Office of the Information and
Privacy Commissioner of Alberta

Investigation Report F2020-IR-01

Investigation into Public Bodies' Compliance with Section 32, the Public Interest Override Provision

July 29, 2020

Alberta Public Bodies

Investigation 009124

Commissioner's Message

I initiated this investigation to assess Alberta public bodies' compliance with section 32 of the *Freedom of Information and Protection of Privacy Act* (FOIP Act). Section 32 requires that a public body disclose information if it is in the public interest.

For a number of reasons, I became interested in how Alberta public bodies understand and use section 32 as the authority to release information. One example was the debate surrounding the disclosure of homicide victims' names, and my office's review of a framework developed by the Alberta Association of Chiefs of Police.

Generally, the investigation found that Alberta public bodies take seriously and understand using section 32 as the authority to disclose "information about a risk of significant harm to the environment or to the health or safety of the public, of the affected group of people, of the person or of the applicant" (section 32(1)(a) of the FOIP Act).

I would like to commend and draw attention to Portage College's policy on "Disclosure in the Public Interest", which is part of its "Policies, Guidelines and Procedures Manual". Portage College graciously granted permission to republish its "Disclosure in the Public Interest" guidelines (attached as Appendix B.)

For public bodies struggling to understand section 32(1)(a), I found Portage College's policy to be clear, comprehensive and practical in determining whether a situation meets the threshold for disclosure of information.

Additionally, public bodies may consider reviewing breach notification decisions published on my office's website where a risk of significant harm to an individual has been found under the *Personal Information Protection Act* to better understand "risk of significant harm".

I would also like to commend Alberta Justice and Solicitor General and municipal police services for their protocols on disclosing information related to high-risk offenders and generally on the "Duty to Warn".

In terms of section 32(1)(b), however, the findings from this investigation show Alberta's public bodies do not regularly turn their minds to disclosing information proactively when it is "clearly in the public interest". Public bodies cited several reasons for this, namely that it is difficult to discern between what information is "of interest to the public" and what information is "clearly in the public interest".

While some public bodies may want clarity from my office on this aspect, public bodies are in the best position to understand what information they hold to decide what is clearly in the public interest.

I agree with guidance issued by my colleagues in British Columbia and Newfoundland and Labrador that some of the factors to determine whether information is clearly in the public

interest include general public interest in transparency, public interest in the issue, public interest in the specific information, suspicion of wrongdoing by a public body and presenting a full picture. These factors are not descriptive or specific, but it is worth repeating that public bodies are in the best position to understand what information must be disclosed based on these factors.

Open government initiatives have increased over the past several years, and may also prove helpful to public bodies in determining what information is "clearly in the public interest". Many public bodies through legislation, policy or other directives have determined certain categories of information to be in the public interest, such as travel and expenses, compensation and sole-sourced contracts.

Although open government disclosures are not made under section 32, per se, these programs could help public bodies determine what information might be disclosed in the public interest under section 32(1)(b).

My office has also issued "Access Impact Assessment Guidelines for Proactive Disclosure" and reviewed certain open government programs.[1,2,3] The guidelines and recommendations from the reports could be helpful to public bodies in developing policies or proactively disclosing information.

Overall, I recommend that public bodies more often consider section 32(1)(b) as the authority to proactively disclose information, and to document decisions where section 32(1)(b) has been considered whether or not a disclosure is made.

I would like to thank all of the public bodies that responded to the survey. The survey received a 100% response rate and helped me in understanding what issues public bodies are facing when considering section 32.

I would also like to thank Naba Shirazi, who was a summer law student in our office. Naba managed the survey and responses, and undertook research for this report.

Jill Clayton
Information and Privacy Commissioner

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[1] The "Access Impact Assessment Guidelines for Proactive Disclosure" are available from www.oipc.ab.ca/resources/.
[2] The "Review of the Government of Alberta's Public Disclosure of Travel and Expenses Policy" is available from www.oipc.ab.ca/resources/.
[3] Investigation Report F2015-IR-01, which reviewed the Government of Alberta's disclosure of compensation information, is available at www.oipc.ab.ca/decisions/investigation-reports/.

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Background

[1] On July 11, 2018, I initiated this investigation under section 53(1)(a) of the *Freedom of Information and Protection of Privacy Act* (FOIP Act). The purpose of the investigation is to assess the compliance of public bodies with section 32 of the FOIP Act. Section 32 requires that a public body disclose information if it is in the public interest.

[2] Section 32 reads:

> **Information must be disclosed if in the public interest**
>
> **32(1)** Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people, to any person or to an applicant
>
> (a) Information about a risk of significant harm to the environment or to the health or safety of the public, of the affected group of people, of the person or of the applicant, or
> (b) Information the disclosure of which is, for any other reason, clearly in the public interest.
>
> **(2)** Subsection (1) applies despite any other provisions of this Act.
>
> **(3)** Before disclosing information under subsection (1), the head of a public body must, where practicable,
>
> (a) notify any third party to whom the information relates,
> (b) give the third party an opportunity to make representations relating to the disclosure, and
> (c) notify the Commissioner.
>
> **(4)** If it is not practicable to comply with subsection (3), the head of the public body must give written notice of the disclosure
>
> (a) to the third party, and
> (b) to the Commissioner.

[3] For a number of reasons I became interested in how Alberta public bodies understand and use section 32 as the authority to release information. For example, the public debate surrounding the disclosure of homicide victims' names, and my office's involvement in reviewing a framework developed by the Alberta Association of Chiefs of Police brought section 32 to the fore.

Methodology

[4] A review of "public interest" in the FOIP Act and relevant orders issued by my office was undertaken to understand how section 32 is interpreted in Alberta. I also reviewed disclosure notices under section 32 submitted by public bodies to my office, as is required by sections 32(3)(c) or 32(4)(b).

[5] In order to understand how public bodies in Alberta consider section 32, I conducted a survey of 87 public bodies. The objectives of the survey were to:

- Examine the policies and procedures established by public bodies in relation to disclosure of information under section 32
- Assess the extent to which section 32 is applied by public bodies
- Identify issues and difficulties in applying section 32
- Make recommendations and develop guidelines for public bodies under section 32

[6] The 87 public bodies were selected based on the following criteria:

- Government departments, excluding Communications and Public Engagement and the Public Service Commission
- Municipalities and specialized municipalities with at least 10,000 residents
- Post-secondary institutions, excluding art and design schools
- School jurisdictions with at least 7,500 students
- Municipal police services
- Regional health authority (Alberta Health Services)
- Hospital board (Covenant Health)

[7] The analysis of "public interest" in the FOIP Act, relevant orders issued by my office and notices of disclosures made under section 32 submitted to my office make up part one of this report.

[8] Survey results are contained in part two of this report.

[9] I also reviewed public interest provisions in other Canadian jurisdictions, and relevant decisions, investigation reports or guidelines in some of those jurisdictions. The analysis of the public interest override in other Canadian jurisdictions makes up part three of this report.

Part 1: Public Interest Override in Alberta

'Public Interest' in the FOIP Act

[10] The term "public interest" is mentioned several times in the FOIP Act.[4]

[11] The main provision is section 32, which reads:

> **Information must be disclosed if in the public interest**
>
> **32(1)** Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people, to any person or to an applicant
>
> (a) Information about a risk of significant harm to the environment or to the health or safety of the public, of the affected group of people, of the person or of the applicant, or
> (b) Information the disclosure of which is, for any other reason, **clearly in the public interest.**
>
> **(2)** Subsection (1) applies despite any other provisions of this Act.
>
> **(3)** Before disclosing information under subsection (1), the head of a public body must, where practicable,
>
> (a) notify any third party to whom the information relates,
> (b) give the third party an opportunity to make representations relating to the disclosure, and
> (c) notify the Commissioner.
>
> **(4)** If it is not practicable to comply with subsection (3), the head of the public body must give written notice of the disclosure
>
> (a) to the third party, and
> (b) to the Commissioner. [emphasis added]

[12] Section 32 is also referenced in the FOIP Act's "whistleblower provision" (section 82), which reads:

> **Disclosure to Commissioner**
>
> **82(1)** An employee of a public body may disclose to the Commissioner any information that the employee is required to keep confidential and that the employee, acting in good faith, believes
>
> (a) ought to be disclosed by a head **under section 32**, or
> (b) is being collected, used or disclosed in contravention of Part 2.
>
> **(2)** The Commissioner must investigate and review any disclosure made under subsection (1).
>
> **(3)** If an employee makes a disclosure under subsection (1), the Commissioner must not disclose the identity of the employee to any person without the employee's consent.

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[4] *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25, s 32.

(4) An employee is not liable to a prosecution for an offence under any Act

(a) for copying a record or disclosing it to the Commissioner, or
(b) for disclosing information to the Commissioner

unless the employee has acted in bad faith.

(5) A public body or person acting on behalf of a public body must not take any adverse employment action against an employee because the employee, acting in good faith,

(a) as disclosed information to the Commissioner under this section, or
(b) as exercised or may exercise a right under this section.

(6) A person who contravenes subsection (5) is guilty of an offence and liable to a fine of not more than $10 000.

(7) In carrying out an investigation and review under this section, the Commissioner has all of the powers and duties set out in sections 56, 59, 68, 69 and 72(1) to (5), and sections 57, 58, 60 and 62 apply. [emphasis added]

[13] Section 82(1)(a) has not been interpreted in any order or public investigation report issued by my office, although Investigation Report F2003-IR-004 looked into a government employee's disclosure made under section 82(1)(b).[5]

[14] Section 93(4)(b) also mentions "public interest". Section 93 reads in part:

Fees

93(1) The head of a public body may require an applicant to pay to the public body fees for services as provided for in the regulations.

…

(4) The head of a public body may excuse the applicant from paying all or part of a fee if, in the opinion of the head,

…

(b) the record **relates to a matter of public interest**, including the environment or public health or safety. [emphasis added]

[15] The thresholds for engaging what is "clearly in the public interest" under section 32(1)(b) and what "relates to a matter of public interest" under section 94(4)(b) are distinct as outlined in orders issued by my office (e.g. Order 98-011[6]). Further, one of my office's earliest orders provided a non-exhaustive list of criteria "for determining

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[5] Office of the Information and Privacy Commissioner of Alberta, Investigation Report F2003-IR-004, July 23, 2003, is available at www.oipc.ab.ca/media/127686/F2003-004IR.pdf.
[6] Office of the Information and Privacy Commissioner of Alberta, Order 98-011, September 1, 1998, is available at www.oipc.ab.ca/media/124357/98-011Order.pdf.

whether a record relates to a matter of public interest under section 87(4)(b) [now section 93(4)(b)]" (Order 96-002[7]). The threshold for "compelling public interest" under section 32 is different, and there is not a similar list of criteria for section 32 "clearly in the public interest" disclosures.

[16] Finally, there is some overlap between sections 32(1)(a) and 40(1).

[17] Section 40(1) outlines the circumstances in which "[a] public body may disclose personal information". For example:

- Section 40(1)(e) says that, "A public body may disclose personal information only… for the purpose of complying with an enactment of Alberta or Canada or with a treaty arrangement or agreement made under an enactment of Alberta or Canada". One health care body said it regularly relies on requirements in other legislation to disclose personal information in certain circumstances (e.g. the *Public Health Act*).

- Section 40(1)(ee) says that, "A public body may disclose personal information only… if the head of the public body believes, on reasonable grounds, that the disclosure will avert or minimize (i) a risk of harm to the health or safety of a minor, or (ii) an imminent danger to the health or safety of any person".

  In the circumstances of Order F2016-33, "Section 40 contains a number of circumstances in which personal information can be disclosed, but the one I believe is the best fit in the present circumstances, section 40(1)(ee), is quite similar in its terms to section 32… Each of the provisions is met by the existence of a risk of harm to the health or safety of any person, and for the reasons given below, I believe that both provisions were met in the present circumstances." The Adjudicator in Order F2016-33 differentiates between section 40(1) "permitting disclosure" whereas section 32 "places a duty to warn on a public body". Regardless, in Order F2016-33 the Adjudicator determined both sections applied. Specifically, the Adjudicator found that the public body disclosed the complainant's personal information in accordance with sections 40(1) and 40(4) of the FOIP Act.

- Section 40(1)(gg) says that, "A public body may disclose personal information only… to a law enforcement agency, an organization providing services to a minor, another public body or any prescribed person or body if the information is in respect of a minor or a parent or guardian of a minor and the head of the public body believes, on reasonable grounds, that the disclosure is in the best interests of that minor." This provision has not been interpreted in orders or public investigation reports

[7] Office of the Information and Privacy Commissioner of Alberta, Order 96-002, March 21, 1996, is available at www.oipc.ab.ca/media/124429/96-002Order.pdf; reconsidered in Order F2006-032.

though it is similar to section 32(1)(a) in that it implies a potential risk of harm to the health or safety of a minor.

Findings

- The difference between what is "of interest to the public" versus what is of "compelling public interest" under section 32 has not been defined in orders issued by the Office of the Information and Privacy Commissioner of Alberta.
- The fee waiver "matter of public interest" under section 93 is different than "clearly in the public interest" under section 32.
- Public bodies often rely on other authorities for the disclosure of personal information in the event of "a risk of significant harm to the environment or to the health or safety of the public", since some section 40(1) provisions overlap in certain circumstances.

Alberta OIPC Orders and the Public Interest Override

[18] Several orders issued by my office, three of which were released in 1996, are significant for interpreting the public interest override provision.

[19] First, Justice Cairns issued Order 96-014 (Adjudication Order #1) on May 21, 1996.[8]

[20] In Order 96-014, Justice Cairns considered the public interest provision (which at the time was section 31) after the applicant raised two issues in relation to a government department's decision to withhold certain records in response to an access request. One of those issues concerned "the 'overriding' Section 31 of the Act" (p. 22); specifically the applicant raised section 31(1)(b) which read, "information the disclosure of which is clearly in the public interest."

[21] Justice Cairns determined that "notwithstanding Section 67(i) which imposes a general onus and burden of proof upon the government official, I am of the view that here the onus is upon the applicant" (p. 23). He supported this position by stating "the principle 'he who asserts must prove' ought to apply, thereby militating against the public body effectively having to prove a negative, i.e., that it is not clearly in the public interest. In this case the applicant asserts its applicability. It thereby must prove that applicability. It has not done so" (p. 23).

[22] In deciding that the release of the information at issue was not clearly in the public interest, Justice Cairns said, "While this matter may well be of interest to the public, it is

[8] Office of the Information and Privacy Commissioner of Alberta, Order 96-014, May 21, 1996, is available at www.oipc.ab.ca/media/470423/Adjudication_Order_1_May1996.pdf. Former Commissioner Robert C. Clark declared "a possible conflict" on this file, and an external adjudicator was appointed.

by no means a matter of public interest. It relates to a private relationship between Agri-Team, a federal government agency, and the provincial government" (p. 23).

[23] Second, Information and Privacy Commissioner Robert C. Clark issued Order 96-007 on June 5, 1996.[9] While he did not make a ruling, he did make an observation regarding section 31, specifically differentiating between a "record" and "information". He said at p. 8:

> It is important to draw the attention of public bodies involved in cases like this to section 31. That section requires the head of a public body to disclose information about risks to others or information which is in the public interest to affected persons. Section 31 overrides any other provision of the Act... In applying section 31, some thought must given [sic] to whether to release the actual record or to release a summary of it or to simply release a warning of the risk.

[24] Third, Commissioner Clark issued Order 96-011 on September 11, 1996.[10] He said, "I agree with the proposition that it is the applicant who bears the burden of proof as a general principle" (p. 17). The Commissioner qualified this support by saying the "burden of proof (is) more applicable for a formal review than for a less formal investigation. The evidentiary burden may not be the same for a section 31 review as for a Part 4 review. On some occasions, a determination about the applicability of section 31 will require only minimal evidence" (p. 17).

[25] Commissioner Clark differentiated between information and record again in Order 96-011. He said at p. 15:

> In my opinion, "information" takes in both "personal information" and a "record" and perhaps more. Information must include *any* information known by the head of a public body, and that information may or may not be coextensive with or include a record.

[26] Order 96-011 also outlined the "pre-conditions" for release of information under section 31, and noted "it is not a burden that will be easily met" (p. 18). The pre-conditions are risk of significant harm to the environment, risk of significant harm to the health or safety of the public and release clearly in the public interest. In analyzing the burden for meeting the pre-conditions for release of information under section 31, Commissioner Clark stated at p. 18:

> I cannot conclude that the Legislature intended for section 31 to operate simply because a member of the public asserts "interest" in the information. The pre-condition that the information must be "clearly a matter of public interest" must refer to a matter of compelling public interest.

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[9] Office of the Information and Privacy Commissioner of Alberta, Order 96-007, June 5, 1996, is available at www.oipc.ab.ca/media/124444/96-007Order.pdf.

[10] Office of the Information and Privacy Commissioner of Alberta, Order 96-011, September 11, 1996, is available at www.oipc.ab.ca/media/124456/96-011Order.pdf.

> Similarly, I cannot conclude that the Legislature intended for section 31 to operate when a member of the public asserts that there is "risk of significant harm". There must be some actual risk, and there must be some evidence that the harm in question is significant.

[27] In subsequent orders since 1996, Commissioner Clark's words – "it is not a burden that will be easily met" – have proved prescient. No applicant has proven the burden for the pre-conditions of release of information under section 31 (now section 32). In some cases, records were disclosed under different sections of the FOIP Act without reliance on the public interest override.

[28] In Order 97-009, the Commissioner interpreted "without delay" in section 31 to mean to apply in "emergency-like" circumstances.[11] That order reads at para. 166, "Section 31 imposes a statutory obligation for the head of a public body to release information of certain risks under 'emergency-like' circumstances (i.e., 'without delay')." The Commissioner noted that in the circumstances at issue in Order 97-009 "the emergency-like circumstances contemplated by section 31 do not exist now… I have not been presented with any evidence that there is a new risk that would require disclosure of additional information now. Therefore, I do not find that there is a present obligation on the Public Body to disclose information under section 31" (p. 37). The circumstances in which section 32 was contemplated in Order 97-009 related to "hydrocarbon contamination" of a particular property (i.e. a risk of harm to the environment).

[29] In Order F2012-014, the records at issue related to an applicant's request for water well information, including water chemistry and biological data, spanning several years.[12] At inquiry, the applicant acknowledged that the information requested was not about a "risk of significant harm to the environment" or any of the other conditions under section 32(1)(a). The applicant also acknowledged that there was "no urgency in this inquiry, such as there might be in the case of a risk of significant harm to the environment or to the health or safety of the public" (para. 187) in releasing information. Rather, the applicant argued that disclosure of groundwater data was "clearly in the public interest" under section 32(1)(b), and that "there is a sufficient degree of urgency in this case". The Adjudicator agreed with the applicant that the sense of urgency required to engage section 32(1)(b) does not have to meet the same threshold as for section 32(1)(a). The Adjudicator added at para. 191:

> The reference to "without delay" in the introductory words of section 32 can depend on context, meaning that some information might require disclosure immediately while other information may not. The terms "urgent" and "emergency", which have been used to describe the kinds of situations that might give rise to disclosure in the public interest under section 32, are themselves relative.

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[11] Office of the Information and Privacy Commissioner of Alberta, Order 97-009, October 28, 1997, is available at www.oipc.ab.ca/media/124375/97-009Order.pdf.

[12] Office of the Information and Privacy Commissioner of Alberta, Order F2012-014, June 29, 2012, is available at www.oipc.ab.ca/media/125992/F2012-014Order.pdf.

[30] While the circumstances in question need not amount to an emergency – in the same sense as an emergency arising from a risk of significant harm to health, safety or the environment – the circumstances must be such that disclosure of information is "clearly" in the public interest, the Adjudicator said.

[31] The Adjudicator ultimately found that there was not a "compelling public interest" in releasing the information, as required by section 32(1)(b).

[32] Other orders where my office has found that an applicant did not meet the burden of proving a "compelling public interest" have included requests related to:

- The transfer of authority from the Universities Coordinating Council to the Alberta Dental Association or the Alberta Dental Association and College (Order F2003-013)
- Legal costs incurred by the Alberta government in proceeding with the case entitled, *Reference Re: Firearms Act* (Order F2004-017)
- Charges, investigation and trial of a former government official who had been convicted of a charge of "accepting a benefit" contrary to the *Criminal Code* (Order F2004-030)[13]
- Closed meeting minutes of the Southern Alberta Institute of Technology's Board of Governors and Board of Governors Committee (Order 2004-012)
- An actuarial study commissioned by Alberta Finance to help set the rate for basic automobile insurance (Order F2004-024)
- A report and video about a man allegedly assaulted by Edmonton Police Service officers (Order F2008-020)[14]
- An ethics committee's review of the issue of a particular police officer providing evidence for the defence in a criminal matter (Order F2009-008)
- A disciplinary hearing of a police officer (Order F2009-010)[15]
- The portion of Edmonton Police Service's training manual on officer safety (Order F2010-008)
- Allegations of sexual assault on female prisoners who were in the custody of a sheriff employed by Alberta Solicitor General and Public Security (Order F2011-010)
- "General Well File Data", a database containing information on wells drilled in Alberta (Order F2012-03)

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[13] The former Commissioner noted in Order F2004-030 at para. 38, "The related court documents are available for public purchase and review. I have reviewed the withheld records and have found nothing in them that suggests inadequacy in the manner the case was investigated, or dealt with by Alberta Justice."

[14] The Adjudicator noted in Order F2008-020 at para. 130, "I found earlier in this Order that certain information in the Report cannot be withheld by the Public Body under section 17 of the Act. I conclude that section 32 does not apply to the remaining information in the records at issue."

[15] The Adjudicator noted in Order F2009-010 at para. 57, "I have already found, in the analysis of section 17, above, that it has not been established that a public interest would be served by disclosing Party A's information. I therefore find that section 32 does not require the Public Body to disclose Party A's personal information."

- A written response to a letter an applicant believed to have been in existence but she had not received (Order F2012-26)
- The City of Lethbridge's purchase of certain investments and certain minutes of *in camera* meetings about the investments (Order F2013-23)
- Communications between the Edmonton Police Commission and Edmonton Police Service about complaints made against police officers under the *Police Act* that had been dismissed (Order F2014-R-01)
- A police investigation of an incident that occurred in Edmonton in 1983, including a report (Order F2014-16)[16]
- The province's "high-risk employers" in terms of compliance with occupational health and safety standards (Decision F2014-D-01)
- The impact of the federal omnibus crime legislation, Bill C-10, on Alberta Justice and Solicitor General (Order F2014-25)
- Specific categories of information that Service Alberta relied on in determining its position as to whether the *Residential Tenancies Act* applied in national parks (Order F2018-26)

[33] A "compelling public interest" was found in Interim Decision F2018-D-02/Order F2018-39, but was limited in application to records not found to be subject to section 27(1)(a), or solicitor-client privileged information. This interim decision/order related to requests made for the Contingency Fee Agreement (CFA) and documents related to it, with respect to arrangements the Government of Alberta made with outside counsel to pursue litigation to recoup smoking-related health care costs. In determining section 32(1)(b) applied to some of the information, the External Adjudicator said at para. 205:

> I find, therefore, that the Applicant has met his/her burden with sufficiently clear, convincing, and cogent evidence to demonstrate that the s. 32(1)(b) public interest override applies and that the Public Body has failed to provide evidence or submissions to successfully prove its decision to withhold the information in the Records at Issue is rationally defensible. Section 32(1)(b) will apply to all those Records at Issue where, pursuant to the Interim Decision, the Public Body is still unable to meet the evidentiary test of sufficiently clear, convincing, and cogent evidence to demonstrate s. 27(1)(a) applies. Thereafter, the Public Body will be ordered, in the Interim Decision, to release all the Records at Issue regardless of any other exceptions on which it has claimed.

[16] The Adjudicator noted in Order F2014-16 at para. 65, "I am not persuaded any of the personal information in the Report should be disclosed on the basis there is a clear and compelling public interest (as distinguished from the Applicant's particular interest) in its disclosure. This is especially so given the significant amount of information disclosed in the media reports in November 1983."

[34] Interim Decision F2018-D-02/Order F2018-39 made the same determination.[17] However, both of these orders are subject to judicial review application sought by the respective public bodies, and are awaiting hearings at court.

Findings

- Orders that interpret section 32 (previously section 31) determined that, at least when the information at issue is subject to an access request, the following applies:
    - The burden of proof for releasing information under section 32 is on the applicant, and "it is not a burden that will be easily met"
    - There must be a compelling public interest to release information under section 32(1)(b), not merely a matter of interest to the public
    - "Record" and "information" are differentiated in that a summary of a record or a warning issued on the basis of the record may suffice, rather than releasing the actual record at issue
    - "Without delay" in section 32(1) is context dependent – "'emergency-like' circumstances" applies to section 32(1)(a), but the same threshold for the immediate release of information due to a risk of significant harm is not triggered by section 32(1)(b)
- At least 20 orders have found that an applicant did not meet their burden of proving a "compelling public interest" for the information at issue in an inquiry.
- Only two orders have found an applicant met the burden of proving "compelling public interest" insofar as the records at issue are not subject to the privileged information exception to disclosure (section 27).

[17] Related orders to the requests for the CFA and documents related to the CFA also contemplated section 32. In Interim Decision F2018-D-04/Order F2018-70, the External Adjudicator said at para. 185, "I find the Applicants have failed to meet their burden of proof with sufficiently clear, convincing, and cogent evidence to demonstrate that there is a compelling public interest and, therefore, the s. 32(1)(b) public interest override does not apply." In Order F2017-61, the External Adjudicator said at para. 206, "Making a determination with respect to public interest in this phase of the Inquiry would only apply to the 35 pages at issue (which count does not include the CFA) and would, in my opinion, be premature."

Section 32 Notices of Disclosure to the Commissioner

[35] As noted in the survey results, relatively few public bodies use section 32 as the authority to release information, despite it placing a duty on public bodies to disclose information when pre-conditions for the release of information are met (i.e. "must, without delay, disclose").

[36] During a non-exhaustive review of 35 notices submitted by public bodies to the Commissioner under sections 32(3)(c) and 32(4)(b), only one appears to have been made "clearly in the public interest" under section 32(1)(b). The example in that case was a municipality disclosing that it had discovered abandoned medical records.

[37] The other 34 notices appear to have been made under section 32(1)(a) as "information about a risk of significant harm to the environment or to the health or safety of the public, of the affected group of people, of the person or of the applicant" was released. Most of these notices related to high risk offenders, while other disclosures related to managing a possible disease outbreak in schools or on campuses, or information related to drainage issues in a municipality.

[38] Based on the finding that nearly every notice to the Commissioner of a disclosure made under section 32 has been made pursuant to section 32(1)(a), it is difficult to determine how regularly public bodies turn their minds to disclosing information when the information is "clearly in the public interest" (section 32(1)(b)). This may be in part due to limited guidance on what constitutes a matter of "compelling public interest". As noted above, no order issued by my office has found an applicant's arguments persuasive to release information because of a "compelling public interest".

Findings

- Nearly every notice to the Commissioner of a disclosure made under section 32 has been a disclosure made pursuant to section 32(1)(a). As a result, it is difficult to determine how regularly public bodies turn their minds to disclosing information when the information is "clearly in the public interest" (section 32(1)(b)).

Part 2: Public Body Survey Results

Issue 1: Do public bodies in Alberta have procedures and policies to determine whether disclosure should be made under section 32?

[39] Of the 87 public bodies surveyed, 37 public bodies, or 43%, said they have a policy or procedure for disclosing information under section 32, while 50 public bodies, or 57%, said they do not have policy or procedure.

[40] However, 18 of 21 ministries cited Service Alberta's "FOIP Guidelines and Practices" manual (the Manual) as the policy or procedure upon which they rely to make decisions under section 32.[18]

Ministries

[41] One ministry had a specific protocol pertaining to disclosures under section 32.

[42] Most ministries indicated that when information needs to be released in the interests of public health or safety, or when information is clearly in the public interest, section 32 is often rendered unnecessary, as disclosure required by the "public interest" has already been made without the need to rely on that section. The other authorities upon which ministries relied to disclose information were not specified.

[43] One ministry said it regularly disclosed information about environmental situations that could affect public health and safety by enacting their emergency protocols. The ministry noted that these disclosures are part of the ministry's regular operations.

Police Services

[44] Six of seven police services had a procedure or policy, generally referred to as the "Duty to Warn".

[45] Police services also follow a standard protocol published by Alberta Justice and Solicitor General for releasing information about high-risk offenders.

[46] Both the "Duty to Warn" policy and high-risk offenders protocol identify:

- Circumstances in which disclosure in the public interest may be required
- What steps must be considered prior to disclosing information
- The need to document decisions

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[18] Service Alberta's "FOIP Guidelines and Practices" manual is available from https://www.servicealberta.ca/foip/ . All ministries said, "[T]his resource provides valuable information for practitioners' use within departments and is publicly available for all local public bodies as well."

- Notification requirements
- The delegated authority to make a final decision to disclose information

[47] Overall, the "Duty to Warn" procedures are well defined, consistent and specific.

[48] Police services were the only group that did not identify overlapping legislation to authorize disclosures of information in the public interest.

Health Care Bodies

[49] The two largest health care providers in Alberta do not have a policy for disclosure in the public interest under section 32 of the FOIP Act.

[50] One of the health care bodies explained it relies on legislation other than the FOIP Act. For example, information is routinely disclosed under section 53(4)(a.1) of the *Public Health Act*, and section 37.3 of the *Health Information Act*. The authority to decide to disclose or not to disclose rests with the President and CEO for one health care body, and requires decisions to be documented.

Municipalities

[51] No municipalities said they have policies or procedures for disclosure under section 32.

[52] Some municipalities said they defer to health care bodies or police services in circumstances where there is a risk of significant harm to the health or safety of the public.

Post-Secondary Institutions

[53] Six post-secondary institutions said they have a procedure for disclosing information under section 32.

[54] Similar to ministries, five of the six post-secondary institutions cited general FOIP policies, which mention section 32 but do not outline the circumstances when section 32 must be considered. One of the procedures specifically contemplated section 32 (see Appendix B).

School Boards

[55] Six out of nineteen school jurisdictions said they have a policy for releasing information under section 32.

[56] Similar to ministries and post-secondary institutions, general FOIP policies were cited, which mention section 32 but do not explicitly outline the circumstances when section 32 must be considered.

Findings

- Police services have the most comprehensive procedures and policies to determine whether disclosure should be made under section 32.
- Other public bodies cited general FOIP guidelines, which are not specific to section 32, or said they do not have procedures or policies for section 32.
- One post-secondary institution provided its "Disclosure in the Public Interest" guidelines or procedures for determining whether disclosure should be made under section 32 (attached as Appendix B).
- One health care body and one ministry said they proactively disclose information in the public interest but rely on authorities in other legislation to disclose the information, rather than relying on section 32 in the FOIP Act as the authority for disclosure.

Issue 2: Do public bodies in Alberta use section 32 as the authority in the FOIP Act to disclose information?

[57] Of the 87 public bodies surveyed, 22 public bodies, or 25%, said they had used section 32 as the authority to disclose information, while 65 public bodies, or 75%, indicated they had never used section 32 to disclose information.

[58] No municipalities or health care bodies reported they had used section 32 as the authority to disclose information.

[59] Generally, public bodies reported that they rely on other provisions within the FOIP Act or authorities in other legislation to release information. For example, some public bodies rely on environmental legislation or, in the case of a public health issue, the *Public Health Act* and *Health Information Act*.

Ministries

[60] Two ministries have released information under section 32.

[61] One of the ministries that regularly discloses information has delegated the authority to decide whether to disclose or not. The ministry has a formal, standard protocol that includes documenting the decision-making process, decision and media release.

Police Services

[62] Five of seven police services said they had disclosed information using section 32 as the authority for disclosure. Police services were found to most frequently use the authority

under section 32 to disclose information. Police services typically disclose information about high-risk offenders being released from custody.

[63] Unlike other types of public bodies, police services cited the FOIP Act as the sole authority for disclosing information about a risk of significant harm to public health or safety, or when clearly in the public interest.

Post-Secondary Institutions

[64] Nine post-secondary institutions reported they had disclosed information under section 32.

[65] Post-secondary institutions provided examples relating to the disclosure of personal information of students who are at risk of self-harm, information related to communicable diseases, or information relating to a high-risk offender on campus.

[66] Some post-secondary institutions described situations where certain communicable diseases are present on-campus, such as chicken pox or pneumonia, but are deemed not notifiable by health care bodies. In such circumstances, a post-secondary institution may release information regarding these illnesses under section 32 of the FOIP Act and in accordance with the *Health Professions Act*.

Health Care Bodies

[67] Both health care bodies said they did not rely on section 32 to disclose information.

[68] One of the health care bodies said, "[D]isclosures relating to risk of significant harm to the environment or the health or safety of the public are made pursuant to the Public Health Act and/or the Health Information Act".

Municipalities

[69] Municipalities have not disclosed information under section 32.

[70] Many municipalities said they consult with and defer to health care bodies or police services in situations where there is a risk of significant harm to the health or safety of the public.

School Boards

[71] Six school boards reported they had disclosed information using section 32 as the authority for the disclosure.

[72] School jurisdictions said they often rely on health care bodies and police services to guide disclosures under section 32, or act as a messenger for notices issued by health

care bodies or police services (e.g. if a high-risk offender notice from police affects schools in a particular community, school boards may further disseminate that notice).

[73] Typically, school boards deal with health-related matters and thus, some use authorities in the *Public Health Act* to disclose information rather than section 32 in the FOIP Act, similar to the approach reported by health care bodies.

[74] Some school boards reported that they must consider the *Children First Act* or different provisions in the FOIP Act, such as section 40, as the authorities upon which to rely to disclose information in certain circumstances.

Findings

- Of the public bodies surveyed, police services most frequently use section 32 as the authority for disclosing information.
- One ministry said it has a standard protocol for disclosing information but that it often relies on authorities in other legislation for the disclosures it makes.
- One health care body said, "[D]isclosures relating to risk of significant harm to the environment or the health or safety of the public are made pursuant to the Public Health Act and/or the Health Information Act".
- Post-secondary institutions cited several different examples of disclosures made in the public interest, such as disclosing personal information of students who are at risk of self-harm or disclosing the incidence of certain communicable diseases on-campus that do not meet the threshold for disclosure by health care bodies.
- Municipalities and school boards said they rarely use section 32 as the authority for disclosing information but will often act as a messenger for health care bodies or police services that are disclosing information in the public interest.

Issue 3: Are public body employees trained on applying section 32?

[75] Of the 87 public bodies surveyed, 38 public bodies, or 44%, said staff were trained on applying section 32, while 49 public bodies, or 56%, said staff were not trained.

[76] It is difficult to determine how many of those 38 public bodies include training specific to section 32, as opposed to general FOIP training, which may mention section 32 requirements to disclose without further guidance on when section 32 might apply and what employees' obligations are with regard to it.

Finding

- Generally, if public bodies provide FOIP training to employees, those public bodies said the training mentions section 32 obligations, but training is not specific to section 32 procedures or policies.

Issue 4: What are the difficulties public bodies identified in applying section 32?

[77] The primary difficulty raised by public bodies related to section 32(1)(b) is that public bodies struggle to interpret what is "clearly in the public interest" versus what is merely "of interest to the public". All but one of the respondent ministries mentioned this difficulty; the remaining ministry stated that overlapping requirements in other legislation, namely legislation that regulates environment or public health, is most difficult in determining when to apply section 32.

[78] Some public bodies, mainly police services and post-secondary institutions, find difficulty in meeting timelines. Specifically, the requirement to release information under section 32(1) "without delay" is difficult when balanced with the section 32(3) requirements "to notify any third party to whom the information relates" and "give the third party an opportunity to make representations relating to the disclosure" before disclosing information, where practicable.

[79] Another difficulty cited included defining what represents a "risk of significant harm to the environment or to the health or safety of the public, of the affected group of people, of the person or of the applicant". This is tied to an additional difficulty mentioned which is what to consider when there are overlapping provisions in different legislation, primarily environment and public health regulations requiring disclosure in certain circumstances. The responses indicate that public bodies subject to these regulations tend to rely on provisions in other legislation as the authority to disclose information, rather than using section 32 of the FOIP Act as the authority for disclosing information.

[80] Training was also cited as a general difficulty.

[81] Approximately 30 public bodies did not identify any difficulties in applying section 32. Of these 30 public bodies, one specifically said:

> We are aware of Section 32 but have not interpreted it as covering our normal course of business. We have viewed it as something extraordinary, significant or out of the norm; for example, when the police release information about a pedophile.

Findings

- Public bodies struggle to determine what is "clearly in the public interest" versus what is merely "of interest to the public" under section 32(1)(b).

- Police services and post-secondary institutions cited difficulty in meeting timelines for notice requirements under sections 32(1) (i.e. “without delay”) and 32(3) (i.e. third party notification).
- Some public bodies have difficulty determining what qualifies as a “risk of significant harm”.
- Training was cited as a general difficulty.

Part 3: Public Interest Disclosures in Canadian Jurisdictions

[82] This section provides an overview of public interest provisions in other Canadian jurisdictions. The jurisdictions included in this section are those where either guidance or decisions were found that directly relate to the public interest override.[19]

British Columbia

[83] The public interest override in British Columbia's *Freedom of Information and Protection of Privacy Act* is under "Division 4 – Public Interest Paramount":[20]

> **Information must be disclosed if in the public interest**
>
> **25**(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information
>
> (a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or
> (b) the disclosure of which is, for any other reason, clearly in the public interest.
>
> (2) Subsection (1) applies despite any other provision of this Act.
>
> (3) Before disclosing information under subsection (1), the head of a public body must, if practicable, notify
>
> (a) any third party to whom the information relates, and
> (b) the commissioner.
>
> (4) If it is not practicable to comply with subsection (3), the head of the public body must mail a notice of disclosure in the prescribed form
>
> (a) to the last known address of the third party, and
> (b) to the commissioner.

[84] In July 2015, the British Columbia Office of the Information and Privacy Commissioner (OIPC) released Investigation Report F15-02, which reinterpreted section 25, finding "temporal urgency" was not required to release information.[21] Prior to July 2, 2015, the prevailing interpretation was in Order 02-38.[22]

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[19] Appendix A includes an overview of the wording for all Canadian jurisdictions' public interest override provisions.
[20] *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, s 25.
[21] Office of the Information and Privacy Commissioner for British Columbia, Investigation Report F15-02, "Review of Mount Polley Mine Tailings Pond Failure and Public Interest Disclosure by Public Bodies", July 2, 2015, is available at www.oipc.bc.ca/investigation-reports/1814.
[22] Office of the Information and Privacy Commissioner for British Columbia, Order 02-38, July 26, 2002, is available at www.oipc.bc.ca/orders/721.

[85] To provide further direction to public bodies, the British Columbia OIPC released its "Section 25: The Duty to Warn and Disclose" guidance document in December 2018.[23]

[86] Specific to section 25(1)(b), the document outlines various factors that should be considered to meet the threshold of "clearly in the public interest" and whether the disclosure would achieve certain objectives, such as "educate the public" or "enable or facilitate the expression of public opinion or enable the public to make informed political decisions" (p. 3). It adds that, "Former Commissioner Denham said that examples of information that could be used in the public interest include matters of public finance or financial management, or matters relating to proper public administration" (p. 3).

[87] Since Investigation Report F15-02 was issued, sections 25(1)(a) and 25(1)(b) have been raised as an issue by applicants in several inquiries. However, orders found that section 25 did not apply. This does not mean that adjudicators decided that records were not to be released, only that the threshold for section 25 was not met (i.e. adjudicators may have ordered the disclosure of certain records under other authorities). Alternatively, adjudicators may have found that previously released or otherwise publicly available information made section 25 moot in the circumstances of a particular order.

[88] Since Investigation Report F15-02, section 25 was found not to apply to requests related to:[24]

- Video footage taken during a 10-day period a mother's son spent in a modified classroom setting (F15-42)
- Construction and operation of a correctional facility (F15-39)
- Expense reports of a specified public corporation's employee who hosted customers at music concerts (F15-43)
- Total value of lottery products purchased through a lottery website for each British Columbia postal code forward sortation area (F15-58)
- Costs of an investigation into a health data breach (F15-64)
- A research data access report and associated background information (F16-06)
- Information on a tolling framework for a bridge (F16-22)
- Permits for work on a road in a specified area (F16-30)
- An invoice for legal services that was submitted by a law firm to a municipality (F16-34)
- Active grievances filed by employees of a public body under a collective bargaining agreement (F16-33)
- A copy of a report produced by a law firm hired to conduct a workplace investigation (F16-40)

[23] Office of the Information and Privacy Commissioner for British Columbia, "Section 25: The Duty to Warn and Disclose", December 2018, is available at www.oipc.bc.ca/guidance-documents/2265.
[24] All orders from the British Columbia OIPC are available at www.oipc.bc.ca/rulings/orders/.

- Work defect notices for a project on public transportation fare collection (F16-45)
- Attachments to a building contract for a correctional facility (F16-49)
- Reports of the Internal Audit and Advisory Services Unit and the Special Investigations Unit issued by the Ministry of Finance's Comptroller General (F16-50)
- A briefing note related to an infrastructure project (F17-15)
- A statement made by a municipal administrator about the financial viability of a municipal water supply project (F17-17)
- Calculations of community amenity contributions for the rezoning of a new development site (F17-19)
- Severance payments to public employees (F17-24, F17-25, F17-26)
- Personal information requests from individuals who were the subject of internal investigations by a police department (F17-56)
- eDrive electricity rate for producers of liquefied natural gas (F18-24)
- A decision to remove personal information from an open information website (F18-26)
- Disclosure of legal fees in a high profile lawsuit (F18-36)
- A meeting between a former minister and executives of a company proposing to build a liquefied natural gas processing and export facility (F18-49)
- A permit to build and operate a liquefied natural gas facility (F18-50)
- A permit authorizing emission from a steel galvanizing plant (F19-16)
- A review of a ministry's data security and handling (F19-40)
- Communications between a municipality and its external counsel during the course of a prior inquiry (F19-49)

Newfoundland and Labrador

[89] The public interest override in Newfoundland and Labrador's *Access to Information and Protection of Privacy Act, 2015* is under "Division 1: The Request":[25]

> **Public interest**
>
> 9. (1) Where the head of a public body may refuse to disclose information to an applicant under a provision listed in subsection (2), that discretionary exception shall not apply where it is clearly demonstrated that the public interest in disclosure of the information outweighs the reason for the exception.
>
> (2) Subsection (1) applies to the following sections:
>
> (a) section 28 (local public body confidences);
> (b) section 29 (policy advice or recommendations);
> (c) subsection 30 (1) (legal advice);
> (d) section 32 (confidential evaluations);
> (e) section 34 (disclosure harmful to intergovernmental relations or negotiations);

[25] *Access to Information and Protection of Privacy Act*, 2015, SNL 2015, c A-1.2, ss 9(3), 9(4).

(f) section 35 (disclosure harmful to the financial or economic interests of a public body);
(g) section 36 (disclosure harmful to conservation); and
(h) section 38 (disclosure harmful to labour relations interests of public body as employer).

(3) Whether or not a request for access is made, the head of a public body shall, without delay, disclose to the public, to an affected group of people or to an applicant, information about a risk of significant harm to the environment or to the health or safety of the public or a group of people, the disclosure of which is clearly in the public interest.

(4) Subsection (3) applies notwithstanding a provision of this Act.

(5) Before disclosing information under subsection (3), the head of a public body shall, where practicable, give notice of disclosure in the form appropriate in the circumstances to a third party to whom the information relates.

[90] To provide guidance to public bodies, the Newfoundland and Labrador OIPC released "Guidelines for Public Interest Override" in June 2015.[26]

[91] Similar to the guidance document issued by the British Columbia OIPC, several factors supporting release are outlined, including general public interest in transparency, public interest in the issue, public interest in the specific information, suspicion of wrongdoing by a public body, and presenting a full picture.

[92] The Newfoundland and Labrador OIPC guidance also identifies factors that are not relevant to determining public interest, such as the identity or motive of the applicant, private interests of the applicant, information may be misunderstood or other means of scrutiny.

Nova Scotia

[93] Nova Scotia's *Freedom of Information and Protection of Privacy Act* includes the following under "Protection of Personal Privacy: Collection, Protection, Retention, Use and Disclosure of Personal Information":[27]

Disclosure in public interest

31 (1) Whether or not a request for access is made, the head of a public body may disclose to the public, to an affected group of people or to an applicant information

(a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people; or
(b) the disclosure of which is, for any other reason, clearly in the public interest.

[26] Office of the Information and Privacy Commissioner of Newfoundland and Labrador, "Guidelines for Public Interest Override", June 2015, available at www.oipc.nl.ca/pdfs/PublicInterestOverride.pdf.
[27] *Freedom of Information and Protection of Privacy Act*, 1993, c 5, s 31.

> **(2)** Before disclosing information pursuant to subsection (1), the head of a public body shall, if practicable, notify any third party to whom the information relates.
>
> **(3)** Where it is not practicable to comply with subsection (2), the head of the public body shall mail a notice of disclosure in the prescribed form to the last known address of the third party.
>
> **(4)** This Section applies notwithstanding any other provision of this Act.

[94] In Review Report FI-00-29, former Review Officer (Information and Privacy Commissioner) Darce Fardy applied factors that had been used to determine fee waivers to its public interest override provision.[28]

[95] The applicant had requested a report prepared by the Department of Justice's Internal Investigation Unit following complaints of abuse at residential youth facilities in Nova Scotia.

[96] In deciding that the public interest overrode exceptions to disclosure for some parts of the report, Nova Scotia's Information and Privacy Commissioner said:

> While 'public interest' is not defined in the Act I have addressed matters of public interest as they apply to requests for fee waivers and have used the following factors when considering whether a matter is one of public interest:
>
> - Has the matter been a subject of recent public debate?
> - Would dissemination of the information yield a public benefit by assisting public understanding of an important policy, law or service?
> - Do the records show how the public body is allocating financial or other resources?
>
> If it is agreed that the matter is one of public interest, other factors to be considered are:
>
> - Is the Applicant's primary purpose to disseminate information in a way that could reasonably be expected to benefit the public or to serve a private interest?
> - Is the Applicant able to disseminate the information to the public? …
>
> The answer to the final factor is yes. The Applicant is a journalist. With respect to the second last factor I conclude that while news stories improve newspaper sales, the primary purpose of this Application is to disseminate the information.
>
> The contents of the IIU Report have been the subject of recent public debate and, it is my view, the public would get a better understanding of the Government's policies with respect to accusations of abuse in public institutions by the disclosure of this Report. The disbursement of public funds has been a significant part of this public debate…

[28] Nova Scotia (Department of Justice) (Re), 2000 CanLII 4407 (NS FOIPOP), http://canlii.ca/t/1cgqr.

> Disclosure of parts of the Report is also appropriate at this time, in my view, so that the Department can meet its obligations for full accountability, particularly with respect to the public funds expended.

[97] In addition, the Nova Scotia OIPC's Review Report FI-10-41/FI-10-85/FI-10-86/FI-10-87 found that section 31 was paramount and that it should be applied in response to a request for access to information.[29]

Ontario

[98] The public interest override in Ontario's *Freedom of Information and Protection of Privacy Act* is under "Exemptions" for "Access to Records":[30]

> **Exemptions not to apply**
>
> **23** An exemption from disclosure of a record under sections 13, 15, 15.1, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[99] The public interest override in Ontario's *Municipal Freedom of Information and Protection of Privacy Act* is under "Exemptions" for "Access to Records":[31]

> **Exemptions not to apply**
>
> **16** An exemption from disclosure of a record under sections 7, 9, 9.1, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[100] Ontario IPC orders, dating back several years, have noted that, "The Act is silent as to who bears the burden of proofs in respect of section 16" (e.g. Order 47[32]).

[101] In Order M-288, under the *Municipal Freedom of Information and Protection of Privacy Act*, the Adjudicator stated, "Where the application of section 16 has been raised by an appellant, it is my view that the burden of proof cannot rest wholly on the appellant, where he or she has not had the benefit of reviewing the record before making submissions in support of their contention that section 16 applies.[33] To do otherwise would be to impose an onus which could seldom, if ever, be met by the appellant."

[102] Several orders issued by Ontario IPC have found compelling public interest to override exemptions that were found to apply in some or all records at issue in responses to access requests relating to nuclear safety (e.g. Orders P-901, P-1190, P-1805 and PO-2072-F; Order P-1190 was upheld on judicial review in *Ontario (Ministry of Finance) v.*

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[29] Office of the Information and Privacy Commissioner for Nova Scotia, Review Report FI-10-41/FI-10-85/FI-10-86/FI-10-87, June 1, 2011, is available from oipc.novascotia.ca/publicly-issued-reports.
[30] *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31, s 23.
[31] *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990, c M.56, s 16.
[32] Ontario (Health) (Re), 1989 CanLII 1361 (ON IPC), canlii.ca/t/1rl8c.
[33] Kitley (Township), 1994 CanLII 6935 (ON IPC), canlii.ca/t/1rmg7.

Ontario (Information and Privacy Commissioner), [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.)[34]).

[103] Order P-1398 issued by Ontario IPC found compelling public interest to override exemptions in parts of certain records at issue in a response to an access request relating to impacts on the Ontario government if Quebec were to declare independence from Canada.[35] However, the public interest override did not apply to all exemptions, and the Adjudicator upheld the public body's decision to deny access to an entire record and other parts of certain records.[36]

[104] Order PO-3164 issued by Ontario IPC found a compelling public interest to override the personal privacy exemption in a record at issue.[37] In this case, the applicant requested "access to the dates that DNA samples were taken from victims and/or identified addresses as part of an investigation relating to a criminal case that has received significant public attention."

[105] Order PO-1779 issued by Ontario IPC found a compelling public interest to override the personal privacy exemption in a record at issue, with minimal exceptions.[38] The applicants had requested access to a 318-page police brief, which was the result of an investigation of "allegations of misconduct by police officers and the Crown Attorney stemming from the findings of the trial Judge."

[106] Order P-1175 issued by Ontario IPC found a compelling public interest in parts of a record relating to safety of a certain type of machinery in petrochemical facilities.[39] The Adjudicator found that an exemption did not apply to the relevant parts of the record, so section 23 did not necessarily override an exemption. Nevertheless, the Adjudicator found a compelling public interest and ordered the disclosure of parts of the record. The Adjudicator also upheld the decision to withhold other parts of the record to which an exemption did apply.

[107] Order MO-1366 issued by Ontario IPC found that section 16 of the *Municipal Freedom of Information and Protection of Privacy Act* did not apply to records in response to an access request for "an electronic list of donors who had made contributions to the campaigns of candidates in the 1997 municipal election."[40] This order was quashed on judicial review and the City of Toronto was ordered to disclose records to the requestor

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[34] All orders from the Information and Privacy Commissioner of Ontario are available from decisions.ipc.on.ca/ipc-cipvp/en/nav.do.
[35] Ontario (Finance) (Re), 1997 CanLII 11914 (ON IPC), canlii.ca/t/1rl7k.
[36] Order P-1398 was upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 484 (C.A.).
[37] Ontario (Community Safety and Correctional Services) (Re), 2013 CanLII 8738 (ON IPC), canlii.ca/t/fw93t.
[38] Ontario (Solicitor General) (Re), 2000 CanLII 20776 (ON IPC), canlii.ca/t/1r23k.
[39] Ontario (Labour) (Re), 1996 CanLII 7396 (ON IPC), canlii.ca/t/1r5ck.
[40] Toronto (City) (Re), 2000 CanLII 21004 (ON IPC), canlii.ca/t/1rfgb.

in *Gombu v. Ontario (Information and Privacy Commissioner)*, 2002 CanLII 53259 (ON SCDC).

[108] Order PO-3746 issued by Ontario IPC found a compelling public interest to override the personal privacy exemption for a variety of reasons in a review of an access request relating to a decision the Ontario Civilian Police Commission made regarding formal complaints into the conduct of a member of the Hamilton Police Services Board.[41] Additionally, Order PO-3746 at para. 62 lists circumstances in which a public interest has been found not to exist. These circumstances included:

- another public process or forum has been established to address public interest considerations
- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations
- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding
- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter
- the records do not respond to the applicable public interest raised by the requester

Manitoba

[109] The public interest override in Manitoba's *Freedom of Information and Protection of Privacy Act* is under "Business Interests of Third Parties" in "Division 3: Mandatory Exceptions to Disclosure":[42]

> **Disclosure in the public interest**
>
> 18(4) Subject to section 33 and the other exceptions in this Act, a head of a public body may disclose a record that contains information described in subsection (1) or (2) if, in the opinion of the head, the private interest of the third party in non-disclosure is clearly outweighed by the public interest in disclosure for the purposes of
>
> (a) public health or safety or protection of the environment;
> (b) improved competition; or
> (c) government regulation of undesirable trade practices.

[110] FIPPA Case 2015-0041 found that the public interest did not override other exemptions in response to an access request relating to an agreement between the Manitoba government and the Manitoba Chiropractors Association.[43]

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[41] Ontario Civilian Police Commission (Re), 2017 CanLII 45053 (ON IPC), canlii.ca/t/h4txq.
[42] *The Freedom of Information and Protection of Privacy Act*, CCSM c F175.
[43] Manitoba Ombudsman, FIPPA Case 2015-0041, May 14, 2015, is available at www.ombudsman.mb.ca/uploads/document/files/case-2015-0041-en.pdf.

Saskatchewan

[111] The public interest override in Saskatchewan's *Freedom of Information and Protection of Privacy Act* is under "Part III: Exemptions":[44]

> **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:
>
> (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.

[112] The public interest override in Saskatchewan's *Local Authority Freedom of Information and Protection of Privacy Act* is under "Part III: Exemptions":[45]

> **Third party information**
>
> 18(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;

[44] *The Freedom of Information and Protection of Privacy Act*, SS 1990-91, c F-22.01.
[45] *The Local Authority Freedom of Information and Protection of Privacy Act*, SS 1990-91, c L-27.1.

(b) financial, commercial, scientific, technical or labour relations information that is supplied in confidence, implicitly or explicitly, to the local authority 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; or
(d) a statement of a financial account relating to a third party with respect to the provision of routine services from a local authority.

(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 clauses (1)(b) to (d) 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.

[113] Saskatchewan OIPC Review Report 200-2015 noted that the Ministry of Environment intended to release an "18 paged report entitled 'Removal of Underground Fuel Storage Tanks [location information removed]" under section 19(3) of *The Freedom of Information and Protection of Privacy Act*.[46] A third party disputed the release of the report. In any event, the Commissioner found that the exception to access applied by the Ministry of Environment did not apply. As a result, the public interest was not considered in recommending release of the record.

[114] Saskatchewan OIPC Review Report 087-2015 and 088-2015 at para. 40 sets out the test to determine whether disclosure of information would be in the public interest.[47,48]

[115] The same report found that the public interest override applied to portions of information in records at issue, and the Commissioner recommended disclosure as the information "relates to public safety and protection of the environment… [and] could

[46] Office of the Information and Privacy Commissioner of Saskatchewan, Review Report 200-2015, November 23, 2015, is available at oipc.sk.ca/assets/foip-review-200-2015.pdf.
[47] Office of the Information and Privacy Commissioner of Saskatchewan, Review Report 087-2015 and 088-2015, is available at oipc.sk.ca/assets/foip-review-087-2015-and-088-2015.pdf.
[48] Review Report 087-2015 and 088-2015 was judicially reviewed in *Consumers' Co-operative Refineries Limited v Regina (City)*, 2016 SKQB 335 (CanLII), canlii.ca/t/gvbpw.

not reasonably be expected to result in financial loss or gain to prejudice the competitive position of a third party."

[116] Saskatchewan OIPC Review Report 043-2015 found that the public interest override applied to a request for access relating to "2012 and 2013 Water and Air Quality Compliance Report. [Name of Third Party business]."[49]

[117] Saskatchewan OIPC File No. 2001/036 found that the public interest override did not apply to a request relating to the amount of royalties the Government of Saskatchewan received from two named companies.[50] The Commissioner noted in finding that the public interest override did not apply, "These dollar figures have, in themselves, little relationship to public health, public safety or the protection of the environment."

[118] Saskatchewan OIPC File No. 2002/004\ found that the public interest override did not apply to a request relating to correspondence between the Department of Health and a named company regarding one of the company's products.[51] The public interest did not "clearly outweigh in importance any prejudice to the competitive position" of the company.

Canada (Information Commissioner)

[119] The public interest override in Canada's *Access to Information Act* is under "Third Party Information" in "Exemptions":[52]

> **Disclosure authorized if in public interest**
>
> **20(6)** The head of a government institution may disclose all or part of a record requested under this Part that contains information described in any of paragraphs (1)(b) to (d) if
>
> (a) the disclosure would 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 clearly outweighs in importance any financial loss or gain to a third party, any prejudice to the security of its structures, networks or systems, any prejudice to its competitive position or any interference with its contractual or other negotiations.

[120] In a decision summary dated June 7, 2018, the Office of the Information Commissioner of Canada (OIC) said, "Transport Canada applied section 20, which protects third-party

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[49] Office of the Information and Privacy Commissioner of Saskatchewan, Review Report 043-2015, May 25, 2015, is available at oipc.sk.ca/assets/foip-review-043-2015.pdf.
[50] Office of the Information and Privacy Commissioner of Saskatchewan, Review Report 2001/036, May 27, 2002, is available at oipc.sk.ca/assets/foip-review-2001-036.pdf.
[51] Office of the Information and Privacy Commissioner of Saskatchewan, Review Report 2002/004, April 9, 2002, is available at oipc.sk.ca/assets/foip-review-2002-004.pdf.
[52] *Access to Information Act*, RSC 1985, c A-1.

information, to withhold reports on inspections of the Ste-Anne tunnel in St-Hyacinthe, Quebec."[53]

[121] During the investigation, "The OIC learned that the tunnel—which is situated near two large residences for long-term care and the elderly—had various structural problems that were of concern to local residents. The OIC considered these factors to be relevant to the public's health and safety, as per subsection 20(6), outweighing any third-party interests in protecting the information." Transport Canada and the third party agreed with the OIC's recommendation to disclose the information in its entirety.

[122] In contrasting the above recommendation and outcome, the OIC added that, "In some circumstances, there may be competing public health, safety or environmental interests. For example, an institution argued that releasing specific technical details about the design of an oil refinery's containment system could make the refinery vulnerable to anyone with harmful intentions. The OIC agreed that the public's interest in the information did not outweigh the risk to public safety that could result from disclosure of the information."

Findings

- Not all public interest override provisions in Canada have the same purpose.

  For example, British Columbia has a similar provision to Alberta; Ontario's is different in how it applies to exceptions to access.

  Additionally, in Alberta and British Columbia there is a proactive disclosure component (i.e. "whether or not a request for access is made"), but other jurisdictions only consider the public interest in the context of an access request being made.

- Not all public interest override provisions have been interpreted in the same way.

  For example, in Alberta the applicant has the burden of proving the public interest exists in disclosing information, but in Ontario it depends on the circumstances whether the burden of proving the public interest rests with the applicant or the public body during an inquiry.

  In addition, in Alberta the fee waiver public interest threshold is different than the section 32 public interest threshold, but in Nova Scotia the fee waiver public interest considerations have been used as the basis for a determination of its public interest override.

[53] Decision summaries from the Office of the Information Commissioner of Canada are available from www.oic-ci.gc.ca/en/decisions.

- Two Canadian jurisdictions, British Columbia and Newfoundland and Labrador, have produced guidance on the public interest override.

  The British Columbia OIPC guidance says a public interest disclosure "must contribute something new and purposeful to the public discourse… [such as] matters of public finance or financial management, or matters relating to proper public administration."

  The Newfoundland and Labrador OIPC guidance identifies factors that are not relevant to determining "public interest", such as the identity or motive of the applicant, private interests of the applicant, information may be misunderstood or other means of scrutiny.

- All jurisdictions have a high threshold for determining what is "clearly in the public interest". Of the publicly available orders and reports in Canadian jurisdictions reviewed as part of this investigation, most have found that the burden of proving a "compelling public interest" has not been met.

Summary of Findings

Part 1: Public Interest Override in Alberta

- The difference between what is "of interest to the public" versus what is of "compelling public interest" under section 32 has not been defined in orders issued by the Office of the Information and Privacy Commissioner of Alberta.

- The fee waiver "matter of public interest" under section 93 is different than "clearly in the public interest" under section 32.

- Public bodies often rely on other authorities for the disclosure of personal information in the event of "a risk of significant harm to the environment or to the health or safety of the public", since some section 40(1) provisions overlap in certain circumstances.

- Orders that interpret section 32 (previously section 31) determined that, at least when the information at issue is subject to an access request, the following applies:

    - The burden of proof for releasing information under section 32 is on the applicant, and "it is not a burden that will be easily met"

    - There must be a compelling public interest to release information under section 32(1)(b), not merely a matter of interest to the public

    - "Record" and "information" are differentiated in that a summary of a record or a warning issued on the basis of the record may suffice, rather than releasing the actual record at issue

    - "Without delay" in section 32(1) is context dependent – "'emergency-like' circumstances" applies to section 32(1)(a), but the same threshold for the immediate release of information due to a risk of significant harm is not triggered by section 32(1)(b)

- At least 20 orders have found that an applicant did not meet their burden of proving a "compelling public interest" for the information at issue in an inquiry.

- Only two orders have found an applicant met the burden of proving "compelling public interest" insofar as the records at issue are not subject to the privileged information exception to disclosure (section 27).

- Nearly every notice to the Commissioner of a disclosure made under section 32 has been a disclosure made pursuant to section 32(1)(a). As a result, it is difficult to determine how regularly public bodies turn their minds to disclosing information when the information is "clearly in the public interest" (section 32(1)(b)).

Part 2: Public Body Survey Results

- Police services have the most comprehensive procedures and policies to determine whether disclosure should be made under section 32.

- Other public bodies cited general FOIP guidelines, which are not specific to section 32, or said they do not have procedures or policies for section 32.

- One post-secondary institution provided its "Disclosure in the Public Interest" guidelines or procedures for determining whether disclosure should be made under section 32 (attached as Appendix B).

- One health care body and one ministry said they proactively disclose information in the public interest but rely on authorities in other legislation to disclose the information, rather than relying on section 32 in the FOIP Act as the authority for disclosure.

- Of the public bodies surveyed, police services most frequently use section 32 as the authority for disclosing information.

- One ministry said it has a standard protocol for disclosing information but that it often relies on authorities in other legislation for the disclosures it makes.

- One health care body said, "[D]isclosures relating to risk of significant harm to the environment or the health or safety of the public are made pursuant to the Public Health Act and/or the Health Information Act".

- Post-secondary institutions cited several different examples of disclosures made in the public interest, such as disclosing personal information of students who are at risk of self-harm or disclosing the incidence of certain communicable diseases on-campus that do not meet the threshold for disclosure by health care bodies.

- Municipalities and school boards said they rarely use section 32 as the authority for disclosing information but will often act as a messenger for health care bodies or police services that are disclosing information in the public interest.

- Generally, if public bodies provide FOIP training to employees, those public bodies said the training mentions section 32 obligations, but training is not specific to section 32 procedures or policies.

- Public bodies struggle to determine what is "clearly in the public interest" versus what is merely "of interest to the public" under section 32(1)(b).

- Police services and post-secondary institutions cited difficulty in meeting timelines for notice requirements under sections 32(1) (i.e. "without delay") and 32(3) (i.e. third party notification).

- Some public bodies have difficulty determining what qualifies as a "risk of significant harm".

- Training was cited as a general difficulty.

Part 3: Public Interest Disclosures in Canadian Jurisdictions

- Not all public interest override provisions in Canada have the same purpose.

  For example, British Columbia has a similar provision to Alberta; Ontario's is different in how it applies to exceptions to access.

  Additionally, in Alberta and British Columbia there is a proactive disclosure component (i.e. "whether or not a request for access is made"), but other jurisdictions only consider the public interest in the context of an access request being made.

- Not all public interest override provisions have been interpreted in the same way.

  For example, in Alberta the applicant has the burden of proving the public interest exists in disclosing information, but in Ontario it depends on the circumstances whether the burden of proving the public interest rests with the applicant or the public body during an inquiry.

  In addition, in Alberta the fee waiver public interest threshold is different than the section 32 public interest threshold, but in Nova Scotia the fee waiver public interest considerations have been used as the basis for a determination of its public interest override.

- Two Canadian jurisdictions, British Columbia and Newfoundland and Labrador, have produced guidance on the public interest override.

  The British Columbia OIPC guidance says a public interest disclosure "must contribute something new and purposeful to the public discourse… [such as] matters of public finance or financial management, or matters relating to proper public administration."

  The Newfoundland and Labrador OIPC guidance identifies factors that are not relevant to determining "public interest", such as the identity or motive of the applicant, private interests of the applicant, information may be misunderstood or other means of scrutiny.

- All jurisdictions have a high threshold for determining what is "clearly in the public interest". Of the publicly available orders and reports in Canadian jurisdictions reviewed as part of this investigation, most have found that the burden of proving a "compelling public interest" has not been met.

Jill Clayton
Information and Privacy Commissioner

Appendix A: Public Interest Disclosure Provisions in Canadian Jurisdictions

Jurisdiction	Provision
Alberta[54]	The public interest override in the FOIP Act is under "Division 4: Public Health and Safety". **Information must be disclosed if in the public interest** **32(1)** Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people, to any person or to an applicant (a) Information about a risk of significant harm to the environment or to the health or safety of the public, of the affected group of people, of the person or of the applicant, or (b) Information the disclosure of which is, for any other reason, clearly in the public interest. **(2)** Subsection (1) applies despite any other provisions of this Act. **(3)** Before disclosing information under subsection (1), the head of a public body must, where practicable, (a) notify any third party to whom the information relates, (b) give the third party an opportunity to make representations relating to the disclosure, and (c) notify the Commissioner. **(4)** If it is not practicable to comply with subsection (3), the head of the public body must give written notice of the disclosure (a) to the third party, and (b) to the Commissioner.
British Columbia[55]	The public interest override in British Columbia's *Freedom of Information and Protection of Privacy Act* is under "Division 4 – Public Interest Paramount". **Information must be disclosed if in the public interest** **25**(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information

[54] *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25, s 32.
[55] *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, s 25

	(c) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or (d) the disclosure of which is, for any other reason, clearly in the public interest. (2) Subsection (1) applies despite any other provision of this Act. (3) Before disclosing information under subsection (1), the head of a public body must, if practicable, notify (a) any third party to whom the information relates, and (b) the commissioner. (4) If it is not practicable to comply with subsection (3), the head of the public body must mail a notice of disclosure in the prescribed form (a) to the last known address of the third party, and (b) to the commissioner.
Newfoundland and Labrador[56]	The public interest override in Newfoundland Labrador's *Access to Information and Protection of Privacy Act, 2015* is under "Division 1: The Request". **Public interest** 9. (1) Where the head of a public body may refuse to disclose information to an applicant under a provision listed in subsection (2), that discretionary exception shall not apply where it is clearly demonstrated that the public interest in disclosure of the information outweighs the reason for the exception. (2) Subsection (1) applies to the following sections: (a) section 28 (local public body confidences); (b) section 29 (policy advice or recommendations); (c) subsection 30 (1) (legal advice); (d) section 32 (confidential evaluations); (e) section 34 (disclosure harmful to intergovernmental relations or negotiations); (f) section 35 (disclosure harmful to the financial or economic interests of a public body); (g) section 36 (disclosure harmful to conservation); and (h) section 38 (disclosure harmful to labour relations interests of public body as employer). (3) Whether or not a request for access is made, the head of a public body shall, without delay, disclose to the public, to an affected group of people or to an applicant, information about a risk of significant harm to the environment or to the health or safety of the public or a group of people, the disclosure of which is clearly in the public interest.

[56] *Access to Information and Protection of Privacy Act*, 2015, SNL 2015, c A-1.2, ss 9(3), 9(4)

	(4) Subsection (3) applies notwithstanding a provision of this Act. (5) Before disclosing information under subsection (3), the head of a public body shall, where practicable, give notice of disclosure in the form appropriate in the circumstances to a third party to whom the information relates.
Nova Scotia[57]	The public interest override in Nova Scotia's *Freedom of Information and Protection of Privacy Act* is under "Protection of Personal Privacy: Collection, Protection, Retention, Use and Disclosure of Personal Information". **Disclosure in public interest** **31 (1)** Whether or not a request for access is made, the head of a public body may disclose to the public, to an affected group of people or to an applicant information (a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people; or (b) the disclosure of which is, for any other reason, clearly in the public interest. **(2)** Before disclosing information pursuant to subsection (1), the head of a public body shall, if practicable, notify any third party to whom the information relates. **(3)** Where it is not practicable to comply with subsection (2), the head of the public body shall mail a notice of disclosure in the prescribed form to the last known address of the third party. **(4)** This Section applies notwithstanding any other provision of this Act.
Ontario[58,59]	The public interest override in Ontario's *Freedom of Information and Protection of Privacy Act* is under "Exemptions" for "Access to Records". **Exemptions not to apply** **23** An exemption from disclosure of a record under sections 13, 15, 15.1, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. The public interest override in Ontario's *Municipal Freedom of Information and Protection of Privacy Act* is under "Exemptions" for "Access to Records". **Exemptions not to apply**

[57] *Freedom of Information and Protection of Privacy Act*, 1993, c 5, s 31
[58] *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31, s 23.
[59] *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990, c M.56, s 16

	16 An exemption from disclosure of a record under sections 7, 9, 9.1, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.
Manitoba[60]	The public interest override in Manitoba's *Freedom of Information and Protection of Privacy Act* is under "Business Interests of Third Parties" in "Division 3: Mandatory Exceptions to Disclosure". **Disclosure in the public interest** 18(4) Subject to section 33 and the other exceptions in this Act, a head of a public body may disclose a record that contains information described in subsection (1) or (2) if, in the opinion of the head, the private interest of the third party in non-disclosure is clearly outweighed by the public interest in disclosure for the purposes of (a) public health or safety or protection of the environment; (b) improved competition; or (c) government regulation of undesirable trade practices.
Saskatchewan[61,62]	The public interest override in Saskatchewan's *Freedom of Information and Protection of Privacy Act* is under "Part III: Exemptions". **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: (iv) result in financial loss or gain to; (v) prejudice the competitive position of; or (vi) 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.

[60] *The Freedom of Information and Protection of Privacy Act*, CCSM c F175.
[61] *The Freedom of Information and Protection of Privacy Act*, SS 1990-91, c F-22.01.
[62] *The Local Authority Freedom of Information and Protection of Privacy Act*, SS 1990-91, c L-27.1.

	(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. The public interest override in Saskatchewan's *Local Authority Freedom of Information and Protection of Privacy Act* is under "Part III: Exemptions". **Third party information** 18(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 the local authority by a third party; (c) information, the disclosure of which could reasonably be expected to: (iv) result in financial loss or gain to; (v) prejudice the competitive position of; or (vi) interfere with the contractual or other negotiations of; a third party; or (d) a statement of a financial account relating to a third party with respect to the provision of routine services from a local authority. (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 clauses (1)(b) to (d) 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.
Canada[63,64]	The public interest override in Canada's *Access to Information Act* is under "Third Party Information" in "Exemptions". **Disclosure authorized if in public interest** **20(6)** The head of a government institution may disclose all or part of a record requested under this Part that contains information described in any of paragraphs (1)(b) to (d) if (a) the disclosure would 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 clearly outweighs in importance any financial loss or gain to a third party, any prejudice to the security of its structures, networks or systems, any prejudice to its competitive position or any interference with its contractual or other negotiations. The public interest override in Canada's *Privacy Act* is under "Protection of Personal Information". **Where personal information may be disclosed** **(2)** Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed … (m) for any purpose where, in the opinion of the head of the institution, (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.
Prince Edward Island[65]	The public interest override in Prince Edward Island's *Freedom of Information and Protection of Privacy Act* is under "Division 4 – Public Health and Safety". 30. Information shall be disclosed if risk of harm to environment or public health (1) Whether or not a request for access is made, the head of a public body shall without delay, disclose to the public, to an affected group of people, to any person or to an applicant

[63] *Access to Information Act*, RSC 1985, c A-1.
[64] *Privacy Act*, RSC 1985, c P-21.
[65] *Freedom of Information and Protection of Privacy Act*, RSPEI 1988, c F-15.01, s 30.

	(a) information about a risk of significant harm to the environment or to the health or safety of the public, of the affected group of people, of the person or of the applicant; or (b) information the disclosure of which is, for any other reason, clearly in the public interest. **Application** (2) Subsection (1) applies despite any other provision of this Act **Notice** (3) Before disclosing information under subsection (1), the head of a public body shall where practicable (a) notify any third party to whom the information relates; (b) give the third party an opportunity to make representations relating to the disclosure; and (c) notify the Commissioner. **Idem** (4) If it is not practicable to comply with subsection (3), the head of a public body shall give written notice of the disclosure (a) to the third party; and (b) to the Commissioner.
Quebec[66]	The public interest override in Quebec's *Act respecting Access to documents held by public bodies and the Protection of personal information* is under "Inapplicable restrictions" in "Division II: Restrictions to the Right of Access". **41.1.** The restrictions set out in this division, except those described in sections 28, 28.1, 29, 30, 33, 34 and 41, do not apply to information that reveals or confirms the existence of an immediate hazard to the life, health or safety of a person or a serious or irreparable violation of the right to environmental quality, unless its disclosure would likely seriously interfere with measures taken to deal with such a hazard or violation. Those restrictions, except the restriction set out in section 28 and, in the case of a document filed by or for the Auditor General, the restriction set out in section 41, do not apply to information concerning the quantity, quality or concentration of contaminants emitted, released, discharged or deposited by a source of contamination, or concerning the presence of a contaminant in the environment.

[66] *Act respecting Access to documents held by public bodies and the Protection of personal information*, CQLR c A-2.1.

	In the case of information supplied by a third person and referred to in the first paragraph, the person in charge must give that third person notice of a decision granting access to the information. The decision is executory despite section 49.
New Brunswick[67]	The public interest override in New Brunswick's *Right to Information and Protection of Privacy Act* under "Mandatory exceptions to disclosure". **Disclosure harmful to a third party's business or financial interests** … **22**(5) Subject to section 34 and any other exception provided for in this Act, the head of a public body shall disclose a record that contains information described in subsection (1) or (2) if, in the opinion of the head, the private interest of the third party in non-disclosure is clearly outweighed by the significant public interest in disclosure for the purposes of public health or safety or protection of the environment.
Northwest Territories[68] and Nunavut[69]	The public interest override in NWT's and Nunavut's *Access to Information and Protection of Privacy Act* is under "Division C: Disclosure of Personal Information". **48.** A public body may disclose personal information … (s) for any purpose when, 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;
Yukon[70]	The public interest override in Yukon's *Access to Information and Protection of Privacy Act* is under "Part 2: Access to Information". **Information must be disclosed if health or safety at risk** **28**(1) Despite any other provision of this Act, a public body must disclose information to the public or an affected group of people if the public body has reasonable grounds to believe that the information would reveal the existence of a serious environmental, health, or safety hazard to the public or group of people. (2) Before disclosing information under subsection (1), the public body must, if practicable, notify

[67] *Right to Information and Protection of Privacy Act*, SNB 2009, c R-10.6.
[68] *Access to Information and Protection of Privacy Act*, SNWT 1994, c 20.
[69] *Access to Information and Protection of Privacy Act*, SNWT (Nu) 1994, c 20.
[70] *Access to Information and Protection of Privacy Act*, RSY 2002, c 1.

	(a) any third party to whom the information relates; and (b) the commissioner. (3) If it is not practicable to comply with subsection (2), the public body must mail a notice of disclosure in the prescribed form (a) to the last known address of the third party; and (b) to the commissioner.

Appendix B: Portage College's "Disclosure in the Public Interest" Guidelines

PORTAGE COLLEGE

Disclosure in the Public Interest
B.6.7
Guidelines / Procedures

Purpose: The College has a responsibility to disclose information about a risk of significant harm to the environment or to the health of the safety of the public, an affected group of people or a person that is clearly in the public interest. This guideline outlines the protocols to determine the appropriate disclosure of information.

Responsibility: **President & CEO**

Guidelines:

1. As per section 32 of the Freedom of Information and Protection of Privacy Act (FOIP), the College has a responsibility to disclose information about a risk of significant harm (that is clearly in the public interest) to the environment or to the health or the safety of the public, an affected group of people or a person.

   Risk of harm means the chance or danger of injury, damage or loss. The provision states *significant* harm so there must be a belief that the risk of harm is considerably greater than in normal circumstances.

   Harm to environment refers to damage to or degradation of any component of the earth including air, land and water; any layer of the atmosphere; any organic and inorganic matter. Harm to the environment also includes damage to, or degradation of the interaction natural systems that include components of these things, through either natural calamity or illegal or improper use.

   Harm to health means damage to the well-being of the body or mind of an individual, or the health of the general public.

   Harm to safety means injury to the individual or to the collective condition of being free from danger or risk.

2. The disclosure in the public interest provision in Section 32 of the FOIP Act represents a significant exception to the rules for privacy protection because it could involve a considerable invasion of personal privacy and needs to be carefully considered and rationally defensible.

3. Section 32 of the FOIP Act does not include records that are excluded from the operations of the Act, for example this does not apply to disclosure of health information by a public body that is a custodian under the Health Information Act. For situations involving communicable disease, refer to Emergency Preparedness and Response Guideline G.1.2 – Appendix B Section 3.12 Communicable Disease.

4. The President & CEO is the designated authority for authorizing disclosure in the public interest and will establish an Executive Assessment Team to review disclosure requests. The team will include the President & CEO, VP – Infrastructure and Information Technology, AVP – Student Services/Registrar and Director Human Resources.

5. Other guidelines to be researched to determine harm include guidelines: B.6.5 - Prevention of Sexual Violence, B.6.6 – Assessments of Threats/High Risk Student Behavior, E.2.1 – Occupational Health and Safety, and G.1.2 – Emergency Preparedness and Response.

6. Third parties may be consulted, i.e. Alberta Health Services, Local Disaster Response.

7. The intent of the provision is to release information but not necessarily records. It is the President & CEO's decision whether to release the actual record, a summary of it or a warning of the risk based on the content of the record.

8. Assessments, decisions and reasons will be documented and kept in a record series in the Office of the President.

9. It is required that action be taken without delay and any situation that warrants consideration of disclosure in public interest requires quick action but due diligence in assessment on a case by case basis.

Procedures:

1. When a situation is identified that warrants consideration of disclosure under Section 32, without delay the President & CEO will;
   i) Assess the situation and authorize disclosure, or,
   ii) Request a recommendation from an Executive Assessment Team, who may seek input from the Threat Assessment Team, Occupational Health & Safety Committee or Crisis Response Team as necessary. Other areas of the College or external bodies may be consulted to ensure a comprehensive assessment is completed.

2. The Executive Assessment Team will use the following criteria in formulating its decision to disclose:

- level of harm anticipated;
- the degree of risk that the harm will occur;
- the imminence of the harm, that is, whether there is a clear and present danger of significant harm;
- measures that could be taken to avoid the harm and the amount of time required for these measures, and whether the release of information would likely reduce the risk of the harm;
- the importance of consulting with other public bodies whose interests may be affected by the disclosure;
- the right of a third party to make representations;
- the right of the public to make informed choices about the risks to which they are exposed; and
- the nature of the release i.e. the actual record, a summary of it or a warning of the risk based on the content of the record.

3. The Executive Assessment Team will provide a copy of the assessment, decisions and reasons to the Office of the President.

4. If a decision to disclose is authorized by the President & CEO, notice will be sent to the Privacy Commission Office and the third party (if possible). Because the provision requires action be taken without delay, the notice may be sent in some cases after the disclosure (use Schedule 3 of the FOIP Regulation: model letter Q in Appendix 3)

Approved by Executive Committee

	October 1, 2019	October 1, 2019
President	Approved Date	Effective Date