before any admissibility ruling is made under the adjudicative process, but there is also the broader problem of the undercutting of the free communications essential to seeking and obtaining legal advice.[210]

Admissibility means the quality, state, or condition of being allowed to be entered into evidence in a hearing, trial or other official proceeding.[211]

A government institution cannot rely on subsection 15(1)(d) of FOIP for a record that:

a) Provides a general outline of the structure or programs of a law enforcement agency; or

b) Reports, by means of statistical analysis or otherwise, on the degree of success achieved in a law enforcement program (see subsection 15(2)).

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[207] SK OIPC Review Report LA-2013-001 at [48].
[208] SK OIPC Review Reports LA-2007-001 at [121], 145-2015 at [13], 153-2015 at [61], 223-2015 and 224-2015 at [19].
[209] SK OIPC Review Reports LA-2014-004 at [15] and 153-2015 at [64].
[210] *Britto v University of Saskatchewan*, 2018 SKQB 92 at [61], [66] and [68].
[211] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 57.

IPC Findings

The Commissioner considered the equivalent provision in LA FOIP in Review Report 223-2015 and 224-2015. An applicant had requested a copy of a completed audit report. The City of Regina (the City) refused to confirm or deny the existence of any records responsive to the request. The City cited subsection 14(1)(d) and section 21 as provisions that would apply if the records existed. The City also provided a severed copy of a briefing note citing subsection 14(1)(d) of LA FOIP. Upon review, the Commissioner found that the first part of the test was met because there was a lawsuit commenced against the City at the time of the review. Furthermore, the Commissioner found that the second part of the test was met because a trial date had not yet been set and injury could result from potential swaying of jury members prior to trial due to the high profile of the case and the media attention it had garnered.

Subsection 15(1)(e)

Law enforcement and investigations

15(1) A head may refuse to give access to a record, the release of which could:

…

(e) reveal investigative techniques or procedures currently in use or likely to be used;

…

(2) Subsection (1) does not apply to a record that:

(a) provides a general outline of the structure or programs of a law enforcement agency; or

(b) reports, by means of statistical analysis or otherwise, on the degree of success achieved in a law enforcement program.

Subsection 15(1)(e) of FOIP is a discretionary class-based exemption. It permits refusal of access in situations where release of a record could reveal investigative techniques or procedures currently in use or likely to be used. Subsection 15(1)(e) of FOIP recognizes that unrestricted access to law enforcement techniques could reduce their usefulness, effectiveness and success.[212]

[212] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 150, quoted in SK OIPC Review Report F-2014-001 at [183].

The following three-part test can be applied:

1. **Does the information in question constitute "investigative techniques" or "procedures?"**

Investigative techniques and procedures mean techniques and procedures used to conduct an investigation or inquiry for the purpose of law enforcement.[213]

- The techniques or procedures must include specific steps. General information (such as forms and standard policies that do not include specific investigative steps and procedures) would not qualify.[214]
- Routine, common or customary investigative techniques and procedures would not qualify.[215]
- Generally known investigative techniques and procedures which the public is already aware of would not qualify.[216]

It does not include well-known investigative techniques, such as wiretapping, fingerprinting and standard sources of information about individuals' addresses, personal liabilities, real property, etc.[217]

2. **Are the investigative techniques and/or procedures currently in use or likely to be used?**

Likely means probable, a likely outcome; reasonably expected.[218]

The exemption is more likely to apply to new technologies in electronic monitoring or surveillance equipment used for a law enforcement purpose.[219]

The exemption 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.[220]

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[213] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 150, first adopted in SK OIPC Review Report F-2014-001 at [186].
[214] SK OIPC Review Reports 2002/041 at [10] to [15], F-2014-001 at [187] and [196].
[215] SK OIPC Review Reports 95/021 at p. 6, F-2014-001 at [190], [191] and [196]; NFLD IPC Review Report A-2008-005 at [33].
[216] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 150, first adopted in SK OIPC Review Report F-2014-001 at [183] and [196], consistent with ON IPC Order P-999 at pp. 2 and 3.
[217] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 150.
[218] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 1113.
[219] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 150.
[220] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 150.

3. Could disclosure reveal investigative techniques or procedures?

Section 15 of FOIP uses the word **could** versus "*could reasonably be expected to*" as seen in other provisions of FOIP. The threshold for *could* is somewhat lower than a reasonable expectation. The requirement for *could* is simply that the release of the information *could* have the specified result. There would still have to be a basis for the assertion. If it is fanciful or exceedingly remote, the exemption should not be invoked.[221] For this provision to apply there must be objective grounds for believing that disclosing the information *could* reveal investigative techniques or procedures.

Reveal means to make known; cause or allow to be seen.[222]

When there is a review by the IPC, the government institution is invited to provide a submission (arguments). The government institution must establish how and why disclosure of the information in question could reveal investigative techniques or procedures.

A government institution cannot rely on subsection 15(1)(e) of FOIP for a record that:

a) Provides a general outline of the structure or programs of a law enforcement agency; or

b) Reports, by means of statistical analysis or otherwise, on the degree of success achieved in a law enforcement program (see subsection 15(2)).

Subsection 15(1)(f)

Law enforcement and investigations

15(1) A head may refuse to give access to a record, the release of which could:

…

(f) disclose the identity of a confidential source of information or disclose information furnished by that source with respect to a lawful investigation or a law enforcement matter;

…

(2) Subsection (1) does not apply to a record that:

(a) provides a general outline of the structure or programs of a law enforcement agency; or

[221] SK OIPC Review Reports LA-2007-001 at [117], LA-2013-001 at [35], F-2014-001 at [149].
[222] Pearsall, Judy, *Concise Oxford Dictionary*, 10th Ed., (Oxford University Press) at p. 1224.

(b) reports, by means of statistical analysis or otherwise, on the degree of success achieved in a law enforcement program.

Subsection 15(1)(f) of FOIP is a discretionary class-based exemption. It permits refusal of access in situations where release of a record could disclose the identity of a confidential source of information, or disclose information furnished by that source with respect to a lawful investigation or a law enforcement matter.

The following two-part test can be applied:

1. Could the information disclose the identity of a confidential source?

Section 15 of FOIP uses the word **could** versus "*could reasonably be expected to*" as seen in other provisions of FOIP. The threshold for *could* is somewhat lower than a reasonable expectation. The requirement for *could* is simply that the release of the information *could* have the specified result. There would still have to be a basis for the assertion. If it is fanciful or exceedingly remote, the exemption should not be invoked.[223] For this provision to apply there must be objective grounds for believing that disclosing the information *could* disclose the identity of a confidential source of information or disclose information furnished by a confidential source.

Identity includes the name and any identifying characteristics, symbols and numbers relating to the source.[224]

A **confidential source** is someone who has provided information with the assurance that his or her identity will remain secret. The assurance may be express or implied. There must be evidence of the circumstances in which the information was provided to establish whether the source is confidential.[225]

The government institution should establish that the source of the information qualifies as a confidential source.[226]

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[223] SK OIPC Review Reports LA-2007-001 at [117], LA-2013-001 at [35], F-2014-001 at [149].
[224] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 150.
[225] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 150. See also British Columbia Government Services, *FOIPPA Policy Definitions* at https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/policy-definitions. Accessed April 23, 2020.
[226] SK OIPC Review Reports 93/021 at pp. 7 and 8, 95/012 at p. 4, 2000/028 at [13], F-2014-001 at [218].

2. Could disclosure reveal information that was provided by the confidential source with respect to a lawful investigation or law enforcement matter?

Section 15 of FOIP uses the word **could** versus "*could reasonably be expected to*" as seen in other provisions of FOIP. The threshold for *could* is somewhat lower than a reasonable expectation. The requirement for *could* is simply that the release of the information *could* have the specified result. There would still have to be a basis for the assertion. If it is fanciful or exceedingly remote, the exemption should not be invoked.[227] For this provision to apply there must be objective grounds for believing that disclosing the information *could* disclose the identity of a confidential source of information or disclose information furnished by a confidential source.

With respect to are words of the widest possible scope; the phrase is probably the widest of any expression intended to convey some connection between two related subject matters.[228]

The information must relate to a lawful investigation and/or law enforcement matter.

A **lawful investigation** is an investigation that is authorized or required and permitted by law.[229]

Law enforcement includes:[230]

a) Policing, including criminal intelligence operations.

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.[231]

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[227] SK OIPC Review Reports LA-2007-001 at [117], LA-2013-001 at [35], F-2014-001 at [149].
[228] The Supreme Court of Canada (SCC) established the meaning of the phrase "*in respect of*" in *Nowegijick v. The Queen*, [1983] 1 SCR 29, 1983 CanLII 18 (SCC) at [39]. The SCC later applied the same interpretation to the phrase "*with respect to*" in *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 SCR 743, 1999 CanLII 680 (SCC) at [15] to [17]. Summary of this can be found in Gardner, J., and Gardner K. (2016) *Sangan's Encyclopedia of Words and Phrases Legal Maxims*, Canada, 5th Edition, Volume 5, S to Z at p. w-97.
[229] First defined in SK OIPC Review Report 93/021 at p. 6. Adopted in SK OIPC Review Report F-2004-006 at [26] and F-2014-001 at [160].
[230] Definition from Newfoundland and Labrador's *Access to Information and Protection of Privacy Act*, SNL 2002, c A-1.1 at subsection 2(i), similar definition in Ontario's *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, Chapter F.31 at subsection 2(1)(b), similar definition in Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 145.
[231] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 145.

Criminal intelligence is information relating to a person or group of persons compiled by law enforcement to anticipate, prevent or monitor possible criminal activity. Intelligence-gathering is sometimes a separate activity from the conduct of specific 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.[232]

b) Investigations, inspections or proceedings conducted under the authority of or for the purpose of enforcing an enactment which lead to, or could lead to a penalty or sanction being imposed under the enactment.

Investigation has been defined, in general, as a systematic process of examination, inquiry and observations.[233]

Inspection has been defined, in general, as a careful examination.[234]

Legal proceeding has been defined, in general, as any proceeding authorized by law and instituted in a court or tribunal to acquire a right or to enforce a remedy.[235]

Penalty or sanction means a punishment or penalty used to enforce obedience to law.[236] It can include a fine, imprisonment, revocation of a license, an order to cease an activity, or expulsion from an educational institution.[237]

Matter should be given its plain and ordinary meaning. It does not necessarily always have to apply to some specific on-going investigation or proceeding.[238]

When there is a review by the IPC, the government institution is invited to provide a submission (arguments). The government institution must establish how and why disclosure of the information in question could disclose the identity of a confidential source of information or disclose information furnished by a confidential source.

A government institution cannot rely on subsection 15(1)(f) of FOIP for a record that:

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[232] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at pp. 145 and 151.
[233] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 145.
[234] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 950.
[235] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 1458.
[236] Dukelow, Daphne A., *The Dictionary of Canadian Law*, *4th Edition* (Toronto: Thomson Reuters Canada Ltd. 2011) at p. 1158.
[237] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 145.
[238] *Evenson v Saskatchewan (Ministry of Justice)*, 2013 SKQB 296 (CanLII) at [44].

a) Provides a general outline of the structure or programs of a law enforcement agency; or

b) Reports, by means of statistical analysis or otherwise, on the degree of success achieved in a law enforcement program (see subsection 15(2)).

Subsection 15(1)(g)

Law enforcement and investigations

15(1) A head may refuse to give access to a record, the release of which could:

...

(g) deprive a person of a fair trial or impartial adjudication;

...

(2) Subsection (1) does not apply to a record that:

(a) provides a general outline of the structure or programs of a law enforcement agency; or

(b) reports, by means of statistical analysis or otherwise, on the degree of success achieved in a law enforcement program.

Applicants have a general right to access information pursuant to section 5 of FOIP. However, other rights and freedoms must be upheld notwithstanding the right of access. The *Canadian Bill of Rights* sets out a number of rights and freedoms. Although only a federal statute, it is helpful in understanding the origins of these rights and freedoms. Subsection 2(e) and (f) of the *Canadian Bill of Rights* provides that:

2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to

...

e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of rights and obligations;

f) deprive a person charged with a criminal offence of the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an

independent and impartial tribunal, or of the right to reasonable bail without just cause.[239]

The *Canadian Charter of Rights and Freedoms* also recognizes these rights and freedoms at section 7 and subsection 11(d). As part of the Constitution, it is the supreme law of Canada and applies to both federal and provincial acts of government.[240]

Subsection 15(1)(g) of FOIP is a discretionary harm-based exemption. It permits refusal of access in situations where release of a record could deprive a person of a fair trial or impartial adjudication.[241]

The following three-part test can be applied:

1. Who is the "person" impacted by possible disclosure?

Person includes an individual, corporation or the heirs, executors, administrators or other legal representatives of a person.[242]

2. Is there a trial or adjudication occurring now or in the future?

Trial means a formal judicial examination of evidence and determination of legal claims in an adversary proceeding.[243]

Adjudication means the legal process of resolving a dispute, the process of judicially deciding a case.[244]

This exemption 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 Automobile Injury Appeal Commission.[245]

Commencement of a legal action is not by itself enough to support the application of this exemption.[246]

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[239] See *Duke v. The Queen,* [1972] SCR 917 CanLII 16 (SCC) at p. 921.
[240] Correctional Service of Canada, *Canadian Bill of Rights 1960*, at https://www.csc-scc.gc.ca/text/pblct/rht-drt/03-eng.shtml, accessed June 20, 2019.
[241] British Columbia and Ontario have similar provisions in their FOIP legislation.
[242] *The Legislation Act*, S.S. 2019, Chapter L-10.2 at ss. 2-29.
[243] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 1812.
[244] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 52.
[245] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 153.
[246] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 153.

3. Could disclosure of the information deprive the person of a fair trial or impartial adjudication?

Section 15 of FOIP uses the word **could** versus "*could reasonably be expected to*" as seen in other provisions of FOIP. The threshold for *could* is somewhat lower than a reasonable expectation. The requirement for *could* is simply that the release of the information *could* have the specified result. There would still have to be a basis for asserting the harm could occur. If it is fanciful or exceedingly remote, the exemption should not be invoked.[247] For this provision to apply there must be objective grounds for believing that disclosing the information *could* result in the harm alleged.

Deprive means to take away or prevent the happening of a certain event.[248]

Fair trial refers to a trial by an impartial tribunal in accordance with regular procedures; especially a criminal trial in which the defendant's constitutional and legal rights are respected.[249] It means a hearing by an impartial tribunal; a proceeding which hears before it condemns, which proceeds upon inquiry, and renders judgement only after consideration of evidence and facts as a whole.[250]

Impartial adjudication means a proceeding in which the parties' legal rights are safeguarded and respected.[251] Not favoring one side more than another; unbiased and disinterested; unswayed by personal interest.[252]

The right to a fair trial is fundamental and cannot be sacrificed.[253]

For guidance on determining the harm, the *Dagenais v. Canadian Broadcasting Corp. (1994)* decision may be of assistance. It concerned a publication ban to prevent the televised broadcast of a fictional account of the sexual abuse of boys in an orphanage until the completion of four criminal charges, where there was a similarity between the subject matter

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[247] SK OIPC Review Reports LA-2007-001 at [117], LA-2013-001 at [35], F-2014-001 at [149].
[248] British Columbia Government Services, *FOIPPA Policy Definitions* at https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/policy-definitions. Accessed April 23, 2020.
[249] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 743. Similar definition relied on in Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 153.
[250] British Columbia Government Services, *FOIPPA Policy Definitions* at https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/policy-definitions. Accessed April 23, 2020.
[251] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 153.
[252] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 901.
[253] *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 SCR 835, 1994 CanLII 39 (SCC) at p. 841.

of the television program and the charges faced by the accused individuals. The main issue addressed was whether the infringement of the *Charter* right to freedom of expression was justified in order to ensure that the accused individuals received a fair and impartial adjudication as contemplated in subsection 11(d) of the *Charter*. Speaking for the majority, Lamer C.J.C. said:

> The common law rule governing publication bans has always been traditionally understood as requiring those seeking a ban to demonstrate that there is a real and substantial risk of interference with the right to a fair trial.
> …
> [P]ublication bans are not available as protections against remote and speculative dangers.[254]

In separate reasons, McLachlin J. said:

> What must be guarded against is the facile assumption that if there is any risk of prejudice to a fair trial, however speculative, the ban should be ordered.[255]

Where a government institution intends to assert that a jury may be influenced by release of the record or information, it should consider *R. v. Corbett, (1988)*, wherein Justice Dickson said:

> …the Court should not be heard to call into question the capacity of juries to do the job assigned to them. The ramifications of any such statement would be enormous… (i)t is logically incoherent to hold that juries are incapable of following the explicit instructions of a judge.[256]

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[254] *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 SCR 835, 1994 CanLII 39 (SCC) at pp. 875 and 880. Also cited and relied on in ON IPC Order P-948 at p. 5. It is important to note that Ontario's FOIP Act uses "*could reasonably be expected to*" for its equivalent provision (subsection 14(1)(f)). That threshold is higher than Saskatchewan's subsection 15(1)(g) of FOIP.

[255] *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 SCR 835, 1994 CanLII 39 (SCC) at p. 950. Also cited and relied on in ON IPC Order P-948 at p. 5. It is important to note that Ontario's FOIP Act uses "*could reasonably be expected to*" for its equivalent provision (subsection 14(1)(f)). That threshold is higher than Saskatchewan's subsection 15(1)(g) of FOIP.

[256] *R. v. Corbett,* [1988] 1 SCR 670, 1988 CanLII 80 (SCC) at p. 693. Similar statements were made in *Ex parte Telegraph Plc.*, [1993] 2 All E.R. 971 (C.A.) at p. 978 and *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 SCR 835, 1994 CanLII 39 (SCC) at p. 322 and *R. V. MacDonnell*, 1996 CanLII 5560 (NA CA) at p. 3.

When there is a review by the IPC, the government institution is invited to provide a submission (arguments). The government institution should describe how and why disclosure of the information in question could deprive a person of the right to a fair trial or hearing.

A government institution cannot rely on subsection 15(1)(g) of FOIP for a record that:

a) Provides a general outline of the structure or programs of a law enforcement agency; or

b) Reports, by means of statistical analysis or otherwise, on the degree of success achieved in a law enforcement program (see subsection 15(2)).

Subsection 15(1)(h)

Law enforcement and investigations

15(1) A head may refuse to give access to a record, the release of which could:

…

(h) facilitate the escape from custody of an individual who is under lawful detention;

…

(2) Subsection (1) does not apply to a record that:

(a) provides a general outline of the structure or programs of a law enforcement agency; or

(b) reports, by means of statistical analysis or otherwise, on the degree of success achieved in a law enforcement program.

Subsection 15(1)(h) of FOIP is a discretionary harm-based exemption. It permits refusal of access in situations where release of a record could facilitate the escape from custody of an individual who is under lawful detention.[257]

[257] Alberta's FOIP Act has a similarly worded provision (subsection 20(1)(j)), however, it uses the phrase "*could reasonably be expected to*" which is a higher threshold than Saskatchewan's subsection 15(1)(h).

Office of the Saskatchewan Information and Privacy Commissioner. Guide to FOIP, Chapter 4, *Exemptions from the Right of Access*. Updated 8 April 2024.

The following two-part test can be applied:

1. Is there an individual who is under lawful detention?

Under lawful detention means any person held in custody pursuant to a valid warrant or other authorized order. It extends to individuals remanded in custody (charged but not yet tried or convicted). It does not include individuals released under bail supervision.[258]

2. Could release of the record facilitate escape from custody?

Section 15 of FOIP uses the word **could** versus "*could reasonably be expected to*" as seen in other provisions of FOIP. The threshold for *could* is somewhat lower than a reasonable expectation. The requirement for *could* is simply that the release of the information *could* have the specified result. There would still have to be a basis for asserting the harm could occur. If it is fanciful or exceedingly remote, the exemption should not be invoked.[259] For this provision to apply there must be objective grounds for believing that disclosing the information *could* result in the harm alleged.

Facilitate means to make the occurrence of escape easier; to render less difficult.[260]

Escape means the act or an instance of breaking free from confinement.[261]

An example of information protected by this exemption is the building plans for a correctional facility.[262]

When there is a review by the IPC, the government institution is invited to provide a submission (arguments). The government institution should describe how and why disclosure of the information in question could facilitate escape.

A government institution cannot rely on subsection 15(1)(h) of FOIP for a record that:

a) Provides a general outline of the structure or programs of a law enforcement agency; or

b) Reports, by means of statistical analysis or otherwise, on the degree of success achieved in a law enforcement program (see subsection 15(2)).

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[258] Government of Newfoundland and Labrador, resource *Access to Information: Policy and Procedures Manual, October 2017* at p. 130.
[259] SK OIPC Review Reports LA-2007-001 at [117], LA-2013-001 at [35], F-2014-001 at [149].
[260] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 734.
[261] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 685.
[262] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 154.

Subsection 15(1)(i)

Law enforcement and investigations

15(1) A head may refuse to give access to a record, the release of which could:

…

(i) reveal law enforcement intelligence information;

…

(2) Subsection (1) does not apply to a record that:

(a) provides a general outline of the structure or programs of a law enforcement agency; or

(b) reports, by means of statistical analysis or otherwise, on the degree of success achieved in a law enforcement program.

Subsection 15(1)(i) of FOIP is a discretionary class-based exemption. It permits refusal of access in situations where release of a record could reveal law enforcement intelligence information.

The following two-part test can be applied:

1. Does the information constitute law enforcement intelligence information?

Law enforcement includes:[263]

a) Policing, including criminal intelligence operations.

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.[264]

Criminal intelligence is information relating to a person or group of persons compiled by law enforcement to anticipate, prevent or monitor possible criminal activity. Intelligence-gathering is sometimes a separate activity from the conduct of specific investigations. Intelligence may be used for future investigations, for activities

[263] Definition from Newfoundland and Labrador's *Access to Information and Protection of Privacy Act*, SNL 2002, c A-1.1 at subsection 2(i), similar definition in Ontario's *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, Chapter F.31 at subsection 2(1)(b), similar definition in Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 145.
[264] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 145.

aimed at preventing the commission of an offence, or to ensure the security of individuals or organizations.[265]

b) Investigations, inspections or proceedings conducted under the authority of or for the purpose of enforcing an enactment which lead to or could lead to a penalty or sanction being imposed under the enactment.

Investigation has been defined, in general, as a systematic process of examination, inquiry and observations.[266]

Inspection has been defined, in general, as a careful examination.[267]

Legal proceeding has been defined, in general, as any proceeding authorized by law and instituted in a court or tribunal to acquire a right or to enforce a remedy.[268]

Penalty or sanction means a punishment or penalty used to enforce obedience to law.[269] It can include a fine, imprisonment, revocation of a license, an order to cease an activity or expulsion from an educational institution.[270]

Matter should be given its plain and ordinary meaning. It does not necessarily always have to apply to some specific on-going investigation or proceeding.[271]

Intelligence information is information gathered by a law enforcement agency in a covert manner with respect to ongoing efforts devoted to the detection and prosecution of crime or the prevention of possible violation of law and is distinct from information which is compiled and identifiable as part of the investigation of a specific occurrence.[272]

2. Could disclosure reveal law enforcement intelligence information?

Section 15 of FOIP uses the word **could** versus "*could reasonably be expected to*" as seen in other provisions of FOIP. The threshold for *could* is somewhat lower than a reasonable expectation. The requirement for *could* is simply that the release of the information *could* have the specified result. There would still have to be a basis for the assertion. If it is fanciful

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[265] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at pp. 145 and 151.
[266] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 145.
[267] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 950.
[268] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 1458.
[269] Dukelow, Daphne A., *The Dictionary of Canadian Law*, *4th Edition* (Toronto: Thomson Reuters Canada Ltd. 2011) at p. 1158.
[270] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 145.
[271] *Evenson v Saskatchewan (Ministry of Justice)*, 2013 SKQB 296 (CanLII) at [44].
[272] ON IPC Orders M-202 at p. 11, P-650 at p. 3, P-1492 at p. 5, NFLD IPC Review Report A-2009-003 at [31].

or exceedingly remote, the exemption should not be invoked.[273] For this provision to apply there must be objective grounds for believing that disclosing the information *could* reveal law enforcement intelligence information.

Reveal means to make known; cause or allow to be seen.[274]

When there is a review by the IPC, the government institution is invited to provide a submission (arguments). The government institution must establish how and why disclosure of the information in question could reveal the intelligence information.

A government institution cannot rely on subsection 15(1)(i) of FOIP for a record that:

a) Provides a general outline of the structure or programs of a law enforcement agency; or

b) Reports, by means of statistical analysis or otherwise, on the degree of success achieved in a law enforcement program (see subsection 15(2)).

Subsection 15(1)(j)

Law enforcement and investigations

15(1) A head may refuse to give access to a record, the release of which could:

…

(j) facilitate the commission of an offence or tend to impede the detection of an offence;

…

(2) Subsection (1) does not apply to a record that:

(a) provides a general outline of the structure or programs of a law enforcement agency; or

(b) reports, by means of statistical analysis or otherwise, on the degree of success achieved in a law enforcement program.

Subsection 15(1)(j) of FOIP is a discretionary harm-based exemption. It permits refusal of access in situations where release of a record could facilitate the commission of an offence or impedes the detection of one.

[273] SK OIPC Review Reports LA-2007-001 at [117], LA-2013-001 at [35], F-2014-001 at [149].
[274] Pearsall, Judy, *Concise Oxford Dictionary*, *10th Ed.*, (Oxford University Press) at p. 1224.

The following two-part test can be applied. However, only one of the questions needs to be answered in the affirmative for the exemption to apply. There may be circumstances where both questions apply and can be answered in the affirmative.

1. Could release of the record facilitate the commission of an offence?

Section 15 of FOIP uses the word **could** versus "*could reasonably be expected to*" as seen in other provisions of FOIP. The threshold for *could* is somewhat lower than a reasonable expectation. The requirement for *could* is simply that the release of the information *could* have the specified result. There would still have to be a basis for asserting the harm could occur. If it is fanciful or exceedingly remote, the exemption should not be invoked.[275] For this provision to apply there must be objective grounds for believing that releasing the information *could* facilitate the commission of an offence.

Facilitate to make the occurrence of something easier; to render less difficult.[276]

Commission of an offence means committing a breach of law.[277]

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 government institution.[278]

When there is a review by the IPC, the government institution is invited to provide a submission (arguments). The government institution should describe how and why disclosure of the information in question could facilitate escape.

2. Could release of the record tend to impede the detection of an offence?

Section 15 of FOIP uses the word **could** versus "*could reasonably be expected to*" as seen in other provisions of FOIP. The threshold for *could* is somewhat lower than a reasonable expectation. The requirement for *could* is simply that the release of the information *could* have the specified result. There would still have to be a basis for asserting the harm could occur. If it is fanciful or exceedingly remote, the exemption should not be invoked.[279] For this

[275] SK OIPC Review Reports LA-2007-001 at [117], LA-2013-001 at [35], F-2014-001 at [149].
[276] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 734.
[277] British Columbia Government Services, *FOIPPA Policy Definitions* at https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/policy-definitions. Accessed April 23, 2020.
[278] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 154.
[279] SK OIPC Review Reports LA-2007-001 at [117], LA-2013-001 at [35], F-2014-001 at [149].

provision to apply there must be objective grounds for believing that releasing the information *could* impede the detection of an offence.

Tend to means to have a direct bearing or effect; to contribute or conduce in some degree or way; to have a tendency to.[280]

Impede in this context means to delay or block the progress or action of detection.[281]

Detection means the act of discovering or revealing something that is hidden or barely perceptible, especially to solve a crime.[282]

Offence means a violation of the law; a crime.[283]

When there is a review by the IPC, the government institution is invited to provide a submission (arguments). The government institution should describe how and why disclosure of the information in question could impede the detection of an offence.

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 government institution.[284]

A government institution cannot rely on subsection 15(1)(j) of FOIP for a record that:

a) Provides a general outline of the structure or programs of a law enforcement agency; or

b) Reports, by means of statistical analysis or otherwise, on the degree of success achieved in a law enforcement program (see subsection 15(2)).

IPC Findings

In Review Report 037-2018, the Commissioner considered the equivalent provision (subsection 14(1)(j)) in LA FOIP. The applicant had requested records relating to a specific incident that occurred in 2012. The Saskatoon Police Service (SPS) withheld portions of the records citing a number of exemptions including subsection 14(1)(j) of LA FOIP. SPS specifically applied subsection 14(1)(j) of LA FOIP to seven pages that contained "ten codes" which were used by SPS when dispatching officers. The codes were used as a means of communication that conveyed a specific message without publicly identifying their true

[280] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 1770.
[281] Pearsall, Judy, *Concise Oxford Dictionary, 10th Ed.*, (Oxford University Press) at p. 711.
[282] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 563.
[283] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 1300.
[284] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 154.

meaning. The codes were unique to SPS. SPS pointed to Ontario IPC Order PO-1665, which dealt with "ten codes". In that case, the Ontario Commissioner agreed the codes should be withheld. The reason was that disclosure would leave OPP officers more vulnerable. Furthermore, it would compromise their ability to provide effective policing services, as it would make it easier for individuals engaged in illegal activities to carry them out and would jeopardize the safety of OPP officers who communicate with each other on publicly accessible radio transmission space. The Commissioner found that SPS appropriately applied subsection 14(1)(j) of LA FOIP to the "ten codes" because release could facilitate the commission of an offence.

Subsection 15(1)(k)

Law enforcement and investigations

15(1) A head may refuse to give access to a record, the release of which could:

…

(k) interfere with a law enforcement matter or disclose information respecting a law enforcement matter;

…

(2) Subsection (1) does not apply to a record that:

(a) provides a general outline of the structure or programs of a law enforcement agency; or

(b) reports, by means of statistical analysis or otherwise, on the degree of success achieved in a law enforcement program.

Subsection 15(1)(k) of FOIP is a discretionary exemption that contains both a class and harm based component. It permits refusal of access in situations where release of a record could interfere with a law enforcement matter or disclose information respecting a law enforcement matter.

The following two-part test can be applied:[285]

1. Is there a law enforcement matter involved?

Although FOIP does not define "law enforcement", other privacy legislation across Canada does define the term in the context of access and privacy. The following definitions have been drawn from other jurisdictions and can be relied upon for subsection15(1)(k) of FOIP.

Law enforcement includes:[286]

a) Policing, including criminal intelligence operations.

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.[287]

Criminal intelligence is information relating to a person or group of persons compiled by law enforcement to anticipate, prevent or monitor possible criminal activity. Intelligence-gathering is sometimes a separate activity from the conduct of specific 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.[288]

b) Investigations, inspections or proceedings conducted under the authority of or for the purpose of enforcing an enactment which lead to or could lead to a penalty or sanction being imposed under the enactment.

Investigation has been defined, in general, as a systematic process of examination, inquiry and observations.[289]

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[285] SK OIPC first considered this provision in Review Report F-2012-006. The matter was later appealed to the Court of Queen's Bench in *Evenson v Saskatchewan (Ministry of Justice)*, 2013 SKQB 296 (CanLII). In later reports, the SK OIPC adjusted the test from three to two parts. The test still encompasses the same questions.

[286] Definition from Newfoundland and Labrador's *Access to Information and Protection of Privacy Act*, SNL 2002, c A-1.1 at subsection 2(i), similar definition in Ontario's *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, Chapter F.31 at subsection 2(1)(b), similar definition used in Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 145.

[287] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 145.

[288] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at pp. 145 and 151.

[289] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 145.

Inspection has been defined, in general, as a careful examination.[290]

Legal proceeding has been defined, in general, as any proceeding authorized by law and instituted in a court or tribunal to acquire a right or to enforce a remedy.[291]

Penalty or sanction means a punishment or penalty used to enforce obedience to law.[292] It can include a fine, imprisonment, revocation of a license, an order to cease an activity or expulsion from an educational institution.[293]

Matter should be given its plain and ordinary meaning. It does not necessarily always have to apply to some specific on-going investigation or proceeding.[294]

The law enforcement matter does not have to be active and ongoing in order to qualify.[295]

It is not limited to law enforcement matters involving the government institution.[296]

Activities of agencies and investigative bodies listed in section 14 of *The Freedom of Information and Protection of Privacy Regulations* for the purpose of subsection 29(2)(g) of FOIP may also qualify as law enforcement matters for the purpose of subsection 15(1)(k) of FOIP.[297]

2. Does one of the following exist?

a) Could release of information interfere with a law enforcement matter?

Section 15 of FOIP uses the word **could** versus "*could reasonably be expected to*" as seen in other provisions of FOIP. The threshold for *could* is somewhat lower than a reasonable expectation. The requirement for *could* is simply that the release of the information *could* have the specified result. There would still have to be a basis for asserting the harm could occur. If it is fanciful or exceedingly remote, the exemption should not be invoked.[298] For this provision to apply there must be objective grounds for believing that disclosing the information *could* result in the harm alleged.

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[290] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 950.
[291] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 1458.
[292] Dukelow, Daphne A., *The Dictionary of Canadian Law*, *4th Edition* (Toronto: Thomson Reuters Canada Ltd. 2011) at p. 1158.
[293] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 145.
[294] *Evenson v Saskatchewan (Ministry of Justice)*, 2013 SKQB 296 (CanLII) at [44].
[295] *Evenson v Saskatchewan (Ministry of Justice)*, 2013 SKQB 296 (CanLII) at [40].
[296] *Leo v Global Transportation Hub Authority*, 2019 SKQB 150 at [25].
[297] SK OIPC Review Reports 1993-021 at p. 7, F-2012-006 at [89] and 139-2017 at [50].
[298] SK OIPC Review Reports LA-2007-001 at [117], LA-2013-001 at [35], F-2014-001 at [149].

Interfere means to hinder or hamper.[299]

Interference can occur on concluded, active, ongoing or future law enforcement matters. For example, the right to ensure witnesses of complete confidentiality and secrecy would be severely compromised if the protection only existed until the end of a criminal proceeding.[300]

When there is a review by the IPC, the government institution is invited to provide a submission (arguments). The government institution should describe how and why disclosure of the information in question could interfere with a law enforcement matter.

b) Could release disclose information with respect to a law enforcement matter?

It is necessary for the government institution to demonstrate that the information in the record is information with respect to a law enforcement matter to meet this part of the test.

Section 15 of FOIP uses the word **could** versus "*could reasonably be expected to*" as seen in other provisions of FOIP. The threshold for *could* is somewhat lower than a reasonable expectation. The requirement for *could* is simply that the release of the information *could* have the specified result. There would still have to be a basis for asserting the outcome could occur. If it is fanciful or exceedingly remote, the exemption should not be invoked.[301]

With respect to are words of the widest possible scope; the phrase is probably the widest of any expression intended to convey some connection between two related subject matters.[302]

A government institution cannot rely on subsection 15(1)(k) of FOIP for a record that:

a) Provides a general outline of the structure or programs of a law enforcement agency; or

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[299] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 152.
[300] *Evenson v Saskatchewan (Ministry of Justice)*, 2013 SKQB 296 (CanLII) at [40] to [45].
[301] SK OIPC Review Reports LA-2007-001 at [117], LA-2013-001 at [35], F-2014-001 at [149].
[302] The Supreme Court of Canada (SCC) established the meaning of the phrase "*in respect of*" in *Nowegijick v. The Queen*, [1983] 1 SCR 29, 1983 CanLII 18 (SCC) at [39]. The SCC later applied the same interpretation to the phrase "*with respect to*" in *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 SCR 743, 1999 CanLII 680 (SCC) at [15] to [17]. Summary of this can be found in Gardner, J., and Gardner K. (2016) *Sangan's Encyclopedia of Words and Phrases Legal Maxims*, Canada, 5th Edition, Volume 5, S to Z at p. w-97.

b) Reports, by means of statistical analysis or otherwise, on the degree of success achieved in a law enforcement program (see subsection 15(2)).

IPC Findings

In Review Report F-2014-001, the Commissioner, considered subsection 15(1)(k) of FOIP. An applicant had made an access request to the Financial and Consumer Affairs Authority of Saskatchewan (FCAAS) for all information associated to the applicant. The FCAAS provided access to some records and withheld others citing a number of exemptions including subsection 15(1)(k) of FOIP. Upon review, the Commissioner found that the FCAAS was conducting investigations pursuant to three pieces of legislation therefore, it was an appropriate law enforcement agency for purposes of subsection 15(1)(k) of FOIP and sanctions could result from the enforcement actions (proceedings) being taken by the FCAAS. As such, a law enforcement matter was found to exist. Further, the Commissioner found that release of the records could disclose information respecting that law enforcement matter.

Subsection 15(1)(k.1)

Law enforcement and investigations

15(1) A head may refuse to give access to a record, the release of which could:

...

(k.1) endanger the life or physical safety of a law enforcement officer or any other person;

...

(2) Subsection (1) does not apply to a record that:

(a) provides a general outline of the structure or programs of a law enforcement agency; or

(b) reports, by means of statistical analysis or otherwise, on the degree of success achieved in a law enforcement program.

Subsection 15(1)(k.1) of FOIP is a discretionary harm-based exemption. It permits refusal of access in situations where release of a record could endanger the life or physical safety of a law enforcement officer or any other person.

The following two-part test can be applied:

1. Who is at risk of harm (law enforcement officer or another person)?

Law enforcement officer is a person whose duty is to enforce the laws and preserve the peace.[303]

Person includes an individual, corporation or the heirs, executors, administrators, or other legal representatives of a person.[304]

2. Could disclosure endanger the life or physical safety of that person?

Section 15 of FOIP uses the word **could** versus "*could reasonably be expected to*" as seen in other provisions of FOIP. The threshold for *could* is somewhat lower than a reasonable expectation. The requirement for *could* is simply that the release of the information *could* have the specified result. There would still have to be a basis for asserting the harm could occur. If it is fanciful or exceedingly remote, the exemption should not be invoked.[305] For this provision to apply there must be objective grounds for believing that disclosing the information *could* result in the harm alleged.

Endanger means exposure to peril or harm.[306]

Physical safety means to be protected from any physical injury or impairment to the human body.[307]

Endanger the life or physical safety refers to situations in which disclosure of information could threaten, or put in peril, someone's life or physical well-being. An individual's physical safety can be threatened as a result of a physical attack or an attack against property that is likely to cause casualties.[308]

When there is a review by the IPC, the government institution is invited to provide a submission (arguments). The government institution should describe how and why disclosure of the information in question could endanger the life or physical safety of the person.

A government institution cannot rely on subsection 15(1)(k.1) of FOIP for a record that:

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[303] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 1058.
[304] *The Legislation Act*, S.S 2019, Chapter L-10.2 at ss. 2-29.
[305] SK OIPC Review Reports LA-2007-001 at [117], LA-2013-001 at [35], F-2014-001 at [149].
[306] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 667.
[307] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 861.
[308] Government of Newfoundland and Labrador resource, *Access to Information: Policy and Procedures Manual, October 2017* at p. 128.

a) Provides a general outline of the structure or programs of a law enforcement agency; or

b) Reports, by means of statistical analysis or otherwise, on the degree of success achieved in a law enforcement program (see subsection 15(2)).

Subsection 15(1)(k.2)

Law enforcement and investigations

15(1) A head may refuse to give access to a record, the release of which could:

...

(k.2) reveal any information relating to or used in the exercise of prosecutorial discretion;

...

(2) Subsection (1) does not apply to a record that:

(a) provides a general outline of the structure or programs of a law enforcement agency; or

(b) reports, by means of statistical analysis or otherwise, on the degree of success achieved in a law enforcement program.

Subsection 15(1)(k.2) of FOIP is a discretionary class-based exemption. It permits refusal of access in situations where release of a record could reveal any information relating to or used in the exercise of prosecutorial discretion. Information related to or used in the exercise of prosecutorial discretion requires protection. The leading authority on the issue of prosecutorial discretion in Canada is *Krieger v. Law Society of Alberta (2002)*. In that case, the Supreme Court of Canada defined the role of the Attorney General and Crown counsel and described their constitutional dimensions in terms of prosecutorial discretion. The Court said:

> It is a constitutional principle in this country that the Attorneys General of this country must act independently of partisan concerns when exercising their delegated sovereign authority to initiate, continue or terminate prosecutions...
>
> The quasi-judicial function of the Attorney General cannot be subjected to interference from parties who are not as competent to consider the various factors involved in making

a decision to prosecute. To subject such decisions to political interference, or to judicial supervision, could erode the integrity of our system of prosecution…[309]

The following three-part test can be applied:[310]

1. **Was the prosecutorial discretion exercised in matters within the prosecutor's authority concerning the prosecution of offences?**

Exercise of prosecutorial discretion is not defined in FOIP. However, where a legislative instrument [such as FOIP] uses a legal term of art, it is generally presumed that the term is used in its correct legal sense.[311]

Prosecutorial discretion was defined in *Krieger v. Law Society of Alberta (2002)* as follows:

> Without being exhaustive, we believe the core elements of prosecutorial discretion encompass the following: (a) the discretion whether to bring the prosecution of a charge laid by police; (b) the discretion to enter a stay of proceedings in either a private or public prosecution, as codified in the [*Criminal Code*], ss. 579 and 579.1; (c) the discretion to accept a guilty plea to a lesser charge; (d) the discretion to withdraw from criminal proceedings altogether: [*R. v. Osborne (1975)*]; and (e) the discretion to take control of a private prosecution: [*R. v. Osiowy (1989)*]. While there are other discretionary decisions, these are the core of the delegated sovereign authority peculiar to the office of the Attorney General.[312]

Exercise means to make use of; to put into action; to execute.[313]

Subsection 2(u) of *The Summary Offences Procedure Act,* 1990, SS 1990-91, c S-63.1 defines "prosecutor" as follows:

> **2** In this Act:
>
> …
>
> (u) **"prosecutor"** means:
>
> (i) the Attorney General or, where the Attorney General does not intervene, the informant or the person who issued the ticket, and includes counsel or the agent

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[309] *Krieger v. Law Society of Alberta*, [2002] 3 SCR 372, 2002 SCC 65 (CanLII) at [3] and [32].
[310] SK OIPC Review Report 004-2020 at [43].
[311] Sullivan, R. *Sullivan and Driedger on the Construction of Statutes* 4th Edition (Markham: Butterworths, 2002) at p. 47.
[312] *Krieger v. Law Society of Alberta*, [2002] 3 SCR 372, 2002 SCC 65 (CanLII) at [66].
[313] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 718.

acting on behalf of the Attorney General, the informant or the person who issued the ticket;

(ii) with respect to a bylaw, anyone authorized by a municipality or by a body corporate mentioned in subclauses (a)(ii) to (iv) to prosecute bylaws on its behalf;

The exercise of prosecutorial discretion may be with respect to offences under the *Criminal Code* and any other enactment of Canada for which the Attorney General for Saskatchewan may initiate and conduct a prosecution. Prosecutorial discretion may also be exercised with respect to offences under an enactment of Saskatchewan, including prosecution of provincial regulatory offences.[314] A regulatory offence is a statutory crime, as opposed to a common-law crime. It is an offence in which motive is not a consideration in determining guilt, such as a traffic violation.[315]

2. Is the information related to or was it used in the exercise of the discretion?

Relating to should be given a plain but expansive meaning.[316] The phrase should be read in its grammatical and ordinary sense. There is no need to incorporate complex requirements (such as "substantial connection") for its application, which would be inconsistent with the plain unambiguous meaning of the words of the statute.[317] "*Relating to*" requires some connection between the information and the exercise of prosecutorial discretion.[318]

Most records relating to this exemption will be in the possession or under the control of the Ministry of Justice. Copies of records or notes reflecting the discretion exercised may be in the files of local authorities or police services.[319]

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.[320]

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[314] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 p. 153.
[315] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at pp. 1302 and 1303.
[316] *Gertner v. Lawyers' Professional Indemnity Company,* 2011 ONSC 6121 (CanLII) at [32].
[317] *Ministry of Attorney General and Toronto Star*, 2010 ONSC 991 (CanLII) at [45]. This case dealt specifically with an appeal regarding Ontario's FOIP legislation.
[318] Adapted from *Ministry of Attorney General and Toronto Star*, 2010 ONSC 991 (CanLII) at [43].
[319] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 p. 153.
[320] AB IPC Order F2007-021 at [51]. Referenced in Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 p. 153.

3. Could disclosure reveal this information?

Section 15 of FOIP uses the word **could** versus "*could reasonably be expected to*" as seen in other provisions of FOIP. The threshold for *could* is somewhat lower than a reasonable expectation. The requirement for *could* is simply that the release of the information *could* have the specified result. There would still have to be a basis for the assertion. If it is fanciful or exceedingly remote, the exemption should not be invoked.[321] For this provision to apply there must be objective grounds for believing that disclosing the information *could* reveal information related to or used in the exercise of prosecutorial discretion.

Reveal means to make known; cause or allow to be seen.[322]

There are also many smaller decisions regarding the "nature and extent" of a prosecution. For example, there are decisions to request and review information, conduct particular legal research or obtain the views of others. Disclosure of these kinds of information may reveal the grounds on which the larger prosecutorial decisions are based.[323]

When there is a review by the IPC, the government institution is invited to provide a submission (arguments). The government institution should describe how and why disclosure of the information in question could result in the release of information related to or used in the exercise of prosecutorial discretion.

A government institution cannot rely on subsection 15(1)(k.2) of FOIP for a record that:

a) Provides a general outline of the structure or programs of a law enforcement agency; or

b) Reports, by means of statistical analysis or otherwise, on the degree of success achieved in a law enforcement program (see subsection 15(2)).

IPC Findings

In Review Report 004-2020, the Commissioner considered the equivalent provision in *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP) (subsection 14(1)(k.2)). The City of Moose Jaw (City) had applied subsection 14(1)(k.2) of LA FOIP to an email exchange between a City Bylaw Enforcement Officer and the City's legal counsel. The Commissioner found that the City was acting as the prosecutor and as such could exercise prosecutorial discretion. Bylaw Enforcement Officers may act on behalf of the City as a

[321] SK OIPC Review Reports LA-2007-001 at [117], LA-2013-001 at [35], F-2014-001 at [149].
[322] Pearsall, Judy, *Concise Oxford Dictionary*, *10th Ed.*, (Oxford University Press) at p. 1224.
[323] AB IPC Order F2007-021 at [47].

prosecutor and may from time to time exercise prosecutorial discretion. The Commissioner found that the City's submission did not explain how the information related to or was used in the exercise of prosecutorial discretion. Therefore, subsection 14(1)(k.2) of LA FOIP was found not to apply.

Subsection 15(1)(k.3)

Law enforcement and investigations

15(1) A head may refuse to give access to a record, the release of which could:

...

(k.3) reveal a record that has been seized by a law enforcement officer in accordance with an Act or Act of Parliament;

...

(2) Subsection (1) does not apply to a record that:

(a) provides a general outline of the structure or programs of a law enforcement agency; or

(b) reports, by means of statistical analysis or otherwise, on the degree of success achieved in a law enforcement program.

Subsection 15(1)(k.3) of FOIP is a discretionary class-based exemption. It permits refusal of access in situations where release of a record could reveal a record that had been seized by a law enforcement officer in accordance with an Act or Act of Parliament.

The following two-part test can be applied:

1. **Is there a record seized by a law enforcement officer in accordance with an Act or Act of Parliament?**

Record means a record of information in any form and includes information that is written, photographed, recorded or stored in any manner, but does not include computer programs or other mechanisms that produce records.[324]

Seized means to forcibly take possession.[325] In this context, seizure may occur as the result of a warrant but there are other circumstances where a warrant may not be involved, for

[324] *The Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01 at subsection 2(1)(i).
[325] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 1631.

example the seizure of plain view evidence or in exigent circumstances (see subsection 87(7) of the *Criminal Code*).

Law enforcement officer is a person whose duty is to enforce the laws and preserve the peace.[326]

An **Act** means an Act of the Legislature and includes an Ordinance of the Northwest Territories in force in Saskatchewan.[327]

An **Act of Parliament** encompasses all Acts enacted by the Parliament of Canada.[328] An example is the *Criminal Code*.

2. Could release reveal the record that was seized?

Section 15 of FOIP uses the word **could** versus "*could reasonably be expected to*" as seen in other provisions of FOIP. The threshold for *could* is somewhat lower than a reasonable expectation. The requirement for *could* is simply that the release of the information *could* have the specified result. There would still have to be a basis for the assertion. If it is fanciful or exceedingly remote, the exemption should not be invoked.[329] For this provision to apply there must be objective grounds for believing that disclosing the information *could* reveal a record that has been seized by a law enforcement officer in accordance with an Act or Act of Parliament.

Reveal means to make known; cause or allow to be seen.[330]

A government institution cannot rely on subsection 15(1)(k.3) of FOIP for a record that:

a) Provides a general outline of the structure or programs of a law enforcement agency; or

b) Reports, by means of statistical analysis or otherwise, on the degree of success achieved in a law enforcement program (see subsection 15(2)).

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[326] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 1058.
[327] See subsection 2-29 of *The Legislation Act*, S.S. 2019, Chapter L-10.2.
[328] Office of the Information Commissioner of Canada, *Investigator's Guide to Interpreting the ATIA*, https://www.oic-ci.gc.ca/en/investigators-guide-interpreting-act/section-16-law-enforcement-investigations-security, accessed on June 14, 2019. Definition relied on in SK OIPC Review Report F-2014-001 at [127].
[329] SK OIPC Review Reports LA-2007-001 at [117], LA-2013-001 at [35], F-2014-001 at [149].
[330] Pearsall, Judy, *Concise Oxford Dictionary, 10th Ed.*, (Oxford University Press) at p. 1224.

Subsection 15(1)(l)

Law enforcement and investigations

15(1) A head may refuse to give access to a record, the release of which could:

…

(l) reveal technical information relating to weapons or potential weapons; or

…

(2) Subsection (1) does not apply to a record that:

(a) provides a general outline of the structure or programs of a law enforcement agency; or

(b) reports, by means of statistical analysis or otherwise, on the degree of success achieved in a law enforcement program.

Subsection 15(1)(l) of FOIP is a discretionary class-based exemption. It permits refusal of access in situations where release of a record could reveal technical information relating to weapons or potential weapons. An example could include information on how to make a bomb.

The following test can be applied:

Could release reveal technical information relating to weapons or potential weapons?

Section 15 of FOIP uses the word **could** versus "*could reasonably be expected to*" as seen in other provisions of FOIP. The threshold for *could* is somewhat lower than a reasonable expectation. The requirement for *could* is simply that the release of the information *could* have the specified result. There would still have to be a basis for the assertion. If it is fanciful or exceedingly remote, the exemption should not be invoked.[331] For this provision to apply there must be objective grounds for believing that disclosing the information *could* reveal technical information relating to weapons or potential weapons.

Reveal means to make known; cause or allow to be seen.[332]

Technical information is information belonging to an organized field of knowledge which would fall under the general categories of applied sciences or mechanical arts. Examples of these fields would include architecture, engineering or electronics…it will usually involve information prepared by a professional in the field and describe the construction, operation

[331] SK OIPC Review Reports LA-2007-001 at [117], LA-2013-001 at [35], F-2014-001 at [149].
[332] Pearsall, Judy, *Concise Oxford Dictionary*, *10th Ed*., (Oxford University Press) at p. 1224.

or maintenance of a structure, process, equipment or thing. Finally, technical information must be given a meaning separate from scientific information.[333]

Relating to should be given a plain but expansive meaning.[334] The phrase should be read in its grammatical and ordinary sense. There is no need to incorporate complex requirements (such as "substantial connection") for its application, which would be inconsistent with the plain unambiguous meaning of the words of the statute.[335] "*Relating to*" requires some connection between the technical information and weapons both existing and potential.[336]

Weapon means an instrument used or designed to be used to injure or kill someone.[337]

Potential means capable of coming into being; possible if the necessary conditions exist.[338]

A government institution cannot rely on subsection 15(1)(l) of FOIP for a record that:

a) Provides a general outline of the structure or programs of a law enforcement agency; or

b) Reports, by means of statistical analysis or otherwise, on the degree of success achieved in a law enforcement program (see subsection 15(2)).

Subsection 15(1)(m)

Law enforcement and investigations

15(1) A head may refuse to give access to a record, the release of which could:

…

(m) reveal the security arrangements of particular vehicles, buildings or other structures or systems, including computer or communication systems, or methods employed to protect those vehicles, buildings, structures or systems.

(2) Subsection (1) does not apply to a record that:

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[333] SK OPIC definition accepted by Justice Keene in *Consumers Co-operative Refineries Limited v Regina (City)*, 2016 SK B 335 (CanLII) at [20]. Same definition is used for third party exemption at subsection 19(1)(b) of this Guide.
[334] *Gertner v. Lawyers' Professional Indemnity Company*, 2011 ONSC 6121 (CanLII) at [32].
[335] *Ministry of Attorney General and Toronto Star*, 2010 ONSC 991 (CanLII) at [45]. This case dealt specifically with an appeal regarding Ontario's FOIP legislation.
[336] Adapted from *Ministry of Attorney General and Toronto Star*, 2010 ONSC 991 (CanLII) at [43].
[337] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 1908.
[338] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 1413.

(a) provides a general outline of the structure or programs of a law enforcement agency; or

(b) reports, by means of statistical analysis or otherwise, on the degree of success achieved in a law enforcement program.

Subsection 15(1)(m) of FOIP is a discretionary class-based exemption. It permits refusal of access in situations where release of a record could reveal the security arrangements of particular vehicles, buildings or other structures or systems, including computer or communication systems, or methods employed to protect those vehicles, buildings, structures or systems.

Including means that the list of information that follows is not complete (non-exhaustive). The examples in the provision are the type of information that could be presumed to qualify as "security arrangements".[339]

The following two-part test can be applied. However, only one of the questions needs to be answered in the affirmative for the exemption to apply. There may be circumstances where both questions apply and can be answered in the affirmative:

1. **Could release reveal security arrangements (of particular vehicles, buildings, other structures, or systems)?**

Section 15 of FOIP uses the word **could** versus "*could reasonably be expected to*" as seen in other provisions of FOIP. The threshold for *could* is somewhat lower than a reasonable expectation. The requirement for *could* is simply that the release of the information *could* have the specified result. There would still have to be a basis for the assertion. If it is fanciful or exceedingly remote, the exemption should not be invoked.[340] For this provision to apply there must be objective grounds for believing that disclosing the information *could* reveal security arrangements of particular vehicles, buildings, other structures, or systems.

Reveal means to make known; cause or allow to be seen.[341]

Security 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

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[339] British Columbia Government Services, *FOIPPA Policy and Procedures Manual* at https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/cabinet-local-public-body-confidences. Accessed June 26, 2019. Definition of "including" as included in SK OIPC *Guide to FOIP*, *Chapter 4 – Exemptions from the Right of Access*, for subsections 16(1), 17(1)(g), 22(a) and 24(1) of FOIP.

[340] SK OIPC Review Reports LA-2007-001 at [117], LA-2013-001 at [35], F-2014-001 at [149].

[341] Pearsall, Judy, *Concise Oxford Dictionary*, *10th Ed.*, (Oxford University Press) at p. 1224.

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.[342] Security means sufficient security.[343]

Other structures or systems includes computer and communication systems. An example of a communication system could be a radio communication system such as two-way radios.

2. Could release reveal security methods employed to protect the particular vehicles, buildings, other structures, or systems?

Section 15 of FOIP uses the word **could** versus "*could reasonably be expected to*" as seen in other provisions of FOIP. The threshold for *could* is somewhat lower than a reasonable expectation. The requirement for *could* is simply that the release of the information *could* have the specified result. There would still have to be a basis for the assertion. If it is fanciful or exceedingly remote, the exemption should not be invoked.[344] For this provision to apply there must be objective grounds for believing that disclosing the information *could* reveal security methods employed to protect particular vehicles, buildings, other structures or systems.

Reveal means to make known; cause or allow to be seen.[345]

Security 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.[346]

Method means a mode of organizing, operating, or performing something.

Other structures or systems includes computer and communication systems. An example of a communication system could be radio communication systems such as two-way radios.

The government institution must demonstrate that the information in the record is information that would reveal security methods employed to protect particular vehicles, buildings, other structures or systems to meet this part of the test.

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[342] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 155.
[343] *The Legislation Act*, S.S. 2019, Chapter L-10.2 at ss. 2-29.
[344] SK OIPC Review Reports LA-2007-001 at [117], LA-2013-001 at [35], F-2014-001 at [149].
[345] Pearsall, Judy, *Concise Oxford Dictionary*, *10th Ed*., (Oxford University Press) at p. 1224.
[346] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 155.

A government institution cannot rely on subsection 15(1)(m) of FOIP for a record that:

a) Provides a general outline of the structure or programs of a law enforcement agency; or

b) Reports, by means of statistical analysis or otherwise, on the degree of success achieved in a law enforcement program (see subsection 15(2)).

IPC Findings

In Review Report 037-2018, the Commissioner considered the equivalent provision in LA FOIP. The applicant had requested records from the Saskatoon Police Service (SPS) related to a specific incident. SPS released some records to the applicant and withheld others pursuant to several provisions including subsection 14(1)(m) of LA FOIP. SPS applied subsection 14(1)(m) of LA FOIP to two pages of the record which constituted a note from an officer to a prosecutor. It advised of special arrangements that may have been required in the courtroom based on the history of some of the individuals involved in the court proceeding. SPS asserted that the note revealed the security arrangements of the Court of King's Bench building. Furthermore, that it would reveal patterns of security personnel at the Court. Upon review, the Commissioner found that the note only contained one suggestion about security for the Court of King's Bench. In addition, there was no evidence that the suggestion had been relayed on to the Court or that the Court followed the suggestion. Finally, if the security measure had been followed, it would have been observable by those who attended at the time. The Commissioner was not persuaded that subsection 14(1)(m) of LA FOIP applied to the note.

Subsection 15(2)

Law enforcement and investigations

15(2) Subsection (1) does not apply to a record that:

(a) provides a general outline of the structure or programs of a law enforcement agency; or

(b) reports, by means of statistical analysis or otherwise, on the degree of success achieved in a law enforcement program.

Subsection 15(2) of FOIP provides that a government institution cannot rely on subsection 15(1) of FOIP for a record that:

a) Provides a general outline of the structure or programs of a law enforcement agency; or

b) Reports, by means of statistical analysis or otherwise, on the degree of success achieved in a law enforcement program.

The purpose of this provision is to encourage disclosure of general information about the structure of law enforcement or its programs or reports and statistics about the success of law enforcement programs.

Structure in this context means the organization of elements or parts such as corporate structure.[347]

Programs in this context means a set of related measures or activities with a long-term aim, a planned series of events.[348] An example would be the Regina Crime Stoppers Program.

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 subsections would information be withheld. This would be done by severing the appropriate parts of the report.[349]

Examples of statistical law enforcement reports include information on the success of programs such as "Crime Stoppers", statistics on safety inspections and reports on matters such as reducing car thefts.

[347] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 1721.
[348] Pearsall, Judy, *Concise Oxford Dictionary*, *10th Ed*., (Oxford University Press) at p. 1142.
[349] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 158.

Section 16: Cabinet Documents

Cabinet documents

16(1) A head shall refuse to give access to a record that discloses a confidence of the Executive Council, including:

(a) records created to present advice, proposals, recommendations, analyses or policy options to the Executive Council or any of its committees;

(b) agendas or minutes of the Executive Council or any of its committees, or records that record deliberations or decisions of the Executive Council or any of its committees;

(c) records of consultations among members of the Executive Council on matters that relate to the making of government decisions or the formulation of government policy, or records that reflect those consultations;

(d) records that contain briefings to members of the Executive Council in relation to matters that:

(i) are before, or are proposed to be brought before, the Executive Council or any of its committees; or

(ii) are the subject of consultations described in clause (c).

(2) Subject to section 30, a head shall not refuse to give access pursuant to subsection (1) to a record where:

(a) the record has been in existence for more than 25 years; or

(b) consent to access is given by:

(i) the President of the Executive Council for which, or with respect to which, the record has been prepared; or

(ii) in the absence or inability to act of the President, by the next senior member of the Executive Council who is present and able to act.

Subsection 16(1) of FOIP is a mandatory class-based provision. Subsections 16(1)(a) through (d) of FOIP are not an exhaustive list. Therefore, even if none of the subsections are found to apply, the introductory wording of subsection 16(1) of FOIP must still be considered.[350] In other words, is the information a confidence of Executive Council?

[350] First stated in SK OIPC Review Report 021-2015 at [20]. Consistent with British Columbia Government Services, *FOIPPA Policy and Procedures Manual* at https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/cabinet-local-public-body-confidences. Accessed June 26, 2019.

Office of the Saskatchewan Information and Privacy Commissioner. Guide to FOIP, Chapter 4, *Exemptions from the Right of Access*. Updated 8 April 2024.

Including means that the list of information that follows is not complete (non-exhaustive). The examples in the provision are the types of information that could be presumed to disclose a confidence of the Executive Council (Cabinet).[351]

The Saskatchewan Government is based on a Cabinet system. Consisting of the Premier and ministers.

In Supreme Court of Canada decision, *Ontario (Attorney Genera) v. Ontario (Information and Privacy Commissioner), 2024 SCC 4*, the following highlights the importance and purpose of protecting cabinet confidences:

> [28] In our constitutional democracy, the confidentiality of Cabinet deliberations is a precondition to responsible government because it enables collective ministerial responsibility. Responsible government is a fundamental principle of our system of government (*OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, at p. 38) and the "most important non-federal characteristic of the Canadian Constitution" (P. W. Hogg and W. K. Wright, *Constitutional Law of Canada* (5th ed. Supp.), at § 9:3). Government is "responsible" in that the executive is accountable to, and must maintain the confidence of, the legislative assembly (§ 9:1; Heard, at p. 90). Cabinet ministers are both *individually* responsible for their own conduct and respective departments, and *collectively* responsible for government policy and action (G. White, *Cabinets and First Ministers* (2005), at pp. 15-16).
>
> [29] Cabinet secrecy derives from the collective dimension of ministerial responsibility (Y. Campagnolo, "The Political Legitimacy of Cabinet Secrecy" (2017), 51 *R.J.T.U.M.* 51, at p. 59). Collective ministerial responsibility requires that ministers be able to speak freely when deliberating without fear that what they say might be subject to public scrutiny (IPC reasons, at paras. 86-87 and 97). This is necessary so ministers do not censor themselves in policy debate, and so ministers can stand together in public, and be held responsible as a whole, once a policy decision has been made and announced. These purposes are referred to by scholars as the "candour" and "solidarity" rationales for Cabinet confidentiality (see Campagnolo (2017), at pp. 66-72). At base, Cabinet confidentiality promotes executive accountability by permitting private disagreement and candour in ministerial deliberations, despite public solidarity (*ibid.*; see also N. d'Ombrain, "Cabinet secrecy" (2004), 47 *Can. Pub. Admin.* 332, at p. 336).

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[351] British Columbia Government Services, *FOIPPA Policy and Procedures Manual* at https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/cabinet-local-public-body-confidences. Accessed June 26, 2019.

[30] Scholars also refer to a third rationale for the convention of Cabinet confidentiality: it promotes the efficiency of the collective decision-making process (see Campagnolo (2017), at p. 68). Thus, Cabinet secrecy promotes candour, solidarity, and efficiency, all in aid of effective government. This objective is also reflected in the jurisprudence of this Court. In *Carey*, this Court observed that the very purpose of the confidentiality is the proper functioning of government (pp. 664, 670-71 and 673). In *Babcock*, McLachlin C.J. stated: "Cabinet confidentiality is essential to good government" (para. 15). And in *John Doe v. Ontario (Finance)*, 2014 SCC 36, [2014] 2 S.C.R. 3, this Court noted that exposure of policy priorities at an early stage of the deliberative process to journalists or political opponents "is combustible material liable to fuel a fire that could quickly destroy governmental credibility and effectiveness" (para. 44, quoting *Canadian Council of Christian Charities v. Canada (Minister of Finance)*, [1999] 4 F.C. 245, at para. 31).

[31] Cabinet confidentiality is therefore "not just a convenient political dodge; it is essential to effective government" (see White, at p. 139; see also p. 138). Our jurisprudence focuses broadly on the value of deliberative secrecy to the effective operation of government institutions, including Cabinet. It also recognizes that too much openness can impair that aim (see *Babcock*, at para. 18; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815 (*Criminal Lawyers' Association 2010*), at para. 40; *B.C. Judges*, at para. 96; see also *John Doe*, at para. 44; Williams Report, at p. 235).

…

[35] …Lord Reid famously explained the value of Cabinet confidentiality to government efficiency in *Conway v. Rimmer*, [1968] A.C. 910 (H.L.), at p. 952, in words quoted with approval by this Court in *Carey*, at pp. 658-59:

> [The premature disclosure of Cabinet secrets] would create or fan ill-informed or captious public or political criticism. The business of government is difficult enough as it is, and no government could contemplate with equanimity the inner workings of the government machine being exposed to the gaze of those ready to criticise without adequate knowledge of the background and perhaps with some axe to grind.

[36] The prerogative to determine when and how to announce Cabinet decisions is grounded in the harmful impact that premature disclosure of policy priorities can have on the deliberative process. As Professor Campagnolo explains, as a matter of convention, the efficiency of the deliberative process justifies "keeping Cabinet proceedings confidential until a final decision is made and announced by ministers" (*Behind Closed Doors: The Law and Politics of Cabinet Secrecy* (2021), at p. 26). Publicizing Cabinet's

> decision-making process before the formulation and announcement of a final decision "would increase the public pressure that stakeholders put on ministers and give rise to partisan criticism from their political opponents"; this scrutiny "would ultimately paralyze the collective decision-making process" (p. 26).
>
> …
>
> [61] In approaching assertions of Cabinet confidentiality, administrative decision makers and reviewing courts must be attentive not only to the vital importance of public access to government-held information but also to Cabinet secrecy's core purpose of enabling effective government, and its underlying rationales of efficiency, candour, and solidarity. They must also be attentive to the dynamic and fluid nature of executive decision making, the function of Cabinet itself and its individual members, the role of the Premier, and Cabinet's prerogative to determine when and how to announce its decisions.

Cabinet establishes the provincial government's policies and priorities for the province. Cabinet ministers are collectively responsible for all actions taken by the Cabinet and must publicly support all Cabinet decisions. In order to reach final decisions, ministers must be able to express their views freely during the discussions held in Cabinet. To allow the exchange of views to be disclosed publicly would result in the erosion of the collective responsibility of ministers. As a result, the collective decision-making process has traditionally been protected by the rule of confidentiality, which upholds the principle of collective responsibility and enables ministers to engage in full and frank discussions necessary for the effective running of a Cabinet system.[352]

The Supreme Court of Canada has recognized that Cabinet confidentiality is essential to good government. In the decision *Babcock v. Canada (Attorney General), 2002*, the Court explained the reasons for this: "The process of democratic governance works best when Cabinet members charged with government policy and decision-making are free to express themselves around the Cabinet table unreservedly."[353]

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[352] Treasury Board of Canada Secretariat, *Confidences of the Queen's Privy Council for Canada (Cabinet confidences)*, https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/privacy/confidences-queen-privy-council-canada-cabinet-confidences.html. Accessed June 26, 2019. Also referenced in the Office of the Information Commissioner resource, *The Access to Information Act and Cabinet confidence: A Discussion of New Approaches*, 1996 at p. 5.

[353] *Babcock v. Canada (Attorney General)*, [2002] 2 SCR 3, 2002 SCC 57 (CanLII) at [18]. Also cited in Treasury Board of Canada Secretariat, *Confidences of the Queen's Privy Council for Canada (Cabinet confidences)*, https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/privacy/confidences-queen-privy-council-canada-cabinet-confidences.html. Accessed June 26, 2019.

Mr. Justice Culliton, made a recommendation about the type of records that should be protected as cabinet confidences in his report titled, *Report of the Honourable E.M. Culliton, Former Chief Justice of Saskatchewan, on the Matter of Freedom of Information and Protection of Privacy in the Province of Saskatchewan*. In Review Report F-2012-004, the Commissioner quoted these recommendations from Justice Culliton as follows:

> The solidarity of cabinet can be maintained only by complete confidentiality in respect to all records relevant to its administration and operation. I recommend that the legislation provide for such complete confidentiality and without in any way restricting that wide protection, should provide specifically that access shall not be granted to:
>
> a) memoranda the purpose of which is to present proposals or recommendations to the executive council;
>
> b) discussion papers, the purpose of which is to present background, explanation, analysis of problems or political options to the executive council for consideration by the council in making decisions;
>
> c) agenda of executive council or minister or records disclosing deliberations or decisions of the executive council;
>
> d) records used for or reflecting conclusions or discussions by the members of the executive council on matters relating to the making of government decisions or the formulation of government policy;
>
> e) records the purpose of which is to brief members of the executive council in relation to matters that are before or are proposed to be brought before the executive council; and
>
> f) draft legislation.[354]

IPC Findings

In 2015, the Commissioner issued 10 Review Reports[355] involving 10 different government institutions. An applicant had requested the Transition Briefing Binders provided to new ministers in June 2014 for each of the 10 government institutions. Each of the government institutions responded to the applicant. All of the responses indicated that the Transition

[354] *Report of the Honourable E. M. Culliton, Former Chief Justice of Saskatchewan on the Matter of Freedom of Information and Protection of Privacy in the Province of Saskatchewan* (Regina: Legislative Assembly of Saskatchewan Library, 1981), p. 85. SK OIPC Review Report F-2012-004 at [55].
[355] SK OIPC Review Reports 016-2015, 017-2015, 018-2015, 019-2015, 020-2015, 021-2015, 022-2015, 023-2015, 032-2015 and 033-2015.

Briefing Binders were being withheld in full from the applicant. Seven of the government institutions cited subsection 16(1)(a), one cited subsection 16(1)(b) and two cited subsection 16(1) of FOIP. The Transition Briefing Binders varied between each government institution with the smallest being 16 pages and the largest being 262 pages. The government institutions asserted that the Transition Briefing Binders were not only a set of briefing notes but also a record that identified the issues, policies and directions of priority for the new ministers. Upon review, the Commissioner found that some portions of the Transition Briefing Binders were appropriately withheld under subsection 16(1) of FOIP. The Commissioner also found that some portions contained personal information pursuant to subsection 24(1) of FOIP. However, the Commissioner also found that some portions were publicly available or had been publicly revealed. For example, organizational charts, some financial information, information on mandates and missions of the government institutions. For portions that were already publicly available or already publicly revealed, the Commissioner found that subsection 16(1) of FOIP did not apply.

Subsection 16(1)(a)

Cabinet documents

16(1) A head shall refuse to give access to a record that discloses a confidence of the Executive Council, including:

(a) records created to present advice, proposals, recommendations, analyses or policy options to the Executive Council or any of its committees;

...

(2) Subject to section 30, a head shall not refuse to give access pursuant to subsection (1) to a record where:

(a) the record has been in existence for more than 25 years; or

(b) consent to access is given by:

(i) the President of the Executive Council for which, or with respect to which, the record has been prepared; or

(ii) in the absence or inability to act of the President, by the next senior member of the Executive Council who is present and able to act.

Subsection 16(1)(a) of FOIP is a mandatory class-based exemption. It permits refusal of access in situations where release of a record could disclose a confidence of Cabinet including records created to present advice, proposals, recommendations, analyses, or policy options to Cabinet or any of its committees.

Office of the Saskatchewan Information and Privacy Commissioner. Guide to FOIP, Chapter 4, *Exemptions from the Right of Access*. Updated 8 April 2024.

Cabinet confidences are generally defined as, in the broadest sense, the political secrets of Ministers individually and collectively, the disclosure of which would make it very difficult for the government to speak in unison before Parliament and the public.[356]

Including means that the list of information that follows is not complete (non-exhaustive). The examples in the provision are the types of information that could be presumed to disclose a confidence of the Executive Council (Cabinet).[357]

The following two-part test can be applied:

1. **Does the record contain advice, proposals, recommendations, analyses or policy options?**

Advice is guidance offered by one person to another.[358] It can include 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.[359] Advice encompasses material that permits the drawing of inferences with respect to a suggested course of action, but which does not itself make a specific recommendation. It can be an implied recommendation.[360] The "pros and cons" of various options also qualify as advice.[361] It should not be given a restricted meaning. Rather, it should be interpreted to include an opinion that involves exercising judgement and skill in weighing the significance of fact. It includes expert opinion on matters of fact on which a public body must make a decision for future action.[362]

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[356] *Federal Access to Information and Privacy Legislation Annotated 2015* (Canada: Thomson Reuters Canada Limited, 2014) at page 1-644.4.
[357] British Columbia Government Services, *FOIPPA Policy and Procedures Manual* at https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/cabinet-local-public-body-confidences. Accessed June 26, 2019.
[358] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 67.
[359] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at pp. 166 and 179. The SK OIPC relied on this definition for the first time in Review Report LA-2010-001 at [28]. Also relied on in SK OIPC Review Report F-2014-001 at [282].
[360] *John Doe v. Ontario (Finance),* [2014] 2 SCR 3, 2014 SCC 36 (CanLII) at [26]. Relied on by Justice Danyliuk in *Britto v University of Saskatchewan*, 2018 SKQB 92 at [77].
[361] *John Doe v. Ontario (Finance),* [2014] 2 SCR 3, 2014 SCC 36 (CanLII) at [47]. Relied on in ON IPC Order PO-3470-R at [21].
[362] *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner),* 2002 BCCA 665 (CanLII) at [113] to [114].

Advice includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.[363]

Advice has a broader meaning than recommendations.[364] The legislative intention was for advice to have a distinct meaning from recommendations. Otherwise, it would be redundant.[365] While "recommendation" is an express suggestion, "advice" is simply an implied recommendation.[366]

A **recommendation** is a specific piece of advice about what to do, especially when given officially; a suggestion that someone should choose a particular thing or person that one thinks particularly good or meritorious.[367] Recommendations relate to a suggested course of action more explicitly and pointedly than "advice".[368] It can include material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised.[369] It includes suggestions for a course of action as well as the rationale or substance for a suggested course of action.[370] A recommendation, whether express or inferable, is still a recommendation.[371]

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[363] *John Doe v. Ontario (Finance),* [2014] 2 SCR 3, 2014 SCC 36 (CanLII) at [26] and [47]. Relied on in ON IPC Order PO-3799 at [29]. It should be noted that this is based on Ontario's FOIP subsection 13(1), which does not include "*policy options*" in its wording. Saskatchewan's FOIP includes '*policy options*' in its wording as a separate type of information.

[364] *John Doe v. Ontario (Finance),* [2014] 2 SCR 3, 2014 SCC 36 (CanLII) at [22] and [24]. Relied on by Justice Danyliuk in *Britto v University of Saskatchewan*, 2018 SKQB 92 at [77].

[365] *John Doe v. Ontario (Finance),* [2014] 2 SCR 3, 2014 SCC 36 (CanLII) at [24]. Relied on by Justice Danyliuk in *Britto v University of Saskatchewan*, 2018 SKQB 92 at [77].

[366] *John Doe v. Ontario (Finance),* [2014] 2 SCR 3, 2014 SCC 36 (CanLII) at [22]. Relied on by Justice Danyliuk in *Britto v University of Saskatchewan*, 2018 SKQB 92 at [77] and Justice Gabrielson in *Hande v University of Saskatchewan*, QBG 1222 of 2018 at [41].

[367] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 1526.

[368] *John Doe v. Ontario (Finance),* [2014] 2 SCR 3, 2014 SCC 36 (CanLII) at [22]. Relied on by Justice Danyliuk in *Britto v University of Saskatchewan*, 2018 SKQB 92 at [77] and Justice Gabrielson in *Hande v University of Saskatchewan*, QBG 1222 of 2018 at [41].

[369] *John Doe v. Ontario (Finance),* [2014] 2 SCR 3, 2014 SCC 36 (CanLII) at [23]. Relied on by Justice Danyliuk in *Britto v University of Saskatchewan*, 2018 SKQB 92 at [77] and Justice Gabrielson in *Hande v University of Saskatchewan*, QBG 1222 of 2018 at [41].

[370] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at pp. 166 and 179. The SK OIPC relied on this definition for the first time in Review Report LA-2010-001 at [28]. Also relied on in SK OIPC Review Report F-2014-001 at [282]. The term "*substance*" was added to the definition following SK IPC Review Report 019-2017 at [21].

[371] *John Doe v. Ontario (Finance),* [2014] 2 SCR 3, 2014 SCC 36 (CanLII) at [24]. Relied on by Justice Danyliuk in *Britto v University of Saskatchewan*, 2018 SKQB 92 at [77] and Justice Gabrielson in *Hande v University of Saskatchewan*, QBG 1222 of 2018 at [41].

A **proposal** is something offered for consideration or acceptance.[372]

Analyses is a detailed examination of the elements or structure of something; the process of separating something into its constituent elements.[373]

Policy options are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made. They would include matters such as the public servant's identification and consideration of alternative decisions that could be made. In other words, they constitute an evaluative analysis as opposed to objective information.[374]

Records containing policy options can take many forms. They might include the full range of policy options for a given decision, comprising all conceivable alternatives, or may only list a subset of alternatives that in the public servant's opinion are most worthy of consideration. They can also include the advantages and disadvantages of each opinion. The list can also be less fulsome and still constitute policy options. For example, a public servant may prepare a list of all alternatives and await further instructions from the decision maker for which options should be considered in depth. Or, if the advantages and disadvantages of the policy options are either perceived as being obvious or have already been canvassed orally or in a prior draft, the policy options might appear without any additional explanation. As long as a list sets out alternative courses of action relating to a decision to be made, it will constitute policy options.[375]

Advice, proposals, recommendations, analyses or policy options can be revealed in two ways:

1. The information itself consists of advice, proposals, recommendations, analyses, or policy options.

2. The information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice, proposals, recommendations, analyses or policy options.[376]

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[372] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 1474.
[373] Pearsall, Judy, *Concise Oxford Dictionary*, *10th Ed*., (Oxford University Press) at p. 47.
[374] *John Doe v. Ontario (Finance),* [2014] 2 SCR 3, 2014 SCC 36 (CanLII) at [26]. Relied on by Justice Kalmakoff in *Leo v Global Transportation Hub Authority*, 2019 SKQB 150 at [30].
[375] *John Doe v. Ontario (Finance),* [2014] 2 SCR 3, 2014 SCC 36 (CanLII) at [27]. Relied on by Justice Kalmakoff in *Leo v Global Transportation Hub Authority*, 2019 SKQB 150 at [30].
[376] ON IPC Orders PO-3470-R at [28], PO-2084 at p. 8 and PO-2028 at pp. 10 and 11, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564. See also Order PO-1993 at p. 12, upheld on judicial review in *Ontario*

2. Was the record created to present to Cabinet or any of its committees?

Records that contain advice, proposals, recommendations, analyses or policy options developed from sources outside of the Executive Council for presentation to the Executive Council are intended to be covered by the provision.

A draft memorandum that was created for the purpose of presenting proposals and recommendations to Cabinet but that was never actually presented to Cabinet remains a confidence. Equally, a memorandum in final form is a confidence even if it has not been presented to Cabinet.[377]

Executive Council means the Executive Council appointed pursuant to *The Executive Government Administration Act*.[378] It consists of the Premier and Cabinet Ministers. Executive Council is also referred to as "Cabinet".[379] **Cabinet** has also been defined as the committee of senior ministers (heading individual provincial government ministries) which acts collectively with the Premier to decide matters of government policy.[380]

A **committee of the Executive Council**, also known as a Cabinet committee, includes one or more Cabinet ministers.[381] The committee exercises some or all of the powers of Cabinet as a whole, or develops and provides recommendations to Cabinet. Also included in the definition is an entity or individual to which the Executive Council or any of its committees has delegated decision-making authority on their behalf.[382] Section 6 of *The Executive Government Administration Act* provides that:

> **6**(1) The Lieutenant Governor in Council may:

(Ministry of Transportation) v. Ontario (Information and Privacy Commissioner), [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.

[377] Treasury Board of Canada Secretariat, *Confidences of the Queen's Privy Council for Canada (Cabinet confidences)*, https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/privacy/confidences-queen-privy-council-canada-cabinet-confidences.html. Accessed June 26, 2019. This approach was adopted in SK OIPC Review Report 023-2014 at [16].

[378] *The Legislation Act*, S.S. 2019, Chapter L-10.2 at ss. 2-29.

[379] Government of Saskatchewan, Cabinet Secretariat, Executive Council, *Executive Government Processes and Procedures in Saskatchewan: A Procedures Manual*, 2007, at p. 16.

[380] British Columbia Government Services, *FOIPPA Policy Definitions* at https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/policy-definitions. Accessed April 23, 2020.

[381] *The Executive Government Administration Act, S.S. 2014,* Chapter E-13.1 at subsection 6(1)(a).

[382] British Columbia Government Services, *FOIPPA Policy and Procedures Manual* at https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/cabinet-local-public-body-confidences. Accessed June 26, 2019.

(a) establish one or more committees to the executive council, each consisting of a minister, who shall preside over the committee, and any other persons that the Lieutenant Governor in Council may appoint; and

(b) determine the duties and functions of each committee established pursuant to clause (a).

(2) Each committee established pursuant to clause (1)(a) may make its own rules and procedures.[383]

The Commissioner has formally found the following are committees of Executive Council. However, this list is not exhaustive. These are only the ones considered by the Commissioner:

- Treasury Board;[384] and
- The Legislation and Regulation Review Committee.[385]

Subsection 16(2) of FOIP requires disclosure of cabinet documents where:

- The record has been in existence for more than 25 years; or
- Consent to release is given by the President of the Executive Council or, in absence of the President, the next senior member of Executive Council.

However, if the record contains personal information, the rules around disclosure under section 30 of FOIP still apply.

IPC Findings

In Review Report 079-2013, the Commissioner considered subsection 16(1)(a) of FOIP. An applicant had made an access to information request to Executive Council for analysis and review of the sale of all or part of the Information Services Corporation prepared for or by the corporation in 2011, 2012 and 2013. Executive Council applied subsection 16(1)(a) of FOIP to a *Decision Item*. Upon review, the Commissioner found that the *Decision Item* contained proposals, recommendations, and analyses. Further, it was addressed to the chair of the Legislation and Regulation Review Committee. This committee was a committee of the Executive Council. As such, the Commissioner found that subsection 16(1)(a) of FOIP applied to the *Decision Item*.

[383] *The Executive Government Administration Act*, SS 2014, c E-13.1 at section 6.
[384] SK OIPC Review Reports 041-2015 at [8], 050-2015 at [12] and 051-2015 at [12].
[385] SK OIPC Review Report 079-2013 at [21].

In Review Report 016-2016, the Commissioner considered subsection 16(1)(a) of FOIP. An applicant had made an access to information request to the Ministry of Health (Health) for briefing notes, analysis and reports related to the adoption of, or transition to user-pay CT scans or MRIs in Saskatchewan since January 1, 2013. Health responded to the request by providing partial access to records. It withheld portions pursuant to subsection 16(1)(a) and several other provisions. Upon review, the Commissioner found that information in the briefing note under the heading "*Confidential/Sensitive Information*" did not qualify for subsection 16(1)(a) because the briefing note stated that the Minister of Health had requested that information be compiled on a certain topic for Cabinet. As this was a directive, it did not qualify as advice, proposals, recommendations, analyses or policy options.

In Review Report 311-2016, the Commissioner considered subsection 16(1)(a) of FOIP. An applicant had made an access to information request to the Ministry of Justice (Justice) for a copy of a recently completed review report on the Office of the Chief Coroner. Justice withheld the report in full citing subsection 16(1)(a) of FOIP. Upon review, the Commissioner found that absent any evidence from Justice, the mere assertion that the report had been loaded to DocShare was not sufficient to demonstrate that the report was intended for Executive Council. As such, the Commissioner found that Justice had not demonstrated that subsection 16(1)(a) of FOIP applied.

Subsection 16(1)(b)

Cabinet documents

16(1) A head shall refuse to give access to a record that discloses a confidence of the Executive Council, including:

…

(b) agendas or minutes of the Executive Council or any of its committees, or records that record deliberations or decisions of the Executive Council or any of its committees;

…

(2) Subject to section 30, a head shall not refuse to give access pursuant to subsection (1) to a record where:

(a) the record has been in existence for more than 25 years; or

(b) consent to access is given by:

(i) the President of the Executive Council for which, or with respect to which, the record has been prepared; or

(ii) in the absence or inability to act of the President, by the next senior member of the Executive Council who is present and able to act.

Subsection 16(1)(b) of FOIP is a mandatory class-based exemption. It permits refusal of access in situations where release of a record could disclose a confidence of Cabinet including agendas or minutes of Cabinet or any of its committee or records that record deliberations or decisions of Cabinet or any of its committees.

Cabinet confidences are generally defined as, in the broadest sense, the political secrets of Ministers individually and collectively, the disclosure of which would make it very difficult for the government to speak in unison before Parliament and the public.[386]

Including means that the list of information that follows is not complete (non-exhaustive). The examples in the provision are the types of information that could be presumed to disclose a confidence of the Executive Council (Cabinet).[387]

The following two-part test can be applied. However, only one of the questions needs to be answered in the affirmative for the exemption to apply. There may be circumstances where both questions apply and can be answered in the affirmative.

1. Does the record disclose agendas or minutes of Cabinet or any of its committees?

An **agenda** is a list of things to be done, as items to be considered at a meeting, arranged in order of consideration.[388]

Minutes are memoranda or notes of a transaction, proceeding or meeting. An official record. It mainly contains a record of what was done at the meeting.[389]

Executive Council means the Executive Council appointed pursuant to *The Executive Government Administration Act*.[390] It consists of the Premier and Cabinet Ministers. Executive Council is also referred to as "Cabinet".[391] **Cabinet** has also been defined as the committee of

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[386] *Federal Access to Information and Privacy Legislation Annotated 2015* (Canada: Thomson Reuters Canada Limited, 2014) at page 1-644.4.
[387] British Columbia Government Services, *FOIPPA Policy and Procedures Manual* at https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/cabinet-local-public-body-confidences. Accessed June 26, 2019.
[388] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 78.
[389] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 1194.
[390] *The Legislation Act*, S.S. 2019, Chapter L-10.2 at ss. 2-29.
[391] Government of Saskatchewan, Cabinet Secretariat, Executive Council, *Executive Government Processes and Procedures in Saskatchewan: A Procedures Manual*, 2007, at p. 16.

senior ministers (heading individual provincial government ministries) which acts collectively with the Premier to decide matters of government policy.[392]

A **committee of the Executive Council**, also known as a Cabinet committee, includes one or more Cabinet ministers.[393] The committee exercises some or all of the powers of Cabinet as a whole, or develops and provides recommendations to Cabinet. Also included in the definition is an entity or individual to which the Executive Council or any of its committees has delegated decision-making authority on their behalf.[394]

The Commissioner has formally found the following are committees of Executive Council. However, this list is not exhaustive. These are only the ones considered by the Commissioner:

- Treasury Board;[395] and
- The Legislation and Regulation Review Committee.[396]

This includes drafts of these documents and any informal notes, which officials may make during the meetings. By disclosing drafts and notes, the associated substance could be disclosed.[397]

2. Is the record a record of deliberations or decisions of Cabinet or any of its committees?

A record of in this context means a documented account of past events, usually designed to memorialize those events.[398]

Deliberation means:

- The action of deliberating (to deliberate: to weigh in mind; to consider carefully with a view to a decision; to think over); careful consideration with a view to a decision.

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[392] British Columbia Government Services, *FOIPPA Policy Definitions* at https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/policy-definitions. Accessed April 23, 2020.
[393] *The Executive Government Administration Act, S.S. 2014,* Chapter E-13.1 at subsection 6(1)(a).
[394] British Columbia Government Services, *FOIPPA Policy and Procedures Manual* at https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/cabinet-local-public-body-confidences. Accessed June 26, 2019.
[395] SK OIPC Review Reports 041-2015 at [8], 050-2015 at [12] and 051-2015 at [12].
[396] SK OIPC Review Report 079-2013 at [21].
[397] Treasury Board of Canada Secretariat, *Confidences of the Queen's Privy Council for Canada (Cabinet confidences)*, https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/privacy/confidences-queen-privy-council-canada-cabinet-confidences.html. Accessed June 27, 2019.
[398] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 1527.

- The consideration and discussions of the reasons for and against a measure by a number of councillors.[399]

A deliberation can occur when there is a discussion or consideration of the reasons for or against an action.[400] It can refer to discussions conducted with a view towards making a decision.[401]

Deliberations can include outcomes or decisions of Cabinet's deliberative process, topics of deliberation, and priorities identified by the Premier, even if they do not ultimately result in government action.[402]

A **decision** is a determination after consideration of the facts.[403]

In Supreme Court of Canada decision, *Ontario (Attorney Genera) v. Ontario (Information and Privacy Commissioner)*, 2024 SCC 4, the court explained the deliberative process and that it isn't always conducted at a boardroom table behind closed doors and this must be taken into consideration:

> [46] To begin, Cabinet's deliberative process consists of discussion, consultation, and policy formulation between the Premier, individual ministers, and Cabinet as a whole — informed by the advice of civil servants every step along the way. The first minister, as head of Cabinet, enjoys extensive powers within Cabinet's deliberative process by convention. In many regards, the role and activities of the Premier are inseparable from Cabinet and its deliberations. First ministers preside over Cabinet, set Cabinet agendas, determine Cabinet's membership and its internal structure (e.g., the number, nature, and membership of Cabinet committees), set Cabinet procedures, and have the right to identify the consensus and determine what Cabinet has decided (Hogg and Wright, at §§ 9:5-9:6).

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[399] *Canada (Information Commissioner) v. Toronto Port Authority*, 2016 FC 683 (CanLII) at [85]. The Federal Court of Canada relied on the definitions found in the Treasury Board Secretariat's *Access to Information Manual* which were based on the ordinary meaning of these words. The manual can be found at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11. Definition consistent with *The Shorter Oxford English Dictionary on Historical Principles*, Oxford University Press 1973, Volume 1 at p. 409. Similar definition used in *R. v. McDonald*, 2003 NSPC 34 (CanLII) at p. 3 and *Canada (Information Commissioner) v. Canada (Minister of the Environment)*, [2007] 3 FCR 125, 2006 FC 1235 (CanLII) at [65] and [66].

[400] AB IPC Order 96-006 at p. 10. Service Alberta, *FOIP Guidelines and Practices: 2009 Edition,* Chapter 4 at p. 180. Adopted in SK OIPC Review Report F-2004-001 at [12].

[401] Originated from ON IPC Order M-184 at p. 3. Adopted in SK OIPC Review Report 187-2015 at [19].

[402] *Ontario (Attorney Genera) v. Ontario (Information and Privacy Commissioner)*, 2024 SCC 4 at [62].

[403] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 511.

[47] As this Court recognized in *John Doe*, "the policy-making process include[s] false starts, blind alleys, wrong turns, changes of mind, the solicitation and rejection of advice, and the re-evaluation of priorities and the re-weighing of the relative importance of the relevant factors as a problem is studied more closely" (para. 44, quoting *Canadian Council of Christian Charities*, at para. 31). In other words, the process is dynamic, fluid, and continues to evolve as leadership changes hands. Cabinet enjoys tremendous flexibility in terms of its organization, its processes, and its composition (White, at p. 34).

[49] The dynamic and fluid nature of Cabinet's deliberative process also means that not all stages of the process take place sitting around the Cabinet table behind a closed door. The decision-making process in Cabinet extends beyond formal meetings of Cabinet or its committees, and encompasses "[o]ne-on-one conversations in the corridors . . ., in the [first minister's] office . . ., over the phone, or however and wherever they may take place" (Brooks, at p. 242). As Professor Brooks writes, "[n]o organization chart can capture this informal but crucial aspect" of the deliberative process, nor the centrality of the first minister's role within it (*ibid.*).

…

[52] The priorities communicated to ministers by the Premier at the outset of governance are the initiation of Cabinet's deliberative process, and are subject to change. Ministers may seek to persuade the Premier and the rest of Cabinet that priorities should be added, abandoned, or approached in a different way (see, e.g., H. Bakvis, "Prime Minister and Cabinet in Canada: An Autocracy in Need of Reform?" (2000), 35:4 *J. Can. Stud.* 60, at pp. 65-66 (discussing the important role of individual ministers and their ability to shape the government's priorities)). Moreover, the Premier may revise priorities at any point throughout the process — whether due to Cabinet colleagues' views, advice from civil servants, or events and changing circumstances.

…

[54] Relatedly, to the extent the IPC required evidence linking the Letters to "actual Cabinet deliberations at a specific Cabinet meeting", that approach was unreasonable. Such a requirement is far too narrow and does not account for the realities of the deliberative process, including the Premier's priority-setting and supervisory functions, which are not necessarily performed at a specific Cabinet meeting and may occur throughout the continuum of Cabinet's deliberative process. Accordingly, it would be unreasonable for the Commissioner to establish a heightened test for exemption from disclosure that would require evidence linking the record to "actual Cabinet deliberations at a specific Cabinet meeting".

...

[61] In approaching assertions of Cabinet confidentiality, administrative decision makers and reviewing courts must be attentive not only to the vital importance of public access to government-held information but also to Cabinet secrecy's core purpose of enabling effective government, and its underlying rationales of efficiency, candour, and solidarity. They must also be attentive to the dynamic and fluid nature of executive decision making, the function of Cabinet itself and its individual members, the role of the Premier, and Cabinet's prerogative to determine when and how to announce its decisions.

Executive Council means the Executive Council appointed pursuant to *The Executive Government Administration Act*.[404] It consists of the Premier and Cabinet Ministers. Executive Council is also referred to as "Cabinet".[405] **Cabinet** has also been defined as the committee of senior ministers (heading individual provincial government ministries) which acts collectively with the Premier to decide matters of government policy.[406]

A **committee of the Executive Council**, also known as a Cabinet committee, includes one or more Cabinet ministers.[407] The committee exercises some or all of the powers of Cabinet as a whole, or develops and provides recommendations to Cabinet. Also included in the definition is an entity or individual to which the Executive Council or any of its committees has delegated decision-making authority on their behalf.[408]

The Commissioner has formally found the following are committees of Executive Council. However, this list is not exhaustive. These are only the ones considered by the Commissioner:

- Treasury Board;[409] and
- The Legislation and Regulation Review Committee.[410]

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[404] *The Legislation Act*, S.S. 2019, Chapter L-10.2 at ss. 2-29.
[405] Government of Saskatchewan, Cabinet Secretariat, Executive Council, *Executive Government Processes and Procedures in Saskatchewan: A Procedures Manual*, 2007, at p. 16.
[406] British Columbia Government Services, *FOIPPA Policy Definitions* at https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/policy-definitions. Accessed April 23, 2020.
[407] *The Executive Government Administration Act, S.S. 2014,* Chapter E-13.1 at subsection 6(1)(a).
[408] British Columbia Government Services, *FOIPPA Policy and Procedures Manual* at https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/cabinet-local-public-body-confidences. Accessed June 26, 2019.
[409] SK OIPC Review Reports 041-2015 at [8], 050-2015 at [12] and 051-2015 at [12].
[410] SK OIPC Review Report 079-2013 at [21].

The following are a few of the types of records that could reveal the substance of deliberations of Executive Council (Cabinet) or a Cabinet committee:

- An agenda, minute or other record that documents matters addressed by Cabinet (e.g. a list of issues tabled at Cabinet that reflects the priorities of Cabinet).
- A letter from Cabinet or a Cabinet committee that relates to the discussion or consideration of an issue or problem, or that reflects a decision made but not made public (e.g., a letter from Treasury Board to a ministry executive stating a decision that affects the ministry's budget, but which has not been announced).
- A briefing note placed before Cabinet or one of its committees.
- A memo from a deputy minister to an assistant deputy minister in a ministry that informs them when Cabinet will consider an issue.
- A briefing note from a deputy minister to a minister concerning a matter that is or will be considered by Cabinet.
- A draft or final Cabinet submission.
- Draft legislation or regulations.[411]

This includes drafts of these documents, and any informal notes which officials may make during the meetings. By disclosing drafts and notes, the associated substance could be disclosed.[412]

Subsection 16(2) of FOIP requires disclosure of cabinet documents where:

- the record has been in existence for more than 25 years; or
- consent to release is given by the President of the Executive Council or in absence of the President, the next senior member of Executive Council.

However, if the record contains personal information, the rules around disclosure under section 30 of FOIP still apply.

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[411] British Columbia Government Services, *FOIPPA Policy and Procedures Manual* at https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/cabinet-local-public-body-confidences. Accessed June 26, 2019. Similar list in Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 168.

[412] Treasury Board of Canada Secretariat, *Confidences of the Queen's Privy Council for Canada (Cabinet confidences)*, https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/privacy/confidences-queen-privy-council-canada-cabinet-confidences.html. Accessed June 27, 2019.

IPC Findings

In Review Report 041-2015, the Commissioner considered subsection 16(1)(b) of FOIP. An applicant had made an access to information request to the Ministry of Finance (Finance) for any analysis, briefing notes or correspondence related to the impact on provincial finances of changing the liquor retailing system conducted since January 1, 2012. Finance responded to the applicant indicating that the records were being withheld in full pursuant in part to subsection 16(1)(b) of FOIP. Finance applied subsection 16(1)(b) of FOIP to two documents which were both Treasury Board Minutes. The Commissioner found that Treasury Board was a committee of Executive Council. The Commissioner found that the minutes qualified for exemption under subsection 16(1)(b) of FOIP.

Subsection 16(1)(c)

Cabinet documents

16(1) A head shall refuse to give access to a record that discloses a confidence of the Executive Council, including:

...

(c) records of consultations among members of the Executive Council on matters that relate to the making of government decisions or the formulation of government policy, or records that reflect those consultations;

...

(2) Subject to section 30, a head shall not refuse to give access pursuant to subsection (1) to a record where:

(a) the record has been in existence for more than 25 years; or

(b) consent to access is given by:

(i) the President of the Executive Council for which, or with respect to which, the record has been prepared; or

(ii) in the absence or inability to act of the President, by the next senior member of the Executive Council who is present and able to act.

Subsection 16(1)(c) of FOIP is a mandatory class-based exemption. It permits refusal of access in situations where release of a record could disclose a confidence of Cabinet including records of consultations among members of Cabinet on matters that relate to the making of government decisions or the formulation of government policy, or records that reflect those consultations.

Office of the Saskatchewan Information and Privacy Commissioner. Guide to FOIP, Chapter 4, *Exemptions from the Right of Access*. Updated 8 April 2024.

Cabinet confidences are generally defined as, in the broadest sense, the political secrets of Ministers individually and collectively, the disclosure of which would make it very difficult for the government to speak in unison before Parliament and the public.[413]

Including means that the list of information that follows is not complete (non-exhaustive). The examples in the provision are the types of information that could be presumed to disclose a confidence of the Executive Council (Cabinet).[414]

The following two-part test can be applied. However, only one of the questions needs to be answered in the affirmative for the exemption to apply. There may be circumstances where both questions apply and can be answered in the affirmative:

1. **Is it a record of consultations among members of Cabinet on matters that relate to the making of government decisions or the formulation of government policy?**

This part of the provision is more specific and is intended to capture records containing consultations. The second part of the provision is broader and is intended to capture records that may reflect the consultations but less directly.

A **consultation** in this context occurs when one or more members of Executive Council discuss matters related to making government decisions or formulating government policy.[415]

Executive Council means the Executive Council appointed pursuant to *The Executive Government Administration Act*.[416] It consists of the Premier and Cabinet Ministers. Executive Council is also referred to as "Cabinet".[417] **Cabinet** has also been defined as the committee of senior ministers (heading individual provincial government ministries) which acts collectively with the Premier to decide matters of government policy.[418]

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[413] *Federal Access to Information and Privacy Legislation Annotated 2015* (Canada: Thomson Reuters Canada Limited, 2014) at page 1-644.4.
[414] British Columbia Government Services, *FOIPPA Policy and Procedures Manual* at https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/cabinet-local-public-body-confidences. Accessed June 26, 2019.
[415] Adapted from definition used for "*consultation*" for subsection 17(1)(b) of this Guide. Original definition came from AB IPC Order F2003-016 at [20]. Adopted by SK OIPC for interpretation of subsection 17(1)(b) in Review Report F-2004-001 at [11] and [12].
[416] *The Legislation Act*, S.S. 2019, Chapter L-10.2 at ss. 2-29.
[417] Government of Saskatchewan, Cabinet Secretariat, Executive Council, *Executive Government Processes and Procedures in Saskatchewan: A Procedures Manual*, 2007, at p. 16.
[418] British Columbia Government Services, *FOIPPA Policy Definitions* at https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/policy-definitions. Accessed April 23, 2020.

Relate to should be given a plain but expansive meaning.[419] The phrase should be read in its grammatical and ordinary sense. There is no need to incorporate complex requirements (such as "substantial connection") for its application, which would be inconsistent with the plain unambiguous meaning of the words of the statute.[420] "*Relating to*" requires some connection between the information and the making of government decisions or the formulation of government policy.[421]

A **decision** is a determination after consideration of the facts.[422]

Formulation means to create or prepare methodically.[423]

A **policy** is a standard course of action that has been officially established by government.[424]

2. Does the record reflect the consultations among members of Cabinet on matters that relate to the making of government decisions or the formulation of government policy?

This first part of the provision is more specific and is intended to capture records containing consultations. The second part of the provision is broader and is intended to capture records that may reflect the consultations but less directly.

Reflect means to embody or represent in a faithful or appropriate way.[425]

A **consultation** in this context occurs when one or more members of Executive Council discuss matters related to making government decisions or formulating government policy.[426]

Executive Council means the Executive Council appointed pursuant to *The Executive Government Administration Act*.[427] It consists of the Premier and Cabinet Ministers. Executive Council is also referred to as "Cabinet".[428] **Cabinet** has also been defined as the committee of

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[419] *Gertner v. Lawyers' Professional Indemnity Company,* 2011 ONSC 6121 (CanLII) at [32].
[420] Adapted from *Ministry of Attorney General and Toronto Star*, 2010 ONSC 991 (CanLII) at [45].
[421] Adapted from *Ministry of Attorney General and Toronto Star*, 2010 ONSC 991 (CanLII) at [43].
[422] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 511.
[423] Pearsall, Judy, *Concise Oxford Dictionary, 10th Ed*., (Oxford University Press) at p. 557.
[424] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 1401.
[425] Pearsall, Judy, *Concise Oxford Dictionary, 10th Ed*., (Oxford University Press) at p. 1203.
[426] Adapted from definition used for "*consultation*" for subsection 17(1)(b) of this Guide. Original definition came from AB IPC Order F2003-016 at [20]. Adopted by SK OIPC for interpretation of subsection 17(1)(b) in Review Report F-2004-001 at [11] and [12].
[427] *The Legislation Act*, S.S. 2019, Chapter L-10.2 at ss. 2-29.
[428] Government of Saskatchewan, Cabinet Secretariat, Executive Council, *Executive Government Processes and Procedures in Saskatchewan: A Procedures Manual*, 2007, at p. 16.

senior ministers (heading individual provincial government ministries) which acts collectively with the Premier to decide matters of government policy.[429]

Relate to should be given a plain but expansive meaning.[430] The phrase should be read in its grammatical and ordinary sense. There is no need to incorporate complex requirements (such as "substantial connection") for its application, which would be inconsistent with the plain unambiguous meaning of the words of the statute.[431] "*Relating to*" requires some connection between the information and the exercise of prosecutorial discretion.[432]

A **decision** is a determination after consideration of the facts.[433]

Formulation means to create or prepare methodically.[434]

A **policy** is a standard course of action that has been officially established by government.[435]

Subsection 16(2) of FOIP requires disclosure of cabinet documents where:

- the record has been in existence for more than 25 years; or
- consent to release is given by the President of the Executive Council or in absence of the President, the next senior member of Executive Council.

However, if the record contains personal information, the rules around disclosure under section 30 of FOIP still apply.

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[429] British Columbia Government Services, *FOIPPA Policy Definitions* at https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/policy-definitions. Accessed April 23, 2020.
[430] *Gertner v. Lawyers' Professional Indemnity Company,* 2011 ONSC 6121 (CanLII) at [32].
[431] *Ministry of Attorney General and Toronto Star*, 2010 ONSC 991 (CanLII) at [45]. This case dealt specifically with an appeal regarding Ontario's FOIP legislation.
[432] Adapted from *Ministry of Attorney General and Toronto Star*, 2010 ONSC 991 (CanLII) at [43].
[433] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 511.
[434] Pearsall, Judy, *Concise Oxford Dictionary, 10th Ed*., (Oxford University Press) at p. 557.
[435] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 1401.

IPC Findings

In Review Report 051-2015, the Commissioner considered subsection 16(1)(c) of FOIP. An applicant had made an access to information request to the Ministry of Finance (Finance) for any analysis or briefing materials on royalty rates since January 1, 2012. Finance withheld the records in full citing in part subsection 16(1)(c) of FOIP. The records contained substantial handwritten notes. Finance asserted the notes were made by a Director and were the Director's speaking notes for presentations to Treasury Board and Cabinet as well as the results of the consultations among the ministers. Upon review, the Commissioner agreed that the notes reflected speaking notes as well as consultations among members of Executive Council following the presentation. As such, subsection 16(1)(c) of FOIP was found to apply.

In Review Report 079-2018, the Commissioner considered subsection 16(1)(c) of FOIP. An applicant had made an access to information request to the Ministry of Health (Health) for information pertaining to the creation of the Lloydminster EMS BLS and ALS Medical Protocols. Health provided access to some records but withheld others citing in part subsection 16(1)(c) of FOIP as reason to withhold. The record at issue was a letter to the chairperson of a regional health authority from the Minister of Health. Upon review, the Commissioner found that the letter did not reflect any discussions between members of the Executive Council as required by the provision. The Commissioner was not persuaded that subsection 16(1)(c) of FOIP applied to the letter.

Subsection 16(1)(d)

Cabinet documents

16(1) A head shall refuse to give access to a record that discloses a confidence of the Executive Council, including:

…

(d) records that contain briefings to members of the Executive Council in relation to matters that:

(i) are before, or are proposed to be brought before, the Executive Council or any of its committees; or

(ii) are the subject of consultations described in clause (c).

(2) Subject to section 30, a head shall not refuse to give access pursuant to subsection (1) to a record where:

(a) the record has been in existence for more than 25 years; or

(b) consent to access is given by:

Office of the Saskatchewan Information and Privacy Commissioner. Guide to FOIP, Chapter 4, *Exemptions from the Right of Access*. Updated 8 April 2024.

(i) the President of the Executive Council for which, or with respect to which, the record has been prepared; or

(ii) in the absence or inability to act of the President, by the next senior member of the Executive Council who is present and able to act.

Subsection 16(1)(d) of FOIP is a mandatory class-based exemption. It permits refusal of access in situations where release of a record could disclose a confidence of Cabinet including records that contain briefings to members of Cabinet in relation to matters that are before, or proposed to be brought before, Cabinet or any of its committees. It also permits refusal where release of a record could disclose matters that are the subject of consultations described in subsection 16(1)(c) of FOIP above.

Cabinet confidences are generally defined as, in the broadest sense, the political secrets of Ministers individually and collectively, the disclosure of which would make it very difficult for the government to speak in unison before Parliament and the public.[436]

Including means that the list of information that follows is not complete (non-exhaustive). The examples in the provision are the types of information that could be presumed to disclose a confidence of the Executive Council (Cabinet).[437]

An important qualifier here is that the records must be for the purpose of briefing a minister in relation to matters before Cabinet, proposed to be brought before, or for use in a discussion with other ministers as be subsection 16(1)(c) of FOIP above.[438]

The following two-part test can be applied. However, only one of the questions needs to be answered in the affirmative for the exemption to apply. There may be circumstances where both questions apply and can be answered in the affirmative.

1. **Does the record contain briefings to members of Cabinet in relation to matters that are before, or are proposed to be brought before, Cabinet or any of its committees?**

[436] *Federal Access to Information and Privacy Legislation Annotated 2015* (Canada: Thomson Reuters Canada Limited, 2014) at page 1-644.4.
[437] British Columbia Government Services, *FOIPPA Policy and Procedures Manual* at https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/cabinet-local-public-body-confidences. Accessed June 26, 2019.
[438] Office of the Information Commissioner of Canada, *The Access to Information Act and Cabinet confidence: A Discussion of New Approaches*, 1996 at p. 11.

Briefing means a written summary of short duration; concise; using few words; a summary of facts or a meeting for giving information or instructions.[439] An example would be a briefing note.

In relation to has been found to have a similar meaning as *"in respect of"*. It was considered in *Nowegijick v. The Queen (1983)*:

> The words "in respect of" are, in my opinion, words of the widest possible scope. They import such meanings as "in relation to", "with reference to" or "in connection with". The phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject-matters.[440]

The phrase **"are before, or are proposed to be brought before,"** suggests present or future tense. It would not include a record already presented to and dealt with by the Executive Council or its committees.[441]

Proposed means something offered for consideration or acceptance, a suggestion.[442] To put forward an idea or plan for consideration.[443]

Executive Council means the Executive Council appointed pursuant to *The Executive Government Administration Act*.[444] It consists of the Premier and Cabinet Ministers. Executive Council is also referred to as "Cabinet".[445] **Cabinet** has also been defined as the committee of senior ministers (heading individual provincial government ministries) which acts collectively with the Premier to decide matters of government policy.[446]

A **committee of the Executive Council**, also known as a Cabinet committee, includes one or more Cabinet ministers.[447] The committee exercises some or all of the powers of Cabinet as a whole, or develops and provides recommendations to Cabinet. Also included in the definition

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[439] Pearsall, Judy, *Concise Oxford Dictionary, 10th Ed.*, (Oxford University Press) at p. 174.
[440] *Nowegijick v. The Queen*, [1983] 1 SCR 29, 1983 CanLII 18 (SCC) at [39].
[441] ON IPC Orders P-22 at p. 5 and P-40 at p. 11. Adopted in SK Review Report 021-2015 at [19].
[442] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 1474.
[443] Pearsall, Judy, *Concise Oxford Dictionary, 10th Ed.*, (Oxford University Press) at p. 1147.
[444] *The Legislation Act*, S.S. 2019, Chapter L-10.2 at ss. 2-29.
[445] Government of Saskatchewan, Cabinet Secretariat, Executive Council, *Executive Government Processes and Procedures in Saskatchewan: A Procedures Manual*, 2007, at p. 16.
[446] British Columbia Government Services, *FOIPPA Policy Definitions* at https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/policy-definitions. Accessed April 23, 2020.
[447] *The Executive Government Administration Act, S.S. 2014,* Chapter E-13.1 at subsection 6(1)(a).

is an entity or individual to which the Executive Council or any of its committees has delegated decision-making authority on their behalf.[448]

The Commissioner has formally found the following are committees of Executive Council. However, this list is not exhaustive. These are only the ones considered by the Commissioner:

- Treasury Board;[449] and
- The Legislation and Regulation Review Committee.[450]

This includes drafts of these documents, and any informal notes which officials may make during the meetings. By disclosing drafts and notes, the associated substance could be disclosed.[451]

2. Does the record contain briefings to members of Cabinet on matters that relate to the making of government decisions or the formulation of government policy?

Briefing means a written summary of short duration; concise; using few words; a summary of facts or a meeting for giving information or instructions.[452]

Executive Council means the Executive Council appointed pursuant to *The Executive Government Administration Act*.[453] It consists of the Premier and Cabinet Ministers. Executive Council is also referred to as "Cabinet".[454] **Cabinet** has also been defined as the committee of senior ministers (heading individual provincial government ministries) which acts collectively with the Premier to decide matters of government policy.[455]

In relation to has been found to have a similar meaning as "in respect of". It was considered in *Nowegijick v. The Queen (1983)*:

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[448] British Columbia Government Services, *FOIPPA Policy and Procedures Manual* at https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/cabinet-local-public-body-confidences. Accessed June 26, 2019.
[449] SK OIPC Review Reports 041-2015 at [8], 050-2015 at [12] and 051-2015 at [12].
[450] SK OIPC Review Report 079-2013 at [21].
[451] Treasury Board of Canada Secretariat, *Confidences of the Queen's Privy Council for Canada (Cabinet confidences)*, https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/privacy/confidences-queen-privy-council-canada-cabinet-confidences.html. Accessed June 27, 2019.
[452] Pearsall, Judy, *Concise Oxford Dictionary*, 10th Ed., (Oxford University Press) at p. 174.
[453] *The Legislation Act*, S.S. 2019, Chapter L-10.2 at ss. 2-29.
[454] Government of Saskatchewan, Cabinet Secretariat, Executive Council, *Executive Government Processes and Procedures in Saskatchewan: A Procedures Manual*, 2007, at p. 16.
[455] British Columbia Government Services, *FOIPPA Policy Definitions* at https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/policy-definitions. Accessed April 23, 2020.

> The words "in respect of" are, in my opinion, words of the widest possible scope. They import such meanings as "in relation to", "with reference to" or "in connection with". The phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject-matters.[456]

A **consultation** in this context occurs when one or more members of Executive Council discuss matters related to making government decisions or formulating government policy.[457]

A **decision** is a determination after consideration of the facts.[458]

Formulation means to create or prepare methodically.[459]

A **policy** is a standard course of action that has been officially established by government.[460]

In order for this provision to apply, the records must contain briefings and be intended for Executive Council. In addition, subsections 16(1)(d)(i) or (ii) must apply. The purpose for which the record was prepared is key.

Subsection 16(2) of FOIP requires disclosure of cabinet documents where:

- the record has been in existence for more than 25 years; or
- consent to release is given by the President of the Executive Council or in absence of the President, the next senior member of Executive Council.

However, if the record contains personal information, the rules around disclosure under section 30 of FOIP still apply.

IPC Findings

In Review Report 016-2015, the Commissioner found that information in Transition Briefing Binders that was already publicly available did not qualify for the exemption.

In Review Report 159-2016, the Commissioner considered subsection 16(1)(d) of FOIP. An applicant had made an access to information request to the Global Transportation Hub

[456] *Nowegijick v. The Queen*, [1983] 1 SCR 29, 1983 CanLII 18 (SCC) at [39].
[457] Adapted from definition used for "*consultation*" for subsection 17(1)(b) of this Guide. Original definition came from AB IPC Order F2003-016 at [20]. Adopted by SK OIPC for interpretation of subsection 17(1)(b) in Review Report F-2004-001 at [11] and [12].
[458] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 511.
[459] Pearsall, Judy, *Concise Oxford Dictionary, 10th Ed.*, (Oxford University Press) at p. 557.
[460] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 1401.

Authority (GTH) for all internal documentation/records related to Brightenview Internal Developments Inc. between January 1, 2013 and April 5, 2016. The GTH responded to the applicant withholding the records in full citing several provisions including subsection 16(1)(d) of FOIP. Upon review, the Commissioner found that nine of the records could be described as briefing notes. As GTH did not provide anything to demonstrate that the briefing notes were prepared for or intended for members of the Executive Council, the Commissioner was not persuaded that subsection 16(1)(d) of FOIP applied to the briefing notes.

In Review Report 157-2016, the Commissioner considered subsection 16(1)(d) of FOIP. An applicant had made an access to information request to the GTH for all correspondence between the GTH and any other ministry related to Brightenview International Development Inc. from December 1, 2015 to April 5, 2016. The GTH responded to the applicant withholding the records in full citing several provisions including subsection 16(1)(d) of FOIP. The GTH applied subsection 16(1)(d) to 12 emails. Upon review, one group of the emails dealt with the timing of an announcement of a decision already approved by Cabinet. None of the emails included a member of the Executive Council. The second group of emails dealt with a news release regarding a decision approved by Cabinet. Again, no members of the Executive Council were included in the emails. The Commissioner was not persuaded that subsection 16(1)(d) of FOIP applied to the emails.

Subsection 16(2)

Cabinet documents

16(2) Subject to section 30, a head shall not refuse to give access pursuant to subsection (1) to a record where:

(a) the record has been in existence for more than 25 years; or

(b) consent to access is given by:

(i) the President of the Executive Council for which, or with respect to which, the record has been prepared; or

(ii) in the absence or inability to act of the President, by the next senior member of the Executive Council who is present and able to act.

Subsection 16(2) of FOIP is a mandatory exemption. It sets out circumstances where a head must not withhold cabinet confidences pursuant to subsection 16(1) of FOIP.

Subsection 16(2)(a)

Cabinet documents

16(2) Subject to section 30, a head shall not refuse to give access pursuant to subsection (1) to a record where:

(a) the record has been in existence for more than 25 years;

Subsection 16(2)(a) of FOIP provides that confidences that have been in existence for more than 25 years cannot be withheld under subsection 16(1) of FOIP. After that time, information in the record becomes subject to the Act and may be released subject to any applicable exemptions.[461]

Before releasing, if the record contains the personal information of a deceased individual, the rules around disclosure under section 30 of FOIP must be considered. For more on section 30 see the *Guide to FOIP*, Chapter 6, "*Protection of Privacy*."

Subsection 16(2)(b)

Cabinet documents

16(2) Subject to section 30, a head shall not refuse to give access pursuant to subsection (1) to a record where:

...

(b) consent to access is given by:

(i) the President of the Executive Council for which, or with respect to which, the record has been prepared; or

(ii) in the absence or inability to act of the President, by the next senior member of the Executive Council who is present and able to act.

[461] Treasury Board of Canada Secretariat, *Confidences of the Queen's Privy Council for Canada (Cabinet confidences)*, https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/privacy/confidences-queen-privy-council-canada-cabinet-confidences.html. Accessed June 27, 2019.

Subsection 16(2)(b) of FOIP recognizes that the Executive Council may lift the designation of Cabinet confidence from a record which has been prepared under its auspices. This consent is not a regular or normal practice.[462]

With respect to are words of the widest possible scope; the phrase is probably the widest of any expression intended to convey some connection between two related subject matters.[463]

Subsection 16(2)(b) does not impose a requirement on the head of a government institution to seek the consent of Cabinet to release the relevant record. What the section requires, at minimum, is that the head turn his or her mind to the issue. This means considering whether to request consent in relation to a request for access. Only the Cabinet for which, or in respect of which, a record was prepared can consent to its release.[464]

Subsection 16(2)(b) provides no express guidance on appropriate criteria for a head to consider in deciding whether to seek Cabinet consent. These criteria will develop with time and experience, but could perhaps include the following:

- The subject matter contained in the records.
- Whether or not the government policy contained in the records has been announced or implemented.
- Whether the record would reveal the nature of Cabinet discussion on the position of an institution.
- Whether the records have, in fact, been considered by the Cabinet.

This list is by no means exhaustive or definitive and is only included in an effort to identify examples of the types of criteria that could be considered.[465]

Before releasing, if the record contains the personal information of a deceased individual, the rules around disclosure under section 30 of FOIP must be considered. For more on section 30 see the *Guide to FOIP*, Chapter 6, "Protection of Privacy."

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[462] Office of the Information Commissioner of Canada, *The Access to Information Act and Cabinet confidence: A Discussion of New Approaches*, 1996 at p. 11.
[463] The Supreme Court of Canada (SCC) established the meaning of the phrase "*in respect of*" in *Nowegijick v. The Queen*, [1983] 1 SCR 29, 1983 CanLII 18 (SCC) at [39]. The SCC later applied the same interpretation to the phrase "*with respect to*" in *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 SCR 743, 1999 CanLII 680 (SCC) at [15] to [17]. Summary of this can be found in Gardner, J., and Gardner K. (2016) *Sangan's Encyclopedia of Words and Phrases Legal Maxims*, Canada, 5th Edition, Volume 5, S to Z at p. w-97.
[464] ON IPC Orders PO-2542 at p. 5, P-1390 at p. 5, PO-2122 at 5. Ontario's subsection 12(2)(b) of the Ontario FOIP Act is similarly worded as Saskatchewan's subsection 16(2)(b) of FOIP.
[465] ON IPC Orders P-24 at p. 12, PO-2122 at p. 6.

IPC Findings

In Review Report F-2004-004, the Commissioner considered subsection 16(2)(b) of FOIP. An applicant asserted that the Premier, as President of the Executive Council, verbally gave his consent to the release of the requested documents in a media scrum before the applicant launched his access to information request. The applicant provided a copy of a transcript of the Premier's statement. Upon review, the Commissioner found that section 18 of *The Freedom of Information and Protection of Privacy Regulations* (FOIP *Regulations*) applied to subsection 16(2)(b) of FOIP meaning that the consent needed to be in writing. Verbal consent was therefore insufficient and could not be used to circumvent the head's mandatory prohibition in section 16(1) of the Act. Finally, the Commissioner found that all consents must be in writing unless it is not reasonably practicable to obtain the written consent of the individual. The Commissioner found that the document remained exempt from disclosure.

Section 17: Advice From Officials

Advice from officials

17(1) Subject to subsection (2), a head may refuse to give access to a record that could reasonably be expected to disclose:

(a) advice, proposals, recommendations, analyses or policy options developed by or for a government institution or a member of the Executive Council;

(b) consultations or deliberations involving:

(i) officers or employees of a government institution;

(ii) a member of the Executive Council; or

(iii) the staff of a member of the Executive Council;

(c) positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the Government of Saskatchewan or a government institution, or considerations that relate to those negotiations;

(d) plans that relate to the management of personnel or the administration of a government institution and that have not yet been implemented;

(e) contents of draft legislation or subordinate legislation;

(f) agendas or minutes of:

(i) a board, commission, Crown corporation or other body that is a government institution; or

(ii) a prescribed committee of a government institution mentioned in subclause (i); or

(g) information, including the proposed plans, policies or projects of a government institution, the disclosure of which could reasonably be expected to result in disclosure of a pending policy or budgetary decision.

(2) This section does not apply to a record that:

(a) has been in existence for more than 25 years;

(b) is an official record that contains a statement of the reasons for a decision that is made in the exercise of a discretionary power or an adjudicative function;

(c) is the result of product or environmental testing carried out by or for a government institution, unless the testing was conducted:

(i) as a service to a person, a group of persons or an organization other than a government institution, and for a fee; or

(ii) as preliminary or experimental tests for the purpose of:

(A) developing methods of testing; or

(B) testing products for possible purchase;

(d) is a statistical survey;

(e) is the result of background research of a scientific or technical nature undertaken in connection with the formulation of a policy proposal; or

(f) is:

(i) an instruction or guide-line issued to the officers or employees of a government institution; or

(ii) a substantive rule or statement of policy that has been adopted by a government institution for the purpose of interpreting an Act or regulation or administering a program or activity of a government institution.

(3) A head may refuse to give access to any report, statement, memorandum, recommendation, document, information, data or record, within the meaning of section 10 of *The Evidence Act*, that, pursuant to that section, is not admissible as evidence in any legal proceeding.

Section 17 of FOIP is a discretionary class-based provision. It is intended to allow for candor during the decision-making process.

The Supreme Court of Canada addressed the purpose of the equivalent provision in Ontario's *Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31, s. 13(1)* in *John Doe v. Ontario (Finance)*, (2014):

[43] The purpose of this provision is to preserve an effective and neutral public service so as to permit public servants to provide full, free and frank advice… Failing to exempt such material risks having advice or recommendations that are less candid and complete, and the public service no longer being perceived as neutral…

[44] In my opinion, Evens J. (as he then was) in *Canada Council of Christian Charities v. Canada (Minister of Finance)*, 1999 CanLII 8293 (FC), [1999] 4 F.C. 245, persuasively explained the rationale for the exemption for advice given by public servants. Although written about the equivalent federal exemption, the purpose and function of the federal and Ontario advice and recommendations exemptions are the same. I cannot improve upon the language of Evans J. and his explanation and I adopt them as my own:

> To permit or to require the disclosure of advice given by officials, either to other officials or to ministers, and the disclosure of confidential deliberations within the public service on policy options, would erode government's ability to formulate and to justify its policies.
>
> It would be an intolerable burden to force ministers and their advisors to disclose to public scrutiny the internal evolution of the policies ultimately adopted. Disclosure of such material would often reveal that the policy-making process included false starts, blind alleys, wrong turns, changes of mind, the solicitation and rejection of advice, and the re-evaluation of priorities and the re-weighing of the relative importance of the relevant factors as a problem is studied more closely. In the hands of journalists or political opponents this is combustible material liable to fuel a fire that could quickly destroy governmental credibility and effectiveness. [paras. 30-31]

[45] Political neutrality, both actual and perceived, is an essential feature of the civil service in Canada (*Osborne v. Canada (Treasury Board)*, 1991 CanLII 60 (SCC) [1991] 2 S.C.R. 69, at p. 86; *OPSEU v. Ontario (Attorney General)*, 1987 CanLII 71 (SCC), [1987] 2 S.C.R., at pp. 44-45). The advice and recommendations provided by a public servant who knows that his work might one day be subject to public scrutiny is less likely to be full, free and frank, and is more likely to suffer from self-censorship. Similarly, a decision maker might hesitate to even request advice or recommendations in writing concerning a controversial matter if he knows the resulting information might be disclosed. Requiring that such advice and recommendations be disclosed risks introducing actual or perceived partisan considerations into public servants' participation in the decision-making process.

> [46] Interpreting "advice" in s. 13(1) as including opinions of a public servant as to the range of alternative policy options accords with the balance struck by the legislature

> between the goals of preserving an effective public service capable of producing full, free and frank advice and the goal of providing a meaningful right of access.[466]

The British Columbia Court of Appeal similarly stated in *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner), (2002)*, that the equivalent provision in British Columbia's *Freedom of Information and Protection of Privacy Act, RSBC 1996, c 165*, "recognizes that some degree of deliberative secrecy fosters the decision-making process."[467]

However, protecting information is balanced against the need for effective public participation in a democracy. In *Canada Council of Christian Charities v. Canada (Minister of Finance), (1999)*, Justice Evans stated:

> [32] On the other hand, of course, democratic principles require that the public, and this often means the representatives of sectional interests, are enabled to participate as widely as possible in influencing policy development. Without a degree of openness on the part of government about its thinking on public policy issues, and without access to relevant information in the possession of government, the effectiveness of public participation will inevitably be curbed.[468]

When determining the application of section 17 of FOIP, government institutions should keep the intention of the Legislature for provisions like section 17 of FOIP in mind along with the purposes of FOIP. For more on this, go to *Balancing Interests* under the heading titled, *Interpreting Exemptions* earlier in this Chapter. In addition, see the *Guide to FOIP*, Chapter 1, "Purposes and Scope of FOIP," under the heading, *The Purposes of FOIP*.

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[466] *John Doe v. Ontario (Finance)*, [2014] 2 SCR 3, 2014 SCC 36 (CanLII) at [43] to [46]. Also relied on by Justice Kalmakoff in *Leo v Global Transportation Hub Authority*, 2019 SKQB 150 at [31].
[467] *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (CanLII) at [105]. Also noted in BC IPC Order F14-57 at [10].
[468] *Canada Council of Christian Charities v. Canada (Minister of Finance)*, 1999 CanLII 8293 (FC), [1999] 4 F.C. 245 at [32].

Subsection 17(1)(a)

Advice from officials

17(1) Subject to subsection (2), a head may refuse to give access to a record that could reasonably be expected to disclose:

(a) advice, proposals, recommendations, analyses or policy options developed by or for a government institution or a member of the Executive Council;

Subsection 17(1)(a) of FOIP is a discretionary class-based exemption. It permits refusal of access in situations where release of a record could reasonably be expected to disclose advice, proposals, recommendations, analyses or policy options developed by or for a government institution or a member of the Executive Council.

The following two-part test can be applied:[469]

1. **Does the information qualify as advice, proposals, recommendations, analyses or policy options?**

Advice is guidance offered by one person to another.[470] It can include 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.[471] Advice encompasses material that permits the drawing of inferences with respect to a suggested course of action, but which does not itself make a specific recommendation. It can be an implied recommendation.[472] The "pros and cons" of various options also qualify as advice.[473] It should not be given a restricted meaning. Rather, it should be interpreted to include an opinion that involves exercising judgement and skill in

[469] Between June and October 2019, the Commissioner modified the original three-part test and the definitions associated with subsection 17(1)(a) in consideration of two court decisions, *Britto v University of Saskatchewan*, 2018 SKQB 92 and *Hande v University of Saskatchewan*, QBG 1222 of 2018 May 21, 2019. The first report where the Commissioner brought forward both the new two-part test and the modified definitions was SK OIPC Review Report 244-2018.
[470] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 67.
[471] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at pp. 166 and 179. The SK OIPC relied on this definition for the first time in Review Report LA-2010-001 at [28]. Also relied on in SK OIPC Review Report F-2014-001 at [282].
[472] *John Doe v. Ontario (Finance),* [2014] 2 SCR 3, 2014 SCC 36 (CanLII) at [26]. Relied on by Justice Danyliuk in *Britto v University of Saskatchewan*, 2018 SKQB 92 at [77].
[473] *John Doe v. Ontario (Finance),* [2014] 2 SCR 3, 2014 SCC 36 (CanLII) at [47]. Relied on in ON IPC Order PO-3470-R at [21].

weighing the significance of fact. It includes expert opinion on matters of fact on which a government institution must make a decision for future action.[474]

Advice includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.[475]

Advice has a broader meaning than recommendations.[476] The legislative intention was for advice to have a distinct meaning from recommendations. Otherwise, it would be redundant.[477] While "recommendation" is an express suggestion, "advice" is simply an implied recommendation.[478]

A **recommendation** is a specific piece of advice about what to do, especially when given officially; it is a suggestion that someone should choose a particular thing or person that one thinks particularly good or meritorious.[479] Recommendations relate to a suggested course of action more explicitly and pointedly than "advice".[480] It can include material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised.[481] It includes suggestions for a course of action as well as the rationale or substance

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[474] *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner),* 2002 BCCA 665 (CanLII) at [113] to [114].
[475] *John Doe v. Ontario (Finance),* [2014] 2 SCR 3, 2014 SCC 36 (CanLII) at [26] and [47]. Relied on in ON IPC Order PO-3799 at [29]. It should be noted that this is based on Ontario's FOIP subsection 13(1), which does not include "*policy options*" in its wording. Saskatchewan's FOIP includes '*policy options*' in its wording as a separate type of information.
[476] *John Doe v. Ontario (Finance),* [2014] 2 SCR 3, 2014 SCC 36 (CanLII) at [22] and [24]. Relied on by Justice Danyliuk in *Britto v University of Saskatchewan*, 2018 SKQB 92 at [77].
[477] *John Doe v. Ontario (Finance),* [2014] 2 SCR 3, 2014 SCC 36 (CanLII) at [24]. Relied on by Justice Danyliuk in *Britto v University of Saskatchewan*, 2018 SKQB 92 at [77].
[478] *John Doe v. Ontario (Finance),* [2014] 2 SCR 3, 2014 SCC 36 (CanLII) at [22]. Relied on by Justice Danyliuk in *Britto v University of Saskatchewan*, 2018 SKQB 92 at [77] and Justice Gabrielson in *Hande v University of Saskatchewan*, QBG 1222 of 2018 at [41].
[479] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 1526.
[480] *John Doe v. Ontario (Finance),* [2014] 2 SCR 3, 2014 SCC 36 (CanLII) at [22]. Relied on by Justice Danyliuk in *Britto v University of Saskatchewan*, 2018 SKQB 92 at [77] and Justice Gabrielson in *Hande v University of Saskatchewan*, QBG 1222 of 2018 at [41].
[481] *John Doe v. Ontario (Finance),* [2014] 2 SCR 3, 2014 SCC 36 (CanLII) at [23]. Relied on by Justice Danyliuk in *Britto v University of Saskatchewan*, 2018 SKQB 92 at [77] and Justice Gabrielson in *Hande v University of Saskatchewan*, QBG 1222 of 2018 at [41].

for a suggested course of action.[482] A recommendation, whether express or inferable, is still a recommendation.[483]

A **proposal** is something offered for consideration or acceptance.[484]

Analyses (or analysis) is the detailed examination of the elements or structure of something; the process of separating something into its constituent elements.[485]

Policy options are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made. They would include matters such as the public servant's identification and consideration of alternative decisions that could be made. In other words, they constitute an evaluative analysis as opposed to objective information.[486]

Records containing policy options can take many forms. They might include the full range of policy options for a given decision, comprising all conceivable alternatives, or may only list a subset of alternatives that in the public servant's opinion are most worthy of consideration. They can also include the advantages and disadvantages of each option. The list can also be less fulsome and still constitute policy options. For example, a public servant may prepare a list of all alternatives and await further instructions from the decision maker for which options should be considered in depth. Or, if the advantages and disadvantages of the policy options are either perceived as being obvious or have already been canvassed orally or in a prior draft, the policy options might appear without any additional explanation. As long as a list sets out alternative course of action relating to a decision to be made, it will constitute policy options.[487]

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[482] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at pp. 166 and 179. The SK OIPC relied on this definition for the first time in Review Report LA-2010-001 at [28]. Also relied on in SK OIPC Review Report F-2014-001 at [282]. The term "*substance*" was added to the definition following SK IPC Review Report 019-2017 at [21].
[483] *John Doe v. Ontario (Finance),* [2014] 2 SCR 3, 2014 SCC 36 (CanLII) at [24]. Relied on by Justice Danyliuk in *Britto v University of Saskatchewan*, 2018 SKQB 92 at [77] and Justice Gabrielson in *Hande v University of Saskatchewan*, QBG 1222 of 2018 at [41].
[484] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 1474.
[485] Pearsall, Judy, *Concise Oxford Dictionary*, *10th Ed*., (Oxford University Press) at p. 47.
[486] *John Doe v. Ontario (Finance),* [2014] 2 SCR 3, 2014 SCC 36 (CanLII) at [26]. Relied on by Justice Kalmakoff in *Leo v Global Transportation Hub Authority*, 2019 SKQB 150 at [30].
[487] *John Doe v. Ontario (Finance),* [2014] 2 SCR 3, 2014 SCC 36 (CanLII) at [27]. Relied on by Justice Kalmakoff in *Leo v Global Transportation Hub Authority*, 2019 SKQB 150 at [30].

2. Was the advice, proposals, recommendations, analyses and/or policy options developed by or for a government institution or a member of the Executive Council?

The advice, proposals, recommendations, analyses and/or policy options can be developed by a government institution or for a government institution including one not relying on the exemption.[488] This is supported by the use of "a government institution" and not "the government institution" in the provision.

Executive Council means the Executive Council appointed pursuant to *The Executive Government Administration Act*.[489] It consists of the Premier and Cabinet Ministers. Executive Council is also referred to as "Cabinet".[490] **Cabinet** has also been defined as the committee of senior ministers (heading individual provincial government ministries) which acts collectively with the Premier to decide matters of government policy.[491]

Developed by or for means the advice, proposals, recommendations, analyses and/or policy options must have been created either: 1) within the government institution, or 2) outside the government institution but *for* a government institution and at its request (for example, by a service provider or stakeholder).[492]

For information to be developed by or for a government institution, the person developing the information should be an official, officer or employee of the government institution, be contracted to perform services, be specifically engaged in an advisory role (even if not paid) or otherwise have a sufficient connection to the government institution.[493]

To put it another way, in order to be "developed by or for" the government institution, the advice, proposals, recommendations, analyses and/or policy options should:

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[488] This is because the provision uses "*a*" rather than "*the*" government institution.
[489] *The Legislation Act*, S.S. 2019, Chapter L-10.2 at ss. 2-29.
[490] Government of Saskatchewan, Cabinet Secretariat, Executive Council, *Executive Government Processes and Procedures in Saskatchewan: A Procedures Manual*, 2007, at p. 16.
[491] British Columbia Government Services, *FOIPPA Policy Definitions* at https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/policy-definitions. Accessed April 23, 2020.
[492] AB IPC Order 2000-021 at [35]. See also British Columbia Government Services, *FOIPPA Policy and Procedures Manual* at https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/policy-advice-recommendations. Accessed July 7, 2019.
[493] AB IPC Order F2008-008 at [41] to [42]. Adopted in SK OIPC Review Reports LA-2010-001 at [30] to [31].

- Be either sought, be expected or be part of the responsibility of the person who prepared the record.
- Be prepared for the purpose of doing something, for example, taking an action or making a decision.
- Involve or be intended for someone who can take or implement the action.[494]

General feedback or input from stakeholders or members of the public would not normally qualify, as they are not sufficiently engaged in an advisory role. For example, general stakeholders and members of the public responding to a survey or poll would not qualify as they have simply been asked to provide their own comments and have developed nothing on behalf of the government institution. However, where a government institution asks a specific stakeholder – who has a particular knowledge, expertise or interest in relation to a topic – to provide advice, proposals, recommendations, analyses or policy options for it, it would be specifically engaging the stakeholder (even if not paid) in an advisory role and there would be a sufficient close connection to the government institution.[495]

Use of the word "*developed*" suggests the Legislature's intention was for the provision to include information generated in the process leading up to the giving of advice, proposals, recommendations, analyses or policy options (for example, draft versions).[496]

Drafts and redrafts of advice, proposals, recommendations, analyses and/or policy options may be protected by the exemption. A public servant may engage in writing any number of drafts before communicating part or all of their content to another person. The nature of the deliberative process is to draft and redraft advice or recommendations until the writer is sufficiently satisfied that they are prepared to communicate the results to someone else. All the information in those earlier drafts informs the end result even if the content of any one draft is not included in the final version.[497]

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[494] Criteria originated from AB IPC Order 96-006 at pp. 9 and 10 for Alberta's equivalent provision. Alberta's subsection 23(1)(a) is substantially similar to Saskatchewan's subsection 17(1)(a). Criteria were adopted in SK OIPC Review Reports F-2010-001 at [81] and LA-2010-001 at [28] for subsections 17(1)(a) of FOIP and 16(1)(a) of LA FOIP.

[495] AB IPC Order F2008-008 at [42] to [44]. Relied on in SK OIPC Review Reports F-2010-001 at [81] and LA-2011-001 at [66].

[496] *Ontario (Ministry of Northern Development and Mines) v. Mitchinson*, 2004 CanLII 15009 (ON SCDC) at [56].
Justice Dunnet found that inclusion of this word changed the meaning in the federal and British Columbia legislation compared to Ontario's FOIP legislation that did not include this word.

[497] *John Doe v. Ontario (Finance),* [2014] 2 SCR 3, 2014 SCC 36 (CanLII) at [48] to [51].

The information does not have to have arrived at the person who can take or implement the action in order to qualify as advice, recommendations, proposals, analyses and/or policy options.[498]

The provision is not meant to protect the bare recitation of facts, without anything further.[499] The provision should be reserved for the opinion, policy, or normative elements of advice, and should not be extended to the facts on which it is based. The exception is where the advice and facts may be so intertwined as to preclude release.[500]

Factual material means a cohesive body of facts, which are distinct from advice, proposals, recommendations, analyses and/or policy options. A government institution can only withhold factual material or assertions of fact under subsection 17(1) of FOIP if the factual information is sufficiently interwoven with other advice, proposals, recommendations, analyses and/or policy options so that it cannot reasonably be considered separate and distinct. In other words, where factual information is intertwined with advice or recommendations in a manner whereby no reasonable separation can be made, then the information is not factual material and can be withheld.[501]

The exemption does not generally apply to records or parts of records that in themselves reveal only the following:

- That advice was sought or given;
- That particular persons were involved in the seeking or giving of advice; or
- That advice was sought or given on a particular topic or at a particular time.[502]

It also generally does not apply to process notes. **Process notes** are brief descriptions of next steps that result from a decision, or directions regarding who should attend meetings or

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[498] *John Doe v. Ontario (Finance),* [2014] 2 SCR 3, 2014 SCC 36 (CanLII) at [48] to [51].
[499] Originated from AB IPC Order 96-006 at p. 10. Relied on in Office of the Nunavut Information and Privacy Commissioner (NU IPC) Review Report 17-131 at p. 6; Office of the Northwest Territories Information and Privacy Commissioner (NWT IPC) Review Report 06-055 at p. 7. Also relied on in SK OIPC Review Reports LA-2007-001 at [54], LA-2011-001 at [58] and F-2014-001 at [279].
[500] *3430901 Canada Inc. v. Canada (Minister of Industry)*, [2002] 1 FC 421, 2001 FCA 254 (CanLII) at [55]. Also see AB IPC Order 99-001 and Service Alberta, FOIP *Guidelines and Practices: 2009 Edition,* Chapter 4 at p. 179.
[501] British Columbia Government Services, *FOIPPA Policy and Procedures Manual* at https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/policy-advice-recommendations. Accessed July 5, 2019.
[502] Originated from AB IPC Review Report F2004-026 at [65] and [71]. Adopted in NWT IPC Review Report 17-163 at pp. 9 and 10. Adopted in SK OIPC Review Reports F-2012-004 at [27] to [30] and F-2014-001 at [280].

review documents. Processes are established and simply followed and generally contain no advice or recommendations.[503]

If releasing this information reveals the substance of the advice, recommendations, proposals, analyses and/or policy options, the government institution can withhold this information.[504] Where a review by the IPC occurs and this is the exception, the government institution should demonstrate how and why release of this type of information would reveal the substance of the advice, recommendations, proposals, analyses and/or policy options.[505]

Advice, proposals, recommendations, analyses or policy options can be revealed in two ways:

1. The information itself consists of advice, proposals, recommendations, analyses or policy options.
2. The information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice, proposals, recommendations, analyses or policy options.[506]

Subsection 17(1) of FOIP includes the requirement that access can be refused where it "*could reasonably be expected to disclose*" the protected information listed in the exemptions. The meaning of the phrase **"could reasonably be expected to"** in terms of harm-based exemptions was considered by the Supreme Court of Canada in *Ontario (Community Safety and Correctional Service) v. Ontario (Information and Privacy Commissioner), (2014)*. Although section 17 of FOIP is not a harms-based provision, the threshold provided by the Court for "*could reasonably be expected to*" is instructive:

> This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well

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[503] *Saskatchewan (Ministry of Health) v West*, 2022 SKCA 18 at [56]. See also SK OIPC Review Report 244-2018 at [40] and NS IPC Review Report 18-02 at [21].
[504] AB IPC Order F2004-026 at [65].
[505] "There may be cases where some of the foregoing items reveal the content of the advice. However, that must be demonstrated for every case for which it is claimed". See AB IPC Order F2004-026 at [71].
[506] ON IPC Orders PO-3470-R at [28], PO-2084 at p. 8 and PO-2028 at pp. 10 and 11, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564. See also Order PO-1993 at p. 12, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.

> beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences"…

A government institution cannot rely on subsection 17(1)(a) of FOIP for a record that fits within the enumerated exclusions listed at subsection 17(2) FOIP. Before applying subsection 17(1) of FOIP, government institutions should ensure that subsection 17(2) of FOIP does not apply to any of the records.

IPC Findings

In Review Report 042-2015, the Commissioner considered subsection 17(1)(a) of FOIP. An applicant had requested analysis, briefing notes, publications or correspondence related to the impact of provincial finances of changing the liquor retailing system conducted since January 1, 2012. The applicant made the request to the Ministry of Finance who transferred it to Saskatchewan Liquor and Gaming Authority (SLGA). SLGA responded to the applicant indicating that all responsive records were being withheld pursuant to subsections 17(1)(a) and (b) FOIP. The records at issue for subsection 17(1)(a) included 23 Excel Workbooks and Appendices to budget submissions. Upon review, the Commissioner found that most of the Excel Workbooks contained only raw numerical data with no textual analysis or indication about a course of action. Without this, there was no way of knowing what advice was being given or what policy options had been proposed. Although SLGA referred to the data as analysis, the Commissioner found it was purely numerical data and would not qualify as analyses in the context of subsection 17(1)(a). Furthermore, the Commissioner found that the content of the Appendices qualified as analyses and policy options. In addition, it was developed by SLGA for Treasury Board. As such, the Commissioner found subsection 17(1)(a) of FOIP applied to the Appendices.

In Review Report 216-2017, the Commissioner considered subsection 17(1)(a) of FOIP. An applicant requested copies of all documentation, memos, emails and minutes of meetings showing all steps the Ministry of Economy (Economy) had taken to make the Mineral Administration Registry Saskatchewan (MARS) compliant with subsection 15(1) of *The Mineral Tenure Registry Regulations*. Economy responded to the applicant indicating that access was granted to some records while others were being withheld pursuant to subsections 17(1)(a) and 29(1) of FOIP. The records at issue under subsection 17(1)(a) were copies of a draft policy. Upon review, the Commissioner found that the edits and comments (track changes) within the draft versions of the policy qualified as recommendations. Furthermore, the

individuals involved in sending the recommendations in the drafts of the policy were individuals within Economy that would appropriately have the responsibility to provide the recommendations and were involved in the development and implementation of the policy. As such, the Commissioner found that subsection 17(1)(a) of FOIP applied to the draft versions of the policy.

Subsection 17(1)(b)

Advice from officials

17(1) Subject to subsection (2), a head may refuse to give access to a record that could reasonably be expected to disclose:

…

(b) consultations or deliberations involving:

(i) officers or employees of a government institution;

(ii) a member of the Executive Council; or

(iii) the staff of a member of the Executive Council;

Subsection 17(1)(b) of FOIP is a discretionary class-based exemption. It permits refusal of access in situations where release of a record could reasonably be expected to disclose consultations or deliberations involving officers or employees of a government institution, a member of the Executive Council or the staff of a member of the Executive Council.

The provision is intended to allow persons having the responsibility to make decisions to freely discuss the issues before them in order to arrive at well-reasoned decisions. The intent is to allow such persons to address an issue without fear of being wrong, looking bad or appearing foolish if their frank deliberations were to be made public.[507]

The following two-part test can be applied:

1. **Does the record contain consultations or deliberations?**

Consultation means:

- The act of consulting or taking counsel together: deliberation, conference.

[507] AB IPC Orders 96-006 at p. 10 and F2004-026 at p. 16. Alberta's subsection 14(1)(b) of Alberta's FOIP is substantially similar to Saskatchewan's subsection 17(1)(b) of FOIP.

- A conference in which the parties consult and deliberate.[508]

A consultation can occur when the views of one or more officers or employees of a government institution are sought as to the appropriateness of a particular proposal or suggested action.[509] It can include consultations about prospective future actions and outcomes in response to a developing situation. It can also include past courses of action. For example, where an employer is considering what to do with an employee in the future, what has been done in the past can be summarized and would qualify as part of the consultation or deliberation.[510]

Deliberation means:

- The act of deliberating (to deliberate: to weigh in mind; to consider carefully with a view to a decision; to think over); careful consideration with a view to a decision.
- The consideration and discussions of the reasons for and against a measure by a number of councillors.[511]

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[508] *Canada (Information Commissioner) v. Toronto Port Authority*, 2016 FC 683 (CanLII) at [85]. The Federal Court of Canada relied on the definitions found in the Treasury Board Secretariat's *Access to Information Manual,* which were based on the ordinary meaning of these words. The manual can be found at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11. Definition consistent with *The Shorter Oxford English Dictionary on Historical Principles*, Oxford University Press 1973, Volume 1 at p. 409. Similar definition used in *R. v. McDonald*, 2003 NSPC 34 (CanLII) at p. 3 and *Canada (Information Commissioner) v. Canada (Minister of the Environment)*, [2007] 3 FCR 125, 2006 FC 1235 (CanLII) at [65] and [66].

[509] Definition originated from AB IPC Orders 96-006 at p. 10 and F2003-016 at [20]. Adopted by SK OIPC in Review Report F-2004-001 at [11] and [12].

[510] *Britto v University of Saskatchewan*, 2018 SKQB 92 at [88] to [89] and *Hande v University of Saskatchewan*, QBG 1222 of 2018 May 21, 2019 at [48] and [49].

[511] *Canada (Information Commissioner) v. Toronto Port Authority*, 2016 FC 683 (CanLII) at [85]. The Federal Court of Canada relied on the definitions found in the Treasury Board Secretariat's *Access to Information Manual* which were based on the ordinary meaning of these words. The manual can be found at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11. Definition consistent with *The Shorter Oxford English Dictionary on Historical Principles*, Oxford University Press 1973, Volume 1 at p. 409. Similar definition used in *R. v. McDonald*, 2003 NSPC 34 (CanLII) at p. 3 and *Canada (Information Commissioner) v. Canada (Minister of the Environment)*, [2007] 3 FCR 125, 2006 FC 1235 (CanLII) at [65] and [66].

A deliberation can occur when there is a discussion or consideration of the reasons for or against an action.[512] It can refer to discussions conducted with a view towards making a decision.[513]

2. Do the consultations or deliberations involve officers or employees of a government institution, a member of the Executive Council, or the staff of a member of the Executive Council?

Involving means including.[514]

There is nothing in the exemption that limits the exemption to participation only of officers or employees of a government institution, a member of the Executive Council or the staff of a member of the Executive Council. Collaboration with others is consistent with the concept of consultation.[515]

Officers or employees of a government institution: *"Employee of a government institution"* means an individual employed by a government institution and includes an individual retained under a contract to perform services for the government institution.[516]

A member of Executive Council: *"Executive Council"* means the Executive Council appointed pursuant to *The Executive Government Administration Act*.[517] It consists of the Premier and Cabinet Ministers. Executive Council is also referred to as "Cabinet".[518] **Cabinet** has also been defined as the committee of senior ministers (heading individual provincial government ministries) which acts collectively with the Premier to decide matters of government policy.[519]

The staff of a member of the Executive Council: The phrase includes the staff in a Minister's office, such as Chief of Staff, Administrative Assistants and Ministerial Assistants.

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[512] AB IPC Order 96-006 at p. 10. Service Alberta, *FOIP Guidelines and Practices: 2009 Edition,* Chapter 4 at p. 180. Adopted in SK OIPC Review Report F-2004-001 at [12].
[513] Originated from ON IPC Order M-184 at p. 3. Adopted in SK OIPC Review Report 187-2015 at [19].
[514] *T1T2 Limited Partnership v. Canada*, 1994 CanLII 7368 (ON SC) at p. 17.
[515] *Hande v University of Saskatchewan*, QBG 1222 of 2018 May 21, 2019 at [49].
[516] *The Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01 at subsection 2(1)(b.i).
[517] *The Legislation Act*, S.S. 2019, Chapter L-10.2 at ss. 2-29.
[518] Government of Saskatchewan, Cabinet Secretariat, Executive Council, *Executive Government Processes and Procedures in Saskatchewan: A Procedures Manual*, 2007, at p. 16.
[519] British Columbia Government Services, *FOIPPA Policy Definitions* at https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/policy-definitions. Accessed April 23, 2020.

It also includes the staff of the Office of the Executive Council. Subsection 28(1) of *The Executive Government Administration Act* defines the staff of the Office of the Executive Council as follows:

> **28**(1) The staff of the office consists of:
>
> a) the Deputy Minister to the Premier;
>
> b) the Cabinet Secretary;
>
> c) the Clerk of the Executive Council; and
>
> d) any other employees that are required for the proper conduct of the business of the office.

When there is a review by the IPC, the government institution is invited to provide a submission (arguments). The government institution should identify the individuals involved in the consultations or deliberations, include the job title of each, list organization affiliation and clarification as to each individuals' role in the decision making process.

The provision is not meant to protect the bare recitation of facts, without anything further.[520]

Factual material means a cohesive body of facts, which are distinct from the consultations or deliberations. It does not refer to isolated statements of fact, or to the analyses of the factual material. Factual material refers specifically to information that cannot be withheld under section 17(1) of FOIP and which must be separated from consultations or deliberations if those are being withheld. Where factual information is intertwined with the consultations and/or deliberations in a manner whereby no reasonable separation can be made, then the information is not factual material and can be withheld.[521]

The exemption does not generally apply to records or parts of records that in themselves reveal only that:

- A consultation or deliberation took place at a particular time;
- Particular persons were involved; or
- A particular topic was involved.[522]

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[520] *Canada (Information Commissioner) v. Canada (Minister of the Environment)*, [2007] 3 FCR 125, 2006 FC 1235 (CanLII) at [67]. AB IPC Order 96-006 at p. 10.
[521] Adapted from British Columbia Government Services, *FOIPPA Policy and Procedures Manual* at https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/policy-advice-recommendations. Accessed July 5, 2019.
[522] AB IPC Order F2004-026 at [65] [71] and [76]. Adopted in SK OIPC Review Report F-2006-004 at [33]. Similar position in BC IPC Orders 01-25 at p. 8 and 193-1997 at p. 8.

If releasing this information reveals the substance of the consultations or deliberations, the government institution can withhold this information.[523] Where a review by the IPC occurs and this is the exception, the government institution should demonstrate how and why release of this type of information would reveal the substance of the consultations and/or deliberations.[524]

Consultations and deliberations can be revealed in two ways:

1. The information itself consists of consultations or deliberations.
2. The information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual consultations or deliberations.[525]

Subsection 17(1) of FOIP includes the requirement that access can be refused where it "*could reasonably be expected to disclose*" the protected information listed in the exemptions. The meaning of the phrase **"could reasonably be expected to"** in terms of harm-based exemptions was considered by the Supreme Court of Canada in *Ontario (Community Safety and Correctional Service) v. Ontario (Information and Privacy Commissioner), (2014)*. Although section 17 of FOIP is not a harms-based provision, the threshold provided by the Court for "*could reasonably be expected to*" is instructive:

> This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences"…

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[523] AB IPC Order F2004-026 at [65].

[524] "There may be cases where some of the foregoing items reveal the content of the advice. However, that must be demonstrated for every case for which it is claimed". See AB IPC Order F2004-026 at [71].

[525] ON IPC Orders PO-3470-R at [28], PO-2084 at p. 8 and PO-2028 at pp. 10 and 11, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564. See also Order PO-1993 at p. 12, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.

There is often confusion among government institutions as to when to apply subsection 17(1)(a) of FOIP versus subsection 17(1)(b) of FOIP. Subsection 17(1)(a) of FOIP is intended to protect communications developed for a government institution by an *advisor*, while subsection 17(1)(b) of FOIP protects communications involving *decision-makers*. This is supported by the use of the word "deliberation": only a person charged with making a decision can be said to *deliberate* that decision. Moreover, "consultation" typically refers to the act of *seeking* advice regarding an action one is considering taking, but not to *giving* advice in relation to it. Information that is the subject of subsection 17(1)(a) of FOIP may be voluntarily or spontaneously provided to a decision-maker for the decision-makers' use because it is the responsibility of an employee to provide information of this kind; however, such information cannot be described as a "consultation" or a "deliberation". Put simply, subsection 17(1)(a) of FOIP is concerned with the situation where advice is given, subsection 17(1)(b) of FOIP is concerned with the situation where advice is sought or considered.[526]

A government institution cannot rely on subsection 17(1)(b) of FOIP for a record that fits within the enumerated exclusions listed at subsection 17(2) of FOIP. Before applying subsection 17(1) of FOIP, government institutions should ensure that subsection 17(2) of FOIP does not apply to any of the records.

IPC Findings

In Review Report 042-2015, the Commissioner considered subsection 17(1)(b) of FOIP. An applicant had requested analysis, briefing notes, publications or correspondence related to the impact of provincial finances of changing the liquor retailing system conducted since January 1, 2012. The applicant made the request to the Ministry of Finance who transferred it to Saskatchewan Liquor and Gaming Authority (SLGA). SLGA responded to the applicant indicating that all responsive records were being withheld pursuant to subsections 17(1)(a) and (b) of FOIP. For subsection 17(1)(b) of FOIP, the records remaining at issue were Excel Workbooks containing only raw numerical data. Upon review, the Commissioner found that the raw numerical data did not qualify as consultations or deliberations. As such, the Commissioner found subsection 17(1)(b) of FOIP would not apply to the Excel Workbooks.

[526] SK OIPC Review Report 119-2022 at [23] to [24].

Subsection 17(1)(c)

Advice from officials

17(1) Subject to subsection (2), a head may refuse to give access to a record that could reasonably be expected to disclose:

…

(c) positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the Government of Saskatchewan or a government institution, or considerations that relate to those negotiations;

Subsection 17(1)(c) of FOIP is a discretionary class-based exemption. It permits refusal of access in situations where release of a record could reasonably be expected to disclose positions, plans, procedures, criteria, or instructions developed for the purpose of contractual or other negotiations by or on behalf of a government institution. It also covers considerations related to those negotiations.

Examples of the type of information that could be covered by this exemption are the various positions developed by a government institution's negotiators in relation to labour, financial and commercial contracts.[527]

Subsection 17(1)(c) of FOIP protects as a class the strategies and tactics employed or contemplated by government institutions for the purpose of negotiations. Such information can be protected from disclosure even after the negotiations have been completed.[528]

The following test can be applied:

1. Does the record contain positions, plans, procedures, criteria, or instructions?
    a. Developed for the purpose of contractual or other negotiations.
    b. By or on behalf of the government institution.
2. Or does the record contain considerations that relate to those negotiations?

[527] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition,* Chapter 4 at p. 181.
[528] Treasury Board of Canada Secretariat, *Access to Information Manual, Chapter 11.18.5*. Available at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11_18**.** Accessed May 9, 2023.

The requirements for each part of the test are broken down below.

1. Does the record contain positions, plans, procedures, criteria or instructions?

A **position** is a point of view or attitude.[529] An opinion; stand; a way of regarding situations or topics; an opinion that is held in opposition to another in an argument or dispute.[530]

A **plan** is a formulated and especially detailed method by which a thing is to be done; a design or scheme.[531] A detailed proposal for doing or achieving something; an intention or decision about what one is going to do.[532]

A **procedure** is an established or official way of doing something; a series of actions conducted in a certain order or manner.[533]

Criteria are standards, rules or tests on which a judgement or decision can be based or compared; a reference point against which other things can be evaluated.[534]

Instructions are directions or orders.[535]

a. Developed for the purpose of contractual or other negotiations

Developed means to start to exist, experience or possess.[536]

Use of the word "*developed*" suggests the Legislature's intention was for the provision to include information generated in the process leading up to the contractual or other negotiations (for example, draft versions).[537]

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[529] Pearsall, Judy, *Concise Oxford Dictionary*, *10th Ed*., (Oxford University Press) at p. 1116.
[530] Treasury Board of Canada Secretariat, *Access to Information Manual, Chapter 11.18.5*. Available at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11_18. Accessed July 9, 2019.
[531] Definition originated from ON IPC Order P-229 at p. 10, which drew the definition from the *Concise Oxford Dictionary*. Adopted in SK OIPC Review Report LA-2011-001 at [78]. Same definition used by the Treasury Board of Canada Secretariat, *Access to Information Manual, Chapter 11.18.5*. Available at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11_18. Accessed July 9, 2019.
[532] Pearsall, Judy, *Concise Oxford Dictionary*, *10th Ed*., (Oxford University Press) at p. 1092.
[533] Pearsall, Judy, *Concise Oxford Dictionary*, *10th Ed*., (Oxford University Press) at p. 1139.
[534] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 473.
[535] Pearsall, Judy, *Concise Oxford Dictionary*, *10th Ed*., (Oxford University Press) at p. 734.
[536] Pearsall, Judy, *Concise Oxford Dictionary*, 10th Ed., (Oxford University Press) at p. 391.
[537] *Ontario (Ministry of Northern Development and Mines) v. Mitchinson*, 2004 CanLII 15009 (ON SCDC) at [56]. Justice Dunnet found that inclusion of this word changed the meaning in the federal and British Columbia legislation compared to Ontario's FOIP legislation that did not include this word for the advice/recommendations provision.

For the purpose of means intention; the immediate or initial purpose of something.[538]

A **negotiation** is a consensual bargaining process in which the parties attempt to reach agreement on a disputed or potentially disputed matter. It can also be defined as dealings conducted between two or more parties for the purpose of reaching an understanding.[539] It connotes a more robust relationship than "consultation". It signifies a measure of bargaining power and a process of back-and-forth, give-and-take discussion.[540]

The contractual or other negotiations can be concluded,[541] ongoing or future negotiations.[542]

There must be a clear indication that the information was "developed for the purpose of" negotiations. There must be a clear indication that the negotiations were in mind when the record was developed.[543]

Subsection 17(1) of FOIP includes the requirement that access can be refused where it "*could reasonably be expected to disclose*" the protected information listed in the exemptions. The meaning of the phrase **"could reasonably be expected to"** in terms of harm-based exemptions was considered by the Supreme Court of Canada in *Ontario (Community Safety and Correctional Service) v. Ontario (Information and Privacy Commissioner), (2014)*. Although subsection 17(1)(c) of FOIP is not a harms-based provision, the threshold provided by the Court for "*could reasonably be expected to*" is instructive:

> This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the

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[538] Gardner, J., and Gardner K. (2016) *Sangan's Encyclopedia of Words and Phrases Legal Maxims*, Canada, 5th Edition, Volume 2, C to H, at p. F-133.
[539] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at pp. 1248 and 1249. Relied on in SK OIPC Review Report 112-2018 at [37].
[540] *Gordon v. Canada (Attorney General)*, 2016 ONCA 625 (CanLII) at [107]. Relied on in SK OIPC Review Report 112-2018 at [37].
[541] Treasury Board of Canada Secretariat, *Access to Information Manual, Chapter 11.18.5*. Available at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11_18. Accessed July 10, 2019. Also consistent with Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 181.
[542] SK OIPC Review Report LA-2010-001 at [51].
[543] NU IPC Review Report 20-170 at p. 6.

nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences" …

Drafts and redrafts of positions, plans, procedures, criteria, instructions or considerations may be protected by the exemption. A public servant may engage in writing any number of drafts before communicating part or all their content to another person. The nature of the deliberative process is to draft and redraft until the writer is sufficiently satisfied that they are prepared to communicate the results to someone else. All the information in those earlier drafts informs the result even if the content of any one draft is not included in the final version.[544]

b. By or on behalf of the Government of Saskatchewan or a government institution

The negotiations must be conducted by the government or on behalf of the government.

On behalf of means "for the benefit of".[545] A person does something "on behalf of" another, when he or she does the thing in the interest of, or as a representative of, the other person.[546]

2. Or does the record contain considerations that relate to those negotiations?

Subsection 17(1)(c) of FOIP extends its protection beyond the positions, plans, procedures, criteria or instructions to considerations that relate to the negotiations.

A **consideration** is a careful thought; a fact taken into account when making a decision.[547] Thus, a record identifying the facts and circumstances connected to positions, plans, procedures, criteria or instructions could also fall within the scope of this provision.[548]

Relate to should be given a plain but expansive meaning.[549] The phrase should be read in its grammatical and ordinary sense. There is no need to incorporate complex requirements (such as "substantial connection") for its application, which would be inconsistent with the plain

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[544] *John Doe v. Ontario (Finance),* [2014] 2 SCR 3, 2014 SCC 36 (CanLII) at [48] to [51].
[545] *Encon Group Inc. v. Capo Construction Inc.*, 2015 BCSC 786 (CanLII) at [34].
[546] *Conibear v. Dahling*, 2010 BCSC 985 (CanLII) at [34].
[547] Pearsall, Judy, *Concise Oxford Dictionary, 10th Ed.*, (Oxford University Press) at p. 304. Same definition used by Treasury Board of Canada Secretariat, *Access to Information Manual, Chapter 11.18.5*. Available at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11_18. Accessed July 10, 2019.
[548] Treasury Board of Canada Secretariat, *Access to Information Manual, Chapter 11.18.5*. Available at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11_18. Accessed July 10, 2019.
[549] *Gertner v. Lawyers' Professional Indemnity Company,* 2011 ONSC 6121 (CanLII) at [32].

unambiguous meaning of the words of the statute.[550] "*Relating to*" requires some connection between the information and the negotiations.[551]

Examples of records or information that could fit under this part of the exemption could include the things considered by the government institution when formulating its positions, plans, procedures, criteria or instructions such as how another government institution approached similar negotiations. Such records may not have been developed by or on behalf of the government institution, but this is not a requirement for this part of the exemption.

A government institution cannot rely on subsection 17(1)(c) of FOIP for a record that fits within the enumerated exclusions listed at subsection 17(2) of FOIP. Before applying subsection 17(1) of FOIP, government institutions should ensure that subsection 17(2) of FOIP does not apply to any of the records.

IPC Findings

In Review Report 258-2016, the Commissioner considered the equivalent provision in *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). An applicant had made an access to information request to the former Kelsey Trail Regional Health Authority (KTHR) for copies of all allegations by KTHR employees regarding the applicant's return to work and all correspondence between specific departments and staff where the applicant was mentioned. KTHR responded to the applicant indicating that access was partially granted to some records but was withheld for others citing several subsections including subsection 16(1)(c) of LA FOIP. The record at issue for subsection 16(1)(c) of LA FOIP was an email. KTHR asserted the information severed in the email constituted "plans" and "instructions" developed for the purpose of negotiations regarding the applicant's return-to-work. Upon review, the Commissioner found that subsection 16(1)(c) of LA FOIP was intended to capture negotiations involving a local authority and an outside party. It did not include internal negotiations with employees. In arriving at this finding, the Commissioner relied on similar interpretations by federal counterparts (see paragraph [48]).

[550] Adapted from *Ministry of Attorney General and Toronto Star*, 2010 ONSC 991 (CanLII) at [45].
[551] Adapted from *Ministry of Attorney General and Toronto Star*, 2010 ONSC 991 (CanLII) at [43].

Subsection 17(1)(d)

Advice from officials

17(1) Subject to subsection (2), a head may refuse to give access to a record that could reasonably be expected to disclose:

…

(d) plans that relate to the management of personnel or the administration of a government institution and that have not yet been implemented;

Subsection 17(1)(d) of FOIP is a discretionary class-based exemption. It permits refusal of access in situations where release of a record could reasonably be expected to disclose plans that relate to the management of personnel or the administration of a government institution which have not yet been implemented.

The provision protects as a class of record, plans that relate to the internal management of government institutions, for example, plans about the relocation or reorganization of government institutions or the management of personnel, and plans to abolish positions or programs.[552]

The following three-part test can be applied:

1. **Does the record contain a plan(s)?**

A **plan** is a formulated and especially detailed method by which a thing is to be done; a design or scheme.[553] A detailed proposal for doing or achieving something; an intention or decision about what one is going to do.[554]

2. **Does the plan(s) relate to:**

    i) **The management of personnel?**

[552] Treasury Board of Canada Secretariat, *Access to Information Manual, Chapter 11.18.6*. Available at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11_18. Accessed July 10, 2019.
[553] Definition originated from ON IPC Order P-229 at p. 10, which drew the definition from the *Concise Oxford Dictionary*. Adopted in SK OIPC Review Report LA-2011-001 at [78]. Same definition used by the Treasury Board of Canada Secretariat, *Access to Information Manual, Chapter 11.18.5*. Available at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11_18. Accessed July 9, 2019.
[554] Pearsall, Judy, *Concise Oxford Dictionary, 10th Ed.*, (Oxford University Press) at p. 1092.

Management of personnel refers to all aspects of the management of human resources of a government institution that relate to the duties and responsibilities of employees. 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. 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).[555]

ii) The administration of the government institution?

Administration of a government institution comprises all aspects of a government institution'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.[556]

Relate to should be given a plain but expansive meaning.[557] The phrase should be read in its grammatical and ordinary sense. There is no need to incorporate complex requirements (such as "substantial connection") for its application, which would be inconsistent with the plain unambiguous meaning of the words of the statute.[558] "*Relating to*" requires some connection between the information and the management of personnel or the administration of a government institution.[559]

3. Has the plan(s) been implemented by the government institution?

Implemented means the point when the implementation of a decision begins. For example, if a government institution 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.[560]

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[555] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 181. Similar definition in British Columbia Government Services, *FOIPPA Policy and Procedures Manual* at https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/disclosure-harmful-economic-interests. Accessed July 17, 2019.
[556] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 181. Similar definition in British Columbia Government Services, *FOIPPA Policy and Procedures Manual* at https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/disclosure-harmful-economic-interests. Accessed July 17, 2019.
[557] *Gertner v. Lawyers' Professional Indemnity Company*, 2011 ONSC 6121 (CanLII) at [32].
[558] Adapted from *Ministry of Attorney General and Toronto Star*, 2010 ONSC 991 (CanLII) at [45].
[559] Adapted from *Ministry of Attorney General and Toronto Star*, 2010 ONSC 991 (CanLII) at [43].
[560] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 181.

In order for the third part of the test to be met, the plan(s) cannot yet have been implemented. However, it is not necessary for the implementation activities to have been completed.[561]

Yet means at some time in the future, in the remaining time available, before all is over.[562]

The plans can relate to a government institution and not just the one relying on the exemption.

Subsection 17(1) of FOIP includes the requirement that access can be refused where it "*could reasonably be expected to disclose*" the protected information listed in the exemptions. The meaning of the phrase **"could reasonably be expected to"** in terms of harm-based exemptions was considered by the Supreme Court of Canada in *Ontario (Community Safety and Correctional Service) v. Ontario (Information and Privacy Commissioner), (2014)*. Although section 17 of FOIP is not a harms-based provision, the threshold provided by the Court for "*could reasonably be expected to*" is instructive:

> This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences"…

A government institution cannot rely on subsection 17(1)(d) of FOIP for a record that fits within the enumerated exclusions listed at subsection 17(2) of FOIP. Before applying subsection 17(1) of FOIP, government institutions should ensure that subsection 17(2) of FOIP does not apply to any of the records.

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[561] British Columbia Government Services, *FOIPPA Policy and Procedures Manual* at https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/disclosure-harmful-economic-interests. Accessed July 17, 2019.
[562] *Shorter Oxford English Dictionary on Historical Principles, 6th Edition*, Volume 2. N-Z, (Oxford University Press) at p. 3693. Definition first used in SK OIPC Review Report 166-2018 at [29].

IPC Findings

In Review Report 166-2018, the Commissioner considered subsection 17(1)(d) of FOIP. An applicant had made an access to information request to the Saskatchewan Legal Aid Commission (SLAC) for any proposals and correspondence related to proposals prepared by SLAC that called for the closure of the Saskatoon Legal Aid office. The SLAC responded to the applicant advising that it was denying access to all of the records citing several provisions under FOIP including subsection 17(1)(d). The record consisted of 843 pages of records including emails and drafts of proposed plans. Upon review, the Commissioner found that subsection 17(1)(d) of FOIP did not apply to the records because the proposed plans had been replaced with a different plan. It was not clear that the plan was intended to be implemented anymore.

In Review Report LA-2014-004, the Commissioner considered the equivalent provision in LA FOIP. An applicant had made an access to information request to the University of Regina (U of R) for any records where the applicant had been discussed or mentioned during meetings that occurred over three dates. The U of R responded to the applicant advising that all of the records were withheld pursuant to subsections 14(1)(d) and 16(1)(d) of LA FOIP. The record consisted of 40 pages of notes taken during the meetings responsive to the applicant's access to information request. Upon review, the Commissioner found that 13 of the 40 pages did not appear to contain plans but rather opinions, feelings and thoughts of employees. The Commissioner recommended these pages be released to the applicant. Furthermore, the Commissioner found that the remaining pages met the first part of the test because they contained plans as defined. The notes referred to different staffing requirements and costs for different positions. The Commissioner also found that the second part of the test was met because the pages referred to the management of personnel. Finally, the Commissioner found that the third part of the test was met because the plans had not yet been implemented. As such, the Commissioner found that the U of R established that subsection 16(1)(d) of LA FOIP applied to the pages. The Commissioner recommended that the pages continue to be withheld.

Subsection 17(1)(e)

Advice from officials

17(1) Subject to subsection (2), a head may refuse to give access to a record that could reasonably be expected to disclose:

…

(e) contents of draft legislation or subordinate legislation;

Subsection 17(1)(e) of FOIP is a discretionary class-based exemption. It permits refusal of access in situations where release of a record could reasonably be expected to disclose the contents of draft legislation or subordinate legislation (e.g., regulations).

The following test can be applied:

Could release of the record disclose the contents of draft legislation or subordinate legislation?

The contents of draft legislation or subordinate legislation can be revealed in two ways:

1. The information itself consists of draft legislation or subordinate legislation.
2. The information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual drafts.[563]

The provision can apply to records that are themselves the draft versions of legislation or subordinate legislation. It can also apply to a record that is not the actual draft but discloses the content of draft legislation or subordinate legislation.[564]

Subsection 17(1) of FOIP includes the requirement that access can be refused where it "*could reasonably be expected to disclose*" the protected information listed in the exemptions. The meaning of the phrase **"could reasonably be expected to"** in terms of harm-based exemptions was considered by the Supreme Court of Canada in *Ontario (Community Safety and Correctional Service) v. Ontario (Information and Privacy Commissioner), (2014)*. Although

[563] Adapted from ON IPC Orders PO-3470-R at [28], PO-2084 at p. 8 and PO-2028 at pp. 10 and 11, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564. See also Order PO-1993 at p. 12, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.
[564] SK OIPC Review Report 086-2018 at [78]. Relied on AB IPC Orders F2004-026 and F2008-028.

section 17 of FOIP is not a harms-based provision, the threshold provided by the Court for "*could reasonably be expected to*" is instructive:

> This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences"…

Contents means the things that are contained in something.[565]

Draft legislation or subordinate legislation refers to preliminary versions of legislative instruments, such as draft versions.[566] It means that the Act in question has not yet been introduced to the Legislative Assembly, or the subordinate legislation has not been approved by Cabinet, as the case may be.[567]

Subordinate legislation is legislation that derives from any authority other than the sovereign power in a state and that therefore depends for its continued existence and validity on some superior or supreme authority. A regulation is often referred to as subordinate legislation.[568]

Subordinate legislation can include regulations, rules, orders, bylaws, or ordinances.[569]

For more on subordinate legislation, including what is included in this phrase, see *The Canadian Bar Review, Subordinate Legislation* by Elmer Driedger.

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[565] Pearsall, Judy, *Concise Oxford Dictionary, 10th Ed.*, (Oxford University Press) at p. 307.
[566] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 166. Adopted in SK OIPC Review Report 086-2018 at [77] and [78].
[567] British Columbia Government Services, *FOIPPA Policy Definitions* at https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/policy-definitions. Accessed April 23, 2020.
[568] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 1082.
[569] Driedger, E., *The Canadian Bar Review, Subordinate Legislation*, Vol. XXXVIII, March 1960, No. 1: Ottawa, at p. 2. See also SK OIPC Review Report 025-2020 at [92] where the Commissioner found that a draft zoning bylaw qualified as "subordinate legislation" for purposes of subsection 17(1)(e) of FOIP.

A government institution cannot rely on subsection 17(1)(e) of FOIP for a record that fits within the enumerated exclusions listed at subsection 17(2) of FOIP. Before applying subsection 17(1) of FOIP, government institutions should ensure that subsection 17(2) of FOIP does not apply to any of the records.

IPC Findings

In Review Report 086-2018, the Commissioner considered subsection 17(1)(e). An applicant had submitted an access to information request to the Ministry of Health (Health) for information pertaining to the Ministry of Health EMS Working Group. Health responded to the applicant providing partial access to 1,697 pages citing several subsections including subsection 17(1)(e) for authority to withhold some of the information. Three pages were at issue under subsection 17(1)(e). Upon review, the Commissioner found that the three pages would disclose the content of draft or subordinate legislation. However, the Commissioner noted that the pages were 14 years old, and the specific piece of legislation had been amended five times since the creation of the three pages. The Commissioner recommended that Health reconsider its exercise of discretion.

Subsection 17(1)(f)

Advice from officials

17(1) Subject to subsection (2), a head may refuse to give access to a record that could reasonably be expected to disclose:

…

(f) agendas or minutes of:

(i) a board, commission, Crown corporation or other body that is a government institution; or

(ii) a prescribed committee of a government institution mentioned in subclause (i);

Subsection 17(1)(f) of FOIP is a discretionary class-based exemption. It permits refusal of access in situations where release of a record could reasonably be expected to disclose agendas or minutes of a board, commission, Crown corporation or other body that is a government institution or a prescribed committee of a government institution. The provision is intended to protect agendas and/or meeting minutes as they relate to decision-making within the bodies listed.

The following two-part test can be applied:

Office of the Saskatchewan Information and Privacy Commissioner. Guide to FOIP, Chapter 4, *Exemptions from the Right of Access*. Updated 8 April 2024.

1. Is the record an agenda of a meeting or minutes of a meeting?

Agendas and minutes of meetings can be revealed in two ways:

1. The information itself consists of agendas or meeting minutes.
2. The information, if disclosed, would permit the drawing of accurate inferences as to the content of the actual agendas or meeting minutes.[570]

Agendas are a list of things to be done, as items to be considered at a meeting, usually arranged in order of consideration.[571]

Minutes are memoranda or notes of a transaction, proceeding or meeting; the formal record of a deliberative assembly's meeting, approved by the assembly; the record of all official actions taken.[572]

2. Are the agendas or minutes of:

- A board, commission, Crown corporation or other body that is a government institution. (See the *Appendix* at Part I of the FOIP *Regulations* for bodies that qualify) **or**
- A prescribed committee of a board, commission, Crown corporation or other body that is a government institution. Currently, the FOIP *Regulations* do not list any committees of a board, commission, Crown corporation or other body that is a government institution.

Subsection 17(1) of FOIP includes the requirement that access can be refused where it "*could reasonably be expected to disclose*" the protected information listed in the exemptions. The meaning of the phrase ***"could reasonably be expected to"*** in terms of harm-based exemptions was considered by the Supreme Court of Canada in *Ontario (Community Safety and Correctional Service) v. Ontario (Information and Privacy Commissioner), (2014)*. Although section 17 of FOIP is not a harms-based provision, the threshold provided by the Court for "*could reasonably be expected to*" is instructive:

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[570] Adapted from ON IPC Orders PO-3470-R at [28], PO-2084 at p. 8 and PO-2028 at pp. 10 and 11, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564. See also Order PO-1993 at p. 12, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.
[571] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 78.
[572] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 1194.

> This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences"… .

In a review with the IPC, the government institution must demonstrate that the agenda or minutes are those of one of the bodies noted in the provision. The exemption can only be applied to the records of the bodies listed in the provision.

A government institution cannot rely on subsection 17(1)(f) of FOIP for a record that fits within the enumerated exclusions listed at subsection 17(2). Before applying subsection 17(1) of FOIP, government institutions should ensure that subsection 17(2) of FOIP does not apply to any of the records.

IPC Findings

In Review Report 157-2016, the Commissioner considered subsection 17(1)(f) of FOIP. An applicant made an access to information request to the Global Transportation Hub Authority (GTH) for all correspondence between the GTH and any other ministry related to Brightenview International Development Incorporation. The GTH responded to the applicant advising that all responsive records were withheld citing several provisions under FOIP including subsection 17(1)(f) of FOIP. The GTH applied subsection 17(1)(f) of FOIP to minutes of the GTH's Audit and Finance Committee. Upon review, the Commissioner found that the record qualified as minutes. The Commissioner also found that the minutes were minutes of a committee meeting of the GTH. However, as the FOIP *Regulations* did not have any prescribed committees, the Audit and Finance Committee of the GTH did not qualify for subsection 17(1)(f)(ii) of FOIP. In fact, there are no committees for purposes of subsection 17(1)(f)(ii) of FOIP prescribed in the FOIP *Regulations*. As such, the Commissioner found that subsection 17(1)(f) of FOIP did not apply to the minutes.

In Review Report 025-2017, the Commissioner considered subsection 17(1)(f) of FOIP. An applicant submitted an access to information request to the Saskatchewan Power Corporation (SaskPower) for all reports or documentation analyzing and/or evaluating the possibility of purchasing land in the Global Transportation Hub between January 1, 2012 and

December 30, 2013. SaskPower responded to the applicant providing access to some records and withholding others pursuant to subsections 17(1)(a) and (f) of FOIP. SaskPower applied subsection 17(1)(f) of FOIP to a two-page document titled, *Minutes – Thursday May 23, 2013*. SaskPower asserted the minutes were minutes of a meeting of a Crown corporation that is a government institution under subsection 17(1)(f) of FOIP. Upon review, the Commissioner found that the document constituted minutes and the minutes were from a SaskPower Board of Directors meeting. As SaskPower qualified as a Crown corporation for purposes of subsection 17(1)(f)(i) of FOIP, the Commissioner found the exemption was appropriately applied. The Commissioner recommended the meeting minutes continue to be withheld.

Subsection 17(1)(g)

Advice from officials

17(1) Subject to subsection (2), a head may refuse to give access to a record that could reasonably be expected to disclose:

…

(g) information, including the proposed plans, policies or projects of a government institution, the disclosure of which could reasonably be expected to result in disclosure of a pending policy or budgetary decision.

Subsection 17(1)(g) of FOIP is a discretionary class-based exemption. It permits refusal of access in situations where release of a record could reasonably be expected to disclose information, including the proposed plans, policies or projects of a government institution, the disclosure of which could reasonably be expected to result in disclosure of a pending policy or budgetary decision.

The provision allows government institutions to prevent premature disclosure of a policy or budgetary decision. Once a policy or budgetary decision has been taken and is being implemented, the information can no longer be withheld under this exemption. A decision has been implemented once those expected to carry out the activity have been authorized and instructed to do so.[573]

The following two-part test can be applied:

[573] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at pp. 182 and 183. Alberta's subsection 24(1)(g) is substantially similar to Saskatchewan's provision.

1. Is it information of a government institution?

The information can be from a government institution other than the one relying on the exemption.[574] The government institution must demonstrate that the information is of a government institution in order for the exemption to apply.

Information means facts or knowledge provided or learned as a result of research or study.[575]

Including means that the list of information that follows is not complete (non-exhaustive). The examples in the provision are the types of information presumed to be involved.[576]

Proposed means something offered for consideration or acceptance; a suggestion.[577] To put forward an idea or plan for consideration.[578]

A **plan** is a formulated and especially detailed method by which a thing is to be done; a design or scheme.[579] A detailed proposal for doing or achieving something; an intention or decision about what one is going to do.[580]

A **policy** is a standard course of action that has been officially established by government.[581]

A **project** is an enterprise carefully planned to achieve a particular aim; a proposed or planned undertaking.[582]

The information does not have to be proposed plans, policies or projects to qualify. The government institution should describe what the information is.

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[574] This is because the provision uses "*a*" rather than "*the*" government institution.
[575] Pearsall, Judy, *Concise Oxford Dictionary*, *10th Ed*., (Oxford University Press) at p. 727. Cited in SK OIPC Review Report F-2006-002 at [45].
[576] Adapted from British Columbia Government Services, *FOIPPA Policy and Procedures Manual* at https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/cabinet-local-public-body-confidences. Accessed June 26, 2019.
[577] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 1474.
[578] Pearsall, Judy, *Concise Oxford Dictionary*, *10th Ed*., (Oxford University Press) at p. 1147.
[579] Definition originated from ON IPC Order P-229 at p. 10, which drew the definition from the *Concise Oxford Dictionary*. Adopted in SK OIPC Review Report LA-2011-001 at [78]. Same definition used by the Treasury Board of Canada Secretariat, *Access to Information Manual, Chapter 11.18.5*. Available at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11_18. Accessed July 9, 2019.
[580] Pearsall, Judy, *Concise Oxford Dictionary*, *10th Ed*., (Oxford University Press) at p. 1092.
[581] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 1401.
[582] Pearsall, Judy, *Concise Oxford Dictionary*, *10th Ed*., (Oxford University Press) at p. 1143.

2. Could disclosure reasonably be expected to result in disclosure of a pending policy or budgetary decision?

Subsection 17(1) of FOIP includes the requirement that access can be refused where it "*could reasonably be expected to disclose*" the protected information listed in the exemptions. The meaning of the phrase **"could reasonably be expected to"** in terms of harm-based exemptions was considered by the Supreme Court of Canada in *Ontario (Community Safety and Correctional Service) v. Ontario (Information and Privacy Commissioner), (2014)*. Although section 17 of FOIP is not a harms-based provision, the threshold provided by the Court for "*could reasonably be expected to*" is instructive:

> This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences"…

Pending means awaiting decision or settlement; about to happen.[583]

A **policy** is a standard course of action that has been officially established by government.[584]

Budgetary means of or pertaining to a budget. A budget is a periodic, (especially annual) estimate of revenue and expenditure.[585]

Decision means the action of coming to a determination or resolution with regard to any point or course of action; resolution or conclusion arrived at.[586]

The government institution must tie the information in the record to the pending policy or budgetary decision that could be disclosed.

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[583] Pearsall, Judy, *Concise Oxford Dictionary, 10th Ed.*, (Oxford University Press) at p. 1055.
[584] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 1401.
[585] *Shorter Oxford English Dictionary on Historical Principles, 6th Edition*, Volume 1. A-M, (Oxford University Press) at p. 304.
[586] *Shorter Oxford English Dictionary on Historical Principles, 6th Edition*, Volume 1. A-M, (Oxford University Press) at p. 619.

A government institution cannot rely on subsection 17(1)(g) of FOIP for a record that fits within the enumerated exclusions listed at subsection 17(2). Before applying subsection 17(1) of FOIP, government institutions should ensure that subsection 17(2) of FOIP does not apply to any of the records.

IPC Findings

In Review Report 042-2015, the Commissioner considered subsection 17(1)(g) of FOIP. An applicant made an access to information request to the Ministry of Finance who transferred it to Saskatchewan Liquor and Gaming (SLGA). The access to information request was for records related to the impact of provincial finances of changing the liquor retailing system conducted since January 1, 2012. SLGA responded to the applicant indicating that all responsive records were being withheld pursuant to subsections 17(1)(a) and (b) of FOIP. During the course of the review, SLGA added subsection 17(1)(g) of FOIP along with other exemptions. The records at issue for subsection 17(1)(g) of FOIP were 23 Excel Workbooks. SLGA asserted that the workbooks were information of SLGA. Furthermore, that the workbooks indicated different factors SLGA was considering as part of proposed policy regarding the retail liquor system in Saskatchewan and that disclosure of the workbooks could disclose a pending policy decision. Upon review, the Commissioner found that the exemption did not apply because the policy had not yet been finalized and that SLGA was considering a "range of potential actions". The Commissioner was not persuaded that release of the Excel Workbooks could reasonably be expected to result in disclosure of a pending policy.

In Review Report 086-2018, the Commissioner considered subsection 17(1)(g) of FOIP. An applicant made an access to information request to the Ministry of Health (Health) for information pertaining to the Ministry of Health EMS Working Group. Health responded to the applicant by providing 1,697 pages. Some of the information in the pages was withheld pursuant to several provisions in FOIP including subsection 17(1)(g) of FOIP. Health applied the exemption to three pages of the record. In its submission to the IPC, Health asserted that the information pertained to budget development for a government institution regarding pending plans and projects that pertained to budgetary decisions. Upon review, the Commissioner found that the pages concerned the 2009-2010 budget and that decisions regarding the 2009-2010 budget had already been made. As such, the decisions were no longer pending. The Commissioner found the second part of the test was not met and subsection 17(1)(g) of FOIP was found not to apply.

Subsection 17(2)

Advice from officials

17(2) This section does not apply to a record that:

(a) has been in existence for more than 25 years;

(b) is an official record that contains a statement of the reasons for a decision that is made in the exercise of a discretionary power or an adjudicative function;

(c) is the result of product or environmental testing carried out by or for a government institution, unless the testing was conducted:

(i) as a service to a person, a group of persons or an organization other than a government institution, and for a fee; or

(ii) as preliminary or experimental tests for the purpose of:

(A) developing methods of testing; or

(B) testing products for possible purchase;

(d) is a statistical survey;

(e) is the result of background research of a scientific or technical nature undertaken in connection with the formulation of a policy proposal; or

(f) is:

(i) an instruction or guide-line issued to the officers or employees of a government institution; or

(ii) a substantive rule or statement of policy that has been adopted by a government institution for the purpose of interpreting an Act or regulation or administering a program or activity of a government institution.

Subsection 17(2) of FOIP provides some specific cases where subsection 17(1) of FOIP does not apply. This includes a record that:

(a) Has been in existence for more than 25 years;

Any information contained within a record which has been in existence for 25 years or more cannot be withheld under subsection 17(1). Other exemptions may still apply to the information.[587]

[587] Adapted from Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 183.

(b) Is an official record containing a statement of the reasons for a decision that is made in the exercise of a discretionary power or an adjudicative function;

This provision makes it clear that subsection 17(1) of FOIP cannot be used to withhold formal judgments, including reasons for reaching those judgments. The provision applies when the decision has already been made and is not merely contemplated.[588]

Reasons for decision means the motive, rationale, justification or facts leading to a decision.[589]

Exercise of discretionary power refers to making a decision that cannot be determined to be right or wrong in an objective sense.[590]

Discretionary means a choice given to a decision-maker as to whether, or how, to exercise a power.[591] Involves the exercise of judgement and choice.[592]

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 Part V of *The Education Act, 1995*, or a hearing by a review board.[593]

Reasons for decisions of this type cannot be withheld under subsection 17(1) of FOIP despite the fact that the decisions may contain advice or recommendations prepared by or for a minister or a government institution.[594]

(c) Is the result of product or environmental testing carried out by or for a government institution, unless the testing was conducted:

(i) As a service to a person, a group of persons or an organization other than a government institution, and for a fee; or

(ii) As preliminary or experimental tests for the purpose of:

(A) Developing methods of testing; or

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[588] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 184.
[589] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 184.
[590] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 184.
[591] AB IPC Order 98-014 at [16].
[592] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 586.
[593] Adapted from Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 184.
[594] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 184.

(B) Testing products for possible purchase.

Examples include test results of commercial products and soil testing. Subsection 17(1) of FOIP may 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. It also covers test results where testing was done by a government institution in order to determine whether or not to purchase a product.[595]

(d) Is a statistical survey;

Statistical survey refers to a specific study of a condition, situation or program, by means of data collection and analysis.[596]

Where a statistical survey appears with information that can be withheld under subsection 17(1) of FOIP, the exempted information should be severed, and the statistical survey released unless another exemption applies.[597]

An example of a statistical survey would be a study of growth rates in various forested areas of northern Saskatchewan. Such a study could not be withheld under subsection 17(1) of FOIP even though it may be part of a larger document dealing with reform of forestry law, regulation, or policy.[598]

(e) Is the result of background research of a scientific or technical nature undertaken in connection with the formulation of a policy proposal; or

Background research encompasses a wide range of study, review and fieldwork aimed at analyzing and presenting an overview of issues.[599]

Subsection 17(2) of FOIP 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. For information to be considered background research under this provision, it must be connected with the development of some specific policy. This

[595] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 184.
[596] British Columbia Government Services, *FOIPPA Policy and Procedures Manual* at https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/policy-advice-recommendations. Accessed July 5, 2019.
[597] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 185.
[598] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 185.
[599] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 185.

would clearly be the case if, for example, a policy proposal referred directly to the research on which the proposal was based.[600]

Normally the research methodology, data and analysis cannot be withheld under subsection 17(1) of FOIP. However, advice and recommendations contained in the same record as the background research or prepared separately by or for a government institution or a minister could be withheld.[601]

In connection with has a very broad meaning. The word "connection" simply means that there is some relationship between two things or activities – that they have something to do with each other. The relationship need not be purposive to constitute a connection. Many activities might be carried out in connection with a particular object, as integrally related activities, without being carried out for the purpose of that object.[602]

(f) Is:

(i) An instruction or guideline issued to the officers or employees of a government institution;

Information used by officials in interpreting legislation, regulations or policy cannot be withheld under subsection 17(1) of FOIP. Generally, an official or employee in a position to provide interpretation or policy direction will have issued the instruction or guideline.[603]

(ii) A substantive rule or statement of policy that has been adopted by a government institution for the purpose of interpreting an Act, regulation, resolution or bylaw or administering a program or activity of a government institution.

Basic interpretations of the law, regulations, and policy under which a government institution operates its programs and activities cannot be withheld under subsection 17(1) of FOIP. The public should have access to any manual, handbook or other guideline used in the decision-making processes that affect the public.[604]

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[600] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 185.
[601] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 185.
[602] *Re Kitchener-Waterloo Real Estate Board Inc. and Regional Assessment Commissioner, Region No. 21 et al.*, 1986 CanLII 2660 (ON SC) at p. 8.
[603] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 185.
[604] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 186.

Subsection 17(3)

Advice from officials

17(3) A head may refuse to give access to any report, statement, memorandum, recommendation, document, information, data or record, within the meaning of section 10 of *The Evidence Act*, that, pursuant to that section, is not admissible as evidence in any legal proceeding.

Subsection 17(3) of FOIP is a discretionary class-based exemption. It permits refusal of access to any report, statement, memorandum, recommendation, document, information, data or record, within the meaning of section 10 of *The Evidence Act* that is not admissible as evidence in any legal proceeding. Section 10 of *The Evidence Act* pertains to evidence given before quality improvement committees.

Committee, in this context, means a committee designated as a quality improvement committee by a health services agency to carry out a quality improvement activity the purpose of which is to examine and evaluate the provision of health services for the purpose of:

(a) Educating persons who provide health services.

(b) Improving the care, practice or services provided to patients by the health services agency.[605]

Health services agency, in this context, means:

(a) The provincial health authority established or continued pursuant to *The Provincial Health Authority Act*;

(b) A health care organization as defined in *The Provincial Health Authority Act*;

(c) the operator of a mental health centre as defined in *The Mental Health Services Act*;

(d) the Saskatchewan Cancer Agency continued by *The Cancer Agency Act*; or

(e) the Athabasca Health Authority Inc.; (« *organisme de services de santé* »)[606]

Legal proceeding, in this context, means any civil or criminal proceeding or inquiry in which evidence is or may be given, and includes a proceeding for the imposition of punishment by

[605] *The Evidence Act,* SS 2006, c E-11.2 at subsection 10(1).
[606] *The Evidence Act,* SS 2006, c E-11.2 at subsection 10(1).

way of fine, penalty or imprisonment to enforce an Act or a regulation made pursuant to an Act.[607]

Section 18: Economic and Other Interests

Economic and other interests

18(1) A head may refuse to give access to a record that could reasonably be expected to disclose:

(a) trade secrets;

(b) financial, commercial, scientific, technical or other information:

(i) in which the Government of Saskatchewan or a government institution has a proprietary interest or a right of use; and

(ii) that has monetary value or is reasonably likely to have monetary value;

(c) scientific or technical information obtained through research by an employee of a government institution, the disclosure of which could reasonably be expected to deprive the employee of priority of publication;

(d) information, the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of the Government of Saskatchewan or a government institution;

(e) positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the Government of Saskatchewan or a government institution, or considerations that relate to those negotiations;

(f) information, the disclosure of which could reasonably be expected to prejudice the economic interest of the Government of Saskatchewan or a government institution;

(g) information, the disclosure of which could reasonably be expected to be injurious to the ability of the Government of Saskatchewan to manage the economy of Saskatchewan; or

(h) information, the disclosure of which could reasonably be expected to result in an undue benefit or loss to a person.

(2) A head shall not refuse, pursuant to subsection (1), to give access to a record that contains the results of product or environmental testing carried out by or for a government institution, unless the testing was conducted:

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[607] *The Evidence Act,* SS 2006, c E-11.2 at subsection 10(1). This definition is similar to the definition in subsection 15(1)(d) of FOIP but is drawn from *The Evidence Act* as this is the context in which the phrase appears.

Office of the Saskatchewan Information and Privacy Commissioner. Guide to FOIP, Chapter 4, *Exemptions from the Right of Access*. Updated 8 April 2024.

(a) as a service to a person, a group of persons or an organization other than a government institution, and for a fee; or

(b) as preliminary or experimental tests for the purpose of:

(i) developing methods of testing; or

(ii) testing products for possible purchase.

Section 18 of FOIP is a discretionary class-based and harm-based provision, meaning, it contains both class and harm based exemptions.

Section 18 of FOIP refers to the Government of Saskatchewan as a whole. It recognizes that government institutions, individually or collectively, may hold significant amounts of financial and economic information that is critical to the management of the provincial economy.[608]

The Government of Saskatchewan is responsible for managing many aspects of the province's economic activities in the interests of the people of Saskatchewan, by ensuring that an appropriate economic infrastructure is in place and by facilitating and regulating the activities of the marketplace.[609]

The heading of the provision is "*Economic and other interests*". The meaning of economic interests can be defined as follows:

> **Economic interests** refers to both the broad interests of a government institution and, for the government as a whole, in managing the production, distribution and consumption of goods and services. This also covers financial matters such as the management of assets and liabilities by a government institution and the government institution's ability to protect its own or the government's interests in financial transactions.[610]

[608] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 188.
[609] British Columbia Government Services, *FOIPPA Policy and Procedures Manual* at https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/disclosure-harmful-economic-interests. Accessed July 17, 2019.
[610] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 188. Similar definition in British Columbia Government Services, *FOIPPA Policy and Procedures Manual* at https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/disclosure-harmful-economic-interests. Accessed July 17, 2019.

Subsection 18(1)(a)

Economic and other interests

18(1) A head may refuse to give access to a record that could reasonably be expected to disclose:

(a) trade secrets;

...

(2) A head shall not refuse, pursuant to subsection (1), to give access to a record that contains the results of product or environmental testing carried out by or for a government institution, unless the testing was conducted:

(a) as a service to a person, a group of persons or an organization other than a government institution, and for a fee; or

(b) as preliminary or experimental tests for the purpose of:

(i) developing methods of testing; or

(ii) testing products for possible purchase.

Subsection 18(1)(a) of FOIP is a discretionary class-based exemption. It permits refusal of access in situations where release of a record could reasonably be expected to disclose trade secrets.

The following two-part test can be applied:

1. **Does the information constitute a trade secret?**

Trade Secret is defined as information, including a plan or process, tool, mechanism or compound, which possesses the following characteristics:

1. The information must be secret in an absolute or relative sense (is known only by one or a relatively small number of people).
2. The possessor of the information must demonstrate he/she has acted with the intention to treat the information as secret.
3. The information must be capable of industrial or commercial application.

4. The possessor must have an interest (e.g., an economic interest) worthy of legal protection.[611]

The information must meet all of the above criteria to be considered a trade secret.

For the fourth criterion, the government institution must own the trade secret or be able to prove a claim of legal right to the information (i.e., license agreement). Normally, this will mean that the trade-secret information has been created by employees of the government institution as part of their jobs, or by a contractor as part of a contract with the government institution.[612]

2. Could release reasonably be expected to disclose the trade secret?

Trade secrets can be revealed in two ways:

1. The information itself consists of trade secrets.
2. The information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual trade secrets.[613]

Section 18 of FOIP includes the requirement that access can be refused where it "*could reasonably be expected to disclose*" the protected information listed in the exemptions. The meaning of the phrase **"could reasonably be expected to"** in terms of harm-based exemptions was considered by the Supreme Court of Canada in *Ontario (Community Safety and Correctional Service) v. Ontario (Information and Privacy Commissioner), (2014)*. Although some of the exemptions contained in section 18 are not harms-based exemptions, the threshold provided by the Court for "*could reasonably be expected to*" is instructive:

> This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is

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[611] *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 SCR 23, 2012 SCC 3 (CanLII) at [109] to [112]. Definition relied on by Justice Zarzeczny in *Canadian Bank Note Limited v Saskatchewan Government Insurance*, 2016 SKQB 362 (CanLII) at [32].

[612] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 190. Similar requirement in British Columbia Government Services, *FOIPPA Policy and Procedures Manual*.

[613] Adapted from ON IPC Orders PO-3470-R at [28], PO-2084 at p. 8 and PO-2028 at pp. 10 and 11, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564. See also Order PO-1993 at p. 12, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.

> probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences"…

A government institution cannot rely on subsection 18(1)(a) of FOIP for a record that fits within the enumerated exclusions listed at subsection 18(2) of FOIP. Before applying subsection 18(1) of FOIP, government institutions should ensure that subsection 18(2) of FOIP does not apply to any of the records.

IPC Findings

In Review Report 185-2016, the Commissioner considered subsection 18(1)(a) of FOIP. An applicant made an access to information request to Saskatchewan Power Corporation (SaskPower) for a copy of the CO_2 supply agreement between SaskPower and Cenovus. SaskPower responded to the applicant advising that the supply agreement was being withheld in full pursuant to several exemptions including subsection 18(1)(a) of FOIP. The records included an original Carbon Dioxide Purchase and Sale Agreement between SaskPower and Cenovus and two amending agreements. SaskPower applied subsection 18(1)(a) to Schedule B of each agreement. SaskPower asserted the information contained in the schedules were trade secrets as they were the specifications of the compressed carbon dioxide (CO_2) that SaskPower was selling. Upon review, the Commissioner agreed that the information was a trade secret as it qualified as a formula. Furthermore, the Commissioner was satisfied that the formula was a secret and that SaskPower demonstrated that it has acted with the intention to treat the information as secret. The Commissioner was persuaded that information in each Schedule B qualified as a trade secret. As the criteria was met in the definition of trade secret, the Commissioner found that subsection 18(1)(a) of FOIP applied to each Schedule B.

Subsection 18(1)(b)

Economic and other interests

18(1) A head may refuse to give access to a record that could reasonably be expected to disclose:

…

(b) financial, commercial, scientific, technical or other information:

(i) in which the Government of Saskatchewan or a government institution has a proprietary interest or a right of use; and

(ii) that has monetary value or is reasonably likely to have monetary value;

…

(2) A head shall not refuse, pursuant to subsection (1), to give access to a record that contains the results of product or environmental testing carried out by or for a government institution, unless the testing was conducted:

(a) as a service to a person, a group of persons or an organization other than a government institution, and for a fee; or

(b) as preliminary or experimental tests for the purpose of:

(i) developing methods of testing; or

(ii) testing products for possible purchase.

Subsection 18(1)(b) of FOIP is a discretionary class-based exemption. It permits refusal of access in situations where release of a record could reasonably be expected to disclose financial, commercial, scientific, technical or other information which the Government of Saskatchewan or a government institution has a proprietary interest or a right of use and which has monetary value or reasonably likely to have monetary value.

The following three-part test can be applied:

1. **Does the information contain financial, commercial, scientific, technical or other information?**

Financial information is information regarding monetary resources, such as financial capabilities, assets, and liabilities, past or present. Common examples are financial forecasts,

investment strategies, budgets, and profit and loss statements. The financial information must be specific to a particular party.[614]

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 and pricing structures, market research, business plans and customer records.[615]

Scientific information is information exhibiting the principles or methods of science. The information could include designs for a product and testing procedures or methodologies.[616] It is information belonging to an organized field of knowledge in the natural, biological, or social sciences or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of specific hypothesis or conclusions and be undertaken by an expert in the field. Finally, scientific information must be given a meaning separate from technical information.[617]

Technical information is information relating to a particular subject, craft or technique. Examples are system design specifications and the plans for an engineering project.[618] It is information belonging to an organized field of knowledge, which would fall under the general categories of applied sciences or mechanical arts. Examples of these fields would include architecture, engineering, or electronics. It will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing. Finally, technical information must be given a meaning separate from scientific information.[619]

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[614] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 191. Definition first relied on for third party exemption in SK OIPC Review Report F-2005-003 at [23].
[615] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 191. Definition relied on for first time in terms of this provision in SK OIPC F-2005-006 at [21].
[616] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 191. Definition first relied on for third party exemption in SK OIPC Review Report F-2006-002 at [85].
[617] Definition originated from ON IPC Order P-454 at p. 4. Adopted in SK OIPC Review Report F-2006-002 at [87].
[618] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 191. Definition first relied on for third party exemption in SK OIPC Review Report F-2006-002 at [85].
[619] Definition originated from ON IPC Order P-454 at p. 4. Adopted in SK OIPC Review Report F-2005-003 at [26].

2. Does the government institution have a proprietary interest or a right to use it?

This means that the government institution must be able to demonstrate rights to the information.

Proprietary means of, relating to or holding as property.[620]

Proprietary interest is the interest held by a property owner together with all appurtenant rights, such as a stockholder's right to vote the shares.[621] It signifies simply "interest as an owner" or "legal right or title".[622]

Owner means someone who has the right to possess, use and convey something; a person in whom one or more interests are vested.[623]

Ontario's *Freedom of Information and Protection of Privacy Act* subsection 18(1)(a) is similar to Saskatchewan's but instead of proprietary interest or right of use, it uses the phrase "that belongs to the Government of Ontario or an institution".[624] In Ontario Order MO-1746, the phrase "*belongs to*" was found to mean "*ownership*" which makes it relevant for Saskatchewan's subsection 18(1)(b) of FOIP. In Order MO-1746, the Adjudicator stated:

> The Assistant Commissioner has thus determined that the term "belongs to" refers to "ownership" by an institution, and that the concept of "ownership of information" requires more than the right to simply possess, use or dispose of information, or control access to the physical record in which the information is contained. For information to "belong to" an institution, the institution must have some proprietary interest in it either in a traditional intellectual property sense - such as copyright, trade mark, patent or industrial design - or in the sense that the law would recognize a substantial interest in protecting the information from misappropriation by another party. Examples of the latter type of information may include trade secrets, business to business mailing lists (Order P-636), customer or supplier lists, price lists, or other types of confidential business information. In each of these examples, there is an inherent monetary value in the information to the organization resulting from the expenditure of money or the

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[620] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 1474.
[621] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 969. First relied on by SK OIPC in F-2005-006 at [11].
[622] *Sangan's Encyclopedia of Words and Phrases Legal Maxims*, Canada, 5th Edition, Volume 4, P to R at p. P-495.
[623] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 1331.
[624] Ontario subsection 18(1)(a) of FOIP provides "A head may refuse to disclose a record that contains…trade secrets or financial, commercial, scientific or technical information that belongs to the Government of Ontario or an institution and has monetary value or potential monetary value".

application of skill and effort to develop the information. If, in addition, there is a quality of confidence about the information, in the sense that it is consistently treated in a confidential manner, and it derives its value to the organization from not being generally known, the courts will recognize a valid interest in protecting the confidential business information from misappropriation by others. [See, for example, *Lac Minerals Ltd. v. International Corona Resources Ltd.* (1989), 61 D.L.R. (4th) 14 (S.C.C.), and the cases discussed therein].[625]

Right of use means a legal, equitable or moral title or claim to the use of property, or authority to use.[626]

3. **Does the information have monetary value for the government institution or is it reasonably likely to?**

Monetary value requires that the information itself have an intrinsic value.[627] This may be demonstrated by evidence of potential for financial return to the government institution. 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.[628]

The mere fact that the government institution incurred a cost to create the record does not mean it has monetary value for the purposes of this section.[629]

Reasonably likely to implies that the question be considered objectively. This means that there must be evidence that will, on a balance of probabilities, support the necessary finding.[630]

Section 18 of FOIP includes the requirement that access can be refused where it "*could reasonably be expected to disclose*" the protected information listed in the exemptions. The meaning of the phrase **"could reasonably be expected to"** in terms of harm-based exemptions was considered by the Supreme Court of Canada in *Ontario (Community Safety and Correctional Service) v. Ontario (Information and Privacy Commissioner), (2014)*. Although

[625] Quoted initially in SK OIPC Review Report F-2005-006 at [12]. Later in SK OIPC Review Reports 184-2016 at [35], 215 to 217-2016 at [19], 056-2017 at [60] and 086-2018 at [94].
[626] Adapted from *The Shorter Oxford English Dictionary on Historical Principles*, Oxford University Press 1973, Volume 1 at p. 2582.
[627] ON IPC Order P-219 at p. 17. Relied on in SK OIPC Review Report F-2005-00 at [27].
[628] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 191.
[629] ON IPC Order PO-3464-I at [51]. Relied on in SK OIPC Review Reports 056-2017 at [62], 039-2018 at [21] and 086-2018 at [95].
[630] *Canada (Director of Investigation and Research) v. Superior Propane Inc.*, 1996 CanLII 8 (CT) at [17].

some of the exemptions contained in section 18 of FOIP are not harms-based exemptions, the threshold provided by the Court for "*could reasonably be expected to*" is instructive:

> This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences"…

A government institution cannot rely on subsection 18(1)(b) of FOIP for a record that fits within the enumerated exclusions listed at subsection 18(2) of FOIP. Before applying subsection 18(1) of FOIP, government institutions should ensure that subsection 18(2) of FOIP does not apply to any of the records.

IPC Findings

In Review Report 185-2016, the Commissioner considered subsection 18(1)(b) of FOIP. An applicant made an access to information request to Saskatchewan Power Corporation (SaskPower) for a copy of the CO_2 supply agreement between SaskPower and Cenovus. SaskPower responded to the applicant advising that the supply agreement was being withheld in full pursuant to several exemptions including subsection 18(1)(b) of FOIP. The records withheld included an original Carbon Dioxide Purchase and Sale Agreement between SaskPower and Cenovus and two amending agreements. SaskPower applied subsection 18(1)(b) of FOIP to all of the records asserting it was financial, commercial, and scientific information. Upon review, the Commissioner agreed that the information was commercial information. Furthermore, the Commissioner found that SaskPower had a right to use the information. However, the Commissioner found the third part of the test was not met. The Commissioner was not persuaded that the contract itself would have any monetary value for SaskPower. In coming to this finding, the Commissioner noted that SaskPower had only demonstrated that other organizations would find monetary value in the contract. As all three parts of the test were not met, the Commissioner found that subsection 18(1)(b) of FOIP did not apply to the record.

Subsection 18(1)(c)

Economic and other interests

18(1) A head may refuse to give access to a record that could reasonably be expected to disclose:

…

(c) scientific or technical information obtained through research by an employee of a government institution, the disclosure of which could reasonably be expected to deprive the employee of priority of publication;

…

(2) A head shall not refuse, pursuant to subsection (1), to give access to a record that contains the results of product or environmental testing carried out by or for a government institution, unless the testing was conducted:

(a) as a service to a person, a group of persons or an organization other than a government institution, and for a fee; or

(b) as preliminary or experimental tests for the purpose of:

(i) developing methods of testing; or

(ii) testing products for possible purchase.

Subsection 18(1)(c) of FOIP is a discretionary harm-based exemption. It permits refusal of access in situations where release of a record could reasonably be expected to disclose scientific or technical information obtained through research by an employee of a government institution, the disclosure of which could reasonably be expected to deprive the employee of priority of publication.

Government institutions employ a wide range of researchers, including professional scientists, technicians and social scientists. Their reputations are often dependent on the research they publish.[631]

The fact that the employees have a professional reputation is of considerable value to the government institutions that employ them. In addition, their research often has monetary and program value for the government institutions. For these reasons, FOIP protects the priority of publication for all types of research.[632]

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[631] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 193.
[632] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 193.

The objective is to maintain the government's ability to hire scientific and technical experts.[633]

The exemption is discretionary and is based on a harms test. The exemption recognizes the exclusive rights of employees of a government institution to publish works based on scientific or technical research done by them while employed by the government institution. These rights are temporary because, upon publication, the background data are no longer covered by this exemption.[634]

The following three-part test can be applied:

1. Does the information in question constitute scientific or technical information?

Scientific information is information exhibiting the principles or methods of science. The information could include designs for a product and testing procedures or methodologies.[635] It is information belonging to an organized field of knowledge in the natural, biological, or social sciences or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of specific hypothesis or conclusions and be undertaken by an expert in the field. Finally, scientific information must be given a meaning separate from technical information.[636]

Technical information is information relating to a particular subject, craft or technique. Examples are system design specifications and the plans for an engineering project.[637] It is information belonging to an organized field of knowledge which would fall under the general categories of applied sciences or mechanical arts. Examples of these fields would include architecture, engineering or electronics…it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a

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[633] Treasury Board of Canada Secretariat, *Access to Information Manual, Chapter 11.11.3*. Available at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11_11. Accessed July 17, 2019.
[634] Treasury Board of Canada Secretariat, *Access to Information Manual, Chapter 11.11.3*. Available at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11_11. Accessed July 17, 2019.
[635] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 191. Definition first relied on for third party exemption in SK OIPC Review Report F-2006-002 at [85].
[636] Definition originated from ON IPC including Order PO-1811. Adopted in SK OIPC Review Report F-2006-002 at [87].
[637] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 191. Definition first relied on for third party exemption in SK OIPC Review Report F-2006-002 at [85].

structure, process, equipment or thing. Finally, technical information must be given a meaning separate from scientific information.[638]

2. Was the information obtained through research conducted by an employee of the government institution?

Obtained means to acquire in any way; to get possession of; to procure or to get a hold of by effort.[639]

Research is defined as a systematic investigation designed to develop or establish principles, facts or generalized knowledge, or any combination of them, and includes the development, testing and evaluation of research.[640]

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 government institution 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.[641]

In order to apply this provision, the research must refer to specific, identifiable research projects conducted by a specific employee of the government institution.

3. Could disclosure reasonably be expected to deprive the employee of priority publication?

For this exemption to be invoked, the employee must be actively engaged in the research with a reasonable expectation of publication.[642]

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[638] Definition originated from ON IPC including Order PO-1806-F. Adopted in SK OIPC Review Report F-2005-003 at [26]. Definition endorsed in *Consumers' Co-operative Refineries Limited v Regina (City)*, 2016 SKQB 335 (CanLII) at [20].
[639] Originated from *Black's Law Dictionary, 6th Edition*, Adopted by AB IPC in Order 2000-021 at [26]. Adopted in SK OIPC Review Report F-2006-001 at [58] and [59]. Also, found in SK OIPC Review Report F-2006-002 at [39].
[640] ON IPC Order PO-2693 at pp. 7 and 8. Definition originates from Ontario's *Personal Health Information Protection Act* (PHIPA) at section 2.
[641] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 193.
[642] Treasury Board of Canada Secretariat, *Access to Information Manual, Chapter 11.11.3*. Available at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11_11. Accessed July 17, 2019.

There must be a reasonable expectation that disclosure could deprive the employee of priority publication. The Supreme Court of Canada set out the standard of proof for harms-based provisions as follows:

> This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences"…[643]

The government institution does not have to prove that a harm is probable but needs to show that there is a "reasonable expectation of harm" if any of the information were to be released. In *British Columbia (Minister of Citizens' Service) v. British Columbia (Information and Privacy Commissioner), (2012)*, Bracken J. confirmed it is the release of the information itself that must give rise to a reasonable expectation of harm.

Government institutions should not assume that the harm is self-evident. The harm must be described in a precise and specific way in order to support the application of the provision.

The expectation of harm must be reasonable, but it need not be a certainty. The evidence of harm must:

- Show how the disclosure of the information would cause harm;
- Indicate the extent of harm that would result; and
- Provide facts to support the assertions made.[644]

Deprive means to take away or prevent the happening of a certain event.[645]

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[643] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2014] 1 SCR 674, 2014 SCC 31 (CanLII) at [54].
[644] Treasury Board of Canada Secretariat, *Access to Information Manual, Chapter 11.14.4*. Available at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11_14. Accessed August 29, 2019.
[645] British Columbia Government Services, *FOIPPA Policy Definitions* at https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/policy-definitions. Accessed April 23, 2020.

Employee means an individual employed by a government institution and includes an individual retained under a contract to perform services for the government institution.[646]

Priority publication is the status of being earlier in time; precedence; the status of being first to publish.[647]

Government institutions should not assume that the deprivation with respect to priority publication is self-evident. The harm must be described in a precise and specific way in order to support the application of the provision.

A government institution cannot rely on subsection 18(1)(c) of FOIP for a record that fits within the enumerated exclusions listed at subsection 18(2) of FOIP. Before applying subsection 18(1) of FOIP, government institutions should ensure that subsection 18(2) of FOIP does not apply to any of the records.

Subsection 18(1)(d)

Economic and other interests

18(1) A head may refuse to give access to a record that could reasonably be expected to disclose:

…

(d) information, the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of the Government of Saskatchewan or a government institution;

…

(2) A head shall not refuse, pursuant to subsection (1), to give access to a record that contains the results of product or environmental testing carried out by or for a government institution, unless the testing was conducted:

(a) as a service to a person, a group of persons or an organization other than a government institution, and for a fee; or

(b) as preliminary or experimental tests for the purpose of:

(i) developing methods of testing; or

[646] *The Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01 at subsection 2(1)(b.i).
[647] Adapted from Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 1445.

(ii) testing products for possible purchase.

Subsection 18(1)(d) of FOIP is a discretionary harm-based exemption. It permits refusal of access in situations where release of a record could reasonably be expected to disclose information, the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of the Government of Saskatchewan or a government institution.

This exemption is intended to protect a government institution's ability to negotiate effectively with other parties.[648] It provides similar protection as is provided third parties under subsection 19(1)(c)(iii) of FOIP.

The following two-part test can be applied:

1. **Are there contractual or other negotiations occurring involving the Government of Saskatchewan or a government institution?**

A **negotiation** is a consensual bargaining process in which the parties attempt to reach agreement on a disputed or potentially disputed matter. It can also be defined as dealings conducted between two or more parties for the purpose of reaching an understanding.[649] It connotes a more robust relationship than "consultation". It signifies a measure of bargaining power and a process of back-and-forth, give-and-take discussion.[650]

Prospective or future negotiations could be included within this exemption, as long as they are foreseeable.[651] It may be applied even though negotiations have not yet started at the time of the access to information request, including when there has not been any direct contact with the other party or their agent. However, a vague possibility of future negotiations is not sufficient. There must be a reasonable fact-based expectation that the future negotiations will take place.[652]

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[648] Treasury Board of Canada Secretariat, *Access to Information Manual, Chapter 11.11.2*. Available at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11_11. Accessed July 19, 2019.
[649] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at pp. 1248 and 1249. Relied on in SK OIPC Review Report 112-2018 at [37].
[650] *Gordon v. Canada (Attorney General)*, 2016 ONCA 625 (CanLII) at [107]. Relied on in SK OIPC Review Report 112-2018 at [37].
[651] SK OIPC Review Report 019-2014 at [27]. Equivalent provision in LA FOIP was being considered (subsection 17(1)(d)). Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 107.
[652] Treasury Board of Canada Secretariat, *Access to Information Manual, Chapter 11.11.2*. Available at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11_11. Accessed July 19, 2019.

Once a contract is executed, negotiation is concluded. The exemption would generally not apply unless, for instance, the same strategy will be used again, and it has not been publicly disclosed.[653]

The exemption covers negotiations either conducted directly by employees or officers of a government institution or Government of Saskatchewan or conducted by a third party acting as an agent of the government institution. It does not cover information relating to negotiations to which a government institution or the Government of Saskatchewan is not a party.[654]

When under review by the IPC, government institutions will be invited to provide the IPC with its submission (i.e., arguments) as to why the exemption applies. Government institutions should detail what negotiations are occurring and what parties are involved.

2. Could release of the record reasonably be expected to interfere with the contractual or other negotiations?

Interfere means to hinder or hamper.[655]

There must be a reasonable expectation that disclosure could interfere with contractual or other negotiations. The Supreme Court of Canada set out the standard of proof for harms-based provisions as follows:

> This Court in Merck Frosst adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in Merck Frosst emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the

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[653] British Columbia Government Services, *FOIPPA Policy and Procedures Manual* at https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/disclosure-harmful-economic-interests. Accessed July 19, 2019. Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 107.
[654] Treasury Board of Canada Secretariat, *Access to Information Manual, Chapter 11.11.2*. Available at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11_11. Accessed July 19, 2019.
[655] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 152.

nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences"…[656]

The government institution does not have to prove that a harm is probable but needs to show that there is a "reasonable expectation of harm" if any of the information were to be released. In *British Columbia (Minister of Citizens' Service) v. British Columbia (Information and Privacy Commissioner), (2012)*, Bracken J. confirmed it is the release of the information itself that must give rise to a reasonable expectation of harm.

Government institutions should not assume that the harm is self-evident. The harm must be described in a precise and specific way in order to support the application of the provision.

The expectation of harm must be reasonable, but it need not be a certainty. The evidence of harm must:

- Show how the disclosure of the information would cause harm;
- Indicate the extent of harm that would result; and
- Provide facts to support the assertions made.[657]

Exemption from disclosure should not be granted on the basis of fear of harm that is fanciful, imaginary, or contrived. Such fears of harm are not reasonable because they are not based on reason…the words "could reasonably be expected" "refer to an expectation for which real and substantial grounds exist when looked at objectively"…[658]

When determining whether disclosure could interfere with contractual or other negotiations of the government institution or the Government of Saskatchewan, the following questions can be asked to assist:

- What negotiations would be affected by disclosure.
- Are these negotiations ongoing.
- Have the negotiations been concluded.
- At what stage are the negotiations.
- How long have they been going on.
- What is the subject matter of the negotiations.

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[656] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2014] 1 SCR 674, 2014 SCC 31 (CanLII) at [54].
[657] Treasury Board of Canada Secretariat, *Access to Information Manual, Chapter 11.14.4*. Available at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11_14. Accessed August 29, 2019.
[658] *Canadian Bank Note Limited v Saskatchewan Government Insurance*, 2016 SKQB 362 (CanLII) at [49] relying on *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 SCR 23, 2012 SCC 3 (CanLII) at [204].

- How would disclosure specifically interfere with the negotiations.
- Does the information relate to an outstanding issue in the negotiations. If so, how would disclosure interfere with negotiations on this issue.
- Does the information relate to issues already resolved in the negotiations.
- Would disclosure cause the issue to be reopened. Why.
- Would it otherwise interfere with negotiations. How.
- Is the information current. How old is the information.
- Does it relate to events prior to the negotiations.
- Does the other side of the negotiations already have this information. If not, have they asked for it.
- Is the information commonly known in the industry.
- Is the information reasonably available elsewhere. If so, how would disclosure interfere with negotiations.[659]

Examples of information to which this exemption may apply include negotiating positions, options, instructions, pricing criteria and points used in negotiations.

A government institution cannot rely on subsection 18(1)(d) of FOIP for a record that fits within the enumerated exclusions listed at subsection 18(2). Before applying subsection 18(1) of FOIP, government institutions should ensure that subsection 18(2) of FOIP does not apply to any of the records.

Subsection 18(1)(e)

Economic and other interests

18(1) A head may refuse to give access to a record that could reasonably be expected to disclose:

…

(e) positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the Government of Saskatchewan or a government institution, or considerations that relate to those negotiations;

…

[659] Information Commissioner of Canada, *Investigator's Guide to Interpreting the Act, Section 20(1)(c)&(d): Questions*, available at https://www.oic-ci.gc.ca/en/investigators-guide-interpreting-act/section-201cd-questions. Accessed July 19, 2019.

(2) A head shall not refuse, pursuant to subsection (1), to give access to a record that contains the results of product or environmental testing carried out by or for a government institution, unless the testing was conducted:

(a) as a service to a person, a group of persons or an organization other than a government institution, and for a fee; or

(b) as preliminary or experimental tests for the purpose of:

(i) developing methods of testing; or

(ii) testing products for possible purchase.

Subsection 18(1)(e) of FOIP is a discretionary, class-based exemption. It permits refusal of access in situations where release of a record could reasonably be expected to disclose positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of a government institution. It also covers considerations related to the negotiations.

Examples of the type of information that could be covered by this exemption are the various positions developed by a government institution's negotiators in relation to labour, financial and commercial contracts.[660]

Subsection 18(1)(e) of FOIP is worded the same as subsection 17(1)(c) of FOIP. Although the context of the larger provisions is different (advice from officials versus economic and other interests), the same definitions and test can be applied.

The following two-part test can be applied:

1. **Does the record contain positions, plans, procedures, criteria, instructions, or considerations that relate to the negotiations?**

A **position** is a point of view or attitude.[661] An opinion, stand; a way of regarding situations or topics; an opinion that is held in opposition to another in an argument or dispute.[662]

[660] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition,* Chapter 4 at p. 181.
[661] Pearsall, Judy, *Concise Oxford Dictionary*, 10th Ed., (Oxford University Press) at p. 1116.
[662] Treasury Board of Canada Secretariat, *Access to Information Manual, Chapter 11.18.5*. Available at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11_18. Accessed July 9, 2019.

A **plan** is a formulated and especially detailed method by which a thing is to be done; a design or scheme.[663] A detailed proposal for doing or achieving something; an intention or decision about what one is going to do.[664]

A **procedure** is an established or official way of doing something; a series of actions conducted in a certain order or manner.[665]

Criteria are standards, rules or tests on which a judgement or decision can be based or compared; a reference point against which other things can be evaluated.[666]

Instructions are directions or orders.[667]

Subsection 18(1)(e) extends its protection beyond positions, plans, procedures, criteria, or instructions to "considerations that relate to those negotiations". To qualify, the information must constitute considerations and they must relate to the negotiations.

A **consideration** is a careful thought; a fact taken into account when making a decision.[668] Thus, a record identifying the facts and circumstances connected to positions, plans, procedures, criteria or instructions could also fall within the scope of this provision.[669]

Relate to should be given a plain but expansive meaning.[670] The phrase should be read in its grammatical and ordinary sense. There is no need to incorporate complex requirements (such as "substantial connection") for its application, which would be inconsistent with the plain

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[663] Definition originated from ON IPC Order P-229 at p. 10, which drew the definition from the *Concise Oxford Dictionary*. Adopted in SK OIPC Review Report LA-2011-001 at [78]. Same definition used by the Treasury Board of Canada Secretariat, *Access to Information Manual, Chapter 11.18.5*. Available at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11_18. Accessed July 9, 2019.
[664] Pearsall, Judy, *Concise Oxford Dictionary, 10th Ed.*, (Oxford University Press) at p. 1092.
[665] Pearsall, Judy, *Concise Oxford Dictionary, 10th Ed.*, (Oxford University Press) at p. 1139.
[666] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 473.
[667] Pearsall, Judy, *Concise Oxford Dictionary, 10th Ed.*, (Oxford University Press) at p. 734.
[668] Pearsall, Judy, *Concise Oxford Dictionary, 10th Ed.*, (Oxford University Press) at p. 304. Same definition used by Treasury Board of Canada Secretariat, *Access to Information Manual, Chapter 11.18.5*. Available at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11_18. Accessed July 10, 2019.
[669] Treasury Board of Canada Secretariat, *Access to Information Manual, Chapter 11.18.5*. Available at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11_18. Accessed July 10, 2019.
[670] *Gertner v. Lawyers' Professional Indemnity Company,* 2011 ONSC 6121 (CanLII) at [32].

unambiguous meaning of the words of the statute.[671] "*Relating to*" requires some connection between the information and the negotiations.[672]

2. **Were the positions, plans, procedures, criteria, instructions, or considerations developed for the purpose of contractual or other negotiations by or on behalf of the Government of Saskatchewan or a government institution?**

Developed means to start to exist, experience or possess.[673]

Use of the word "*developed*" suggests the Legislature's intention was for the provision to include information generated in the process leading up to the contractual or other negotiations (for example, draft versions).[674]

Drafts and redrafts of positions, plans, procedures, criteria, instructions or considerations may be protected by the exemption. A public servant may engage in writing any number of drafts before communicating part or all of their content to another person. The nature of the deliberative process is to draft and redraft until the writer is sufficiently satisfied that they are prepared to communicate the results to someone else. All the information in those earlier drafts informs the end result even if the content of any one draft is not included in the final version.[675]

For the purpose of means intention; the immediate or initial purpose of something.[676]

The negotiations can be conducted by the government or on behalf of the government.

On behalf of means "for the benefit of".[677] A person does something "on behalf of" another, when he or she does the thing in the interest of, or as a representative of, the other person.[678]

A **negotiation** is a consensual bargaining process in which the parties attempt to reach agreement on a disputed or potentially disputed matter. It can also be defined as dealings

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[671] Adapted from *Ministry of Attorney General and Toronto Star*, 2010 ONSC 991 (CanLII) at [45].
[672] Adapted from *Ministry of Attorney General and Toronto Star*, 2010 ONSC 991 (CanLII) at [43].
[673] Pearsall, Judy, *Concise Oxford Dictionary*, *10th Ed*., (Oxford University Press) at p. 391.
[674] *Ontario (Ministry of Northern Development and Mines) v. Mitchinson*, 2004 CanLII 15009 (ON SCDC) at [56]. Justice Dunnet found that inclusion of this word changed the meaning in the federal and British Columbia legislation compared to Ontario's FOIP legislation that did not include this word for the advice/recommendations provision.
[675] *John Doe v. Ontario (Finance),* [2014] 2 SCR 3, 2014 SCC 36 (CanLII) at [48] to [51].
[676] Gardner, J., and Gardner K. (2016) *Sangan's Encyclopedia of Words and Phrases Legal Maxims*, Canada, 5th Edition, Volume 2, C to H, at p. F-133.
[677] *Encon Group Inc. v. Capo Construction Inc.*, 2015 BCSC 786 (CanLII) at [34].
[678] *Conibear v. Dahling*, 2010 BCSC 985 (CanLII) at [34].

conducted between two or more parties for the purpose of reaching an understanding.[679] It connotes a more robust relationship than "consultation". It signifies a measure of bargaining power and a process of back-and-forth, give-and-take discussion.[680]

The contractual or other negotiations can be concluded,[681] ongoing or future negotiations.[682]

Subsection 18(1) includes the requirement that access can be refused where it "*could reasonably be expected to disclose*" the protected information listed in the exemptions. The meaning of the phrase **"could reasonably be expected to"** in terms of harm-based exemptions was considered by the Supreme Court of Canada in *Ontario (Community Safety and Correctional Service) v. Ontario (Information and Privacy Commissioner), (2014)*. Although section 18(1)(e) is not a harms-based provision, the threshold provided by the Court for "*could reasonably be expected to*" is instructive:

> This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences"…

A government institution cannot rely on subsection 18(1)(e) of FOIP for a record that fits within the enumerated exclusions listed at subsection 18(2) of FOIP. Before applying subsection 18(1) of FOIP, government institutions should ensure that subsection 18(2) of FOIP does not apply to any of the records.

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[679] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at pp. 1248 and 1249. Relied on in SK OIPC Review Report 112-2018 at [37].
[680] *Gordon v. Canada (Attorney General)*, 2016 ONCA 625 (CanLII) at [107]. Relied on in SK OIPC Review Report 112-2018 at [37].
[681] Treasury Board of Canada Secretariat, *Access to Information Manual, Chapter 11.18.5*. Available at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11_18. Accessed July 10, 2019. Also consistent with Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 181.
[682] SK OIPC Review Report LA-2010-001 at [51].

Subsection 18(1)(f)

Economic and other interests

18(1) A head may refuse to give access to a record that could reasonably be expected to disclose:

…

(f) information, the disclosure of which could reasonably be expected to prejudice the economic interest of the Government of Saskatchewan or a government institution;

…

(2) A head shall not refuse, pursuant to subsection (1), to give access to a record that contains the results of product or environmental testing carried out by or for a government institution, unless the testing was conducted:

(a) as a service to a person, a group of persons or an organization other than a government institution, and for a fee; or

(b) as preliminary or experimental tests for the purpose of:

(i) developing methods of testing; or

(ii) testing products for possible purchase.

Subsection 18(1)(f) of FOIP is a discretionary, harm-based exemption. It permits refusal of access in situations where release of a record could reasonably be expected to prejudice the economic interest of the Government of Saskatchewan or a government institution.

The following test can be applied:

Could disclosure reasonably be expected to prejudice the economic interests of the Government of Saskatchewan or a government institution?

"Could reasonably be expected to" means there must be a reasonable expectation that disclosure could prejudice the economic interests of the government institution or the Government of Saskatchewan. The Supreme Court of Canada set out the standard of proof for harms-based provisions as follows:

> This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle

ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences"…[683]

The government institution does not have to prove that a harm is probable but needs to show that there is a "reasonable expectation of harm" if any of the information were to be released. In *British Columbia (Minister of Citizens' Service) v. British Columbia (Information and Privacy Commissioner), (2012),* Bracken J. confirmed it is the release of the information itself that must give rise to a reasonable expectation of harm.

Government institutions should not assume that the harm is self-evident. The harm must be described in a precise and specific way in order to support the application of the provision.

The expectation of harm must be reasonable, but it need not be a certainty. The evidence of harm must:

- Show how the disclosure of the information would cause harm;
- Indicate the extent of harm that would result; and
- Provide facts to support the assertions made.[684]

A reasonable expectation of prejudice to economic interest is not established by simply asserting that disclosure of records would result in financial loss or that it would interfere in future business dealings. Nor is it established by the mere prospect of heightened competition flowing from disclosure: *Canadian Broadcasting Corp. v Canada (National Capital Commission)*, 147 FTR (Fed CT). The use of the word "reasonably" in subsection 18(1)(f) adds an objective and qualitative element to the analysis required: *Kattenburg v Manitoba (Industry, Trade and Tourism)* (1999), 143 Man R 92d) 42 (Man QB).[685]

While direct evidence of specific future harm is not required, there must be an explanation based on the evidence to establish that the harm feared is more than speculative or "merely possible". The evidence must be more than conjecture: *Canada (Information Commissioner) v Toronto Port Authority*, 2016 FC 683.[686]

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[683] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2014] 1 SCR 674, 2014 SCC 31 (CanLII) at [54].
[684] Treasury Board of Canada Secretariat, *Access to Information Manual, Chapter 11.14.4*. Available at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11_14. Accessed August 29, 2019.
[685] *Leo v Global Transportation Hub Authority*, 2019 SKQB 150 at [53].
[686] *Leo v Global Transportation Hub Authority*, 2019 SKQB 150 at [54].

Prejudice in this context refers to detriment to economic interests.[687]

Economic interests refer to both the broad interests of a government institution and, for the government as a whole, in managing the production, distribution and consumption of goods and services. This also covers financial matters such as the management of assets and liabilities by a government institution and the government institution's ability to protect its own or the government's interests in financial transactions.[688]

Examples of harm to economic interests can include:

- Information in budget preparation documents which could result in segments of the private sector taking actions affecting the government's ability to meet economic goals (Note: approved budgets are not included as they are tabled in the Legislature as public documents).
- Background material to be used in establishing land costs which if released would affect revenue from the sale of the land.[689]

In the recent Saskatchewan Court of Appeal decision, *Leo v Global Transportation Hub Authority*, 2020 SKCA 91 (CanLII), stated the following with regards to third parties doing business with government institutions and what does not constitute prejudice to the economic interest of the Government of Saskatchewan or a government institution:

> [55] …Individuals or entities doing business with a government institution are required to take the access to information regime prescribed by the *Act* as a given. The possibility of information being disclosed pursuant to the *Act* is an unavoidable part of the environment in which they are obliged to operate.
>
> [56] …In other words, the application of s. 18(1)(f) does not depend on whether a party doing business with a government institution will, or will not, be irritated or made unhappy by the disclosure of records. The *Act* specifically addresses the release of third party information in s. 19. That is the vehicle by which the interests of third parties, like Brightenview, are accommodated.

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[687] Adapted from Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 149.
[688] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 188. Similar definition in British Columbia Government Services, *FOIPPA Policy and Procedures Manual* at https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/cabinet-local-public-body-confidences. Accessed July 17, 2019.
[689] British Columbia Government Services, *FOIPPA Policy and Procedures Manual* at https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/disclosure-harmful-economic-interests. Accessed July 19, 2019. For more on this example, see SK OIPC Review Report 184-2016 at [63] and [64].

> [57] …The Legislature, by enacting the *Act*, has prescribed the rules of the game. Those wishing to do business with a government institution must play by those rules. Negative reactions to the *Act*, and the possibility of information being disclosed pursuant to it, cannot be what the Legislature had in mind when it referred to "prejudice the economic interest of the Government of Saskatchewan or a government institution". If that were the case, s. 18(1)(f) would merely operate at the whim of third parties doing business with the Government and government institutions.[690]

A government institution cannot rely on subsection 18(1)(f) of FOIP for a record that fits within the enumerated exclusions listed at subsection 18(2) of FOIP. Before applying subsection 18(1) of FOIP, government institutions should ensure that subsection 18(2) of FOIP does not apply to any of the records.

Subsection 18(1)(g)

Economic and other interests

18(1) A head may refuse to give access to a record that could reasonably be expected to disclose:

…

(g) information, the disclosure of which could reasonably be expected to be injurious to the ability of the Government of Saskatchewan to manage the economy of Saskatchewan;

(2) A head shall not refuse, pursuant to subsection (1), to give access to a record that contains the results of product or environmental testing carried out by or for a government institution, unless the testing was conducted:

(a) as a service to a person, a group of persons or an organization other than a government institution, and for a fee; or

(b) as preliminary or experimental tests for the purpose of:

(i) developing methods of testing; or

(ii) testing products for possible purchase.

Subsection 18(1)(g) of FOIP is a discretionary, harm-based exemption. It permits refusal of access in situations where release of a record could reasonably be expected to be injurious to the ability of the Government of Saskatchewan to manage the economy of Saskatchewan.

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[690] *Leo v Global Transportation Hub Authority*, 2020 SKCA 91 (CanLII) at [55] to [57].

The following test can be applied:

Could disclosure reasonably be expected to be injurious to the ability of the Government of Saskatchewan to manage the economy of Saskatchewan?

"Could reasonably be expected to" means there must be a reasonable expectation that disclosure could be injurious to the ability of the Government of Saskatchewan to manage the economy of Saskatchewan. The Supreme Court of Canada set out the standard of proof for harms-based provisions as follows:

> This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences"…[691]

The government institution does not have to prove that a harm is probable but needs to show that there is a "reasonable expectation of harm" if any of the information were to be released. In *British Columbia (Minister of Citizens' Service) v. British Columbia (Information and Privacy Commissioner), (2012)*, Bracken J. confirmed it is the release of the information itself that must give rise to a reasonable expectation of harm.

Government institutions should not assume that the harm is self-evident. The harm must be described in a precise and specific way in order to support the application of the provision.

The expectation of harm must be reasonable, but it need not be a certainty. The evidence of harm must:

- Show how the disclosure of the information would cause harm;
- Indicate the extent of harm that would result; and

[691] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2014] 1 SCR 674, 2014 SCC 31 (CanLII) at [54].

- Provide facts to support the assertions made.[692]

Injury implies damage or detriment.[693]

Ability to manage the economy refers to the responsibility of the Government of Saskatchewan 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.[694]

Government of Saskatchewan used in subsection 18(1)(g) of FOIP, has a broader meaning than "government institution", used elsewhere in FOIP. This recognizes that government institutions, individually or collectively, may hold significant amounts of financial and economic information critical to the management of the provincial economy. Sensitive information about provincial government bodies not subject to FOIP can also be exempt under subsection 18(1)(g) of FOIP if it can be shown that disclosure could reasonably be expected to be injurious to the ability of the Government of Saskatchewan to manage the economy in the province.[695]

A government institution cannot rely on subsection 18(1)(g) of FOIP for a record that fits within the enumerated exclusions listed at subsection 18(2) of FOIP. Before applying subsection 18(1) of FOIP, government institutions should ensure that subsection 18(2) of FOIP does not apply to any of the records.

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[692] Treasury Board of Canada Secretariat, *Access to Information Manual, Chapter 11.14.4*. Available at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11_14. Accessed August 29, 2019.
[693] Adapted from definition of 'harm' in Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 148.
[694] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 189. Similar definition in British Columbia Government Services, *FOIPPA Policy and Procedures Manual* at https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/disclosure-harmful-economic-interests. Accessed July 17, 2019. Similar definition in Treasury Board of Canada Secretariat, Access to Information Manual, Chapter 11.11.4. Available at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11_11. Accessed July 19, 2019.
[695] Treasury Board of Canada Secretariat, *Access to Information Manual, Chapter 11.11.4*. Available at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11_11. Accessed July 19, 2019.

Subsection 18(1)(h)

Economic and other interests

18(1) A head may refuse to give access to a record that could reasonably be expected to disclose:

…

(h) information, the disclosure of which could reasonably be expected to result in an undue benefit or loss to a person.

(2) A head shall not refuse, pursuant to subsection (1), to give access to a record that contains the results of product or environmental testing carried out by or for a government institution, unless the testing was conducted:

(a) as a service to a person, a group of persons or an organization other than a government institution, and for a fee; or

(b) as preliminary or experimental tests for the purpose of:

(i) developing methods of testing; or

(ii) testing products for possible purchase.

Subsection 18(1)(h) of FOIP is a discretionary, harm-based exemption. It permits refusal of access in situations where release of a record could reasonably be expected to result in an undue benefit or loss to a person.

The following test can be applied:

Could disclosure reasonably be expected to result in an undue benefit or loss to a person?

"Could reasonably be expected to" means there must be a reasonable expectation that disclosure could result in an undue benefit or loss to a person. The Supreme Court of Canada set out the standard of proof for harms-based provisions as follows:

> This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the

nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences"…[696]

The government institution does not have to prove that a harm is probable but needs to show that there is a "reasonable expectation of harm" if any of the information were to be released. In *British Columbia (Minister of Citizens' Service) v. British Columbia (Information and Privacy Commissioner), (2012)*, Bracken J. confirmed it is the release of the information itself that must give rise to a reasonable expectation of harm.

Government institutions should not assume that the harm is self-evident. The harm must be described in a precise and specific way in order to support the application of the provision.

The expectation of harm must be reasonable, but it need not be a certainty. The evidence of harm must:

- Show how the disclosure of the information would cause harm;
- Indicate the extent of harm that would result; and
- Provide facts to support the assertions made.[697]

Undue means excessive or disproportionate.[698]

The word 'undue' must be given real meaning, determined in the circumstances of each case. Generally speaking, that which is 'undue' can only be measured against that which is 'due'.[699]

Persons or businesses that contract with public bodies (local authorities, government institutions, and health trustees) must have some understanding that those dealings are necessarily more transparent than purely private transactions. Even if one assumes loss could be expected to the person or business, such loss would not be 'undue'.[700]

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[696] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2014] 1 SCR 674, 2014 SCC 31 (CanLII) at [54].
[697] Treasury Board of Canada Secretariat, *Access to Information Manual, Chapter 11.14.4*. Available at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11_14. Accessed August 29, 2019.
[698] British Columbia Government Services, *FOIPPA Policy and Procedures Manual* at https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/disclosure-harmful-economic-interests . Accessed July 17, 2019.
[699] BC IPC Order 00-08 at p. 17. See also *Howard Smith Paper Mills Ltd.* v. *The Queen* (1957), 1957 CanLII 11 (SCC), 29 C.P.R. 6 (S.C.C.), at p. 425.
[700] Adapted from BC IPC Order 00-41 at Appendix p. viii.

Benefit means a favourable or helpful factor or circumstance; advantage, profit.[701]

Loss means an undesirable outcome of a risk; the disappearance or diminution of value, usually in an unexpected or relatively unpredictable way.[702]

Person includes an individual, corporation or the heirs, executors, administrators or other legal representatives of a person.[703]

Examples can include:

- The disclosure of confidential information about the government's intention to buy certain property might result in third parties buying the property in anticipation of profits from the government's acquisition.
- Premature disclosure of information about a change in revenue sources, such as taxes, duties or tariff rates, could result in undue benefit to a third party.
- Disclosure of the specifications of special testing equipment or software developed by a government institution that have been kept secret or confidential could reasonably be expected to result in improper benefit.[704]

A government institution cannot rely on subsection 18(1)(h) of FOIP for a record that fits within the enumerated exclusions listed at subsection 18(2) of FOIP. Before applying subsection 18(1) of FOIP, government institutions should ensure that subsection 18(2) of FOIP does not apply to any of the records.

Subsection 18(2)

Economic and other interests

18(2) A head shall not refuse, pursuant to subsection (1), to give access to a record that contains the results of product or environmental testing carried out by or for a government institution, unless the testing was conducted:

(a) as a service to a person, a group of persons or an organization other than a government institution, and for a fee; or

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[701] British Columbia Government Services, *FOIPPA Policy Definitions* at https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/policy-definitions. Accessed April 23, 2020.
[702] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 1132.
[703] *The Legislation Act*, S.S. 2019, Chapter L-10.2 at ss. 2-29.
[704] Treasury Board of Canada Secretariat, *Access to Information Manual, Chapter 11.11.4*. Available at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11_11. Accessed July 19, 2019.

(b) as preliminary or experimental tests for the purpose of:

(i) developing methods of testing; or

(ii) testing products for possible purchase.

The intent of subsection 18(2) of FOIP is to ensure that a government institution does not withhold information resulting from product or environmental testing carried out by the employees of a government institution, or by another organization on behalf of a government institution.

Results of product or environmental testing means information recording the results of product or environmental testing. For example, water quality reports; results of routine testing of food served in correctional facilities; or testing of a hospital's air conditioning.[705]

Other 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.[706]

Subsection 18(2) of FOIP provides that the exemptions in 18(1) of FOIP do not apply to a record containing the results of product or environmental testing carried out by or for a government institution unless:

(a) The testing was done as a service to a person, a group of persons or an organization other than a government institution, and for a fee.

In other words, information can be withheld when the government institution performs the testing, for a fee, as a service to a private citizen or a private corporate body.[707]

Examples:

- A commercial product test.
- A soil test conducted at the request of an individual, for which a fee is charged.
- A test intended to develop a new drug testing technique.[708]

(b) As preliminary or experimental tests for the purpose of:

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[705] British Columbia Government Services, *FOIPPA Policy and Procedures Manual* at https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/disclosure-harmful-economic-interests. Accessed July 17, 2019.
[706] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 193.
[707] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 193.
[708] British Columbia Government Services, *FOIPPA Policy and Procedures Manual* at https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/disclosure-harmful-economic-interests. Accessed July 22, 2019.

(i) Developing methods of testing.

(ii) Testing products for possible purchase.

In other words, information can be withheld if the testing was done for the purpose of developing testing methods, such as a new methodology for tire recycling. Information can also be applied to test results compiled to determine whether or not a government institution would purchase a product.[709]

Section 19: Third Party Business Information

Third party information

19(1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:

(a) trade secrets of a third party;

(b) financial, commercial, scientific, technical or labour relations information that is supplied in confidence, implicitly or explicitly, to a government institution by a third party;

(c) information, the disclosure of which could reasonably be expected to:

(i) result in financial loss or gain to;

(ii) prejudice the competitive position of; or

(iii) interfere with the contractual or other negotiations of;

a third party;

(d) a statement of a financial account relating to a third party with respect to the provision of routine services from a government institution;

(e) a statement of financial assistance provided to a third party by a prescribed Crown corporation that is a government institution; or

(f) information supplied by a third party to support an application for financial assistance mentioned in clause (e).

(2) A head may give access to a record that contains information described in subsection (1) with the written consent of the third party to whom the information relates.

(3) Subject to Part V, a head may give access to a record that contains information described in subsection (1) if:

[709] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 193.

(a) disclosure of that information could reasonably be expected to be in the public interest as it relates to public health, public safety or protection of the environment; and

(b) the public interest in disclosure could reasonably be expected to clearly outweigh in importance any:

(i) financial loss or gain to;

(ii) prejudice to the competitive position of; or

(iii) interference with contractual or other negotiations of;

a third party.

Section 19 of FOIP is a mandatory, class-based and harm-based provision, meaning, it contains both class and harm based exemptions. As a mandatory provision, the government institution has no, or more limited, discretion regarding whether or not to apply the exemption. That is, if the information is covered by the exemption and the conditions for the exercise of discretion do not exist, then it must not be disclosed.

FOIP defines a **third party** as a person, including an unincorporated entity, other than an applicant or a government institution.[710] A "local authority", as defined under subsection 2(1)(f) of *The Local Authority Freedom of Information and Protection of Privacy Act* can also qualify as a third party for purposes of FOIP.[711]

The provision is intended to protect the business interests of third parties and to ensure that government institutions are able to maintain the confidentiality necessary to effectively carry on business with the private sector.[712]

The Government of Saskatchewan collects a wide range of information from third parties. This information may be submitted voluntarily, such as in a bid for a government contract, or submitted as required by law, such as for proof of regulatory compliance. There is a compelling need to protect information that is provided to the government by third parties if the information falls within one of the enumerated exemptions under section 19.[713]

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[710] *The Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01 at subsection 2(1)(j).
[711] SK OIPC Review Report 080-2018 at [51] and [52].
[712] Nunavut Information and Privacy Commissioner (NU IPC) Review Report 03-08 at p. 7.
[713] Adapted from the Information Commissioner of Canada's *2017-2018 Annual Report, Investigation Highlights*, *Section 20 – Third Party Information*. Available at https://www.oic-ci.gc.ca/en/resources/reports-publications/2017-2018-investigation-highlights#h3. Accessed July 22, 2019.

Although government institutions need to be open and accountable, they also need to conduct business and enter into business relationships; in doing so, they must be able to assure their private sector partners that their trade secrets and commercial and financial secrets will not be readily disclosed to competitors and the public.[714]

The leading case authority in terms of third-party information is *Merck Frosst Canada Ltd. v. Canada (Health)*, (2012). At paragraph [23], the court recognized that a balance must be struck between the private interests of third parties and the public interest in the disclosure of information. The court commented:

> [23] Nonetheless, when the information at stake is third party, confidential commercial and related information, the important goal of broad disclosure must be balanced with the legitimate private interests of third parties and the public interest in promoting innovation and development. The Act strikes this balance between the demands of openness and commercial confidentiality in two main ways. First, it affords substantive protection of the information by specifying that certain categories of third party information are exempt from disclosure. Second, it provides procedural protection. The third party whose information is being sought has the opportunity, before disclosure, to persuade the institution that exemptions to disclosure apply…[715]

Third parties doing business with public institutions must understand that certain information detailing the expenditure of public funds might be disclosed.[716]

Third parties should be aware that the right of access to information under government control is available to every member of the public and cannot be restricted by considerations of motive or occupation. The only way motivation could be relevant is in order to establish a reasonable expectation of harm to third parties [subsection 19(1)(c) of FOIP].[717]

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[714] NWT IPC Review Report 04-043 at p. 4.
[715] Quoted by Justice Zarzeczny in *Canadian Bank Note Limited v Saskatchewan Government Insurance*, 2016 SKQB 362 (CanLII) at [28].
[716] ON IPC Order PO-3845 at [62].
[717] *Intercontinental Packers Ltd. v. Canada (Minister of Agriculture)* (1987), 14 F.T.R. 142 (T.D.), affirmed (1988), 87 N.R. 99 (Fed. C.A.) at [145].

Subsection 19(1)(a)

Third party information

19(1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:

(a) trade secrets of a third party;

...

(2) A head may give access to a record that contains information described in subsection (1) with the written consent of the third party to whom the information relates.

(3) Subject to Part V, a head may give access to a record that contains information described in subsection (1) if:

(a) disclosure of that information could reasonably be expected to be in the public interest as it relates to public health, public safety or protection of the environment; and

(b) the public interest in disclosure could reasonably be expected to clearly outweigh in importance any:

(i) financial loss or gain to;

(ii) prejudice to the competitive position of; or

(iii) interference with contractual or other negotiations of;

a third party.

Subsection 19(1)(a) of FOIP is a mandatory, class-based exemption. It permits refusal of access in situations where a record contains the trade secrets of a third party.

The following test can be applied:

Does the record contain trade secrets of a third party?

Trade secret is defined as information, including a plan or process, tool, mechanism or compound, which possesses each of the four following characteristics:

i) The information must be secret in an absolute or relative sense (is known only by one or a relatively small number of people)

ii) The possessor of the information must demonstrate he/she has acted with the intention to treat the information as secret.

iii) The information must be capable of industrial or commercial application.

Office of the Saskatchewan Information and Privacy Commissioner. Guide to FOIP, Chapter 4, *Exemptions from the Right of Access*. Updated 8 April 2024.

iv) The possessor must have an interest (e.g., an economic interest) worthy of legal protection.[718]

The information must meet all the above criteria to be considered a trade secret.

The types of information that could potentially fall in this class include the chemical composition of a product and the manufacturing processes used. However, not every process or test would fall into this class, particularly when the process or test is common in a particular industry.[719]

If the government institution determines that the information qualifies as a trade secret and it intends to withhold it, it should ask the third party if it consents to the release of the information pursuant to subsection 19(2). Consent should be in writing.

Pursuant to subsection 19(2) of FOIP, where a record contains third party information, the government institution can release it with the written consent of the third party.

Pursuant to subsection 19(3) of FOIP, where a record contains third party information, the government institution can release it if disclosure is in the public interest *and* the information relates to public health, public safety or protection of the environment. In addition, the public interest clearly outweighs in importance any financial loss or gain, prejudice to competitive position or interference with contractual negotiations of the third party. For further guidance, see *Subsection 19(3)* of this Chapter.

In *Canadian Bank Note Limited v. Saskatchewan Government Insurance, (2016)*, Justice Zarzeczny found that unit prices in a contract between Saskatchewan Government Insurance and a third party (Veridos Canada Ltd.) did not qualify as a trade secret.

[718] *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 SCR 23, 2012 SCC 3 (CanLII) at p. 7. Definition relied on by Justice Zarzeczny in *Canadian Bank Note Limited v Saskatchewan Government Insurance*, 2016 SKQB 362 (CanLII) at [32].
[719] Treasury Board of Canada Secretariat, *Access to Information Manual, Chapter 11.14.2*. Available at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11_14. Accessed July 22, 2019.

Subsection 19(1)(b)

Third party information

19(1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:

…

(b) financial, commercial, scientific, technical or labour relations information that is supplied in confidence, implicitly or explicitly, to a government institution by a third party;

…

(2) A head may give access to a record that contains information described in subsection (1) with the written consent of the third party to whom the information relates.

(3) Subject to Part V, a head may give access to a record that contains information described in subsection (1) if:

(a) disclosure of that information could reasonably be expected to be in the public interest as it relates to public health, public safety or protection of the environment; and

(b) the public interest in disclosure could reasonably be expected to clearly outweigh in importance any:

(i) financial loss or gain to;

(ii) prejudice to the competitive position of; or

(iii) interference with contractual or other negotiations of;

a third party.

Subsection 19(1)(b) of FOIP is a mandatory, class-based exemption. It permits refusal of access in situations where a record contains financial, commercial, scientific, technical, or labour relations information that was supplied in confidence to a government institution by a third party.

The following three-part test can be applied:[720]

1. **Is the information financial, commercial, scientific, technical, or labour relations information of a third party?**

[720] MCCreary J. used this three-part test in *Seon v Board of Education of the Regina Roman Catholic School Division NO. 81*, 2018 SKQB 166 at [9] for the equivalent provision (subsection 18(1)(b)) in *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP).

Financial information is information regarding monetary resources, such as financial capabilities, assets and liabilities, past or present. Common examples are financial forecasts, investment strategies, budgets and profit and loss statements. The financial information must be specific to a third party.[721]

Commercial information is information relating to the buying, selling or exchange of merchandise or services. This can include third party associations, past history, references and insurance policies and pricing structures, market research, business plans, and customer records.[722]

Types of information included in the definition of commercial information can include:

- Offers of products and services a third-party business proposes to supply or perform.
- A third-party business' experiences in commercial activities where this information has commercial value.
- Terms and conditions for providing services and products by a third party.
- Lists of customers, suppliers or sub-contractors compiled by a third-party business for its use in its commercial activities or enterprises - such lists may take time and effort to compile, if not skill.
- Methods a third-party business proposes to use to supply goods and services.
- Number of hours a third-party business proposes to take to complete contracted work or tasks.[723]

Scientific information is information exhibiting the principles or methods of science. The information could include designs for a product and testing procedures or methodologies.[724] It is information belonging to an organized field of knowledge in the natural, biological, or social sciences or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of specific hypothesis or conclusions and be undertaken by an expert in the field. Finally, scientific information must be given a meaning separate from technical information.[725]

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[721] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 103. Definition first relied on in SK OIPC Review Report F-2005-003 at [23].
[722] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 102.
[723] BC IPC Order F05-09 at [9]. First cited in SK OIPC Review Report 019-2014 at [35].
[724] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 191. Definition first relied on for third party exemption in SK OIPC Review Report F-2006-002 at [85].
[725] Definition originated from ON IPC Order P-454 at p. 4. Adopted in SK OIPC Review Report F-2006-002 at [87].

Technical information is information relating to a particular subject, craft or technique. Examples are system design specifications and the plans for an engineering project.[726] It is information belonging to an organized field of knowledge which would fall under the general categories of applied sciences or mechanical arts. Examples of these fields would include architecture, engineering, or electronics. It will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment, or thing. Finally, technical information must be given a meaning separate from scientific information.[727]

Labour relations information is information that relates to the management of personnel by a person or organization, whether or not the personnel are organized into bargaining units. It includes relationships within and between workers, working groups, managers, employers and their organizations. Labour relations information also includes collective relations between a public body and its employees. Common examples of labour relations information are hourly wage rates, personnel contracts, and information on negotiations regarding collective agreements.[728]

In the decision *Merck Frosst Canada Ltd. v. Canada (Health)*, (2012), the Supreme Court of Canada recognized that administrative details such as page and volume numbering, dates, and location of information within records do not constitute financial, commercial, scientific or technical information.[729]

2. Was the information supplied by the third party to a government institution?

Supplied means provided or furnished.[730]

Information may qualify as "supplied" if it was directly supplied to a government institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.[731]

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[726] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 191. Definition first relied on for third party exemption in SK OIPC Review Report F-2006-002 at [85].
[727] Definition originated from ON IPC Order P-454 at p. 4. Adopted in SK OIPC Review Report F-2005-003 at [26]. Definition endorsed in *Consumers' Co-operative Refineries Limited v Regina (City)*, 2016 SKQB 335 (CanLII) at [20].
[728] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 103. Definition first relied on in SK OIPC Review Report 019-2014 at [37].
[729] *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 SCR 23, 2012 SCC 3 (CanLII) at [141].
[730] British Columbia Government Services, *FOIPPA Policy Definitions* at https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/policy-definitions#supplied. Accessed August 21, 2019.
[731] SK OIPC Review Reports F-2005-003 at [17], F-2006-002 at [40].

Information gathered by government inspectors via their own observations does not qualify as information "supplied" to the government institution. Judgements or conclusions expressed by officials based on their own observations generally cannot be said to be information supplied by a third party.[732]

Records can still be "supplied" even when they originate with the government institution (i.e., the records still may contain or repeat information extracted from documents supplied by the third party). However, the third-party objecting to disclosure will have to prove that the information originated with it and that it is confidential.[733]

Whether confidential information has been "supplied" to a government institution by a third party is a question of fact. The content rather than the form of the information must be considered: the mere fact that the information appears in a government document does not, on its own, resolve the issue.[734]

The following are examples of information not supplied by a third party:

- Information that reflects the viewpoints, opinions, or comments of government officials;
- Reports resulting from factual observations made by government inspectors; and
- The terms of a lease negotiated between a third party and a government institution.[735]

The contents of a contract involving a government institution and a third party will not normally qualify as having been supplied by a third party. The provisions of a contract, in general, have been treated as **mutually generated**, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party.[736]

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[732] *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 SCR 23, 2012 SCC 3 (CanLII) at [156] and [158].
[733] *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 SCR 23, 2012 SCC 3 (CanLII) at [157].
[734] *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 SCR 23, 2012 SCC 3 (CanLII) at [158].
[735] *Halifax Developments Ltd. v. Minister of Public Works* (994), F.C.J. No. 2035 (QL) (F.C.T.D.). Also in Treasury Board of Canada Secretariat, *Access to Information Manual, Chapter 11.14.3*. Available at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11_14. Accessed August 21, 2019.
[736] Originated in 2002 ON IPC Order PO-2018. The language above is drawn from the most recent 2019 ON Order PO-3974 at [42]. First relied on in SK OIPC Review Report F-2005-003 at [17]. Several court decisions support this approach. See *Boeing C. v. Ontario (Ministry of Economic Development and Trade)*, 2005 CanLII 24249 (ON SCDC), [2005] O.J. 2851, *Canadian Medical Protective Association v. John Doe*, 2008 CanLII 45005 (ON SCDC), [2008] O.J. No. 3475, *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, 2002 BCSC 603 (CanLII), *Canada Post Corp. v. National Capital Commission*,(2002), 2002 FCT 700 (CanLII), *Halifax Development Ltd. v. Canada (Minister of Public Works*

An agreement where the government institution contributed significantly to its terms would not qualify under this exemption because it is the result of negotiation between the parties and was also largely based on the criteria set out by the government institution in its request for proposals.[737]

There are two exceptions to the general rule of "mutually generated" information in contracts.[738] If one of these exceptions apply, the information in a contract could be found to have been supplied by the third party:

i) *Inferred disclosure* – where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the third party to the public body;[739] and

ii) *Immutability* – information the third party provided that is immutable or not open or susceptible to change and was incorporated into the contract without change, such as the operating philosophy of a business, or a sample of its products.[740]

3. Was the information supplied in confidence implicitly or explicitly?

Supplied means provided or furnished.[741]

In confidence usually describes a situation of mutual trust in which private matters are relayed or reported. Information obtained *in confidence* means that the supplier of the information has stipulated how the information can be disseminated.[742] In order for confidence to be found, there must be an implicit or explicit agreement or understanding of

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and Government Services), [1994] F.C.J. No. 2035. Similar position taken by other IPC offices including BC, AB, NFLD and Labrador and PEI.

[737] SK OIPC Review Reports F-2005-003 at [17] to [19] and LA-2011-001 at [97].

[738] Base case was BC IPC Order 01-20 at [86]. This Order was later discussed in *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)* [2002] B.C.J. No. 848 at [72] to [79]. See also ON IPC Orders MO-1706 at p. 12, PO-2371 at pp. 6 to 9, PO-2528 at p. 12. Included for the first time in SK IPC Review Report 084-2015 at [22].

[739] An example of "inferred disclosure" can be found at [25] of *Aventis Pasteur Ltd. v. Canada (Attorney General)*, 2004 FC 1371 (CanLII). See also BC IPC Order 01-20 at [86].

[740] The Ontario Superior Court of Justice, in *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC) and [55], considered "immutability" as a factor in its determination that the information was not "supplied" by the third party.

[741] British Columbia Government Services, *FOIPPA Policy Definitions* at https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/policy-definitions#supplied. Accessed August 21, 2019.

[742] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 104, SK OIPC Review Reports F-2006-002 at [51], H-2008-002 at [73], ON IPC Order MO-1896 at p. 8.

confidentiality on the part of both the government institution and the third party providing the information.[743]

Implicitly means that the confidentiality is understood even though there is no actual statement of confidentiality, agreement, or other physical evidence of the understanding that the information will be kept confidential.[744]

Explicitly 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.[745]

In order for subsection 19(1)(b) of FOIP to apply, a government institution must show that both parties intended the information be held in confidence at the time the information was supplied.[746]

The expectation of confidentiality must be reasonable and must have an objective basis.[747] Whether the information is confidential will depend upon its content, its purposes, and the circumstances in which it was compiled or communicated (*Corporate Express Canada, Inc. v. The President and Vice Chancellor of Memorial University of Newfoundland, Gary Kachanoski, (2014)*).

Factors considered when determining whether a document was supplied in confidence *implicitly* include (not exhaustive):

- What is the nature of the information. Would a reasonable person regard it as confidential. Would it ordinarily be kept confidential by the third party or the government institution.[748]
- Was the information treated consistently in a manner that indicated a concern for its protection by the third party and the government institution from the point at which it was supplied until the present time.[749]
- Is the information available from sources to which the public has access.[750]

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[743] SK OIPC Review Reports F-2006-002 at [52], LA-2013-002 at [57], ON IPC Order MO-1896 at p. 8.
[744] SK OIPC Review Reports F-2006-002 at [57], F-2009-001 at [62], F-2012-001/LA-2012-001 at [29], LA-2013-002 at [49], F-2014-002 at [47].
[745] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at pp. 104 and 105.
[746] SK OIPC Review Reports 158-2016 at [37] and 203-2016 at [28].
[747] SK OIPC Review Reports F-2012-001/LA-2012-001 at [32], LA-2013-002 at [49], ON IPC Orders PO-2273 at p. 7 and PO-2283 at p. 10.
[748] BC IPC Orders 331-1999 at [8], F13-01 at [23]; PEI IPC Order FI-16-006 at [19]; NS IPC Review Reports 16-09 at [44], 17-03 at [34].
[749] ON IPC Orders PO-2273 at p. 8, PO-2283 at p. 10.
[750] ON IPC Orders PO-2273 at p. 8, PO-2283 at p. 10.

- Does the government institution have any internal policies or procedures that speak to how records such as the one in question are to be handled confidentially.
- Was there a mutual understanding that the information would be held in confidence.

Mutual understanding means that the government institution and the third party both had the same understanding regarding the confidentiality of the information at the time it was supplied. If one party intends the information to be kept confidential but the other does not, the information is not considered to have been supplied in confidence. However, mutual understanding alone is not sufficient. Additional factors must exist in addition.[751]

The preceding factors are not a test but rather guidance on factors to consider. It is not an exhaustive list. Each case will require different supporting arguments. The bare assertion that the information was supplied implicitly in confidence would not be sufficient.[752]

Factors to consider when determining if a document was supplied in confidence *explicitly* include (not exhaustive):

- The existence of an express condition of confidentiality between the government institution and the third party.[753]
- The fact that the government institution requested the information be supplied in a sealed envelope and/or outlined its confidentiality intentions to the third party prior to the information being supplied.[754]

The preceding factors are not a test but rather guidance on factors to consider. It is not an exhaustive list. Each case will require different supporting arguments.

The Federal Court has summarized the following in terms of what is considered confidential:

- It is an objective standard (based on facts);
- It is not sufficient that the third-party state, without further evidence, that the information is confidential;
- Information has not been held to be confidential even if the third party considered it so, where it has been available to the public from other sources or where it has been available at an earlier time or in another form from government; and

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[751] *Jacques Whitford Environment Ltd. v. Canada (Minister of National Defence)*, 2001 FCT 556 at [40], SK OIPC Review Reports F-2006-002 at [52], LA-2013-002 at [58] to [59], ON IPC Order MO-1896 at p. 8, BC IPC Order F-11-08 at [32].
[752] SK OIPC Review Report LA-2013-002 at [60].
[753] SK OIPC Review Reports F-2006-002 at [56], LA-2013-003 at [113], F-2014-002 at [47], PEI IPC Order 03-006 at p. 5, AB IPC Orders 97-013 at [23] to [24], 2001-008 at [54].
[754] SK OIPC Review Reports F-2006-002 at [56], F-2012-001/LA-2012-001 at [29], LA-2013-002 at [49], LA-2013-003 at [113], F-2014-002 at [47]; PEI IPC Order 03-006 at p. 5; AB IPC Order 97-013 at [25].

- Information is not confidential where it could be obtained by observation albeit with more effort by the applicant.[755]

Compulsory supply means there is a compulsory legislative requirement to supply information. Where supply is compulsory, it will not ordinarily be confidential. In some cases, there may be indications in the legislation relevant to the compulsory supply that establish confidentiality The relevant legislation may even expressly state that such information is deemed to have been supplied in confidence.[756] Where information is required to be provided, unless otherwise provided by statute, confidentiality cannot be built in by agreement, informally or formally.[757]

Example: In Review Report 043-2015, the Commissioner found that subsection 19(1)(b) of FOIP did not apply because the third party was required to provide the information in question to the Ministry of Environment pursuant to *The Environmental Management and Protection Act, 2002*, *The Water Regulations* and *The Clean Air Act*. As such, this constituted compulsory supply. In addition, these statutes did not have any confidentiality provisions related to the types of information in question.

In the decision *Merck Frosst Canada Ltd. v. Canada (Health)*, (2012), the Supreme Court of Canada established that information is not confidential if it is in the public domain, including being publicly available through another source. To be confidential, the information must not be available from sources otherwise accessible by the public or obtainable by observation or independent study by a member of the public acting on his or her own. Information that has been published is not confidential. Furthermore, information, which merely reveals the existence of publicly available information, cannot generally be confidential.[758]

Contractors setting out to win government contracts through a confidential bidding process should not expect that the monetary terms will remain confidential if the bid succeeds. The public's right to know how government spends public funds as a means of holding

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[755] *Air Atonabee Ltd. v. Minister of Transport*, (1989), 27 C.P.R. (3d) 180 (F.C.T.D.) at p.11. *Stenotran Services v. Canada (Minister of Public Works and Government Services)*, 2000 CanLII 15464 (FC) at [9] citing Air Atonabee. It is important to note that subsection 20(1)(b) of the federal ATIA places the focus on the confidential nature of the information itself. SK's subsection 19(1)(b) of FOIP places the focus on the confidential nature of the supply. However, *Air Atonabee* may still be instructive with interpreting SK's subsection 19(1)(b) of FOIP.

[756] *Chesal v. Nova Scotia (Attorney General) et al.*, 2003 NSCA 124 (CanLII) at [72] and [73] and *Stevens v. Canada (Prime Minister)*, [1997] 2 FC 759, 1997 CanLII 4805 (FC) at p. 1. Also, see NS IPC Review Report 17-03 at [98] and SK OIPC Review Reports F-2006-001 at [76] to [78].

[757] SK OIPC Review Report F-2006-001 at [78].

[758] *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 SCR 23, 2012 SCC 3 (CanLII) at [146].

government accountable for its expenditures is a fundamental notion of responsible government that is known to all.[759]

Simply labelling documents as "confidential" does not, on its own, make the documents confidential (i.e., confidentiality stamps or standard automatic confidentiality statements at the end of emails). It is just one factor that we consider when determining whether the information was explicitly supplied in confidence.[760] The typical bottom of e-mail "confidentiality" note is not sufficient to establish that information was supplied in confidence. Such notes are largely format and platitudes.[761]

Government institutions cannot be relieved of their responsibilities under FOIP merely by agreeing via a confidentiality clause in a contract/agreement to keep matters confidential.[762] Since a government institution cannot guarantee confidentiality if FOIP mandates disclosure, it should frame any contract provisions, representations or policies accordingly so third parties are informed prior to providing information to the government institution. This includes tenders, requests for proposals and other processes.

Pursuant to subsection 19(2) of FOIP, where a record contains third party information, the government institution can release it with the written consent of the third party.

Pursuant to subsection 19(3) of FOIP, where a record contains third party information, the government institution can release it if disclosure is in the public interest and the information relates to public health, public safety or protection of the environment. In addition, the public interest clearly outweighs in importance any financial loss or gain, prejudice to competitive position or interference with contractual negotiations of the third party. For further guidance, see *Subsection 19(3)* of this Chapter.

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[759] *Canada (Minister of Public Works and Government Services) v. Hi-Rise Group Inc.,* 2004 FCA 99 (CanLII) at [37] and [42].
[760] SK OIPC Review Report F-2012-001/LA-2012-001 at [43].
[761] *Brewster Inc. v. Canada (Environment)*, 2016 FC 339 (CanLII) at [22].
[762] *St. Joseph Corp. v. Canada (Public Works & Government Services)* [2002] FCT 274 at [53] and [54], Brookfield *LePage Johnson Controls Facility Management Services v. Canada (Minister of Public Works and Government Services),* [2003] FCT 254 at [16], SK OIPC Review Reports 159-2016 at [39], 052-2017 at [55] and Review Report 311-2017, 312-2017, 313-2017, 316-2017, 340-2017, 341-2017, 342-2017 at [63].

IPC Findings

In Review Report 007-2015, the Commissioner considered subsection 19(1)(b) of FOIP. An applicant had made an access to information request to the Ministry of Central Services (Central Services) for the Statement of Work attached to Information Technology Consulting Services Agreement ITO-12023. Central Services responded to the applicant advising that it was withholding portions of the Statement of Work pursuant to several provisions of FOIP including subsection 19(1)(b). The Commissioner found that the estimated hours, hourly rate and estimated cost per consultant was the financial and commercial information of the third party. However, the Commissioner found that the estimated hours, hourly rate and estimated cost per consultant were not supplied by the third party because they were part of the contract between Central Services and the third party and the result of negotiation between the parties. As all three parts of the test were not met, the Commissioner found that subsection 19(1)(b) of FOIP did not apply.

In Review Report 031-2015, the Commissioner considered subsection 19(1)(b) of FOIP. An applicant had made an access to information request to Saskatchewan Government Insurance (SGI) for all records relating to a Request for Proposals (RFP). SGI responded to the applicant indicating that access was partially granted to some records, but others were withheld pursuant to several exemptions including subsection 19(1)(b). The records at issue under subsection 19(1)(b) were hundreds of pages that constituted the actual proposals submitted by two separate third parties to SGI. There were also 87 pages worth of emails. Upon review, the Commissioner found that the records contained financial, commercial, scientific, technical, and labour relations information. The Commissioner further found that the entire proposal packages of the two third parties constituted commercial information because the proposals related to the buying or selling of goods and services. This approach was consistent with other jurisdictions including British Columbia (Order F09-22) and Ontario (MO-3179). The Commissioner went on to find that all the records were supplied by the third parties, including emails sent to SGI by the third parties. Finally, the Commissioner found that the records were supplied explicitly in confidence. This was based on the submissions of all the parties which indicated all the parties agreed on this fact (mutual understanding). Furthermore, the RFP included a confidentiality clause. As all three parts of the test were met, the Commissioner found that subsection 19(1)(b) of FOIP was appropriately applied by SGI to the proposals and the severed information in the emails.

In Review Report 054-2015 and 055-2015, the Commissioner considered the equivalent provision, subsection 18(1)(b), in *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). An applicant had made an access to information request to the City of Regina (City) for a tender and contract related to a street infrastructure project. The records

involved were two documents titled, *Form of Tender*. The applicant was only interested in the unit prices and total prices severed from the two documents. The City withheld this information in part under subsection 18(1)(b) of LA FOIP. The City asserted that the unit prices disclosed pricing and pricing practices of the third parties involved in a competitive contract award process. The Commissioner found the unit prices and total prices constituted commercial and financial information of the third parties. The City asserted that the tender package supplied by the City to bidders contained a blank Form of Tender. Bidders entered their specific data in Schedule A of the form and returned it to the City as part of their bid package. Based on this, the Commissioner found that the third parties supplied the unit prices and total prices. The City asserted that clause 19 of the Instructions to Bidders issued by the City indicated that financial and commercial information supplied by bidders would be supplied in confidence. Based on this, the Commissioner found that the unit pricing and total prices were supplied explicitly in confidence. As all three parts of the test were met, the Commissioner found that subsection 18(1)(b) of LA FOIP was appropriately applied.

In Review Report 195-2015 and 196-2015, the Commissioner considered subsection 19(1)(b) of FOIP. An applicant made two access to information requests to the Ministry of Central Services (Central Services) for all current active information technology service contracts with a maximum value of over $1 million and any between Central Services and Solvera Solutions over $1 million. Central Services responded to the applicant advising that some of the information in the contracts was being withheld under various provisions of FOIP including withholding the hourly rates for contracted services pursuant to subsection 19(1)(b). Upon review, the Commissioner found that the hourly rates for contracted services qualified as commercial information of the third party. However, the Commissioner found that the third party did not supply the hourly rates for contracted services because they were provisions of a contract that were mutually generated through negotiation. As all three parts of the test were not met, the Commissioner found that subsection 19(1)(b) of FOIP did not apply.

In Review Report 229-2015, the Commissioner considered subsection 19(1)(b) of FOIP. An applicant made an access to information request to Saskatchewan Government Insurance (SGI) for information related to a contract for Centralized Driver License and Identification Card Production and Facial Recognition Services including contract price, price per card components, lump sum price components, and card volume and contract term. SGI responded to the applicant indicating that some of the information was being withheld pursuant to several provisions of FOIP including subsection 19(1)(b) of FOIP. The Commissioner found that the price per unit and lump sum prices constituted the commercial information of the third party. Furthermore, the Commissioner found that the price per unit and lump sum prices were terms of the contract that had been agreed to by both the third party and SGI and as such were mutually generated as part of the negotiation process. The

Commissioner distinguished this case from Review Report 054-2015 and 055-2015, where the unit prices were provided on a blank *Form of Tender* provided by the City of Regina to bidders. The Commissioner noted that unlike the other case, the bidding process was concluded, the successful bidder was selected, and a contract was already awarded. The Commissioner found that the unit prices and lump sum prices were not supplied by the third party but were negotiated terms of the contract that both parties agreed to. As the second part of the test was not met, the Commissioner found that subsection 19(1)(b) of FOIP was not appropriately applied. The third party appealed the Commissioner's decision to the Court of King's Bench where Justice Zarzeczny in *Canadian Bank Note Limited v Saskatchewan Government Insurance*, considered the facts and circumstances in the de novo appeal, agreed that the information was commercial information of the third party but found that the unit prices were supplied to SGI by the third party.[763]

In Review Report 052-2017, the Commissioner considered subsection 19(1)(b) of FOIP. An applicant made an access to information request to Saskatchewan Power Corporation (SaskPower) for a copy of an appraisal related to SaskPower's purchase of land from the Global Transportation Hub. SaskPower responded to the applicant denying access to the appraisal citing subsections 19(1)(b) and (c) of FOIP. The third party responsible for developing the appraisal provided a submission to the Commissioner for consideration. The third party asserted, in part, that release of the appraisal would infringe on the third party's copyright to the integrity of its work in accordance with the *Copyright Act*, RSC 1985 c. C-42. The Commissioner did not agree with this line of reasoning. The Commissioner referred to subsection 32.1(1)(a) of the *Copyright Act* which provided that disclosing under access to information legislation is not an infringement of copyright. The Commissioner could not find that the information was technical information as asserted by the third party as insufficient evidence was provided. As the first part of the test was not met, the Commissioner found that subsection 19(1)(b) of FOIP did not apply to the appraisal.

Subsection 19(1)(c)

Third party information

19(1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:

...

(c) information, the disclosure of which could reasonably be expected to:

[763] *Canadian Bank Note Limited v Saskatchewan Government Insurance*, 2016 SKQB 362 (CanLII) at [36] to [39].

(i) result in financial loss or gain to;

(ii) prejudice the competitive position of; or

(iii) interfere with the contractual or other negotiations of;

a third party;

…

(2) A head may give access to a record that contains information described in subsection (1) with the written consent of the third party to whom the information relates.

(3) Subject to Part V, a head may give access to a record that contains information described in subsection (1) if:

(a) disclosure of that information could reasonably be expected to be in the public interest as it relates to public health, public safety or protection of the environment; and

(b) the public interest in disclosure could reasonably be expected to clearly outweigh in importance any:

(i) financial loss or gain to;

(ii) prejudice to the competitive position of; or

(iii) interference with contractual or other negotiations of;

a third party.

Subsection 19(1)(c) of FOIP is a mandatory, harm-based provision. It permits refusal of access in situations where disclosure could reasonably be expected to result in the harms outlined at subclauses (i), (ii) and (iii).

Government institutions and third parties should not assume that the harms are self-evident. The harm must be described in a precise and specific way to support the application of the provision.

Subclause 19(1)(c)(i)

Third party information

19(1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:

…

(c) information, the disclosure of which could reasonably be expected to:

(i) result in financial loss or gain to;

...

a third party;

...

(2) A head may give access to a record that contains information described in subsection (1) with the written consent of the third party to whom the information relates.

(3) Subject to Part V, a head may give access to a record that contains information described in subsection (1) if:

(a) disclosure of that information could reasonably be expected to be in the public interest as it relates to public health, public safety or protection of the environment; and

(b) the public interest in disclosure could reasonably be expected to clearly outweigh in importance any:

(i) financial loss or gain to;

(ii) prejudice to the competitive position of; or

(iii) interference with contractual or other negotiations of;

a third party.

Subclause 19(1)(c)(i) of FOIP is a mandatory, harm-based exemption. It permits refusal of access in situations where disclosure of information could reasonably be expected to result in financial loss or gain to a third party.

The following two-part test can be applied:

1. **What is the financial loss or gain being claimed?**

Financial loss or gain must be monetary, have a monetary equivalent or value (e.g., loss of revenue or loss of corporate reputation).[764]

2. **Could release of the record reasonably be expected to result in financial loss or gain to a third party?**

For this exemption to apply there must be objective grounds for believing that disclosing the information could result in loss or gain to a third party measured in monetary terms (e.g., loss of revenue).[765]

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[764] Adapted from British Columbia Government Services, *FOIPPA Policy and Procedures Manual* at https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/policy-definitions#undue_fin_gain. Accessed August 29, 2019.

[765] Adapted from British Columbia Government Services, *FOIPPA Policy and Procedures Manual* at https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-

The disclosure of information that is not already in the public domain that is shown to give competitors a head start in developing competing products, or to give them a competitive advantage in future transactions may, in principle, meet the requirements. The evidence would have to demonstrate that there is a direct link between the disclosure and the apprehended harm and that the harm could reasonably be expected to ensue from disclosure.[766] However, asserting disclosure would create a more competitive environment does not give rise to a reasonable expectation of a material financial loss or prejudice to a third party's competitive position.[767]

"Could reasonably be expected to" means there must be a reasonable expectation that disclosure could result in financial loss or gain to a third party. The Supreme Court of Canada set out the standard of proof for harms-based provisions as follows:

> This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences"…[768]

The government institution and third party do not have to prove that a harm is probable but need to show that there is a "reasonable expectation of harm" if any of the information were to be released. In *British Columbia (Minister of Citizens' Service) v. British Columbia (Information and Privacy Commissioner), (2012)*, Bracken J. confirmed it is the release of the information itself that must give rise to a reasonable expectation of harm.

Government institutions should not assume that the harm is self-evident. The harm must be described in a precise and specific way to support the application of the provision.

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procedures/foippa-manual/policy-definitions#undue_fin_gain and Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 108.

[766] *Canadian Bank Note Limited v Saskatchewan Government Insurance*, 2016 SKQB 362 (CanLII) at [55] relying on *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 SCR 23, 2012 SCC 3 (CanLII) at [219].

[767] *Canadian Pacific Hotels Corp. v. Canada (Attorney General)*, 2004 FC 444 (CanLII) at [35].

[768] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2014] 1 SCR 674, 2014 SCC 31 (CanLII) at [54].

The expectation of harm must be reasonable, but it need not be a certainty. The evidence of harm must:

- Show how the disclosure of the information would cause harm;
- Indicate the extent of harm that would result; and
- Provide facts to support the assertions made.[769]

Exemption from disclosure should not be granted based on fear of harm that is fanciful, imaginary or contrived. Such fears of harm are not reasonable because they are not based on reason…the words "could reasonably be expected" "refer to an expectation for which real and substantial grounds exist when looked at objectively"…[770]

Some relevant questions that may assist are:[771]

- What kind of harm is expected from disclosure.
- How will the loss or gain specifically occur.
- How much money is involved.
- Will the loss or gain affect the financial performance of the third party. How. To what degree.
- How old is the information. If the information is not current, why would disclosure still adversely affect the third party.
- Has similar information about the third party been made public in the past. If so, what was the impact. Was the impact quantifiable (e.g., lost sales or revenues).
- Is information of this nature available about competitors of the third party.
- Are there examples in other businesses where disclosure of similar information led to material financial loss or gain. If so, describe and quantify the financial loss or gain. Why is the situation parallel to that of this third party.
- What actions could the third party take to counteract potential financial loss or gain knowing the information would be disclosed.

In *Astrazeneca Canada Inc. v. Canada (Minister of Health)*, the Federal Court stated that proof of harm for the equivalent provisions in the federal *Access to Information Act*, required reasonable speculation because "in many circumstances a party cannot rely on harm from

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[769] Treasury Board of Canada Secretariat, *Access to Information Manual, Chapter 11.14.4*. Available at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11_14. Accessed August 29, 2019.
[770] *Canadian Bank Note Limited v Saskatchewan Government Insurance*, 2016 SKQB 362 (CanLII) at [49] relying on *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 SCR 23, 2012 SCC 3 (CanLII) at [204].
[771] Adapted from Information Commissioner of Canada resource, *FOIPPA Policy Definitions*. Available at https://www.oic-ci.gc.ca/en/investigators-guide-interpreting-act/section-201cd-questions. Accessed August 28, 2019.

past disclosures as evidence of reasonably expected harm because past disclosures of that type of evidence may never have occurred". Nonetheless, the party seeking to exempt the information must put forward something more than internally held beliefs and fears. Forecasting evidence, expert evidence and evidence of treatment of similar elements of proof or similar situations are frequently accepted as a logical basis for the expectation of harm.[772]

Pursuant to subsection 19(2) of FOIP, where a record contains third party information, the government institution can release it with the written consent of the third party.

Pursuant to subsection 19(3) of FOIP, where a record contains third party information, the government institution can release it if disclosure is in the public interest and the information relates to public health, public safety or protection of the environment. In addition, the public interest clearly outweighs in importance any financial loss or gain, prejudice to competitive position or interference with contractual negotiations of the third party. For further guidance, see *Subsection 19(3)* of this Chapter.

IPC Findings

In Review Report 007-2015, the Commissioner considered subsection 19(1)(c). An applicant had made an access to information request to the Ministry of Central Services (Central Services) for the *Statement of Work* attached to *Information Technology Consulting Services Agreement ITO-12023*. Central Services responded to the applicant advising that it was withholding portions of the *Statement of Work* pursuant to several provisions of FOIP including subsection 19(1)(c). During the review, Central Services and the third party asserted that releasing the estimated hours, hourly rate and estimated cost per consultant would result in a competitor having the ability to provide a lower rate for future contracts, which would cause the third party to experience a competitive disadvantage. However, neither Central Services nor the third party provided anything further to support this assertion. The Commissioner also stated that the winning contractor would have access to the internal cost estimates in question as it is part of the current contract and that keeping these figures from the public, including other future bidders, would jeopardize competitive bidding processes. The Commissioner found that subsection 19(1)(c) of FOIP was not properly applied by Central Services.

In Review Report 195-2015 and 196-2015, the Commissioner considered subsection 19(1)(c) of FOIP. An applicant made two access to information requests to the Ministry of Central Services (Central Services) for all current active information technology service contracts with a maximum value of over $1 million and any between Central Services and Solvera Solutions

[772] *Astrazeneca Canada Inc. v. Canada (Minister of Health)*, 2005 FC 189 (CanLII) at [44] to [47].

that were over $1 million. Central Services responded to the applicant advising that some of the information in the contracts was being withheld under various provisions of FOIP including subsection 19(1)(c). Specifically, Central Services withheld the hourly rates for contracted services pursuant to subsection 19(1)(c). Upon review, both Central Services and the third party asserted that releasing the hourly rates could result in competitors having the ability the provide a lower rate for future contracts and result in undue loss to Solvera Solutions and prejudice its competitive position. The Commissioner found that the bids were evaluated based on several criteria and laid out the three stages used by Central Services at paragraph [44] of the report. As such, the selection was not based on price alone. Finally, the Commissioner found that releasing costs would increase the chances that a public body would, in the future, obtain fair bids and a competitive bidding process. The Commissioner found that subsection 19(1)(c) did not apply to the hourly rates.

In Review Report 236-2017, the Commissioner considered subsection 19(1)(c) of FOIP. An applicant made an access to information request to the Water Security Agency (WSA) for copies of a report of the standing of each firm who submitted quotes to WSA in response to a Request for Quotes. Upon review, the WSA asserted that if the quotes were released to the applicant, it would result in financial loss for the third parties and result in a competitive advantage. Relying on Review Reports 007-2015 and 195-2015 and 196-2015, the Commissioner found that the risk of being underbid by competitors for future contracts did not meet the threshold for this provision. Releasing costs would increase the chances that the public body would obtain fair bids and a competitive bidding process.

Subclause 19(1)(c)(ii)

Third party information

19(1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:

...

(c) information, the disclosure of which could reasonably be expected to:

...

(ii) prejudice the competitive position of;

...

a third party;

...

(2) A head may give access to a record that contains information described in subsection (1) with the written consent of the third party to whom the information relates.

(3) Subject to Part V, a head may give access to a record that contains information described in subsection (1) if:

(a) disclosure of that information could reasonably be expected to be in the public interest as it relates to public health, public safety or protection of the environment; and

(b) the public interest in disclosure could reasonably be expected to clearly outweigh in importance any:

(i) financial loss or gain to;

(ii) prejudice to the competitive position of; or

(iii) interference with contractual or other negotiations of;

a third party.

Subclause 19(1)(c)(ii) of FOIP is a mandatory, harm-based exemption. It permits refusal of access in situations where disclosure of information could reasonably be expected to prejudice the competitive position of a third party.

The following two-part test can be applied:

1. What is the prejudice to a third party's competitive position that is being claimed?

Prejudice in this context refers to detriment to the competitive position of a third party.[773]

Competitive position means the information must be capable of use by an existing or potential business competitor, whether that competitor currently competes for the same market share. For example:

- Information that discloses the profit margin on a private company's operations.
- Marketing plans, including market research surveys, polls.
- Information that reveals the internal workings of a private company.[774]

[773] Adapted from Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 149.
[774] British Columbia Government Services, *FOIPPA Policy and Procedures Manual* at https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/disclosure-harmful-business-interests-third-party. Accessed August 28, 2019.

2. Could release of the record reasonably be expected to result in the prejudice?

The disclosure of information that is not already in the public domain that is shown to give competitors a head start in developing competing products, or to give them a competitive advantage in future transactions may, in principle, meet the requirements. The evidence would have to demonstrate that there is a direct link between the disclosure and the harm. Furthermore, that the harm could reasonably be expected to ensue from disclosure.[775] However, asserting disclosure would create a more competitive environment does not give rise to a reasonable expectation of a material financial loss or prejudice to a third party's competitive position.[776]

"Could reasonably be expected to" means there must be a reasonable expectation that disclosure could prejudice the competitive position of a third party. The Supreme Court of Canada set out the standard of proof for harms-based provisions as follows:

> This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences"…[777]

The government institution and third party do not have to prove that a harm is probable but need to show that there is a "reasonable expectation of harm" if any of the information were to be released. In *British Columbia (Minister of Citizens' Service) v. British Columbia (Information and Privacy Commissioner), (2012),* Bracken J. confirmed it is the release of the information itself that must give rise to a reasonable expectation of harm.

Government institutions should not assume that the harm is self-evident. The harm must be described in a precise and specific way to support the application of the provision.

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[775] *Canadian Bank Note Limited v Saskatchewan Government Insurance*, 2016 SKQB 362 (CanLII) at [55] relying on *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 SCR 23, 2012 SCC 3 (CanLII) at [219].
[776] *Canadian Pacific Hotels Corp. v. Canada (Attorney General)*, 2004 FC 444 (CanLII) at [35].
[777] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2014] 1 SCR 674, 2014 SCC 31 (CanLII) at [54].

The expectation of harm must be reasonable, but it need not be a certainty. The evidence of harm must:

- Show how the disclosure of the information would cause harm;
- Indicate the extent of harm that would result; and
- Provide facts to support the assertions made.[778]

Exemption from disclosure should not be granted on the basis of fear of harm that is fanciful, imaginary, or contrived. Such fears of harm are not reasonable because they are not based on reason…the words "could reasonably be expected" "refer to an expectation for which real and substantial grounds exist when looked at objectively"…[779]

Some relevant questions that may assist are: [780]

- Does the third party perceive that disclosure would likely prejudice its competitive position.
- How would disclosure impact on the competitive position of the third party.
- Would it have an adverse effect on sales or marketing. How.
- Would disclosure reveal plans or strategy. If so, what kind of plans or strategy.
    - Product launch
    - Product approvals
    - Marketing plans
    - Business acquisitions
    - Asset acquisitions
    - Others
- How would knowledge of these plans specifically prejudice the third party's competitive position.
- Is there an indication of how a competitor could use the information to its advantage, i.e., by developing competing pricing strategies.
- Has the information or same subject matter been disclosed elsewhere.

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[778] Treasury Board of Canada Secretariat, *Access to Information Manual, Chapter 11.14.4*. Available at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11_14. Accessed August 29, 2019.
[779] *Canadian Bank Note Limited v Saskatchewan Government Insurance*, 2016 SKQB 362 (CanLII) at [49] relying on *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 SCR 23, 2012 SCC 3 (CanLII) at [204].
[780] Adapted from Information Commissioner of Canada resource, *Investigator's Guide to Interpreting the Act, Section 20(1)(c) & (d): Questions*. Available at https://www.oic-ci.gc.ca/en/investigators-guide-interpreting-act/section-201cd-questions. Accessed August 28, 2019.

    - Publications
    - In applications to government that are public
    - In the press
    - In annual reports, government filings
    - In public registries

- How old is the information. If the information is not current, why would disclosure still adversely affect the third party.
- Has similar information about the third party been made public in the past. If so, what was the impact. Was the impact quantifiable (e.g., lost sales or revenues).
- Is information of this nature available about competitors of the third party.
- Are there examples in other businesses where disclosure of similar information led to competitive prejudice. If so, describe and quantify the financial loss or gain. Why is the situation parallel to that of this third party.
- What actions could the third party take to counteract potential competitive prejudice knowing the information would be disclosed.

Pursuant to subsection 19(2) of FOIP, where a record contains third party information, the government institution can release it with the written consent of the third party.

Pursuant to subsection 19(3) of FOIP, where a record contains third party information, the government institution can release it if disclosure is in the public interest and the information relates to public health, public safety or protection of the environment. In addition, the public interest clearly outweighs in importance any financial loss or gain, prejudice to competitive position or interference with contractual negotiations of the third party. For further guidance, see *Subsection 19(3)* of this Chapter.

IPC Findings

In Review Report 007-2015, the Commissioner considered subsection 19(1)(c). An applicant made an access to information request to the Ministry of Central Services (Central Services) for the *Statement of Work* attached to *Information Technology Consulting Services Agreement ITO-12023*. Central Services responded to the applicant advising that it was withholding portions of the *Statement of Work* pursuant to several provisions of FOIP including subsection 19(1)(c). During the review, Central Services and the third party asserted that releasing the estimated hours, hourly rate and estimated cost per consultant would result in a competitor having the ability to provide a lower rate for future contracts, which would cause the third party to experience a competitive disadvantage. However, neither Central Services nor the third party provided anything further to support this assertion. The Commissioner also stated that the winning contractor would have access to the internal cost estimates in question as it

is part of the current contract and that keeping these figures from the public, including other future bidders, would jeopardize competitive bidding processes. The Commissioner found that subsection 19(1)(c) of FOIP was not properly applied by Central Services.

In Review Report 195-2015 and 196-2015, the Commissioner considered subsection 19(1)(c) of FOIP. An applicant made two access to information requests to the Ministry of Central Services (Central Services) for all current active information technology service contracts with a maximum value of over $1 million and any between Central Services and Solvera Solutions that were over $1 million. Central Services responded to the applicant advising that some of the information in the contracts was being withheld under various provisions of FOIP including subsection 19(1)(c). Specifically, Central Services withheld the hourly rates for contracted services pursuant to subsection 19(1)(c). Upon review, both Central Services and the third party asserted that releasing the hourly rates could result in competitors having the ability the provide a lower rate for future contracts and result in undue loss to Solvera Solutions and prejudice its competitive position. The Commissioner found that the bids were evaluated based on several criteria and laid out the three stages used by Central Services at paragraph [44] of the report. As such, the selection was not based on price alone. Finally, the Commissioner found that releasing costs would increase the chances that a public body would, in the future, obtain fair bids and a competitive bidding process. The Commissioner found that subsection 19(1)(c) did not apply to the hourly rates.

In Review Report 236-2017, the Commissioner considered subsection 19(1)(c) of FOIP. An applicant made an access to information request to the Water Security Agency (WSA) for copies of a report of the standing of each firm who submitted quotes to WSA in response to a Request for Quotes. Upon review, the WSA asserted that if the quotes were released to the applicant, it would result in financial loss for the third parties and result in a competitive advantage. Relying on Review Reports 007-2015 and 195-2015 and 196-2015, the Commissioner found that the risk of being underbid by competitors for future contracts did not meet the threshold for this provision. Releasing costs would increase the chances that the public body would obtain fair bids and a competitive bidding process.

Subclause 19(1)(c)(iii)

Third party information

19(1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:

...

(c) information, the disclosure of which could reasonably be expected to:

...

(iii) interfere with the contractual or other negotiations of;

a third party;

...

(2) A head may give access to a record that contains information described in subsection (1) with the written consent of the third party to whom the information relates.

(3) Subject to Part V, a head may give access to a record that contains information described in subsection (1) if:

(a) disclosure of that information could reasonably be expected to be in the public interest as it relates to public health, public safety or protection of the environment; and

(b) the public interest in disclosure could reasonably be expected to clearly outweigh in importance any:

(i) financial loss or gain to;

(ii) prejudice to the competitive position of; or

(iii) interference with contractual or other negotiations of;

a third party.

Subclause 19(1)(c)(iii) of FOIP is a mandatory, harm-based exemption. It permits refusal of access in situations where disclosure of information could reasonably be expected to interfere with the contractual or other negotiations of a third party.

The following two-part test can be applied:

1. Are there contractual or other negotiations occurring involving a third party?

A **negotiation** is a consensual bargaining process in which the parties attempt to reach agreement on a disputed or potentially disputed matter. It can also be defined as dealings conducted between two or more parties for the purpose of reaching an understanding.[781] It connotes a more robust relationship than "consultation". It signifies a measure of bargaining power and a process of back-and-forth, give-and-take discussion.[782]

[781] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at pp. 1248 and 1249. Relied on in SK OIPC Review Report 112-2018 at [37].
[782] *Gordon v. Canada (Attorney General)*, 2016 ONCA 625 (CanLII) at [107]. Relied on in SK OIPC Review Report 112-2018 at [37].

Prospective or future negotiations could be included within this exemption, if they are foreseeable.[783] It may be applied even though negotiations have not yet started at the time of the access to information request, including when there has not been any direct contact with the other party or their agent. However, a vague possibility of future negotiations is not sufficient. There must be a reasonable fact-based expectation that the future negotiations will take place.[784]

Once a contract is executed, negotiation is concluded. The exemption would generally not apply unless, for instance, the same strategy will be used again, and it has not been publicly disclosed.[785]

2. Could release of the record reasonably be expected to interfere with the contractual or other negotiations of a third party?

Interfere means to hinder or hamper.[786]

"Could reasonably be expected to" means there must be a reasonable expectation that disclosure could interfere with the contractual or other negotiations of a third party. The Supreme Court of Canada set out the standard of proof for harms-based provisions as follows:

> This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the

[783] SK OIPC Review Report 019-2014 at [27]. Equivalent provision in LA FOIP was being considered (subsection 17(1)(d)). Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 107.
[784] Treasury Board of Canada Secretariat, *Access to Information Manual, Chapter 11.11.2*. Available at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11_11. Accessed July 19, 2019.
[785] British Columbia Government Services, *FOIPPA Policy and Procedures Manual* at https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/disclosure-harmful-economic-interests. Accessed July 19, 2019. Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 107.
[786] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 152.

nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences"…[787]

The government institution and third party do not have to prove that a harm is probable but need to show that there is a "reasonable expectation of harm" if any of the information were to be released. In *British Columbia (Minister of Citizens' Service) v. British Columbia (Information and Privacy Commissioner), (2012)*, Bracken J. confirmed it is the release of the information itself that must give rise to a reasonable expectation of harm.

Government institutions and third parties should not assume that the harm is self-evident. The harm must be described in a precise and specific way to support the application of the provision.

The expectation of harm must be reasonable, but it need not be a certainty. The evidence of harm must:

- Show how the disclosure of the information would cause harm;
- Indicate the extent of harm that would result; and
- Provide facts to support the assertions made.[788]

Exemption from disclosure should not be granted based on fear of harm that is fanciful, imaginary or contrived. Such fears of harm are not reasonable because they are not based on reason…the words "could reasonably be expected" "refer to an expectation for which real and substantial grounds exist when looked at objectively"…[789]

The Federal Court in *Société Gamma Inc. v. Canada (Department of the Secretary of State)* (1994), 56 C.P.R. (3d) 58, interpreted the equivalent provision in the federal *Access to Information Act* as requiring that "it must refer to an obstruction to those negotiations and not merely the heightening of competition for the third party which might flow from

[787] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2014] 1 SCR 674, 2014 SCC 31 (CanLII) at [54].
[788] Treasury Board of Canada Secretariat, *Access to Information Manual, Chapter 11.14.4*. Available at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11_14. Accessed August 29, 2019.
[789] *Canadian Bank Note Limited v Saskatchewan Government Insurance*, 2016 SKQB 362 (CanLII) at [49] relying on *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 SCR 23, 2012 SCC 3 (CanLII) at [204].

disclosure".[790] Furthermore, a distinction must be drawn between actual contractual negotiations and the daily business operations of a third party.[791]

When determining whether disclosure could interfere with contractual or other negotiations of a third party, the following questions can be asked to assist:[792]

- What negotiations would be affected by disclosure.
- Are these negotiations ongoing.
- Have the negotiations been concluded.
- What stage are the negotiations at.
- How long have they been going on.
- What is the subject matter of the negotiations.
- How would disclosure specifically interfere with the negotiations.
- Does the information relate to an outstanding issue in the negotiations. If so, how would disclosure interfere with negotiations on this issue.
- Does the information relate to issues already resolved in the negotiations.
- Would disclosure cause the issue to be reopened. Why.
- Would it otherwise interfere with negotiations. How.
- Is the information current. How old is the information.
- Does it relate to events prior to the negotiations.
- Does the other side of the negotiations already have this information. If not, have they asked for it.
- Is the information commonly known in the industry.
- Is the information reasonably available elsewhere. If so, how would disclosure interfere with negotiations.[793]

Examples of information to which this exemption may apply include negotiating positions, options, instructions, pricing criteria and points used in negotiations.

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[790] *Société Gamma Inc. v. Canada (Department of the Secretary of State)*, (April 27, 1994), T-1587-93, T-1588-93 (F.C.T.D.) at [10].
[791] *Canada (Information Commissioner) v. Canada (Minister of External Affairs)* (T.D.), [1990] 3 FC 665, 1990 CanLII 7951 (FC) at [24].
[792] Adapted from Information Commissioner of Canada resource, *Investigator's Guide to Interpreting the Act, Section 20(1)(c) & (d): Questions*. Available at https://www.oic-ci.gc.ca/en/investigators-guide-interpreting-act/section-201cd-questions. Accessed August 29, 2019.
[793] Information Commissioner of Canada, *Investigator's Guide to Interpreting the Act, Section 20(1)(c)&(d): Questions*, available at https://www.oic-ci.gc.ca/en/investigators-guide-interpreting-act/section-201cd-questions. Accessed July 19, 2019.

Pursuant to subsection 19(2) of FOIP, where a record contains third party information, the government institution can release it with the written consent of the third party.

Pursuant to subsection 19(3) of FOIP, where a record contains third party information, the government institution can release it if disclosure is in the public interest and the information relates to public health, public safety or protection of the environment. In addition, the public interest clearly outweighs in importance any financial loss or gain, prejudice to competitive position or interference with contractual negotiations of the third party. For further guidance, see *Subsection 19(3)* of this Chapter.

Subsection 19(1)(d)

Third party information

19(1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:

> …
> (d) a statement of a financial account relating to a third party with respect to the provision of routine services from a government institution;
> …

(2) A head may give access to a record that contains information described in subsection (1) with the written consent of the third party to whom the information relates.

(3) Subject to Part V, a head may give access to a record that contains information described in subsection (1) if:

> (a) disclosure of that information could reasonably be expected to be in the public interest as it relates to public health, public safety or protection of the environment; and
>
> (b) the public interest in disclosure could reasonably be expected to clearly outweigh in importance any:
>
> > (i) financial loss or gain to;
> >
> > (ii) prejudice to the competitive position of; or
> >
> > (iii) interference with contractual or other negotiations of;
>
> a third party.

Subsection 19(1)(d) of FOIP is a mandatory, class-based exemption. It permits refusal of access in situations where a record contains a statement of a financial account relating to a third party with respect to the provision of routine services from a government institution.

FOIP contains a unique exemption for accounts for routine services rendered by a government institution to a third party.[794] Only the Northwest Territories and Nunavut's *Access to Information and Protection of Privacy Act,* S.N.W.T. 1994, c-20, has a similarly worded provision.

The following two-part test can be applied:

1. **Is the record a statement of a financial account relating to a third party with respect to the provision of routine services?**

A **statement** is a formal written or oral account, setting down facts, a document setting out the items of debit and credit between two parties.[795]

A **"statement of a financial account"** is not defined in FOIP. However, the following is helpful in interpreting what the Legislative Assembly intended by this phrase:

> A **statement of account** is a report issued periodically (usually monthly) by a creditor to a customer, providing certain information on the customer's account, including the amounts billed, credits given and the balance due;[796] a document setting out the items of debit and credit between two parties.[797]
>
> An **accounting** means a detailed statement of the debits and credits between parties to a contract or to a fiduciary relationship; a reckoning of monetary dealings.[798]
>
> An **account** means a record of financial expenditure and receipts; a bill taking the form of such a record.[799]
>
> **Financial** means of or pertaining to revenue or money matters.[800]

Relating to should be given a plain but expansive meaning.[801] The phrase should be read in its grammatical and ordinary sense. There is no need to incorporate complex requirements

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[794] McNairn, C., Woodbury, C., 2009, *Government Information: Access and Privacy*, Carswell: Toronto, p. 4-17.
[795] *The Shorter Oxford English Dictionary on Historical Principles*, Oxford University Press 1973, Volume 1 at p. 3006.
[796] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 1699.
[797] *The Shorter Oxford English Dictionary on Historical Principles*, Oxford University Press 1973, Volume 2 at p. 3006.
[798] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 21.
[799] Pearsall, Judy, *Concise Oxford Dictionary*, *10th Ed*., (Oxford University Press) at p. 8.
[800] *The Shorter Oxford English Dictionary on Historical Principles*, Oxford University Press 1973, Volume 1 at p. 964.
[801] *Gertner v. Lawyers' Professional Indemnity Company,* 2011 ONSC 6121 (CanLII) at [32].

(such as "substantial connection") for its application, which would be inconsistent with the plain unambiguous meaning of the words of the statute.[802] "*Relating to*" requires some connection between the information and the provision of routine services.[803]

With respect to are words of the widest possible scope; the phrase is probably the widest of any expression intended to convey some connection between two related subject matters.[804]

Routine means a regular course of procedure; an unvarying performance of certain acts; regular or unvarying procedure or performance.[805]

Services means labour performed in the interest or under the direction of others; the performance of some useful act or series of acts for the benefit of another, usually for a fee; an intangible commodity in the form of human effort, such as labour, skill or advice.[806]

FOIP defines a **third party** as a person, including an unincorporated entity, other than an applicant or a government institution.[807] A "local authority", as defined under subsection 2(1)(f) of *The Local Authority Freedom of Information and Protection of Privacy Act*, can also qualify as a third party for purposes of FOIP.[808]

2. Is the statement from a government institution?

FOIP defines a **government institution** at subsection 2(1)(d).

The statement must be from the government institution to meet the second part of the test.

Pursuant to subsection 19(2) of FOIP, where a record contains third party information, the government institution can release it with the written consent of the third party.

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[802] *Ministry of Attorney General and Toronto Star*, 2010 ONSC 991 (CanLII) at [45]. This case dealt specifically with an appeal regarding Ontario's FOIP legislation.
[803] Adapted from *Ministry of Attorney General and Toronto Star*, 2010 ONSC 991 (CanLII) at [43].
[804] The Supreme Court of Canada (SCC) established the meaning of the phrase "*in respect of*" in *Nowegijick v. The Queen*, [1983] 1 SCR 29, 1983 CanLII 18 (SCC) at [39]. The SCC later applied the same interpretation to the phrase "*with respect to*" in *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 SCR 743, 1999 CanLII 680 (SCC) at [15] to [17]. Summary of this can be found in Gardner, J., and Gardner K. (2016) *Sangan's Encyclopedia of Words and Phrases Legal Maxims*, Canada, 5th Edition, Volume 5, S to Z at p. w-97.
[805] *The Shorter Oxford English Dictionary on Historical Principles*, Oxford University Press 1973, Volume 1 at p. 2620.
[806] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 1643.
[807] *The Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01 at subsection 2(1)(j).
[808] SK OIPC Review Report 080-2018 at [51] and [52].

Pursuant to subsection 19(3) of FOIP, where a record contains third party information, the government institution can release it if disclosure is in the public interest and the information relates to public health, public safety or protection of the environment. In addition, the public interest clearly outweighs in importance any financial loss or gain, prejudice to competitive position or interference with contractual negotiations of the third party. For further guidance, see *Subsection 19(3)* of this Chapter.

IPC Findings

In Review Report 020-2016, the Commissioner considered the equivalent provision in LA FOIP. An applicant made an access to information request to the City of Lloydminster (City) for a copy of a proposal submitted by a third party for waste disposal services. The City withheld the proposal in full citing several provisions of LA FOIP including subsection 18(1)(d). Upon review, the Commissioner found that the portions being considered under subsection 18(1)(d) of LA FOIP was background information about the third party. The information did not relate to a specific financial account and did not appear to be a statement of any kind. Therefore, the Commissioner found that subsection 18(1)(d) of LA FOIP did not apply.

Subsection 19(1)(e)

Third party information

19(1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:

…

(e) a statement of financial assistance provided to a third party by a prescribed Crown corporation that is a government institution; or

…

(2) A head may give access to a record that contains information described in subsection (1) with the written consent of the third party to whom the information relates.

(3) Subject to Part V, a head may give access to a record that contains information described in subsection (1) if:

(a) disclosure of that information could reasonably be expected to be in the public interest as it relates to public health, public safety or protection of the environment; and

(b) the public interest in disclosure could reasonably be expected to clearly outweigh in importance any:

(i) financial loss or gain to;

(ii) prejudice to the competitive position of; or

(iii) interference with contractual or other negotiations of;

a third party.

Subsection 19(1)(e) of FOIP is a mandatory, class-based exemption. It permits refusal of access in situations where a record contains a statement of financial assistance provided to a third party by a prescribed Crown corporation that is a government institution.

FOIP contains a unique exemption for statements of financial assistance from a prescribed Crown corporation to a third party.[809] Only the Northwest Territories and Nunavut *Access to Information and Protection of Privacy Act,* S.N.W.T. 1994, c-20, have a similarly worded provision.

The following two-part test can be applied:

1. **Is the record a statement of financial assistance?**

A **statement** is a formal written or oral account, setting down facts, a document setting out the items of debit and credit between two parties.[810]

Financial assistance means any economic benefit, such as a scholarship or stipend, given by one person or entity to another.[811]

The exemption does not include records that merely list a company as having received a loan. It must include other details such as credits and debits to meet the definition of a statement of financial assistance.[812]

2. **Was the statement provided to a third party by a prescribed Crown corporation that is a government institution?**

See the Appendix, Part I of the FOIP *Regulations* for prescribed Crown corporations.

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[809] McNairn, C., Woodbury, C., 2009, *Government Information: Access and Privacy*, Carswell: Toronto, p. 4-17.
[810] *The Shorter Oxford English Dictionary on Historical Principles*, Oxford University Press 1973, Volume 1 at p. 3006.
[811] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 774.
[812] Originated from NWT IPC Review Report 05-049 *Dictionary on Historical Principles*, Oxford University Press 1973, Volume 1 at p. 3006.
[812] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 774.
[812] Originated from NWT IPC Review Report 05-049. Adopted in SK OIPC Review Report F-2013-003 at [56] and [57].

Subsection 2(1)(h) of FOIP provides:

> **2**(1) In this Act:
>
> …
>
> (h) **"prescribed"** means prescribed in the regulations;

When considering subsection 19(1)(e) of FOIP, section 11 of the FOIP *Regulations* should be considered. Section 11 of the FOIP *Regulations* provides:

> **Third party statements**
>
> **11** For the purposes of clause 19(1)(e) of the Act, the Agricultural Credit Corporation is prescribed as a Crown corporation the head of which is required to refuse to give access to a record that contains a statement of financial assistance provided to a third party.

Pursuant to subsection 19(2) of FOIP, where a record contains third party information, the government institution can release it with the written consent of the third party.

Pursuant to subsection 19(3) of FOIP, where a record contains third party information, the government institution can release it if disclosure is in the public interest and the information relates to public health, public safety or protection of the environment. In addition, the public interest clearly outweighs in importance any financial loss or gain, prejudice to competitive position or interference with contractual negotiations of the third party. For further guidance, see *Subsection 19(3)* of this Chapter.

IPC Findings

In Review Report F-2013-003, the Commissioner considered subsection 19(1)(e) of FOIP for the first time. An applicant made an access to information request to the Ministry of Agriculture for records related to the planning, share purchase and takeover of two businesses by Agri-Food Equity Fund in 1998. The Ministry responded to the applicant advising that the records were being withheld in full citing several provisions under FOIP including subsection 19(1)(e) of FOIP. Upon review, the Ministry asserted that the correspondence and documents related to the provision of financial assistance to a business through the sale of the AgriFood Equity Fund (AFEF) shares. Further, that the AFEF was part of the Agricultural Corporation of Saskatchewan (ACS), which was a prescribed Crown corporation under FOIP at the time. Finally, that the records detailed proposed shares for debt transactions, as well as the loans owed AFEF by two third parties. The Commissioner found that although some of the records qualified as a statement of financial assistance, the Ministry did not identify which third party benefited from the financial assistance. As such,

the Commissioner found that the Ministry had not met the burden of proof in demonstrating that subsection 19(1)(e) of FOIP applied to the records.

In Review Report F-2014-002, the Commissioner considered subsection 19(1)(e) of FOIP. An applicant made an access to information request to Saskatchewan Crop Insurance Corporation (SCIC) for cultivated and seeded acres claimed by tenants on the applicant's land between 2001 and 2010 SCIC responded to the applicant indicating that the information was being withheld citing several provisions including subsection 19(1)(e) of FOIP. Upon review, the SCIC asserted that the SCIC was a prescribed Crown corporation. Furthermore, the information related to financial assistance provided by SCIC to an Operator. The Commissioner found that no portion of the Seeded Acreage Reports appeared to be a statement of financial assistance. As such, the Commissioner found that subsection 19(1)(e) of FOIP did not apply.

Subsection 19(1)(f)

Third party information

19(1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:

...

(f) information supplied by a third party to support an application for financial assistance mentioned in clause (e).

(2) A head may give access to a record that contains information described in subsection (1) with the written consent of the third party to whom the information relates.

(3) Subject to Part V, a head may give access to a record that contains information described in subsection (1) if:

(a) disclosure of that information could reasonably be expected to be in the public interest as it relates to public health, public safety or protection of the environment; and

(b) the public interest in disclosure could reasonably be expected to clearly outweigh in importance any:

(i) financial loss or gain to;

(ii) prejudice to the competitive position of; or

(iii) interference with contractual or other negotiations of;

a third party;

Subsection 19(1)(f) of FOIP is a mandatory class-based exemption. It permits refusal of access in situations where a record contains information supplied by a third party to support an application for financial assistance mentioned in clause (e).

FOIP contains a unique exemption for applications for financial assistance from a prescribed Crown corporation to a third party.[813] Only the Northwest Territories and Nunavut *Access to Information and Protection of Privacy Act,* S.N.W.T. 1994, c-20, have a similarly worded provision.

The following two-part test can be applied:

1. Was the information to support an application for financial assistance?

The provision is intended to protect information that a third party provides to a Crown corporation, which supports its application for financial assistance.

Support means to corroborate.[814]

Application means a formal request to an authority.[815]

Financial assistance means any economic benefit, such as a scholarship or stipend, given by one person or entity to another.[816]

2. Was the information supplied by a third party?

Supplied means provided or furnished.[817]

Information may qualify as "supplied" if it was directly supplied to a government institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.[818]

Information gathered by government inspectors via their own observations does not qualify as information "supplied" to the government institution. Judgements or conclusions

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[813] McNairn, C., Woodbury, C., 2009, *Government Information: Access and Privacy*, Carswell: Toronto, p. 4-17.
[814] Pearsall, Judy, *Concise Oxford Dictionary*, *10th Ed*., (Oxford University Press) at p. 1440.
[815] Pearsall, Judy, *Concise Oxford Dictionary*, *10th Ed*., (Oxford University Press) at p. 64.
[816] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 774.
[817] British Columbia Government Services, *FOIPPA Policy Definitions* at https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/policy-definitions#supplied. Accessed August 21, 2019.
[818] SK OIPC Review Reports F-2005-003 at [17], F-2006-002 at [40].

expressed by officials based on their own observations generally cannot be said to be information supplied by a third party.[819]

Records can still be "supplied" even when they originate with the government institution (i.e., the records still may contain or repeat information extracted from documents supplied by the third party). However, the third-party objecting to disclosure will have to prove that the information originated with it and that it is confidential.[820]

Whether confidential information has been "supplied" to a government institution by a third party is a question of fact. The content rather than the form of the information must be considered: the mere fact that the information appears in a government document does not, on its own, resolve the issue.[821]

Pursuant to subsection 19(2) of FOIP, where a record contains third party information, the government institution can release it with the written consent of the third party.

Pursuant to subsection 19(3) of FOIP, where a record contains third party information, the government institution can release it if disclosure is in the public interest and the information relates to public health, public safety or protection of the environment. In addition, the public interest clearly outweighs in importance any financial loss or gain, prejudice to competitive position or interference with contractual negotiations of the third party. For further guidance, see *Subsection 19(3)* of this Chapter.

IPC Findings

In Review Report F-2013-003, the Commissioner considered subsection 19(1)(f) of FOIP for the first time. An applicant made an access to information request to the Ministry of Agriculture for records related to the planning, share purchase and takeover of two businesses by Agri-Food Equity Fund in 1998. The Ministry responded to the applicant advising that the records were being withheld in full citing several provisions under FOIP including subsection 19(1)(f). Upon review, the Ministry asserted that subsection 19(1)(f) applied to the project submissions provided by the third party which outlined proposals, plans, amount of debt, marketing plans, financial analysis statements etc. Furthermore, that the third party supplied sales figures, sales projections, losses incurred by the third party, projected losses, as well as information related to inspections and improvements. The Ministry asserted that this information was provided to request additional investment in the third party by AgriFood Equity Fund (AFEF). The Ministry asserted that the AFEF was part of

[819] *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 SCR 23, 2012 SCC 3 (CanLII) at [156] and [158].
[820] *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 SCR 23, 2012 SCC 3 (CanLII) at [157].
[821] *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 SCR 23, 2012 SCC 3 (CanLII) at [158].

the Agricultural Corporation of Saskatchewan (ACS), which was a prescribed Crown corporation under FOIP at the time. The Commissioner found that although the Ministry claimed the records were provided by the third party, it appeared the record was created by AFEF. Further, that the record appeared to be commenting and making recommendations with respect to the third party's need for financial assistance. AFEF was apparently a business unit of the crown corporation. The Commissioner found that the record was supplied to the Ministry by another government institution. As such, the Commissioner found that the burden of proof was not met in establishing that subsection 19(1)(f) of FOIP applied.

In Review Report F-2014-002, the Commissioner considered subsection 19(1)(f) of FOIP. An applicant made an access to information request to Saskatchewan Crop Insurance Corporation (SCIC) for cultivated and seeded acres claimed by tenants on the applicant's land between 2001 and 2010. SCIC responded to the applicant indicating that the information was being withheld citing several provisions including subsection 19(1)(f) of FOIP. Upon review, the SCIC asserted that the SCIC was a prescribed Crown corporation. Furthermore, the information related to financial assistance provided by SCIC to an Operator. The Commissioner found that SCIC did not offer any evidence that the third party supplied the information in the Seeded Acreage Reports for the purposes of financial assistance. Due to the lack of persuasive argument and lack of evidence offered, the Commissioner found that subsection 19(1)(f) of FOIP did not apply.

Subsection 19(2)

Third party information

19(2) A head may give access to a record that contains information described in subsection (1) with the written consent of the third party to whom the information relates.

Subsection 19(2) of FOIP provides that the government institution may give access to a record that contains third party information if the third-party consents in writing to disclosure. The provision is intended to prevent situations where the government institution would be under an obligation to withhold a record when the third party agreed to disclosure.[822]

[822] Treasury Board of Canada Secretariat, *Access to Information Manual, Chapter 11.14.10*. Available at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11_14. Accessed November 19, 2019.

If the government institution determines that the information qualifies as third-party information, it should make a reasonable effort to seek the consent of the third party to disclose the requested information.[823]

Subsection 19(3)

Third party information

19(3) Subject to Part V, a head may give access to a record that contains information described in subsection (1) if:

(a) disclosure of that information could reasonably be expected to be in the public interest as it relates to public health, public safety or protection of the environment; and

(b) the public interest in disclosure could reasonably be expected to clearly outweigh in importance any:

(i) financial loss or gain to;

(ii) prejudice to the competitive position of; or

(iii) interference with contractual or other negotiations of;

a third party.

Subsection 19(3) of FOIP is a discretionary provision for the release of third-party information in circumstances where the head of the government institution forms the opinion that disclosure "could reasonably be in the public interest as it relates to public health, public safety or protection of the environment".

A government institution should consider subsection 19(3) of FOIP when dealing with third party information. A government institution should first determine that the information is indeed third-party information pursuant to one of the subsections outlined at 19(1) of FOIP. If it is, then consider subsection 19(3) of FOIP.

To properly apply the provision, government institutions should do the following:[824]

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[823] Treasury Board of Canada Secretariat, *Access to Information Manual, Chapter 11.14.10*. Available at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11_14. Accessed September 4, 2019.
[824] Treasury Board of Canada Secretariat, *Access to Information Manual, Chapter 11.14.11*. Available at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11_14. Accessed September 4, 2019.

i) Determine whether the information qualifies or might qualify for exemption pursuant to subsection 19(1) of FOIP.

   The public interest "override" comes into play only when all or part of a record falls within one or more of the classes of records described in subsection 19(1) of FOIP.

ii) Determine whether the record is related to public health, public safety or protection of the environment.

   When undertaking the initial review of records, consider immediately whether a public interest "override" may come into play.

iii) Consider whether disclosure of the record related to public health, public safety or protection of the environment may be in the public interest.

iv) Send a notice to the third party pursuant to section 34 of FOIP.

   If the records are related to public health, public safety or protection of the environment, government institutions should ask the third party to provide not only representations as to why they consider the information to be exempted from disclosure but also reasons why disclosure in the public interest should not outweigh in importance the injury involved. The government institution should be very clear about the type of information needed from the third party to decide.

v) Analyze the representations of the third party.

   Once the representations have been received, government institutions should thoroughly analyze the arguments presented by the third party to justify subsection 19(1) exemptions.

   If the government institution accepts the third party's representations as substantiating an exemption under subsection 19(1) of FOIP, it must then consider the representations made against disclosure in the public interest.

   Once a decision is made, the government institution should provide notification procedures as set out in section 37 of FOIP.

The following three-part test can be applied:

1. **Does the information relate to public health, public safety or protection of the environment?**

Relates to should be given a plain but expansive meaning.[825] The phrase should be read in its grammatical and ordinary sense. There is no need to incorporate complex requirements (such as "substantial connection") for its application, which would be inconsistent with the plain unambiguous meaning of the words of the statute.[826] "*Relating to*" requires some connection between the information and public health, public safety or protection of the environment.[827]

Public health means the health of the community at large, the healthful or sanitary condition of the general body of people or the community collectively; especially the methods of maintaining the health of the community, as by preventative medicine an organized care for the sick.[828] Public health refers to the well-being of the public at large. This may include physical, mental or emotional health.[829]

Public safety means the welfare and protection of the general public, usually expressed as a governmental responsibility.[830]

Protection of the environment refers to guarding or defending natural surroundings, i.e., plants and animals. For example, it may be necessary to disclose the information of an industrial plant that is discharging toxic wastes into a waterway.[831]

2. **Could disclosure of the information reasonably be expected to be in the public interest?**

There must be a public interest in disclosure of the information, not a private interest.

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[825] *Gertner v. Lawyers' Professional Indemnity Company,* 2011 ONSC 6121 (CanLII) at [32].
[826] Adapted from *Ministry of Attorney General and Toronto Star*, 2010 ONSC 991 (CanLII) at [45].
[827] Adapted from *Ministry of Attorney General and Toronto Star*, 2010 ONSC 991 (CanLII) at [43].
[828] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 864.
[829] Government of Newfoundland and Labrador resource, *Access to Information: Policy and Procedures Manual, October 2017* at p. 103.
[830] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 1488.
[831] British Columbia Government Services, *FOIPPA Policy Definitions* at https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/policy-definitions. Accessed April 23, 2020.

Public interest is not black and white; it is a matter of degree. There is always a balance to be struck.[832] In determining if there is a public interest, the following can be considered:[833]

- Whose interests would be affected by disclosure other than the third party.
    - Individual
    - General
    - Describe affected group
- Does the information concern an event/proposal/incident/condition involving health, safety, or protection of the environment.
    - If so, what group in the public is affected by the event/proposal/incident/condition
- Is the event/proposal/incident/condition one which requires government approval.
- Did it result in government enforcement activity or investigation.
- Did it involve contravention or violation of standards in health, safety, and environmental protection.
    - Describe the extent of the danger or risk
    - Who is affected by the danger or risk
- Has the danger or risk been alleviated.
    - To what extent
    - When
    - What was the degree of exposure to the danger or risk before it was alleviated
    - For how long
- What was the impact of any past event/incident described in the record.
    - Describe the degree or extent
- What are the remaining effects or impacts.
- Are people, animals or environment currently exposed to the dangers or risks arising from the event described in the information.

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[832] AB IPC Order 096-002 at p. 17.

[833] Information Commissioner of Canada resource, *Investigator's Guide to Interpreting the Act, Section 20(2), (5), (6): Questions – Disclosure Authorized in Public Interest*. Available at https://www.oic-ci.gc.ca/en/investigators-guide-interpreting-act/section-20256-questions-disclosure-authorized-public-interest. Accessed September 4, 2019.

- To what degree

- Have the issues described in the information been publicly examined elsewhere.
    - In an ongoing process
- Will the process likely result in disclosure of the information to the public or in public discussion of the information.
- What are the dangers, if any, that would be caused by disclosure (aside from 19(1) harm).
    - What are they
    - Why would they arise

Subsection 19(3) of FOIP includes the requirement that the information "*could reasonably be expected*" to be in the public interest. The meaning of the phrase **"could reasonably be expected to"** in terms of harm-based exemptions was considered by the Supreme Court of Canada in *Ontario (Community Safety and Correctional Service) v. Ontario (Information and Privacy Commissioner), (2014)*. Although this part of the provision does not contemplate harm, the threshold proposed by the Supreme Court is instructive:

> This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences"…

3. **Could the public interest in disclosure reasonably be expected to clearly outweigh the importance of the financial loss or gain, prejudice to competitive positions or interference with contractual relationships relating to a third party?**

Clear means free from doubt; sure; unambiguous.[834]

[834] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition.* St. Paul, Minn.: West Group at p. 317.

Use of the word "*clearly*" means the test is rigorous, limiting the applicability of the public interest "override".[835]

Outweigh means to be of more importance or value than something else.[836]

In determining if the public interest clearly outweighs in importance the financial loss or gain, competitive prejudice or interference in negotiations of a third party, the following can be considered:[837]

- Quantify the financial loss or gain, prejudice to competitive position or degree of interference in negotiations of the third party.
- In the case of information described in subsection 19(1), what degree of importance is attached to keeping the information confidential.
- What is the nature of the relationship between the government institution and the third party, i.e., why did the third party supply the information to the government.
    - Voluntary
        - If so, what were the circumstances.
    - Mandatory
- Describe any chilling effect of disclosure, if any.
- Describe any impact on the government relationship or duty it must maintain information in a confidential fashion.
- What factors did the government institution consider in assessing whether subsection 19(3) applies.
- Why did the government institution decide not to disclose pursuant to subsection 19(3).
- Did the government institution consider the purposes of FOIP in its decision. For example:
    - Provides for the right of access.
    - Government information should be available to the public.

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[835] Treasury Board of Canada Secretariat, *Access to Information Manual, Chapter 11.14.11*. Available at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11_14. Accessed September 4, 2019.
[836] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 1330.
[837] Information Commissioner of Canada resource, *Investigator's Guide to Interpreting the Act, Section 20(2), (5), (6): Questions – Disclosure Authorized in Public Interest*. Available at https://www.oic-ci.gc.ca/en/investigators-guide-interpreting-act/section-20256-questions-disclosure-authorized-public-interest. Accessed September 4, 2019.

    - Necessary exemptions should be limited and specific.

- Did the government institution consider:
    - The value of public education with respect to the subject matter of the information.
    - Public confidence in regulatory, enforcement or investigatory systems.
    - Need for public awareness of successes or failures of regulatory enforcement or investigatory systems.
    - The need for public awareness of legislative or regulatory gaps or inadequacies in the areas of public health, safety, or environmental protection.
- Were the interests of all groups interested in disclosure of the information considered.
    - How
- What is the danger of further disclosure.
- Was the decision not to apply subsection 19(3) based in part on a fear of public confusion.
    - If so, what would give rise to or cause the confusion.
- Could the government institution take measures to reduce or eliminate the dangers.
    - Are there public relations measures.
    - Are there explanations that can be given.
    - Why could no other measures be taken.
- Could the third party take measures (with respect to subsection 19(1) information) that could reduce the impact on them of disclosure.
    - What measures.
    - Why could no measures be taken.
- Was the government's own performance an issue in the consideration leading to a decision to not apply subsection 19(3) of FOIP.
- Have there been any allegations of impropriety, negligence, cover-up or inadequacy about the government institution arising from the matters described in the records.
- Has the government institution responded to these allegations.

Subsection 19(3) of FOIP includes the requirement that the public interest in disclosure "*could reasonably be expected*" to clearly outweigh in importance the harms listed. The meaning of the phrase **"could reasonably be expected to"** in terms of harm-based exemptions was

considered by the Supreme Court of Canada in *Ontario (Community Safety and Correctional Service) v. Ontario (Information and Privacy Commissioner), (2014)*:

> This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences"…

IPC Findings

The Commissioner considered subsection 19(3) of FOIP in Review Report 043-2015. An applicant made an access to information request to the Ministry of Environment for the "2012 and 2013 Water and Air Quality Compliance Reports". The Ministry withheld portions of the two reports citing subsections 19(1)(b) and (c) of FOIP (third party information). Upon review, the Commissioner found that subsection 19(1)(c) of FOIP applied to portions of the reports. Furthermore, the Commissioner found that the public interest resulting from disclosure of the information would outweigh in importance, any financial loss or prejudice to the competitive position of the third party. As such, the Commissioner found that subsection 19(1)(3) of FOIP applied. The Commissioner recommended release.

Section 20: Testing Procedures, Tests and Audits

Testing procedures, tests and audits

20 A head may refuse to give access to a record that contains information relating to:

(a) testing or auditing procedures or techniques; or

(b) details of specific tests to be given or audits to be conducted;

if disclosure could reasonably be expected to prejudice the use or results of particular tests or audits.

Section 20 of FOIP is a discretionary, harm-based provision. The provision is intended to protect records that contain information relating to:

Office of the Saskatchewan Information and Privacy Commissioner. Guide to FOIP, Chapter 4, *Exemptions from the Right of Access*. Updated 8 April 2024.

- Test or auditing procedures or techniques;
- Details of specific tests to be given; or
- Details of specific audits to be conducted.

In addition, the consequences of disclosure must almost certainly lead to:

- The inability to use the test or auditing procedure; or
- The inability to use or rely upon the tests or to use the techniques etc.[838]

Subsection 20(a)

Testing procedures, tests and audits

20 A head may refuse to give access to a record that contains information relating to:

(a) testing or auditing procedures or techniques; or

...

if disclosure could reasonably be expected to prejudice the use or results of particular tests or audits.

Subsection 20(a) of FOIP is a discretionary, harm-based exemption. It permits refusal of access in situations where a record contains information relating to testing or auditing procedures or techniques if disclosure could reasonably be expected to prejudice the use or results of particular tests or audits.

The following two-part test can be applied:

1. **Does the record contain information relating to testing or auditing procedures or techniques?**

Relating to should be given a plain but expansive meaning.[839] The phrase should be read in its grammatical and ordinary sense. There is no need to incorporate complex requirements (such as "substantial connection") for its application, which would be inconsistent with the

[838] Information Commissioner of Canada resource, *Investigator's Guide to Interpreting the Act, Section 22: Testing or Audits*. Available at https://www.oic-ci.gc.ca/en/investigators-guide-interpreting-act/section-22-testing-or-audits. Accessed September 5, 2019.
[839] *Gertner v. Lawyers' Professional Indemnity Company,* 2011 ONSC 6121 (CanLII) at [32].

plain unambiguous meaning of the words of the statute.[840] "*Relating to*" requires some connection between the information and the testing or auditing procedures or techniques.[841]

A **test** is a set of questions, exercises, or practical activities that measure either what someone knows or what someone or something is like or can do.[842]

An **audit** is the formal examination of an individual's or organization's accounting records, financial situation or compliance with some other set of standards.[843] It is the systematic identification, evaluation and assessment of an organization's policies, procedures, acts and practices against pre-defined standards.[844]

Procedures are the manner of proceeding; a system of proceeding; conduct, behavior.[845]

Techniques are the manner of execution or performance in relation to mechanical or formal details; a skillful or efficient way of doing or achieving something.[846]

The terms **testing** and **auditing** cover a wide range of activities. Examples include environmental testing, language testing, personnel audits, financial audits, staffing examinations and program audits. The exemption applies to testing and auditing carried out by government institutions, consultants, and contractors.[847]

2. Could disclosure reasonably be expected to prejudice the use or results of particular tests or audits?

"Could reasonably be expected to" means there must be a reasonable expectation that disclosure could prejudice the use or results of particular tests or audits. The Supreme Court of Canada set out the standard of proof for harms-based provisions as follows:

> This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to"

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[840] *Ministry of Attorney General and Toronto Star*, 2010 ONSC 991 (CanLII) at [45]. This case dealt specifically with an appeal regarding Ontario's FOIP legislation.
[841] Adapted from *Ministry of Attorney General and Toronto Star*, 2010 ONSC 991 (CanLII) at [43].
[842] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 1776.
[843] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 161.
[844] SK OIPC Review Report F-2010-001 at [97].
[845] *The Shorter Oxford English Dictionary on Historical Principles*, Oxford University Press 1973, Volume 2 at p. 2355.
[846] *The Shorter Oxford English Dictionary on Historical Principles*, Oxford University Press 1973, Volume 2 at p. 3194.
[847] Treasury Board of Canada Secretariat, *Access to Information Manual, Chapter 11.19*. Available at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11_19. Accessed September 5, 2019

> language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences"…[848]

The government institution does not have to prove that a harm is probable but needs to show that there is a "reasonable expectation of harm" if any of the information were to be released. In *British Columbia (Minister of Citizens' Service) v. British Columbia (Information and Privacy Commissioner), (2012)*, Bracken J. confirmed it is the release of the information itself that must give rise to a reasonable expectation of harm.

Government institutions should not assume that the harm is self-evident. The harm must be described in a precise and specific way in order to support the application of the provision.

The expectation of harm must be reasonable, but it need not be a certainty. The evidence of harm must:

- Show how the disclosure of the information would cause harm;
- Indicate the extent of harm that would result; and
- Provide facts to support the assertions made.[849]

Prejudice in this context refers to detriment to the use or to the results of tests or audits.[850]

The provision may 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 the audit having to be abandoned as a result. Test questions that are regularly used – for example, in making staffing decisions - may qualify.[851]

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[848] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2014] 1 SCR 674, 2014 SCC 31 (CanLII) at [54].
[849] Treasury Board of Canada Secretariat, *Access to Information Manual, Chapter 11.14.4*. Available at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11_14. Accessed August 29, 2019.
[850] Adapted from Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 149.
[851] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 195.

For subsection 20(a) of FOIP, the provision primarily protects testing or auditing procedures and techniques; the testing/auditing mechanism, not the content.[852]

The exemption does not cover the results of tests or audits.[853]

IPC Findings

In Review Report F-2010-001, the Commissioner considered subsection 20(a) of FOIP. An applicant made an access to information request to the Ministry of Health for information related to the inclusion and interpretation of section 57 of *The Health Information Protection Act* (HIPA), policy rationale related to proposed HIPA Regulations covering 12 years. The applicant also requested information pertaining to submissions received during the public consultation for the HIPA Regulations. The Ministry withheld portions of the records pursuant to several provisions of FOIP including subsection 20(a). Upon review, the Commissioner found that a privacy impact assessment (PIA) qualified as an audit for purposes of subsection 20(a) of FOIP. However, the provision was found not to apply, as a PIA was a fact-finding exercise where the questions remained constant. The responses change with the circumstances. The exemption was intended to primarily protect procedures and techniques: the testing mechanism and not the content. As such, the Commissioner found that subsection 20(a) of FOIP did not apply. The Commissioner recommended release of the PIA.

In Review Report 145-2015, the Commissioner considered subsection 20(a) of FOIP. An applicant made an access to information request to Saskatchewan Power Corporation (SaskPower) for a copy of the investigation report prepared by SaskPower that led to the applicant's termination along with copies of email conversations and calibration session comments. SaskPower responded to the applicant advising that the investigation report was being withheld pursuant to several provisions of FOIP including subsection 20(a). Upon review, the Commissioner found that the investigation performed by SaskPower would qualify as an audit for the purposes of section 20 of FOIP. However, the techniques or procedures must include specific steps. General information, such as forms and standard policies that did not include specific steps and procedures, would not qualify. Routine, common or customary auditing techniques and procedures would not qualify. The Commissioner found that three portions of the investigation report, which included a section titled, *Forensic Analysis Procedures*, would constitute auditing techniques or procedures. Further, the Commissioner was persuaded that the release of the auditing techniques and procedures could reasonably be expected to prejudice the use or results of particular tests or

[852] SK OIPC Review Report F-2010-001 at [102].
[853] *Canada (Information Commissioner) v. Ponts Jacques Cartier & Champlain Inc.* (2000), 8 C.P.R. (4th) 536 (Fed. T.D.) at 543-545.

audits. As such, the Commissioner found that subsection 20(a) of FOIP applied to portions of the investigation report.

In Review Report 231-2015, the Commissioner considered subsection 20(a) of FOIP. An applicant made an access to information request to the Ministry of Economy (Economy) for specific potash royalty information. Economy responded to the applicant advising that records were being withheld under several provisions of FOIP including subsection 20(a). Economy applied subsection 20(a) to royalty and tax audit reports. Economy asserted that the royalty and tax audit reports outlined specific steps taken by the auditor to analyze the company's returns. Furthermore, the identification of the subject areas reviewed represented an auditing technique by which the auditor is able to focus on the areas most likely to reveal shortfalls in tax reported. The Commissioner was persuaded that subsection 20(a) of FOIP applied to the audit reports.

Subsection 20(b)

Testing procedures, tests and audits

20 A head may refuse to give access to a record that contains information relating to:

…

(b) details of specific tests to be given or audits to be conducted;

if disclosure could reasonably be expected to prejudice the use or results of particular tests or audits.

Subsection 20(b) of FOIP is a discretionary, harm-based provision. This provision protects details relating to specific tests to be given or audits to be conducted.

The following two-part test can be applied:

1. **Does the record contain information relating to details of specific tests to be given or audits to be conducted?**

Relating to should be given a plain but expansive meaning.[854] The phrase should be read in its grammatical and ordinary sense. There is no need to incorporate complex requirements (such as "substantial connection") for its application, which would be inconsistent with the

[854] *Gertner v. Lawyers' Professional Indemnity Company,* 2011 ONSC 6121 (CanLII) at [32].

plain unambiguous meaning of the words of the statute.[855] "*Relating to*" requires some connection between the information and the testing or auditing procedures or techniques.[856]

Details means a number of particulars; an aggregate of small items.[857]

A **test** is a set of questions, exercises or practical activities that measure either what someone knows or what someone or something is like or can do.[858]

An **audit** is the formal examination of an individual's or organization's accounting records, financial situation or compliance with some other set of standards.[859] It is the systematic identification, evaluation and assessment of an organization's policies, procedures, acts and practices against pre-defined standards.[860]

The terms **testing** and **auditing** cover a wide range of activities. Examples include environmental testing, language testing, personnel audits, financial audits, staffing examinations and program audits. The exemption applies to testing and auditing carried out by government institutions, consultants, and contractors.[861]

2. Could disclosure reasonably be expected to prejudice the use or results of particular tests or audits?

"Could reasonably be expected to" means there must be a reasonable expectation that disclosure could prejudice the use or results of particular tests or audits. The Supreme Court of Canada set out the standard of proof for harms-based provisions as follows:

> This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well

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[855] *Ministry of Attorney General and Toronto Star*, 2010 ONSC 991 (CanLII) at [45]. This case dealt specifically with an appeal regarding Ontario's FOIP legislation.
[856] Adapted from *Ministry of Attorney General and Toronto Star*, 2010 ONSC 991 (CanLII) at [43].
[857] British Columbia Government Services, *FOIPPA Policy Definitions* at https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/policy-definitions. Accessed April 23, 2020.
[858] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 1776.
[859] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 161.
[860] SK OIPC Review Report F-2010-001 at [97].
[861] Treasury Board of Canada Secretariat, *Access to Information Manual, Chapter 11.19*. Available at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11_19. Accessed September 5, 2019

beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences"…[862]

The government institution does not have to prove that a harm is probable but needs to show that there is a "reasonable expectation of harm" if any of the information were to be released. In *British Columbia (Minister of Citizens' Service) v. British Columbia (Information and Privacy Commissioner), (2012),* Bracken J. confirmed it is the release of the information itself that must give rise to a reasonable expectation of harm.

Government institutions should not assume that the harm is self-evident. The harm must be described in a precise and specific way in order to support the application of the provision.

The expectation of harm must be reasonable, but it need not be a certainty. The evidence of harm must:

- Show how the disclosure of the information would cause harm;
- Indicate the extent of harm that would result; and
- Provide facts to support the assertions made.[863]

Prejudice in this context refers to detriment to the use or to the results of tests or audits.[864]

It is generally 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.[865]

The exemption does not cover the results of tests or audits.[866]

IPC Findings

[862] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2014] 1 SCR 674, 2014 SCC 31 (CanLII) at [54].
[863] Treasury Board of Canada Secretariat, *Access to Information Manual, Chapter 11.14.4*. Available at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11_14. Accessed August 29, 2019.
[864] Adapted from Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 149.
[865] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 195.
[866] *Canada (Information Commissioner) v. Ponts Jacques Cartier & Champlain Inc.* (2000), 8 C.P.R. (4th) 536 (Fed. T.D.) at 543-545.

In Review Report 159-2016, the Commissioner considered subsection 20(b) of FOIP. An applicant made an access to information request to the Global Transportation Hub Authority (GTH) for all internal records related to Brightenview International Developments Inc. between January 1, 2013 and April 5, 2016. The GTH responded to the applicant advising that access to the records was denied pursuant to several provisions of FOIP including subsection 20(b). The GTH applied the exemption to one email where the GTH responded to questions of an external auditor who was hired to perform an audit for the GTH. It also applied the exemption to the attachments to the email that demonstrated the approval for travel of one of its employees. Upon review, the Commissioner found that the exemption does not apply to the perception of the results of a completed audit. Furthermore, the exemption applied to testing and auditing procedures and techniques or the mechanism, not the content. As the withheld information related to the content of an audit, the Commissioner was not convinced that subsection 20(b) of FOIP applied.

Section 21: Danger to Health or Safety

Danger to health or safety

21 A head may refuse to give access to a record if the disclosure could threaten the safety or the physical or mental health of an individual.

Section 21 of FOIP is a discretionary, harm-based exemption. It permits refusal of access in situations where disclosure of a record could threaten the safety or the physical or mental health of an individual.

Every jurisdiction in Canada (except Quebec) has a similarly worded provision as Saskatchewan's section 21 of FOIP. However, the thresholds for every other jurisdiction are higher and use the "*could reasonably be expected*" threshold. No other jurisdiction in Canada has the same lower threshold as Saskatchewan's section 21.

The following test can be applied:

Could disclosure of the record threaten the safety or the physical or mental health of an individual?

For section 21 of FOIP, the question that must be answered is **could** disclosure of the record threaten the safety or the physical or mental health of an individual? The threshold for "*could*" is somewhat lower than a reasonable expectation but well beyond or considerably

above mere speculation. On the continuum, speculation is at one end and certainty is at the other. The threshold for "*could*" therefore, is that which is possible.

Speculative means engaged in, expressing or based on conjecture rather than knowledge. *Conjecture* is an opinion or conclusion based on incomplete information.[867] Speculation generally has no objective basis. If the harm is fanciful or exceedingly remote, it is in the realm of speculation or conjecture.

Possible means capable of existing, happening, or being achieved; that which is not certain or probable.[868]

Probable means likely to happen or be the case.[869]

If it is fanciful or exceedingly remote, the exemption should not be invoked.[870] For this provision to apply there must be objective grounds for believing that disclosing the information *could* result in the harm alleged.

Generally, this means the government institution must assess the risk and determine whether there are reasonable grounds for concluding there is a danger to the health or safety of any person. The assessment must be specific to the circumstances under consideration. Inconvenience, upset or the unpleasantness of dealing with difficult or unreasonable people is not sufficient to trigger the exemption. The threshold cannot be achieved based on unfounded, unsubstantiated allegations.[871]

The government institution should be able to detail what the harm is and to whom the harm threatens if the information were released.

To **threaten** means to be likely to injure; be a source of harm or danger to.[872] It means to create the possibility or risk of harm or jeopardize an individual's safety or mental or physical well-being.[873]

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[867] Pearsall, Judy, *Concise Oxford Dictionary*, *10th Ed*., (Oxford University Press) at pp. 1379 and 301.
[868] Pearsall, Judy, *Concise Oxford Dictionary*, *10th Ed*., (Oxford University Press) at p. 1117.
[869] Pearsall, Judy, *Concise Oxford Dictionary*, *10th Ed*., (Oxford University Press) at p. 1139.
[870] SK OIPC Review Reports LA-2007-001 at [117], LA-2013-001 at [35], F-2014-001 at [149].
[871] SK OIPC Review Reports H-2007-001 at [29] and LA-2012-002 at [45] and [102].
[872] *The Shorter Oxford English Dictionary on Historical Principles*, Oxford University Press 1973, Volume 2 at p. 3248.
[873] British Columbia Government Services, *FOIPPA Policy Definitions* at https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/policy-definitions. Accessed April 23, 2020.

Safety means the state of being protected from or guarded against hurt or injury; freedom from danger.[874]

Physical health refers to the well-being of an individual's physical body.[875] Determination of the effect of a release of information on an individual's physical health must consider the current or normal state of health of persons who may be affected by the release of information, as well as the decline in health that is expected to occur if the information is disclosed to the applicant.[876]

Mental health means the condition of a person in respect of the functioning of the mind.[877] It means the ability of a person's mind to function in its normal state. Determination of the effect of a release of information on a person's mental health must, where practicable, be based on a subjective evaluation made on a case-by-case basis.[878]

The exemption can apply where the nature of the applicant is the reason harm may occur. For example:

> *Mental health*: where the applicant has a history of mental or emotional difficulties and disclosure of the information could worsen or aggravate his/her condition to the point that he/she could harm someone.
>
> *Violent behavior*: where the applicant has a history of violent behavior and disclosure of the identity of informants who assisted the government in its case against the applicant could endanger the safety of the informants.[879]

It is fair then to look at the probable effect of disclosure from the perspective of the applicant – i.e., what use might this specific applicant make of the requested information? What, in view

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[874] *The Shorter Oxford English Dictionary on Historical Principles*, Oxford University Press 1973, Volume 2 at p. 2647.
[875] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 137.
[876] British Columbia Government Services, *FOIPPA Policy Definitions* at https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/policy-definitions. Accessed April 23, 2020.
[877] *The Shorter Oxford English Dictionary on Historical Principles*, Oxford University Press 1973, Volume 1 at p. 1220.
[878] British Columbia Government Services, *FOIPPA Policy Definitions* at https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/policy-definitions. Accessed April 23, 2020.
[879] Information Commissioner of Canada resource, *Investigator's Guide to Interpreting the Act, Section 17: Safety of Individuals.* Available at https://www.oic-ci.gc.ca/en/investigators-guide-interpreting-act/section-17-safety-individuals. Accessed September 6, 2019.

of what is known about the applicant, might the applicant do to themselves or someone else if the information is disclosed?[880]

For example, the mental or physical health of a person would be threatened if information were disclosed to an applicant that would cause severe stress such as suicidal ideation or that could result in verbal or physical harassment or stalking. Individual safety could be threatened if information were released that allowed someone who had threatened to kill or injure the individual to locate them. 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, or an employee who has been threatened.[881]

If the information is already available elsewhere to the public, there may be no need for the exemption.[882]

IPC Findings

In *Evenson v Kelsey Trail Regional Health Authority, (2012)*, Justice Zarzeczny considered the equivalent provision in *The Local Authority Freedom of Information and Protection of Privacy Act*, (section 20). Kelsey Trail Regional Health Authority (KTRHA) had denied an applicant access to certain hospital records including the names of nurses that were on duty at the Melfort Hospital during a specific time. Justice Zarzeczny ruled that KTRHA had not established that the exemption applied. Further, that the concerns about the applicant raised by KTRHA did not have any basis or foundation in fact. Nor were they supported by any circumstances which were established in the materials that were presented to the Commissioner in Review Report LA-2012-002.

In *Consumers' Co-Operative Refineries Limited v. Regina (City), (2016)*, Justice Keene ruled that a Major Hazard Risk Assessment Report (MHRAR) qualified for the equivalent provision in *The Local Authority Freedom of Information and Protection of Privacy Act*, (section 20). In making this decision, Justice Keene considered that the MHRAR revealed specific parts of a refinery where the worst possible accidents could occur. Over disclosure of the information could be harmful to the public (i.e., nondisclosure of records can actually promote public safety in certain circumstances). Facilities such as nuclear power plants and refining complexes could

[880] Information Commissioner of Canada resource, *Investigator's Guide to Interpreting the Act, Section 17: Safety of Individuals.* Available at https://www.oic-ci.gc.ca/en/investigators-guide-interpreting-act/section-17-safety-individuals. Accessed September 6, 2019.
[881] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 137.
[882] Information Commissioner of Canada resource, *Investigator's Guide to Interpreting the Act, Section 17: Safety of Individuals.* Available at https://www.oic-ci.gc.ca/en/investigators-guide-interpreting-act/section-17-safety-individuals. Accessed September 6, 2019.

be the target of attack, which could pose a public safety risk. As such, the provision was found to apply in the greater sense of the protection of the public.

Section 22: Solicitor-Client Privilege

Solicitor-client privilege

22 A head may refuse to give access to a record that:

(a) contains any information that is subject to any privilege that is available at law, including solicitor-client privilege;

(b) was prepared by or for an agent of the Attorney General for Saskatchewan or legal counsel for a government institution in relation to a matter involving the provision of advice or other services by the agent or legal counsel; or

(c) contains correspondence between an agent of the Attorney General for Saskatchewan or legal counsel for a government institution and any other person in relation to a matter involving the provision of advice or other services by the agent or legal counsel.

Section 22 of FOIP is a discretionary class-based provision. It is intended to protect records that contain:

- Information subject to any privilege available at law, including solicitor-client privilege (22(a));
- Information that relates to the provision of legal advice or services and was prepared for specified individuals (22(b)); or
- Information relating to the provision of legal advice or services contained in correspondence between specified individuals (22(c)).

Subsection 22(a)

Solicitor-client privilege

22 A head may refuse to give access to a record that:

(a) contains any information that is subject to any privilege that is available at law, including solicitor-client privilege;

Subsection 22(a) of FOIP is a discretionary, class-based exemption. It permits refusal of access in situations where a record contains information that is subject to any legal privilege, including solicitor-client privilege.

Including means that the list of information that follows is not complete (non-exhaustive). The example in the provision is the type of information that could be presumed to qualify as a "privilege available at law".[883]

Amendments were made to this subsection effective January 1, 2018. The change was the inclusion of the phrase "*any privilege that is available at law*". The exemption previously only considered solicitor-client privilege.

Privilege is a special right, exemption, or immunity granted to a person or class of persons.[884]

There are several types of privilege. The exemption can include, but is not limited to:[885]

- Solicitor-client privilege (see below).
- Litigation privilege (see below).
- Legislative privilege (see below).
- Case-by-case privilege (see below).
- Common interest privilege: a privilege that exists when records are provided among parties where several parties have a common interest in anticipated litigation.[886]
- Informer privilege: historically known as 'police informer privilege,'[887] means the qualified privilege that a government can invoke to prevent disclosure of the identity and communications of its informants.[888]
- Labour relations privilege: is a privilege in the labour relations context. Four conditions should be satisfied in order for the privilege to be claimed for communications made within a confidential relationship:

    1. The communications must originate in a confidence that they will not be disclosed.

    2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relations between the parties.

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[883] British Columbia Government Services, *FOIPPA Policy and Procedures Manual* at https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/cabinet-local-public-body-confidences. Accessed June 26, 2019. Definition of "including" as included in SK OIPC *Guide to FOIP*, *Chapter 4 – Exemptions from the Right of Access*, for subsections 16(1), 17(1)(g) and 24(1) of FOIP.
[884] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 1449.
[885] List of examples originates from Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 197.
[886] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 199.
[887] AB IPC Order 96-020 at [67].
[888] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 1451.

3. The relation must be one which in the opinion of the community ought to be sedulously fostered.

4. The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of the litigation.[889]

- Settlement privilege: a privilege that applies to the discussions leading up to a resolution of a dispute in the face of litigation. It promotes the settlement of lawsuits.[890] The existence of the privilege is determined by a three-part test:

    1. The existence or contemplation of a litigious dispute;

    2. Communications that are made with the intention they remain confidential if negotiations failed; and

    3. The purpose of the communications was to achieve a settlement.[891]

- Mediation privilege: is closely related to settlement privilege. Settlement relates, in the main, to discussions and negotiations leading up to the settlement of a dispute which culminate in a final settlement agreement. Mediation privilege, on the other hand, relates to steps taken to resolve a dispute, typically, outside a traditional court or other adjudicative process. Generally speaking, participation in mediation is voluntary, and this reality underlies the public policy rationale for maintaining confidentiality over mediation processes.[892]
- Statutory privilege: a legal privilege established by an act or by a regulation.[893]

Solicitor-client privilege

The purpose of solicitor-client privilege is to assure clients of confidentiality and enable them to speak honestly and candidly with their legal representatives.[894] The privilege has long been

[889] *CB, HK & RD v Canadian Union of Public Employees, Local No. 21*, 2017 CanLII 68786 (SK LRB) at [40] to [42].
[890] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 201.
[891] *CB, HK & RD v Canadian Union of Public Employees, Local No. 21*, 2017 CanLII 68786 (SK LRB) at [35].
[892] *CB, HK & RD v Canadian Union of Public Employees, Local No. 21*, 2017 CanLII 68786 (SK LRB) at [43]. See also SK OIPC Review Report 171-2019 at [110].
[893] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 201.
[894] *Smith v Jones*, [1999] 1 SCR 455 at [46].

recognized as "fundamental to the proper functioning of our legal system"[895] and a cornerstone of access to justice. It has evolved from a rule of evidence to a substantive rule that is more nuanced than simply any communications between lawyer and client.

In *Solosky v. The Queen, (1980)*, Justice Dickson regarded the rule of solicitor-client privilege as a "fundamental civil and legal right" that guaranteed clients a right to privacy in their communications with their lawyers. Furthermore, that solicitor-client privilege must be claimed document by document, and that each document must meet the three-part test.

The following three-part test can be applied:[896]

1. Is the record a communication between solicitor and client?

In *Descoteaux et al. v. Mierzwinski, (1982)*, Justice Lamer outlined a very liberal approach to the scope of the privilege by extending it to include all communications made "within the framework of the solicitor-client relationship." The protection is very strong, as long as the person claiming the privilege is within the framework.

A **communication** is the process of bringing an idea to another's perception; the message or ideas so expressed or exchanged; the interchange of messages or ideas by speech, writing, gestures or conduct.[897]

The government institution should make it clear who the solicitor is and who the client is.

Solicitor means a lawyer who is duly admitted as a member and whose right to practice is not suspended.[898] **Lawyer** means a member of the Law Society and includes a law student registered in the Society's pre-call training program.[899]

Client means a person who:

- Consults a lawyer and on whose behalf the lawyer renders or agrees to render legal services; or
- Having consulted the lawyer, reasonably concludes that the lawyer has agreed to render legal services on his or her behalf;

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[895] *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, [2008] 2 SCR 574, 2008 SCC 44 (CanLII) at [9].
[896] Established by Justice Dickson in *Solosky v The Queen*, [1980] 1 SCR 821, 1979 CanLII 9 (SCC) at [28]. This test has consistently been applied and the case has not been overturned or overtaken by subsequent jurisprudence.
[897] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 348.
[898] *The Legal Profession Act, 1990*, SS 1990-91, c L-10.1 at s. 87.
[899] Law Society of Saskatchewan, *Code of Professional Conduct* at p. 13, *Definitions*.

and includes a client of the law firm of which the lawyer is a partner or associate, whether or not the lawyer handles the client's work.[900]

This provision ensures that a government institution, as the client, has the same protection for its legal documents as persons in the private sector.

Whether a solicitor-client relationship exists is a fact driven and multifaceted analysis. Sometimes, it will be readily apparent that a retainer exists. Other times, a careful examination of the facts must be undertaken.[901] It is not necessary that a person formally retain a lawyer by way of letter or other document before a solicitor-client relationship can be found. Nor is it necessary that an account be rendered by the lawyer or that an account be paid. There are certain *indicia* that may or may not determine that such a relationship exists. These include:

- A contract or retainer.
- A file opened by the lawyer.
- Meetings between the lawyer and the party.
- Correspondence between the lawyer and the party.
- A bill rendered by the lawyer to the party.
- A bill paid by the party.
- Instructions given by the party to the lawyer.
- The lawyer acting on the instructions given.
- Statements made by the lawyer that the lawyer is acting for the party.
- A reasonable expectation by the party about the lawyer's role.
- Legal advice given.
- Any legal documents created for the party.[902]

The client can be an individual, corporation or government institution.

The Ministry of Justice can act as legal advisors for all departments of government.[903]

Solicitor-client privilege can apply in the context of an in-house government lawyer providing legal advice to the government.[904] However, owing to the nature of the work of in-house

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[900] Law Society of Saskatchewan, *Code of Professional Conduct* at p. 10, *Definitions*.
[901] *Trillium Motor World Ltd. v. General Motors of Canada Limited*, 2015 ONSC 3824 (CanLII) at [417].
[902] *Jeffers v. Calico Compression Systems*, 2002 ABQB 72 (CanLII) at [8].
[903] SK OIPC Review Report F-2005-002 at [26]. For this interpretation, the Commissioner, relied on *The Law of Evidence in Canada*.
[904] *R. v Campbell*, [1999] 1 SCR 565.

counsel (i.e., having both legal and non-legal responsibilities), each situation must be assessed on a case-by-case basis to determine if the privilege arises in the circumstances.[905]

Communications can be written or verbal.[906]

The privilege does not necessarily apply to attachments to documents (e.g., attachments to emails) even those attached to genuine legal advice. On the other hand, an attachment that is an integral part of a legal opinion in the covering email or document could be privileged. For example, if the attachment would provide some basis for a reader to determine some or all of the opinion or advice. The party claiming privilege over an attachment must provide some basis for the claim. The point is that it is the content of the communication and who is communicating, not the form of the communication that determines privilege and confidentiality. Furthermore, it makes no practical sense to parse the contents of attachments in order to sever the parts that are privileged from the parts that are not. If some of the attachment is part of the legal advice, then all of it is protected by solicitor-client privilege.[907]

Written communications between officials or employees of a government institution, quoting the legal advice given orally by the government institution's solicitor, or employee's notes documenting the legal advice given orally by the solicitor could qualify. This includes notes "to file" in which legal advice is quoted or discussed.[908]

The privilege does not attach to advice provided by someone who is not a lawyer; the advice must be sought from a professional legal advisor in his or her capacity as such.[909]

Where the communication itself, between client and solicitor, constitutes a criminal act, or counsels someone to commit a crime, the privilege will not apply.[910]

2. Does the communication entail the seeking or giving of legal advice?

The scope of solicitor-client privilege is broad. It applies to all communications made with a view of obtaining legal advice.[911] If a communication falls somewhere within the continuum

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[905] John Sopinka et al., *The Law of Evidence in Canada*, 5th Ed (Toronto: LexisNexis Canada Inc., 2018) at § 14.125.
[906] *Susan Hosiery Limited v. Minister of National Revenue,* [1969] 2 Ex. C.R. 27, [1969] C.T.C. 353 at p. 33.
[907] *British Columbia (Minister of Finance) v. British Columbia (Information and Privacy Commissioner)*, 2021 BCSC 266 at [110] to [112].
[908] AB IPC Order 99-013 at [62] to [66].
[909] *Solosky v. The Queen*, [1980] 1 SCR 821, 1979 CanLII 9 (SCC).
[910] *Stevens v. Canada (Prime Minister)*, [1998] 4 FC 89, 1998 CanLII 9075 (FCA).
[911] *Leo v. Global Transportation Hub Authority*, 2019 SKQB 150 (CanLII) at [67], *Maranda v Richer*, 2003 SCC 67, [2003] 3 CR 193.

of that necessary exchange of information, the object of which is the giving or receiving of legal advice, it is protected by solicitor-client privilege.[912]

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.[913]

The second part of the test is satisfied where the person seeking advice has a reasonable concern that a particular decision or course of action may have legal implications and turns to their legal advisor to determine what those legal implications might be.[914]

The privilege applies not only to the records that actually give the legal advice but also to those that seek it and that provide factual information relative to which the advice is sought.[915]

Background information can be included as part of the definition of legal advice because it forms part of the "*continuum of communication*" between a solicitor and his or her client.[916] Statements of fact are not themselves privileged. It is the communication of those facts between a client and a lawyer that is privileged.[917]

The privilege applies to records that quote or discuss the legal advice. For example, information in written communications between officials or employees of a government institution in which the officials or employees quote or discuss the legal advice given by the government institution's solicitor.[918]

Business or policy advice provided by a lawyer will not attract the privilege. The Supreme Court of Canada in *Campbell* recognized this:

> It is, of course, not everything done by a government (or other) lawyer that attracts solicitor-client privilege. While some of what government lawyers do is indistinguishable from the work of private practitioners, they may and frequently do have multiple responsibilities including, for example, participation in various operating committees of

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[912] *Leo v. Global Transportation Hub Authority*, 2019 SKQB 150 (CanLII) at [67], *Canada (Public Safety and Emergency Preparedness) v Canada (Information Commissioner)*, 2013 FCA 104, 360 DLR (4th) 176; *Redhead Equipment v Canada (Attorney General)*, 2016 SKCA 115, 402 DLR (4th) 649.
[913] Definition originated from ON Order P-210 at p. 18. Adopted in SK OIPC Review Report F-2012-003 at [97]. Definition also adopted by AB IPC in Order 96-017.
[914] AB IPC Order F2004-003 at [29].
[915] AB IPC Order F2004-003 at [31].
[916] AB IPC Order F2013-42 at [20].
[917] *Stevens v. Canada (Prime Minister)*, [1984] 4 F.C. 89 (Fed. C.A.) at p. 109.
[918] AB IPC Order 96-020 at [133] to [134]. Consistent with *Mutual Life Assurance Co. of Can. v. Canada (Deputy Attorney General)*, [1988], 28 C.P.C. (2D) 101 (Ont. H.C.).

> their respective departments. Government lawyers who have spent years with a particular client department may be called upon to offer policy advice that has nothing to do with their legal training or expertise, but draws on departmental know-how. Advice given by lawyers on matters outside the solicitor-client relationship is not protected…Whether or not solicitor-client privilege attaches in any of these situations depends on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered.[919]

Not all communications between a lawyer and his or her client are privileged. For example, provision of purely business advice by in-house counsel or purely social interactions between counsel and their clients will not constitute privileged communications.[920]

Documents that are provided to a lawyer or "which simply come into the possession of a lawyer that are not related to the provision of legal advice are not privileged".[921] Documents do not become subject to solicitor-client privilege simply because they were provided to a lawyer.[922]

Not every record dropped off, funneled through or otherwise given to a government institution's solicitor has been given in confidence for the purpose of giving or seeking legal advice. Just because a solicitor may have been involved is not enough to find that privilege applies to records.[923] For example, copying the solicitor in emails does not automatically make them subject to solicitor-client privilege.

3. Did the parties intend for the communication to be treated confidentially?

There must be an expectation on the part of the government institution that the communication will be confidential. "Not every aspect of relations between a lawyer and a client is necessarily confidential".[924] Conduct which is inconsistent with an expectation of confidentiality can constitute a waiver of privilege. Confidentiality is the *sine qua non* of

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[919] *R. v Campbell*, [1999] 1 SCR 565.
[920] *Canada (Information Commissioner) v. Canada (Public Safety and Emergency Preparedness)*, 2012 FC 877 (CanLII) at [17].
[921] *Redhead Equipment v Canada (Attorney General)*, 2016 SKCA 115 (CanLII) at [33], citing *General Accident Assurance Company v. Chrusz*, 1999 CanLII 7320 (ON CA).
[922] *West v Saskatchewan (Health)*, 2020 SKQB 244 (CanLII) at [77].
[923] AB IPC Order 2000-019 at [38] to [39].
[924] *Foster Wheeler Power Co. v. Société intermunicipale de gestion et d'élimination des déchets (SIGED) inc.*, [2004] 1 SCR 456, 2004 SCC 18 (CanLII) at [37].

privilege.[925] Without confidentiality there can be no privilege and when confidentiality ends so too should the privilege.[926]

As a general rule, the client (usually a government institution) must not have disclosed the legal advice (either verbally or in writing) to parties who are outside of the solicitor-client relationship.[927]

Intended confidentiality, though necessary, is not sufficient to attach protection to communications between a lawyer and the government institution – legal advice must be involved.[928] This distinction was emphasized by the Ontario Court of Appeal in *Straka v. Humber River Regional Hospital*, where the Court states "[it] has long been established that confidentiality alone, no matter how earnestly desired and clearly expressed, does not make a communication privileged from disclosure."[929]

Wide circulation of internal communications by in-house counsel or communications with in-house counsel that do not clearly reflect an intention that those communications be kept confidential will not be protected by privilege.[930]

While solicitor-client privilege started out as a rule of evidence, it is now unquestionably a rule of substance.[931] In *Descoteaux et al. v. Mierzwinski, (1982)*, Justice Lamer set out the substantive rule as follows:

1. The confidentiality of communications between solicitor and client may be raised in any circumstances where such communications are likely to be disclosed without the client's consent.

2. Unless the law provides otherwise, when and to the extent that the legitimate exercise of a right would interfere with another person's right to have his communications with

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[925] *Blank v. Canada (Minister of Justice)*, [2006] 2 SCR 319, 2006 SCC 39 (CanLII) at [32].
[926] Dodek, Adam, *Solicitor-Client Privilege*, 2014 (LexisNexis Canada Inc.: Markham, Ontario) at p. 189.
[927] Treasury Board of Canada Secretariat, *Access to Information Manual, Chapter 11.21.1*. Available at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11_21. Accessed September 18, 2019.
[928] *Solosky v R.* (1979), [1980] 1 SCR 821, 105 DLR (3d) 745 at [752]: "It is not every item of correspondence passing between a solicitor and client to which privilege attaches, for only those in which the client seeks the advice of counsel in his professional capacity, or in which counsel gives advice, are protected."
[929] *Straka v. Humber River Regional Hospital*, (2000), 193 DLR (4th) 680 at [59].
[930] *Toronto-Dominion Bank v. Leigh Instruments Ltd*., 1997 CanLII 12113 (ON SC).
[931] *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, [2008] 2 SCR 574, 2008 SCC 44 (CanLII) at [10].

his lawyer kept confidential, the resulting conflict should be resolved in favour of protecting the confidentiality.

3. When the law gives someone the authority to do something which, in the circumstances of the case, might interfere with that confidentiality, the decision to do so and the choice of means of exercising that authority should be determined with a view to not interfering with it except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation.

4. Acts providing otherwise in situations under paragraph 2 and enabling legislation referred to in paragraph 3 must be interpreted restrictively.[932]

By the nature of the records themselves, implicit confidentiality could be intended.[933]

Express statements of an intention of confidentiality on records may qualify. For example, email confidentiality clauses if they are specific to the communication (i.e., wording and content). Standard confidentiality clauses in the footers of emails would not apply.[934]

Communications made in order to facilitate the commission of a crime or fraud will not be confidential, regardless of whether or not the lawyer is acting in good faith.[935]

An applicant is entitled to general identifying information, such as the description of the document (for example, the "memorandum" heading and internal file identification), the name, title and address of the person to whom the communication was directed, the subject line, the generally innocuous opening words and closing words of the communication and the signature block.[936]

A lawyer's bill of accounts and itemized disbursements are protected including: the terms and amount of the retainer; the arrangements with respect to payment; the type of services rendered and their cost – all these matters are central to the solicitor-client relationship.[937]

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[932] *Descôteaux et al. v. Mierzwinski*, 1982 CanLII 22 (SCC), [1982] 1 SCR 860 at p. 16.
[933] AB IPC Orders F2004-003 at [30] and F2007-008 at [14]. Relied on in SK OIPC Review Report F-2014-001 at [264].
[934] SK OIPC Review Report F-2012-003 at [80] to [81].
[935] *Descôteaux et al. v. Mierzwinski*, [1982] 1 SCR 860, 1982 CanLII 22 (SCC).
[936] *Blank v. Canada (Minister of Justice)*, 2005 FC 1551, at [49].
[937] *Stevens v. Canada (Prime Minister)*, [1998] 4 FC 89, 1998 CanLII 9075 (FCA) and *Maranda v. Richer*, [2003] 3 SCR 193, 2003 SCC 67 (CanLII).

IPC Findings

In Review Report 052-2013, the Commissioner considered the equivalent provision in LA FOIP. An applicant had made an access to information request to the Village of Buena Vista (the Village) for copies of records that detail the funds charged to the Village on behalf of certain council members, repayment plans and the legal fees paid by the Village on the Mayor's behalf. The Village responded to the applicant indicating that some records did not exist and that the invoices were being withheld pursuant to subsections 18(1) and 21(a) of LA FOIP. Upon review, the Village pointed to the Supreme Court of Canada (SCC) decision *Maranda v. Richer*, [2003] 3 S.C.R. 193, 2003 SCC 67. In that decision, the SCC determined that there was a presumption of privilege for lawyers' bills of account as a whole. The Commissioner found that the presumption of privilege could be rebutted if an applicant could provide persuasive argument that the disclosure of information could not result in the applicant learning of information subject to solicitor-client privilege. The Commissioner relied on the Court of Appeal for Ontario decision, *Ontario (Ministry of Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)*, [2005] OJ No 941 where the court summarized the approach as follows:

1. Is there any reasonable possibility that disclosure of the amount of the fees paid will directly or indirectly reveal any communication protected by the privilege? and

2. Could an assiduous inquirer, aware of background information, use the information requested to deduce or otherwise acquire privileged communications?

(*School District No. 49 (Central Coast) v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 427)

After considering the submission from the Applicant, the Commissioner was not persuaded that release of information, namely the fees detailed in the invoices, was neutral information and that the presumption of privilege was rebutted. The Commissioner found that subsection 21(a) of LA FOIP applies to the invoices in their entirety. The Commissioner took a similar approach in Review Reports 280-2016 & 281-2016 and 003-2017.

Waiver of Privilege

Confidentiality is the *sine qua non* of privilege.[938] Without confidentiality there can be no privilege and when confidentiality ends, so too should the privilege.[939]

Where a client authorizes the solicitor to reveal a solicitor-client communication, either it was never made with the intention of confidentiality, or the client has waived the right to confidentiality. In either case, there is no intention of confidentiality and no privilege attaches. For example, it has been held that documents prepared with the intention that they would be communicated to a third party, or where on their face they are addressed to a third party, are not privileged.[940]

Waiver of privilege means the voluntary relinquishing of a right, exemption or immunity.[941]

Solicitor-client privilege belongs to the client and persists unless it is waived by the client.

To constitute a valid waiver, two essential prerequisites are generally necessary:

i) The client knows of the existence of the privilege; and

ii) The client demonstrates a clear intention to forego the privilege.[942]

Waiver of privilege can be express, inadvertent, by implication or where fairness requires. There must be an intention manifested from either the client's voluntary disclosure of confidential information or from objective consideration of the client's conduct.[943]

Disclosing that legal advice was received and relied on, or revealing the mere gist, summary or conclusion of that advice (i.e., public announcements) is not sufficient to imply a waiver over the whole of the privileged communications absent any unfairness. Furthermore, this approach reflects the fundamental purposes of freedom of information legislation because it recognizes the need for accountability on the part of public bodies without impinging on their right to maintain confidentiality over privileged communications.[944]

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[938] *Blank v. Canada (Minister of Justice)*, [2006] 2 SCR 319, 2006 SCC 39 (CanLII) at [32].
[939] Dodek, Adam, *Solicitor-Client Privilege*, 2014 (LexisNexis Canada Inc.: Markham, Ontario) at p. 189.
[940] *Stevens v. Canada (Prime Minister)* (T.D.), 1997 CanLII 4805 (FC), [1997] 2 F.C. 759, p. 8.
[941] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 1895.
[942] *Western Canada Investment Company, Limited v. McDairmid*, (1922), 15 Sask. L.R. 142 (QL) (Sask CA) at [146]. Drawn from *Solicitor-Client Privilege in Canadian Law* (Toronto: Butterworths, 1993) at p. 187. Relied on in SK OIPC Review Report F-2005-002 at [40].
[943] SK OIPC Review Report F-2005-002 at [41].
[944] BC IPC Order F15-09 at [20].

Communication of privileged information between ministries or departments is not a waiver.[945]

FOIP does not provide for a burden of proof when waiver is claimed. Where an applicant has asserted that solicitor-client privilege has been waived, the applicant bears the burden of proving the privilege has been waived.[946]

IPC Findings

In Review Report F-2005-002, the Commissioner considered whether solicitor-client privilege had been waived. The Commissioner found that even where a government institution releases some documents, dissemination of some information related to a litigation does not constitute a waiver by the government institution's privilege. As such, the Commissioner found that the Saskatchewan government had not waived its privilege.

Process During a Review by IPC

In the wake of The *University of Saskatchewan v Saskatchewan (Information and Privacy Commissioner), 2018 SKCA 34*, the IPC revised its procedures in relation to government institutions asserting solicitor-client privilege over responsive records.

For more on the procedures see, *Part 9: Solicitor-Client or Litigation Privilege* in *The Rules of Procedures*. In addition, see the Commissioner's blog, *Solicitor-Client Privilege/Litigation Privilege*.

Ordering Production of Solicitor-Client Privileged Records

Powers of commissioner

54(1) Notwithstanding any other Act or any privilege that is available at law, the commissioner may, in a review:

(a) require to be produced and examine any record that is in the possession or under the control of a government institution; and

(b) enter and inspect any premises occupied by a government institution.

[945] *Stevens v. Canada (Prime Minister)*, [1997] 2 FC 759, 1997 CanLII 4805 (FC).
[946] SK OIPC Review Report F-2005-002 at [39].

(2) For the purposes of conducting a review, the commissioner may summon and enforce the appearance of persons before the commissioner and compel them:

(a) to give oral or written evidence on oath or affirmation; and

(b) to produce any document or things;

that the commissioner considers necessary for a full review, in the same manner and to the same extent as the court.

(3) For the purposes of subsection (2), the commissioner may administer an oath or affirmation.

In *Descôteaux et al. v. Mierzwinski*, 1982 CanLII 22 (SCC), [1982] 1 SCR 860, Lamer J., on behalf of a unanimous Court, formulated four substantive rules to apply when communications between solicitor and client are likely to be disclosed without the client's consent. The third substantive rule is relevant for the topic of production of solicitor-client or litigation records in an IPC Review. Rule number three reads as follows:

…

3. When the law gives someone the authority to do something which, in the circumstances of the case, might interfere with that confidentiality, the decision to do so and the choice of means of exercising that authority should be determined with a view to not interfering with it except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation.

…

What this means is that the Commissioner will not interfere with the confidentiality of communications between solicitor and client "except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation [i.e., FOIP]".

While the courts have said that solicitor-client privilege must remain as close to absolute as possible, it is not absolute. It can be limited or abrogated by statute. A statute purporting to limit or abrogate the privilege must be interpreted restrictively.

The Commissioner has the power, under section 54 of FOIP, to order production of records over which solicitor-client privilege or litigation privilege is claimed.[947] The Commissioner

[947] This has been confirmed by the Court of Appeal for Saskatchewan in *University of Saskatchewan v Saskatchewan (Information and Privacy Commissioner)*, 2018 SKCA 34 (CanLII) at [47].

exercises this authority cautiously and with restraint given the clear direction by the courts that a reviewing body's decision to examine privileged documents must never be made lightly or as a matter of course.[948]

Therefore, given the importance of solicitor-client privilege and litigation privilege, and to minimally infringe on these privileges, the Commissioner will only order production of records being withheld under solicitor-client or litigation privilege pursuant to subsection 22(a) of FOIP when it is absolutely necessary to decide the issues in dispute.

Absolutely necessary is as restrictive a test as may be formulated short of an absolute prohibition in every case.[949]

As to when it would be appropriate to order production of records withheld under the solicitor-client or litigation privilege provision at subsection 22(a) of FOIP, the Commissioner will exercise discretion in the following circumstances:

- Where there is some evidence that the party claiming privilege has done so 'falsely" or inappropriately.[950]
- When the party claiming privilege fails to respond to a reasonable request by the Commissioner for additional information.[951]

A naked "trust me" that the records in dispute are subject to solicitor-client privilege or litigation privilege is not sufficient from the government institution when making the case that subsection 22(a) of FOIP applies.[952]

In a review, the Commissioner requests copies of records in order to conduct the review and determine whether exemptions have been appropriately applied. This includes requesting records which a government institution may have claimed solicitor-client privilege or litigation privilege over pursuant to subsection 22(a) of FOIP. The government institution may choose to make a "prima facie" case of solicitor-client or litigation privilege for those records

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[948] *University of Saskatchewan v Saskatchewan (Information and Privacy Commissioner)*, 2018 SKCA 34 (CanLII) at [73], [76], and [83].
[949] *Goodis v. Ontario (Ministry of Correctional Services)*, 2006 SCC 31 (CanLII), [2006] 2 SCR 32 at [20].
[950] *University of Saskatchewan v Saskatchewan (Information and Privacy Commissioner)*, 2018 SKCA 34 (CanLII) at [53], [54] and [72].
[951] *University of Saskatchewan v Saskatchewan (Information and Privacy Commissioner)*, 2018 SKCA 34 (CanLII) at [83].
[952] *University of Saskatchewan v Saskatchewan (Information and Privacy Commissioner)*, 2018 SKCA 34 (CanLII) at [75].

pursuant to subsection 22(a) of FOIP. If it does so, it must still meet the "burden of proof" in demonstrating that subsection 22(a) of FOIP applies as required by section 60 of FOIP (see the *Guide to FOIP*, Chapter 2: "Administration of FOIP" for more on the burden of proof).

Prima facie means at first sight; on first appearance but subject to further evidence or information. A 'prima facie case' is where a party produces enough evidence to allow the fact-trier to infer the fact at issue and rule in the party's favor..[953]

A *prima facie* case can be made to the Commissioner without providing a copy of the records but only for records that may be subject to solicitor-client and litigation privilege. All other records must be provided in the course of a review.
If making a *prima facie* case, the Commissioner will need the following from the government institution if claiming solicitor-client privilege for subsection 22(a) of FOIP:

- An **affidavit of documents** which includes an **Index of Records** (Schedule) that includes:
    - Sufficient detail to identify the document and allow the Commissioner to determine whether a prima facie case for the claim of solicitor-client privilege has been made. It should include:
        - The date of the record.
        - Whether the record is a letter, memo, fax, and so forth.
        - The author of the record.
        - The recipient of the record.
        - Whether the record is an original or copy.[954]

For more on what the Commissioner requires, see Part 9: Solicitor-Client or Litigation Privilege in the *Rules of Procedure*.

If the government institution provides less than what is needed for a *prima facie* case to be met, the Commissioner may request additional details. If the government institution fails to provide the additional details, the Commissioner may do one or both of the following, pursuant to subsection 54(2) of FOIP:

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[953] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 1441.
[954] *University of Saskatchewan v Saskatchewan (Information and Privacy Commissioner)*, 2018 SKCA 34 (CanLII) at [75], [76] and [82].

- Summon and enforce the appearance of any person, including employees of a government institution, before the Commissioner and compel them to give oral and/or written evidence under oath or affirmation and produce any documents required.
- Seek an order from the Court of King's Bench for production of the records from the government institution.

Case-by-Case Privilege

Case-by-case privilege is a privilege found by a decision-maker to exist for information in a particular case.[955] In each case, the decision-maker must determine whether the public interest favours disclosure or non-disclosure of the record.[956]

In order to determine if case-by-case privilege applies, the government institution must determine if the records at issue are "private records" or "Crown records". If the records at issue are "private records, one must apply the Wigmore test to determine if the case-by-case privilege applies. If the records at issue are "Crown records", then one must apply the criteria for public interest immunity.[957]

Private records are third party records not in the hands of the Crown.[958]

Crown records are records containing information relating to government activities or operations, and decisions at the highest level of government.[959]

When determining whether records are *private records* or *Crown records*, what matters is whose information it is, not necessarily who is in possession of the records.[960]

Wigmore test is a four-part test set out by Wigmore in *Evidence in Trials at Common Law,* Vol. 8 (McNaughton rev.) (Boston: Little, Brown & Co, 1961), and adopted by the Supreme Court of Canada in *Slavutych v. Baker et al.*, 1975 CanLII 5 (SCC), [1976] 1 SCR 254. If the records are *private records*, the Wigmore test should be applied. The four fundamental

[955] AB IPC Order 96-020 at [60].
[956] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 200.
[957] SK OIPC Review Report 171-2019 at [102] to [109].
[958] AB IPC Order 96-020 at [74]. Cited in SK OIPC Review Report 171-2019 at [106].
[959] AB IPC Order 96-020 at [77]. Cited in SK OIPC Review Report 171-2019 at [106].
[960] AB IPC Order 96-020 at [83]. See also SK OIPC Review Report 171-2019 at [104].

conditions necessary to the establishment of a privilege against the disclosure of communications are:

1. The communications must originate in a *confidence* that they will not be disclosed;

2. This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties;

3. The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*; and

4. The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.[961]

Public interest immunity - If the records are *Crown records*, the criteria for public interest immunity should be applied. The Crown must put forth a proper claim based on the criteria for public interest immunity. The criteria are as follows:

1. The nature of the policy concerned

2. The particular contents of the documents

3. The level of the decision-making process

4. The time when a document or information is to be revealed

5. The importance of producing the documents in the administration of justice, with particular consideration to:

    - The importance of the case.
    - The need or desirability of producing the documents to ensure that it can be adequately and fairly represented.

[961] *Slavutych v. Baker et al.*, 1975 CanLII 5 (SCC), [1976] 1 SCR 254 at p. 260. Cited in SK OIPC Review Report 171-2019 at [103]. See also AB IPC Order 96-020 at [76].

- The ability to ensure that only the particular facts relating to the case are revealed.

6. Any allegation of improper conduct by the executive branch towards a citizen.[962]

Common Interest Privilege

Common interest privilege is a privilege that exists when records are provided among parties where several parties have a common interest in anticipated litigation;[963]

Disclosure of privileged information to outsiders generally constitutes as a waiver of privilege. However, if there is a sharing of information between parties where the parties have a sufficient "common interest", then the privilege is preserved (or not waived).

The following two-part test can be applied when determining if common interest privilege applies:[964]

1. **Does the record contain information that is subject to any privilege that is available at law?**

The information at issue must be inherently privileged in that it must have arisen in such a way that it meets the definition of solicitor-client privilege under subsection 22(a) of FOIP.

2. **Do the parties who share the information have a "common interest", but not necessarily an identical interest, in the information?**

In *Buttes Gas and Oil Co. v. Hammer (No. 3)*, [1980 3 All E.R. 475 (C.A), Lord Denning provided that "common interest" privilege is a type of litigation privilege. Lord Denning said:

> There is a privilege which may be called a "common interest" privilege. That is a privilege in aid of anticipated litigation in which several persons have a common interest. It often happens in litigation that a plaintiff or defendant has other persons standing alongside him – who have the self-same interest as he – and who have consulted lawyers on the self-same points as he – but these others have not been made parties to the action. Maybe for economy or for simplicity or what you will. All exchange counsel's opinions. All

[962] *Leeds v. Alberta (Minister of the Environment)*, 1990 CanLII 5933 (AB QB) at [25]. See also SK OIPC Review Report 171-2019 at [103] and AB IPC Order 96-020 at [79].
[963] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 199.
[964] SK OIPC Review Report 298-2019 at [53]. This test was adapted from AB IPC's two-part test in Order 97-009 and ON IPC's Order PO-3154.

> collect information for the purpose of litigation. All make copies. All await the outcome with the same anxious anticipation – because it affects each as much as it does the others. Instances come readily to mind. Owners of adjoining houses complain of a nuisance which affects them both equally. Both take legal advice. Both exchange relevant documents. But only one is a plaintiff. An author writes a book and gets it published. It is said to contain a libel or to be an infringement of copyright. Both author and publisher take legal advice. Both exchange documents. But only one is made a defendant.
>
> > In all such cases I think the courts should – for the purposes of discovery – treat all the persons interested as if they were partners in a single firm or departments in a single company. Each can avail himself of the privilege in aid of litigation. Each can collect information for the use of his or the other's legal adviser. Each can hold originals and each make copies. And so forth. All are the subject of the privilege in aid of anticipated litigation, even though it should transpire that, when the litigation is afterwards commenced, only one of them is made a party to it. No matter that one has the originals and the other has the copies. All are privileged.

In contrast, in *Maximum Ventures Inc. V. De Graaf*, 2007 BCCA 510 (CanLII), the British Columbia Court of Appeal provided that common interest privilege may exist even where there is no litigation in existence or contemplated.

> [14] Recent jurisprudence has generally placed an increased emphasis on the protection from disclosure of solicitor-client communications, including those shared in furtherance of a common commercial interest. In the instant case the McEwan draft was produced within the recognized solicitor-client privileged relationship. The common interest privilege issues arise in response to a plea of waiver of that privilege. The common interest privilege is an extension of the privilege attached to that relationship. The issue turns on whether the disclosures were intended to be in confidence and the third parties involved had a sufficient common interest with the client to support extension of the privilege to disclosure to them. In my view, the ambit of the common interest privilege is aptly summarized in the Sopinka on evidence 2d ed., Supp. of 2004 @ p. 133 which cites the case of Pitney Bowes of Canada Ltd. V. Canada (2003), 225 D.LR. (4th) 747, 2003 FCT 214 quoted by the chambers judge at para. 31 of his reasons. **Where legal opinions are shared by parties with mutual interests in commercial transactions, there is a sufficient interest in common to extend the common interest privilege to disclosure of opinions obtained by one of them to the others within the group, even in circumstances where no litigation is in existence or contemplated.**
>
> [Emphasis added]

IPC Findings

In Review Report 298-2019, the Commissioner considered common interest privilege. The Saskatoon Board of Police Commissioners (Board) asserted that common interest privilege applied. Upon review, the Commissioner established the two-part test and found that there was a common interest privilege between the Board and the Saskatoon Police Service members. Furthermore, that the sharing of the records did not constitute a waiver of the solicitor-client privilege that applied to the records.

Legislative Privilege

Legislative privilege (also known as *parliamentary privilege*) is a unique class privilege that extends to members of the Legislative Assembly immunity to do their legislative work.[965] It has been defined as "the sum of the privileges, immunities and powers enjoyed by the Senate, the House of Commons and provincial legislative assemblies, and by each member individually, without which they could not discharge their functions."[966]

Legislative bodies in Canada have inherent parliamentary privileges which flow from their nature and function in a Westminster model of parliamentary democracy. By shielding some areas of legislative activity from external review, parliamentary privilege helps preserve the separation of powers. It grants the legislative branch of government the autonomy it requires to perform its constitutional functions. Parliamentary privilege also plays an important role in our democratic tradition because it ensures that elected representatives have the freedom to vigorously debate laws and to hold the executive to account. However, inherent privileges are limited to those which are necessary for legislative bodies to fulfill their constitutional functions.[967]

The reach of inherent privilege extends only so far as is "necessary to protect legislators in the discharge of their legislative and deliberative functions, and the legislative assembly's work in holding the government to account for the conduct of the country's business".[968]

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[965] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 199.
[966] *Chagnon v. Syndicat de la fonction publique et parapublique du Québec*, [2018] 2 SCR 687, 2018 SCC 39 (CanLII) at [19].
[967] *Chagnon v. Syndicat de la fonction publique et parapublique du Québec*, [2018] 2 SCR 687, 2018 SCC 39 (CanLII) at [1] and [2].
[968] *Chagnon v. Syndicat de la fonction publique et parapublique du Québec*, [2018] 2 SCR 687, 2018 SCC 39 (CanLII) at [27] referencing *Canada (House of Commons) v. Vaid*, 2005 SCC 30 (CanLII), [2005] 1 S.C.R. 667 at [41].

In order to fall within the scope of legislative privilege, the matter at issue must meet the *necessity test*. The test requires that to qualify it must be "so closely and directly connected with the fulfillment by the assembly or its members of their functions as a legislative and deliberative body…that outside interference would undermine the level of autonomy required to enable the assembly and its members to do their work with dignity and efficiency".[969]

Examples of areas previously considered subject to legislative privilege include:

- Immunity of members of the legislative assembly for their speech insofar as it relates to their mandate.
- The legislative assembly's autonomy in controlling its debates or proceedings.
- Its power to exclude strangers from proceedings.
- Immunity of members from subpoenas during a legislative session.
- Its authority to discipline its members as well as non-members who interfere with the discharge of legislative duties.[970]

The party seeking to rely on legislative privilege bears the burden of proof in establishing its necessity. It must demonstrate that the scope of the protection it claims is necessary in light of the purposes of legislative privilege.[971]

Legislative privilege does not apply to the management of security guards. The privilege to exclude strangers does not protect the decision to dismiss employees.[972]

Litigation Privilege

Litigation privilege is the non-disclosure protection imposed on documents, which come into existence after litigation commenced or in contemplation, and where they have been made with a view to such litigation.[973]

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[969] *Chagnon v. Syndicat de la fonction publique et parapublique du Québec*, [2018] 2 SCR 687, 2018 SCC 39 (CanLII) at [29] referencing *Canada (House of Commons) v. Vaid*, 2005 SCC 30 (CanLII), [2005] 1 S.C.R. 667 at [46].
[970] *Chagnon v. Syndicat de la fonction publique et parapublique du Québec*, [2018] 2 SCR 687, 2018 SCC 39 (CanLII) at [31] referencing *Canada (House of Commons) v. Vaid*, 2005 SCC 30 (CanLII), [2005] 1 S.C.R. 667 at [29(10)].
[971] *Chagnon v. Syndicat de la fonction publique et parapublique du Québec*, [2018] 2 SCR 687, 2018 SCC 39 (CanLII) at [32].
[972] *Chagnon v. Syndicat de la fonction publique et parapublique du Québec*, [2018] 2 SCR 687, 2018 SCC 39 (CanLII) at [51] and [57].
[973] *Duhaime's Law Dictionary*, available at http://www.duhaime.org/LegalDictionary/L-Page1.aspx. Accessed September 20, 2019.

The purpose of litigation privilege is to create a "zone of privacy" in relation to pending or apprehended litigation.[974] To achieve its purpose, parties to litigation, represented or not, must be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure.[975]

Conceptually distinct from solicitor-client privilege, litigation privilege differs in at least three respects:

1. Solicitor-client privilege protects a relationship, litigation privilege protects the efficacy of the adversarial process;
2. Solicitor-client privilege is permanent; litigation privilege is time-limited and expires with the end of the litigation in question; and
3. Unlike solicitor-client privilege, litigation privilege applies to unrepresented parties and non-confidential documents.[976]

Litigation privilege aims to facilitate a process (namely, the adversary process), while solicitor-client privilege aims to protect a relationship (namely, the confidential relationship between a lawyer and a client).[977]

The following two-part test can be applied:[978]

1. Has the record or information been prepared for the dominant purpose of litigation?

Litigation privilege attaches to documents created for the dominant purpose of litigation.[979]

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[974] *Blank v. Canada (Minister of Justice)*, [2006] 2 SCR 319, 2006 SCC 39 (CanLII) at [34].
[975] *Blank v. Canada (Minister of Justice)*, [2006] 2 SCR 319, 2006 SCC 39 (CanLII) at [27].
[976] *Britto v University of Saskatchewan*, 2018 SKQB 92 (CanLII) at [66], *R v Husky Energy Inc.,* 2017 SKQB 383 at [22], *Lizotte v Aviva Insurance Company of Canada,* 2016 SCC 52, [2016] 2 SCR 521, *Blank v. Canada (Minister of Justice)*, [2006] 2 SCR 319, 2006 SCC 39 (CanLII).
[977] *Blank v. Canada (Minister of Justice)*, [2006] 2 SCR 319, 2006 SCC 39 (CanLII) at [28] referencing Sharpe J.A. in "Claiming Privilege in the Discovery Process", in *Special Lectures of the Law Society of Upper Canada* (1984), 163, at pp. 164 and 165).
[978] Legal requirements or 'the two-part test' originates from Treasury Board of Canada Secretariat, *Access to Information Manual, Chapter 11.21.2*. Available at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11_21. Accessed September 20, 2019.
[979] *Blank v. Canada (Minister of Justice)*, [2006] 2 SCR 319, 2006 SCC 39 (CanLII) at intro para. 3.

The dominant purpose for creating or obtaining the record must be to decide whether to initiate, or to prepare for, litigation. It cannot be standard operational procedure to prepare such records for various reasons, only one of which is to prepare for litigation.[980]

A self-represented litigant is no less in need of, and therefore entitled to, a "zone" or "chamber" of privacy.[981]

Papers and materials created or obtained especially for the lawyer's brief for litigation, whether existing or contemplated are privileged.[982]

A claim of litigation privilege will not be made out simply because litigation support is one of the purposes of a document's preparation, even if it is a substantial purpose. Litigation must be the dominant purpose in order for litigation privilege to exist.[983]

Litigation privilege is a class privilege. Documents which fall into that class (i.e., those whose dominant purpose is preparation for litigation) will be protected by immunity from disclosure unless an exception applies. The exceptions include those which apply to solicitor-client privilege (i.e., criminal communications, innocence of an accused person, and public safety).[984]

Examples of litigation privilege records include:

- Correspondence between counsel and the client(s).
- Documents relevant to the issues pleaded in the lawsuit that were produced by the parties.
- Witness statements.
- Letters retaining experts or commenting on their reports.
- Research memoranda and legal authorities.
- Annotations on records written by the litigator.

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[980] Treasury Board of Canada Secretariat, *Access to Information Manual, Chapter 11.21.2*. Available at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11_21. Accessed September 20, 2019.
[981] *Blank v. Canada (Minister of Justice)*, [2006] 2 SCR 319, 2006 SCC 39 (CanLII) at [32].
[982] *Susan Hosiery Limited v. Minister of National Revenue,* [1969] 2 Ex. C.R. 27, [1969] C.T.C. 353 at p. 33.
[983] *Britto v University of Saskatchewan*, 2018 SKQB 92 (CanLII) at [66], *R v Husky Energy Inc.,* 2017 SKQB 383 at [22], *Lizotte v Aviva Insurance Company of Canada,* 2016 SCC 52, [2016] 2 SCR 521, *Blank v. Canada (Minister of Justice)*, [2006] 2 SCR 319, 2006 SCC 39 (CanLII).
[984] *Britto v University of Saskatchewan*, 2018 SKQB 92 (CanLII) at [66], *R v Husky Energy Inc.,* 2017 SKQB 383 at [22], *Lizotte v Aviva Insurance Company of Canada,* 2016 SCC 52, [2016] 2 SCR 521, *Blank v. Canada (Minister of Justice)*, [2006] 2 SCR 319, 2006 SCC 39 (CanLII).

- Miscellaneous public documents such as newspaper clippings, press releases and investigator's reports.[985]

2. Is the litigation ongoing or anticipated?

Litigation must be ongoing, or there must be a reasonable expectation of litigation (e.g., the litigator has been notified that he or she will be served with notification of litigation). The litigation cannot be a mere vague anticipation or possibility.[986]

Once the litigation has ended, the privilege to which it gave rise has lost its specific and concrete purpose – and therefore its justification.[987] The privilege may retain its purpose and its effect where the litigation that gave rise to the privilege has ended, but related litigation remains pending or may reasonably be apprehended. This enlarged definition of litigation includes separate proceedings that involve the same or related parties and arise from the same or a related cause of action or juridical source. Proceedings that raise issues common to the initial action and share its essential purpose would qualify as well.[988]

The point in time a grievance is filed, "litigation" has commenced for the purposes of litigation privilege. Grievance arbitration proceedings qualify as litigation. They are adversarial in nature. Litigation encompasses the continuum from the filing of the grievance to the arbitration hearing.[989]

IPC Findings

In Review Report 005-2017, 214-2015 – Part II, the Commissioner considered litigation privilege. The Saskatchewan Health Authority (SHA) asserted that litigation privilege applied to some of the records requested. Upon review, the Commissioner found that the records were prepared for the purpose of litigation and that litigation was ongoing between the SHA and the applicant.

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[985] Treasury Board of Canada Secretariat, *Access to Information Manual, Chapter 11.21.2*. Available at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11_21. Accessed September 20, 2019.
[986] Treasury Board of Canada Secretariat, *Access to Information Manual, Chapter 11.21.2*. Available at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11_21. Accessed September 20, 2019.
[987] *Blank v. Canada (Minister of Justice)*, [2006] 2 SCR 319, 2006 SCC 39 (CanLII) at [34].
[988] *Blank v. Canada (Minister of Justice)*, [2006] 2 SCR 319, 2006 SCC 39 (CanLII) at para. 1.
[989] BC IPC Orders F11-29 at [13] to [14] and F15-12 at [52] to [53].

Process During a Review by IPC

In the wake of The *University of Saskatchewan v Saskatchewan (Information and Privacy Commissioner), 2018 SKCA 34,* the IPC revised its procedures in relation to government institutions asserting litigation privilege over responsive records.

For more on the procedures see, *Part 9: Solicitor-Client or Litigation Privilege* in *The Rules of Procedures*. In addition, see the Commissioner's blog, *Solicitor-Client Privilege/Litigation Privilege*.

Ordering Production of Litigation Privileged Records

Powers of commissioner

54(1) Notwithstanding any other Act or any privilege that is available at law, the commissioner may, in a review:

(a) require to be produced and examine any record that is in the possession or under the control of a government institution; and

(b) enter and inspect any premises occupied by a government institution.

(2) For the purposes of conducting a review, the commissioner may summon and enforce the appearance of persons before the commissioner and compel them:

(a) to give oral or written evidence on oath or affirmation; and

(b) to produce any document or things;

that the commissioner considers necessary for a full review, in the same manner and to the same extent as the court.

(3) For the purposes of subsection (2), the commissioner may administer an oath or affirmation.

In *Descôteaux et al. v. Mierzwinski*, 1982 CanLII 22 (SCC), [1982] 1 SCR 860, Lamer J., on behalf of a unanimous Court, formulated four substantive rules to apply when communications between solicitor and client are likely to be disclosed without the client's consent. The third substantive rule is relevant for the topic of production of solicitor-client or litigation records in an IPC Review. Rule number three reads as follows:

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What this means is that the Commissioner will not interfere with the confidentiality of communications between solicitor and client "except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation [i.e., FOIP]".

While the courts have said that solicitor-client privilege must remain as close to absolute as possible, it is not absolute. It can be limited or abrogated by statute. A statute purporting to limit or abrogate the privilege must be interpreted restrictively.

The Commissioner has the power, under section 54 of FOIP, to order production of records over which solicitor-client privilege or litigation privilege is claimed.[990] The Commissioner exercises this authority cautiously and with restraint given the clear direction by the courts that a reviewing body's decision to examine privileged documents must never be made lightly or as a matter of course.[991]

Therefore, given the importance of solicitor-client privilege and litigation privilege, and to minimally infringe on these privileges, the Commissioner will only order production of records being withheld under solicitor-client or litigation privilege pursuant to subsection 22(a) of FOIP when it is absolutely necessary to decide the issues in dispute.

Absolutely necessary is as restrictive a test as may be formulated short of an absolute prohibition in every case.[992]

As to when it would be appropriate to order production of records withheld under the solicitor-client or litigation privilege provision at subsection 22(a) of FOIP, the Commissioner will exercise discretion in the following circumstances:

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[990] This has been confirmed by the Court of Appeal for Saskatchewan in *University of Saskatchewan v Saskatchewan (Information and Privacy Commissioner)*, 2018 SKCA 34 (CanLII) at [47].
[991] *University of Saskatchewan v Saskatchewan (Information and Privacy Commissioner)*, 2018 SKCA 34 (CanLII) at [73], [76], and [83].
[992] *Goodis v. Ontario (Ministry of Correctional Services)*, 2006 SCC 31 (CanLII), [2006] 2 SCR 32 at [20].

- Where there is some evidence that the party claiming privilege has done so 'falsely" or inappropriately.[993]
- When the party claiming privilege fails to respond to a reasonable request by the Commissioner for additional information.[994]

A naked "trust me" that the records in dispute are subject to solicitor-client privilege or litigation privilege is not sufficient from the government institution when making the case that subsection 22(a) of FOIP applies.[995]

In a review, the Commissioner requests copies of records in order to conduct the review and determine whether exemptions have been appropriately applied. This includes requesting records which a government institution may have claimed solicitor-client privilege or litigation privilege over pursuant to subsection 22(a) of FOIP. The government institution may choose to make a "prima facie" case of solicitor-client or litigation privilege for those records pursuant to subsection 22(a) of FOIP. If it does so, it must still meet the "burden of proof" in demonstrating that subsection 22(a) of FOIP applies as required by section 60 of FOIP (see the *Guide to FOIP*, Chapter 2, "Administration of FOIP" for more on the burden of proof).

Prima facie means at first sight; on first appearance but subject to further evidence or information. A 'prima facie case' is where a party produces enough evidence to allow the fact-trier to infer the fact at issue and rule in the party's favor .[996]
A *prima facie* case can be made to the Commissioner without providing a copy of the records but only for records that may be subject to solicitor-client and litigation privilege. All other records must be provided in the course of a review.

If making a *prima facie* case, the Commissioner will need the following from the government institution if claiming litigation privilege for subsection 22(a) of FOIP:

- An **affidavit of documents** which includes an **Index of Records** (Schedule) that includes:

[993] *University of Saskatchewan v Saskatchewan (Information and Privacy Commissioner)*, 2018 SKCA 34 (CanLII) at [53], [54] and [72].
[994] *University of Saskatchewan v Saskatchewan (Information and Privacy Commissioner)*, 2018 SKCA 34 (CanLII) at [83].
[995] *University of Saskatchewan v Saskatchewan (Information and Privacy Commissioner)*, 2018 SKCA 34 (CanLII) at [75].
[996] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 1441.

- Sufficient detail to identify the document and allow the Commissioner to determine whether a prima facie case for the claim of litigation privilege has been made. It should include:

    - A description of the litigation.
    - The dates of the litigation.
    - A description of the party to whom the correspondence is written to, or received from, or at least a description of the role of the party (such as medical expert, potential witness, client).
    - A description of an enclosure where relevant.
    - Some particulars as to the purpose of the document.[997]

For more on what the Commissioner requires, see Part 9: Solicitor-Client or Litigation Privilege in the *Rules of Procedure*.

If the government institution provides less than what is needed for a prima facie case to be met, the Commissioner may request additional details. If the government institution fails to provide the additional details, the Commissioner may do one or both of the following, pursuant to subsection 54(2) of FOIP:

- Summon and enforce the appearance of any person, including employees of a government institution, before the Commissioner and compel them to give oral and/or written evidence under oath or affirmation and produce any documents required.
- Seek an order from the Court of King's Bench for production of the records from the government institution.

Settlement Privilege

Settlement privilege is privilege that applies to the discussions leading up to a resolution of a dispute in the face of litigation. It promotes the settlement of lawsuits.[998]

[997] *Gichuru v. British Columbia (Information and Privacy Commissioner)*, 2014 BCCA 259 (CanLII) at [43].
[998] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 201.

The purpose of settlement privilege is to promote settlement by allowing parties to negotiate without fear that the concessions they offer, and the information they provide, will be used against them in subsequent proceedings.[999]

The rule is that communications and documents exchanged by parties as they try to settle a dispute cannot be used in subsequent proceedings, whether or not a settlement is reached. The privilege applies not only to communications involving offers of settlement, but also to communications that are reasonably connected to the parties' negotiations.[1000]

If settlement privilege is established, it belongs to both parties and cannot be unilaterally waived.[1001]

The existence of the privilege is determined by the following three-part test:[1002]

1. Is there the existence or contemplation of a litigious dispute?

The litigious dispute requirement is satisfied where parties are in a dispute or negotiation, even if they have not commenced legal proceedings.[1003]

However, settlement privilege does not apply where parties are simply negotiating the terms of a commercial contract. This because, without having entered into a contract, there are no legal obligations between the parties that could form the basis for a litigious dispute.[1004]

2. Were the communications made with the intention they remain confidential if negotiations failed?

The context and the substance of the communications can assist in this determination.

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[999] *Union Carbide Canada Inc. v. Bombardier Inc.*, 2014 SCC 35 at [3] and [31]; *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37 at [12]. See also BC IPC Order F20-21 at [57].
[1000] *Middelkamp v. Fraser Valley Real Estate Board*, 1992 CanLII 4039 (BC CA) at [20]; *Union Carbide*, *supra* note 830 at [31]; *Sable*, *supra* note 830 at [2] and [17]; *Bellatrix Exploration Ltd. v. Penn West Petroleum Ltd.*, 2013 ABCA 10 at [26] and BC IPC Order F20-21 at [57].
[1001] *Reum Holdings Ltd. v. 0893178 B.C. Ltd.*, 2015 BCSC 2022 at [56], citing *Sinclair v. Roy*, 1985 CanLII 559 (BC SC) at 222. See also BC IPC Order F20-21 at [59].
[1002] *CB, HK & RD v Canadian Union of Public Employees, Local No. 21*, 2017 CanLII 68786 (SK LRB) at [35].
[1003] *Langley (Township) v. Witschel*, 2015 BCSC 123 at [34] to [40], applying *Belanger v. Gilbert*, 1984 CanLII 355 (BC CA). See also BC IPC F20-21 at [65].
[1004] *Maillet v. Thomas Corner Mini Mart & Deli Inc.*, 2017 BCSC 214 at [1] to [17]; *Jeffrie v. Hendriksen*, 2012 NSSC 335 at [25] to [40]. See also BC IPC Order F20-21 at [65].

3. **Was the purpose of the communications to achieve a settlement?**

The context and the substance of the communications can assist in this determination.

Subsection 22(b)

Solicitor-client privilege

22 A head may refuse to give access to a record that:

…

(b) was prepared by or for an agent of the Attorney General for Saskatchewan or legal counsel for a government institution in relation to a matter involving the provision of advice or other services by the agent or legal counsel;

Subsection 22(b) is a discretionary, class-based exemption. It permits refusal of access in situations where a record was prepared by or for legal counsel (or an agent of the Attorney General) for a government institution in relation to the provision of advice or services by legal counsel (or an agent of the Attorney General). This provision is broader in scope than subsection 22(a).

The following two-part test can be applied:

1. **Were the records "prepared by or for" an agent or legal counsel for a government institution?**

The record must be "prepared", as the term is understood, in relation to the advice or services or compiled or created for the purpose of providing the advice or services.

Prepared means to be made ready for use or consideration.[1005]

By or for means the person preparing the record must be either the person providing the legal advice or legal service or a person who is preparing the record in question on behalf of, or, for the use of, the provider of legal advice or legal related services.[1006]

An agent of the Attorney General for Saskatchewan can include public prosecutions at the Ministry of Justice.[1007]

[1005] Pearsall, Judy, *Concise Oxford Dictionary*, *10th Ed*., (Oxford University Press) at p. 1129.
[1006] Originated from AB IPC Order F2008-021 at [110] and [111]. Adopted in SK OIPC Review Report LA-2014-003 at [17].
[1007] SK OIPC Review Report F-2012-006 at [111].

Attorney General, in this context, is the chief law officer of Saskatchewan responsible for advising the government on legal matters and representing it in litigation.[1008]

For FOIP, a government institution can capture any government institution and not just the one applying the exemption (i.e. by the use of "*a*" government institution rather than "*the*").

2. **Were the records prepared in relation to a matter involving the provision of advice or other services by the agent or legal counsel?**

In relation to has been found to have a similar meaning as *"in respect of"*. It was considered in *Nowegijick v. The Queen*:

> The words "in respect of" are, in my opinion, words of the widest possible scope. They import such meanings as "in relation to", "with reference to" or "in connection with". The phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject-matters.[1009]

Legal advice includes a legal opinion about a legal issue, and a recommended course of action, based on legal considerations, regarding a matter with legal implications.[1010]

Legal service includes any law-related service performed by a person engaged by a government institution and who is licenced to practice law.[1011]

The government institution should explain how the record relates to a matter involving legal advice or legal services provided by its legal counsel.

[1008] Modified from Garner, Bryan A., 2009. *Black's Law Dictionary, Deluxe 10th Edition*. St. Paul, Minn.: West Group at p. 154.
[1009] *Nowegijick v. The Queen*, [1983] 1 SCR 29, 1983 CanLII 18 (SCC) at [39].
[1010] Definition originated from ON Order P-210 at p. 18. Adopted in SK OIPC Review Report F-2012-003 at [97]. Definition also adopted by AB IPC in Order 96-017.
[1011] Definition originated from AB IPC Order 96-017 at [37]. Adopted in SK OIPC Review Report F-2012-003 at [96]. Adjusted to include "engaged by a government institution" in Review Report 171-2019 at [119].

Subsection 22(c)

Solicitor-client privilege

22 A head may refuse to give access to a record that:

…

(c) contains correspondence between an agent of the Attorney General for Saskatchewan or legal counsel for a government institution and any other person in relation to a matter involving the provision of advice or other services by the agent or legal counsel.

Subsection 22(c) of FOIP is a discretionary class-based exemption. It permits refusal of access in situations where a record contains correspondence between the government institution's legal counsel (or an agent of the Attorney General) and any other person in relation to a matter that involves the provision of advice or services by legal counsel (or an agent of the Attorney General). This provision is broader in scope than subsection 22(a) of FOIP.

Subsection 22(c) of FOIP is intended to allow parties to correspond freely in relation to matters about which they need to speak in order to allow the lawyer's advice or services to be provided.[1012]

The following two-part test can be applied:

1. **Is the record a correspondence between the government institution's legal counsel (or an agent of the Attorney General) and any other person?**

Correspondence means letters sent or received.[1013] It is an interchange of written communication.[1014]

A memorandum or note from one employee of a government institution to another summarizing a conversation between that employee and the government institution's lawyer may meet the criteria for this provision.[1015]

[1012] AB IPC Interim Decision Order F2018-D-01/Order F2018-38 at [153].
[1013] Pearsall, Judy, *Concise Oxford Dictionary*, *10th Ed.*, (Oxford University Press) at p. 320.
[1014] Previous definition from SK OIPC Review Report 125-2015 at [35].
[1015] Information contained in a "post-it" note was found to be "information in correspondence between …a public body and any other person in relation to a matter involving the provision of advice…by the lawyer" in AB IPC Order 96-019 at [113].

Agent means someone who is authorized to act for or in place of another.[1016]

Attorney General, in this context, is the chief law officer of Saskatchewan responsible for advising the government on legal matters and representing it in litigation.[1017]

Any other person was an intentional and inclusive phrase to capture just that – *any other person*. The government institution must make it sufficiently clear, as to what the nature of that other person's role in the correspondence was.[1018]

2. Does the correspondence relate to a matter that involves the provision of advice or other services by the agent or legal counsel?

In relation to has been found to have a similar meaning as *"in respect of"*. It was considered in *Nowegijick v. The Queen*:

> The words "in respect of" are, in my opinion, words of the widest possible scope. They import such meanings as "in relation to", "with reference to" or "in connection with". The phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject-matters.[1019]

Legal advice includes a legal opinion about a legal issue, and a recommended course of action, based on legal considerations, regarding a matter with legal implications.[1020]

Legal service includes any law-related service performed by a person engaged by a government institution and who is licenced to practice law.[1021]

The government institution should explain how the correspondence relates to a matter involving advice or other services provided by legal counsel.

[1016] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 78.
[1017] Modified from Garner, Bryan A., 2009. *Black's Law Dictionary, Deluxe 10th Edition*. St. Paul, Minn.: West Group at p. 154.
[1018] AB IPC Interim Decision Order F2018-D-01/Order F2018-38 at [151].
[1019] *Nowegijick v. The Queen*, [1983] 1 SCR 29, 1983 CanLII 18 (SCC) at [39].
[1020] Definition originated from ON Order P-210 at p. 18. Adopted in SK OIPC Review Report F-2012-003 at [97]. Definition also adopted by AB IPC in Order 96-017.
[1021] Definition originated from AB IPC Order 96-017 at [37]. Adopted in SK OIPC Review Report F-2012-003 at [96]. Adjusted to include "engaged by a government institution" in Review Report 171-2019 at [119].

Subsection 29(1): Disclosure of Personal Information

Disclosure of Personal Information

29(1) No government institution shall disclose personal information in its possession or under its control without the consent, given in the prescribed manner, of the individual to whom the information relates except in accordance with this section or section 30.

Subsection 29(1) of FOIP protects the privacy of individuals whose *personal information* may be contained within records responsive to an access to information request made by someone else.

Subsection 29(1) of FOIP requires a government institution to have the consent of the individual whose *personal information* is in the record prior to disclosing it.

When dealing with information in a record that appears to be *personal information*, the first step is to confirm the information indeed qualifies as *personal information* pursuant to section 24 of FOIP. For more on what constitutes *personal information*, see the *Guide to FOIP*, Chapter 6, "Protection of Privacy" for a detailed explanation of section 24 of FOIP and the definition of *personal information*.

Once confirmed as *personal information*, the government institution needs to determine if getting consent from the individual is reasonable. There may be circumstances where getting consent is possible. However, in some circumstances it may not be reasonable to do so.

Reasonable means what is fair, proper, or moderate under the circumstances; sensible.[1022]

The consent must be in writing pursuant to section 18 of *The Freedom of Information and Protection of Privacy Regulations* (FOIP Regulations). Section 18 of the FOIP *Regulations* has a number of requirements in terms of the consent gathered. This includes that the consent:

- Relate to the purpose for which the information is required;
- Be informed;
- Be given voluntarily; and
- Not be obtained through misrepresentation, fraud or coercion.

Without consent, *personal information* cannot be released unless one of the provisions under subsection 29(2) of FOIP applies. For more on subsection 29(2) of FOIP, see the *Guide to FOIP*,

[1022] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 1518.

Chapter 6, "Protection of Privacy". Releasing *personal information* without proper authority could constitute a breach of privacy.

Section 30: Personal Information of Deceased Individual

Personal information of deceased individual

30(1) Subject to subsection (2) and to any other Act, the personal information of a deceased individual shall not be disclosed until 25 years after the death of the individual.

(2) Where, in the opinion of the head, disclosure of the personal information of a deceased individual to the individual's next of kin would not constitute an unreasonable invasion of privacy, the head may disclose that personal information before 25 years have elapsed after the individual's death.

Subsection 30(1)

Personal information of deceased individual

30(1) Subject to subsection (2) and to any other Act, the personal information of a deceased individual shall not be disclosed until 25 years after the death of the individual.

Subsection 30(1) of FOIP provides that the personal information of a deceased individual cannot be disclosed until 25 years after the death of the individual.

When considering the application of this provision, government institutions should also consider whether section 59 of FOIP (Exercise of rights by other persons) has any application in the circumstances. In some instances, *personal representatives* may be exercising a right or power as it relates to the administration of the individual's estate. Furthermore, there may be written authorization from the individual prior to death (see subsection 59(e) of FOIP). For more on section 59 of FOIP, see *Exercise of Rights by Authorized Representatives* in the *Guide to FOIP*, Chapter 3, "Access to Records".[1023]

[1023] Also see section 59 (Exercise of rights by other persons) in FOIP.

IPC Findings

In Review Report 098-2015, the Commissioner considered section 30(1) of FOIP. An applicant had requested records from Saskatchewan Government Insurance (SGI) related to a son's auto claim file. The son was deceased. SGI responded to the applicant providing partial access to records and withholding others pursuant to several provisions in FOIP including section 30. Upon review, the Commissioner found that based on evidence provided by the applicant, the applicant was the duly appointed administrator of the son's estate. As such, the applicant qualified as the personal representative for purposes of subsection 59(a) of FOIP. In order for the personal representative to access the personal information, it must relate to the administration of the estate. The Commissioner found that the information related to the administration of the son's estate because the information appeared to relate to the adjudication of the son's auto claim. The Commissioner recommended the personal information of the applicant's son be released to the applicant.

Subsection 30(2)

Personal information of deceased individual

30(2) Where, in the opinion of the head, disclosure of the personal information of a deceased individual to the individual's next of kin would not constitute an unreasonable invasion of privacy, the head may disclose that personal information before 25 years have elapsed after the individual's death.

Subsection 30(2) of FOIP provides discretion on the head to disclose the personal information of a deceased individual before 25 years after death to the individual's next of kin where it is deemed not to constitute an unreasonable invasion of privacy.

Next of kin is a person's nearest relative by blood or marriage which could include: a cousin, grandparent, niece or nephew, who has close ties to the individual who is deceased. For example:

- Spouse, parent, child
- Cousins brought up together as siblings
- A grandchild brought up by grandparents[1024]

[1024] British Columbia Government Services, *FOIPPA Policy Definitions* at https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/policy-definitions. Accessed April 23, 2020.

FOIP does not define what constitutes an "*unreasonable invasion of privacy*". However, other jurisdictions in Canada have what constitutes an unreasonable invasion of privacy built into its privacy legislation.

Section 31: Access to Personal Information

Individual's access to personal information

31(1) Subject to Part III and subsection (2), an individual whose personal information is contained in a record in the possession or under the control of a government institution has a right to, and:

(a) on an application made in accordance with Part II; and

(b) on giving sufficient proof of his or her identity;

shall be given access to the record.

(2) A head may refuse to disclose to an individual personal information that is evaluative or opinion material compiled solely for the purpose of determining the individual's suitability, eligibility or qualifications for employment or for the awarding of government contracts and other benefits, where the information is provided explicitly or implicitly in confidence.

This section can also be found in the *Guide to FOIP*, Chapter 3, "Access to Records" and Chapter 6, "Protection of Privacy." It is reproduced here for ease of access.

Subsection 31(1)

Individual's access to personal information

31(1) Subject to Part III and subsection (2), an individual whose personal information is contained in a record in the possession or under the control of a government institution has a right to, and:

(a) on an application made in accordance with Part II; and

(b) on giving sufficient proof of his or her identity;

shall be given access to the record.

Subsection 31(1) of FOIP provides that upon application an individual is entitled to their own personal information contained within a record unless an exemption applies under Part III or subsection 31(2) of FOIP applies.

Government institutions should interpret the exemptions to this right to personal information with a view to giving an individual as much access as possible.

Records containing personal information may be very sensitive in nature, so care must be taken to ensure that proper safeguards are in place when these types of records are released. When providing an applicant with access to personal information, a government institution must be satisfied that the individual receiving the information is indeed the individual that the information is about or a duly appointed representative of that person.[1025] For more on duly appointed representatives, see the *Guide to FOIP*, Chapter 3, "Access to Records", at *Exercise of Rights by Authorized Representatives*.[1026]

For more information on verifying the identity of the applicant, the Ministry of Justice, Access and Privacy Branch issued the resource, *Verifying the Identity of an Applicant*. It provides helpful direction on steps to take to verify identity.

Subsection 31(2)

Individual's access to personal information

31(2) A head may refuse to disclose to an individual personal information that is evaluative or opinion material compiled solely for the purpose of determining the individual's suitability, eligibility or qualifications for employment or for the awarding of government contracts and other benefits, where the information is provided explicitly or implicitly in confidence.

Subsection 31(2) of FOIP enables the head to refuse to disclose to individuals, personal information that is evaluative or opinion material compiled solely for the purpose of determining suitability, eligibility, or qualifications for employment or for the awarding of government contracts and other benefits.

The provision attempts to address two competing interests: the right of an individual to have access to his or her personal information and the need to protect the flow of frank information to government institutions so that appropriate decisions can be made respecting the awarding of jobs, contracts and other benefits.[1027]

The following three-part test can be applied:

[1025] Government of Saskatchewan, Ministry of Justice, Access and Privacy Branch, *Verifying the Identity of an Applicant*, September 2017, at p. 2.
[1026] Also see section 59 (Exercise of rights by other persons) in FOIP.
[1027] Adapted from ON IPC Order P-773. Ontario has a similar provision at subsection 49(c) of its *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31.

1. Is the information personal information that is evaluative or opinion material?

To qualify as *personal information*, the information must be about an identifiable individual and must be personal in nature. Some examples are provided in subsection 24(1) of FOIP. See *Section 24* in the *Guide to FOIP,* Chapter 6, "Protection of Privacy".

Evaluative means to have assessed, appraised, to have found or to have stated the number of.[1028]

Opinion material is a belief or assessment based on grounds short of proof; a view held as probable for example, a belief that a person would be a suitable employee, based on that person's employment history. An opinion is subjective in nature and may or may not be based on facts.[1029]

2. Was the personal information compiled solely for one of the enumerated purposes?

Compiled means that the information was drawn from several sources or extracted, extrapolated, calculated or in some other way manipulated.[1030]

The enumerated purposes are:

- For determining the individual's suitability, eligibility, or qualifications for employment.
- For the awarding of contracts with the government institution.
- For awarding other benefits.

Suitability means right or appropriate for a particular person, purpose or situation.[1031]

Eligibility means fit and proper to be selected or to receive a benefit; legally qualified for an office, privilege or status.[1032]

Qualifications means the possession of qualities or properties inherently or legally necessary to make one eligible for apposition or office, or to perform a public duty or function.[1033]

[1028] AB IPC Order 98-021 at p.4.
[1029] AB IPC Order 98-021 at p.4.
[1030] British Columbia Government Services, *FOIPPA Policy Definitions* at https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/policy-definitions. Accessed April 23, 2020.
[1031] Pearsall, Judy, *Concise Oxford Dictionary*, *10th Ed*., (Oxford University Press) at p. 1434.
[1032] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 657.
[1033] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 1497.

Employment means the selection for a position as an employee of a government institution.[1034]

Employment reference means personal information that is evaluative, or opinion material compiled solely for the purpose of describing an individual's suitability, eligibility or qualifications for employment.[1035]

Award means to give or to order to be given as a payment, compensation or prize; to grant; to assign.[1036]

Benefit means a favourable or helpful factor or circumstance; advantage, profit.[1037]
Other benefits refer to benefits conferred by a government institution 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.[1038]

Employee of a government institution means an individual employed by a government institution and includes an individual retained under a contract to perform services for the government institution.[1039]

The personal information must have been compiled solely for one of the enumerated purposes to qualify.

3. Was the personal information provided explicitly or implicitly in confidence?

In confidence usually describes a situation of mutual trust in which private matters are relayed or reported. Information provided *in confidence* means that the supplier of the information has stipulated how the information can be disseminated.[1040] In order for confidence to be found, there must be an implicit or explicit agreement or understanding of

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[1034] Service Alberta, *FOIP Guidelines and Practices, 2009 Edition*, Chapter 4 at p. 141.
[1035] *The Freedom of Information and Protection of Privacy Regulations,* c. F-22.01 Reg. 1, s. 2(1)(b).
[1036] AB IPC, Order 98-021 at p.5.
[1037] British Columbia Government Services, *FOIPPA Policy Definitions* at https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/policy-definitions. Accessed April 23, 2020.
[1038] Service Alberta, *FOIP Guidelines and Practices, 2009 Edition*, Chapter 4 at p. 141.
[1039] *The Freedom of Information and Protection of Privacy Act* [S.S. 1990-91, c. F-22.01 as am], s. 2(1)(b.1).
[1040] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 104, SK OIPC Review Reports F-2006-002 at [51], H-2008-002 at [73], ON IPC Order MO-1896 at p. 8.

confidentiality on the part of both the government institution and the party providing the information.[1041]

Implicitly means that the confidentiality is understood even though there is no actual statement of confidentiality, agreement or other physical evidence of the understanding that the information will be kept confidential.[1042]

Explicitly 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 provided on the understanding that it would be kept confidential.[1043]

Factors considered when determining whether a document was provided in confidence *implicitly* include (not exhaustive):

- What is the nature of the information. Would a reasonable person regard it as confidential. Would it ordinarily be kept confidential by the party providing it or by the government institution.[1044]
- Was the information treated consistently in a manner that indicated a concern for its protection by the party providing it and the government institution from the point at which it was provided until the present time.[1045]
- Is the information available from sources to which the public has access.[1046]
- Does the government institution have any internal policies or procedures that speak to how records or information such as that in question are to be handled confidentially.
- Was there a mutual understanding that the information would be held in confidence. **Mutual understanding** means that the government institution and the party providing it both had the same understanding regarding the confidentiality of the information at the time it was provided. If one party intended the information to be kept confidential but the other did not, the information is not considered to have

[1041] SK OIPC Review Reports F-2006-002 at [52], LA-2013-002 at [57]; ON IPC Order MO-1896 at p. 8.
[1042] SK OIPC Review Reports F-2006-002 at [57], F-2009-001 at [62], F-2012-001/LA-2012-001 at [29], LA-2013-002 at [49], F-2014-002 at [47].
[1043] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at pp. 104 and 105.
[1044] BC IPC Orders 331-1999 at [8], F13-01 at [23]; NS IPC Review Reports 17-03 at [34], 16-09 at [44]; PEI IPC Order FI-16-006 at [19].
[1045] ON IPC Orders PO-2273 at p. 8, PO-2283 at p. 10.
[1046] ON IPC Orders PO-2273 at p. 8, PO-2283 at p. 10.

been provided in confidence. However, mutual understanding alone is not sufficient. Additional factors must exist.[1047]

The preceding factors are not a test but rather guidance on factors to consider. It is not an exhaustive list. Each case will require different supporting arguments. The bare assertion that the information was provided implicitly in confidence would not be sufficient.[1048]

Factors to consider when determining if a document was provided in confidence *explicitly* include (not exhaustive):

- The existence of an express condition of confidentiality between the government institution and the party providing it.[1049]
- The fact that the government institution requested the information be provided in a sealed envelope and/or outlined its confidentiality intentions to the party prior to the information being provided.[1050]

The preceding factors are not a test but rather guidance on factors to consider. It is not an exhaustive list. Each case will require different supporting arguments.

Two cases came before the Court of King's Bench for Saskatchewan dealing with the equivalent provision in *The Local Authority Freedom of Information and Protection of Privacy Act* [see s. 30(2)]. Those two cases are as follows:

- *Fogal v. Regina School Division No. 4*, 2002 SKKB 92 (CanLII)
- *Britto v University of Saskatchewan*, 2018 SKKB 92 (CanLII)

IPC Findings

In Review Report LA-2004-001, the Commissioner considered the equivalent provision in *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). The review involved Lloydminster Public School Division (Division). An applicant requested access to records related to the applicant's suitability for volunteering in after-school sport activities. Upon review, the Commissioner found that the evaluative or opinion material was not compiled for the purpose of determining the applicant's suitability, eligibility or qualifications

[1047] *Jacques Whitford Environment Ltd. v. Canada (Minister of National Defence)*, 2001 FCT 556 at [40]; SK OIPC Review Reports F-2006-002 at [52], LA-2013-002 at [58] to [59]; ON IPC Order MO-1896 at p. 8; BC IPC Order F-11-08 at [32].
[1048] SK OIPC Review Report LA-2013-002 at [60].
[1049] SK OIPC Review Reports F-2006-002 at [56], LA-2013-003 at [113], F-2014-002 at [47]; PEI IPC Order 03-006 at p. 5; AB IPC Orders 97-013 at [23] to [24], 2001-008 at [54].
[1050] SK OIPC Review Reports F-2006-002 at [56], F-2012-001/LA-2012-001 at [29], LA-2013-002 at [49], LA-2013-003 at [113], F-2014-002 at [47]; PEI IPC Order 03-006 at p. 5; AB IPC Order 97-013 at [25].

for employment or for the awarding of a contract or other benefit. It was compiled for the purpose of determining the suitability of a volunteer to engage in "volunteer" activity in an after-hours sports program. The Commissioner found that a volunteer does not meet the definition of "employee" of a local authority. As such, the Commissioner found that subsection 30(2) of LA FOIP did not apply.

In Review Report 258-2016, the Commissioner found that the name of the individual giving the opinion was also captured by the provision. The purpose and intent of the provision is to allow individuals to provide frank feedback where there is an evaluation process occurring. In addition, evaluating suitability for employment can take place not only during the hiring process but also during an employee's tenure. Furthermore, the provision can include unsolicited records such as letters of concern or complaint (*Fogal v. Regina School Division No. 4, (2002)*).

In Review Report 010-2018, the Commissioner considered the equivalent provision in *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). The review involved the South East Cornerstone Public School Division #209 (Cornerstone). An applicant was seeking parental complaints and witness statements regarding an incident. Cornerstone withheld the records pursuant to several provisions in LA FOIP including subsection 30(2) of LA FOIP. Upon review, the Commissioner found that the records contained personal information that was evaluative or opinion material. Furthermore, the Commissioner found that the personal information was compiled solely for the purpose of determining the applicant's suitability for employment. Finally, the Commissioner found that the interview notes were provided explicitly in confidence. However, the written complaints were not provided implicitly or explicitly in confidence. The Commissioner recommended that Cornerstone sever the opinions and other personal information of individuals other than the applicant and release the rest.

In Review Report 142-2022, the Commissioner considered a denial of access involving the Ministry of Social Services (Social Services). Social Services withheld portions of the record totaling 255 pages. It applied subsection 31(2) of FOIP to portions of the records. Upon review, the Commissioner found that the assessment information collected on the applicant was for the enumerated purpose of determining eligibility to an income program offered by Social Services. The assessment information contained the comments of the assessor. However, the Commissioner found that Social Services did not demonstrate that the scores on the assessment were provided explicitly or implicitly in confidence. As such, the Commissioner found that subsection 31(2) of FOIP did not apply.

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