Policy Advice or Recommendations
(Section 29)

ATIPPA, 2015 requires disclosure of information to applicants by public bodies subject to limited and specific exceptions. The object of the exception for policy advice or recommendations includes maintaining an effective and neutral public service capable of producing full, free and frank advice. This discretionary exception is subject to the public interest override in section 9.

When considering the application of this exception, Coordinators must consider three things:

1. Does the record fit within the exception?
2. If it does, is the harm that the exception is intended to protect against present? (Even though the record fits within the exception, should the information be released anyway?)
3. Does the public interest override apply? (Is it clearly demonstrated that the public interest in disclosure outweighs the reason for the exception?)

1. Does the Record Fit within the Exception?

Section 29 states:

> *29. (1) The head of a public body may refuse to disclose to an applicant information that would reveal*
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> *(a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or minister;*
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> *(b) the contents of a formal research report or audit report that in the opinion of the head of the public body is incomplete and in respect of which a request or order for completion has been made by the head within 65 business days of delivery of the report; or*
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> *(c) draft legislation or regulations.*
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> *(2) The head of a public body shall not refuse to disclose under subsection (1)*
>
> *(a) factual material;*
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> *(b) a public opinion poll;*
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> *(c) a statistical survey;*
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> *(d) an appraisal;*
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> *(e) an environmental impact statement or similar information;*

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(f) *a final report or final audit on the performance or efficiency of a public body or on any of its programs or policies;*

(g) *a consumer test report or a report of a test carried out on a product to test equipment of the public body;*

(h) *a feasibility or technical study, including a cost estimate, relating to a policy or project of the public body;*

(i) *a report on the results of field research undertaken before a policy proposal is formulated;*

(j) *a report of an external task force, committee, council or similar body that has been established to consider a matter and make a report or recommendations to a public body;*

(k) *a plan or proposal to establish a new program or to change a program, if the plan or proposal has been approved or rejected by the head of the public body;*

(l) *information that the head of the public body has cited publicly as the basis for making a decision or formulating a policy; or*

(m) *a decision, including reasons, that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of the applicant.*

(3) Subsection (1) does not apply to information in a record that has been in existence for 15 years or more.

"Advice or Recommendations" and "Policy Options"

The Supreme Court of Canada in *John Doe* v. *Ontario (Finance)* addressed a similar exception in Ontario's access legislation. The Court emphasized that the words advice or recommendations must have separate meanings:

> [24] *...the legislative intention must be that advice has a broader meaning than recommendations. Otherwise, it would be redundant. By leaving no room for advice to have a distinct meaning from recommendations, the Adjudicator's decision was unreasonable.*

This finding supports this Office's past interpretation of advice or recommendations in Report A-2009-007:

> *[14]...The words "advice" and "recommendations" have similar but distinct meanings. The term "recommendations" relates to a suggested course of action. "Advice" relates to an expression of opinion on policy-related matters such as when a public official identifies a matter for decision and sets out the options, without reaching a conclusion as to how the matter should be decided or which of the options should be selected.*

In the *Doe* case, the Court discussed the meaning of the term "policy options":

> [26] *Policy options are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made. They would include matters such as the public servant's identification and consideration of alternative decisions that could be made. In other words, they constitute an evaluative analysis as opposed to objective information.*
>
> [27] *Records containing policy options can take many forms. They might include the full range of policy options for a given decision, comprising all conceivable alternatives, or may only list a subset of alternatives that in the public servant's opinion are most worthy of consideration. They can also include the advantages and disadvantages of each option, as do the Records here. But the list can also be less fulsome and still constitute policy options. For example, a public servant may prepare a list of all alternatives and await further instructions from the decision maker for which options should be considered in depth. Or, if the advantages and disadvantages of the policy options are either perceived as being obvious or have already been canvassed orally or in a prior draft, the policy options might appear without any additional explanation. As long as a list sets out alternative courses of action relating to a decision to be made, it will constitute policy options.*

In Cropley, the public body argued that the ordinary meaning of advice does not require a deliberative process. The Ontario Court of Appeal rejected that argument, finding that:

> [28] *The public's right to information would be severely diminished because much communication within government institutions would fall within the broad meaning of 'advice', and s. 13(1) would not be a limited and specific exemption…*
>
> [29]…*A "recommendation" may be understood to "relate to a suggested course of action" more explicitly and pointedly than "advice". "Advice" may be construed more broadly than "recommendation" to encompass material that permits the drawing of inferences with respect to a suggested course of action, but which does not itself make a specific recommendation.*

After the decision was rendered in *Doe*, the Ontario IPC in Order PO-3645 held that:

> [34] *"Advice" includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.*

The British Columbia Court of Appeal in *College of Physicians* held that the word "advice" should be interpreted to include:

> [113] "an opinion that involves exercising judgment and skill to weigh the significance of matters of fact on which a public body must make a decision for future action."

Section 29 also clearly states that the exception applies to information that would reveal "advice, proposals, recommendations, analyses or policy options" which clearly includes the "evaluative analysis" described by the SCC.

Drafts and Communication of Advice

The Court in *Doe* also spoke on the issue of drafts and communication of the advice:

> [50] *No words in s. 13(1) express a requirement that the advice or recommendations be communicated in order to qualify for exemption from disclosure. A public servant may engage in writing any number of drafts before communicating part or all of their content to another person. The nature of the deliberative process is to draft and redraft advice or recommendations until the writer is sufficiently satisfied that he is prepared to communicate the results to someone else. All the information in those earlier drafts informs the end result even if the content of any one draft is not included in the final version.*
>
> [51] *Protection from disclosure would indeed be illusory if only a communicated document was protected and not prior drafts. It would also be illusory if drafts were only protected where there is evidence that they led to a final, communicated version. In order to achieve the purpose of the exemption, to provide for the full, free and frank participation of public servants or consultants in the deliberative process, the applicability of s. 13(1) must be ascertainable as of the time the public servant or consultant prepares the advice or recommendations.*

There is no specific reference in the exception to "drafts". The analysis must be of the content of the record itself and not its status in terms of stage of development or whether it was submitted.

Using the Exclusions to Define

When defining the scope of the exception, the Supreme Court of Canada made reference to the items excluded from the exception:

> [30] *Greater insight into what the legislature intended with the term "advice" in s. 13(1) is provided by considering the nature of some of the exceptions listed in s. 13(2). The exceptions in s. 13(2) can be divided into two categories: objective information, and specific types of records that could contain advice and recommendations.*

For a full description of all the specific types of records excluded from the advice or recommendations exception see the ATIPP Manual.

When Disclosure would Allow an "Accurate Inference"

We note that the British Columbia IPC found in *ICBC* at paragraph 17 that the exception "applies not only when disclosure of the information would directly reveal advice or recommendations, but also when it would allow accurate inferences about the advice or recommendations".

Ontario IPC also found in Order PO-3645 that:

> [36] *Advice or recommendations may be revealed in two ways:*
> - *the information itself consists of advice or recommendations; or,*
> - *the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.*

2. Is the Harm that the Exception is Intended to Protect against Present?

One of the primary purposes of the *ATIPPA, 2015* (section 3(1)(a)) is disclosure of information to citizens that is required to participate meaningfully in the democratic process, which is balanced by specifying limited exceptions necessary to preserve the ability of government to function efficiently, (section 3(2)(c)).

The Court in *Doe* reflected on the similar purpose of the Ontario statute and noted the crucial role played by the head of the public body in fulfilling that purpose:

> [42] *The head of the institution that controls or has custody of the requested records, and who has knowledge of their content and the impact of their release, has the primary responsibility for determining whether one of the exemptions applies to the requested records. In the case of a discretionary exemption, he also has the responsibility of determining whether that exemption should be invoked.*

The Court also made a very clear statement about the purpose of this exception:

> [46] *Interpreting "advice" in s. 13(1) as including opinions of a public servant as to the range of alternative policy options accords with the balance struck by the legislature between the goal of preserving an effective public service capable of producing full, free and frank advice and the goal of providing a meaningful right of access.*

British Columbia's OIPC also made a clear statement on the purpose of this exception in the *ICBC* referenced above:

> [16] *Section 13(1) has been the subject of many Orders that have consistently held that the purpose of s. 13(1) is to allow full and frank discussion of advice or recommendations on a proposed course of action by preventing the harm that would occur if the deliberative process of government decision and policy-making were subject to excessive scrutiny. In John Doe v. Ontario (Finance), the Supreme Court of Canada addressed Ontario's equivalent of s. 13 and said:*
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> > *Political neutrality, both actual and perceived, is an essential feature of the civil service in Canada… The advice and recommendations provided by a public servant who knows that his work might one day be subject to public scrutiny is less likely to be full, free and frank, and is more likely to suffer from self-censorship. Similarly, a decision maker might hesitate to even request advice or recommendations in writing concerning a controversial matter if he knows the resulting information might be disclosed. Requiring that such advice or recommendations be disclosed risks introducing actual or perceived partisan considerations into public servants' participation in the decision-making process*

The next step, if the purpose of the exception is present (i.e. there is a risk of impeding open communication on policy matters) is for the public body to consider whether or not it should exercise its discretion to release despite that conclusion.

Our Office addressed the topic of discretion in Report A-2017-001 when discussing the solicitor-client privilege exception:

> [10] *That does not entirely end the matter. On one hand, as the Department pointed out in its submissions, the Supreme Court of Canada has held on numerous occasions that solicitor-client privilege is all but absolute, in recognition of the significant public interest in maintaining the confidentiality of the solicitor-client relationship. On the other hand, section 30 is a discretionary exception to access. That means that the public body can decide to disclose the record, even though it falls within the exception. This is a judgment that the head of the public body must exercise in every case involving a discretionary exception. It is described as follows in the Access to Information: Policy and Procedures Manual issued by the ATIPP Office:*
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> > *Exercising discretion is not simply a formality where the public body considers issues before routinely saying no. The public body must consider whether or not to exercise discretion to disclose information with respect to each request, taking into consideration the information requested and the particular circumstances of the case. The public body must not replace the exercise of discretion with a blanket policy that information will not be released, simply because it can be withheld under*

> *one of the discretionary exceptions. A public body may develop guidelines on exercising discretion but should not treat them as binding rules – in exercising discretion the public body must "have regard to all relevant considerations" and to the spirit and purposes of the Act.*

3. Does the Public Interest Override Apply?

If, after the second step, a decision to withhold the records has been made, the Coordinator must then apply the public interest override test, set out in section 9 of the *Act*:

> *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.*

For more information on how to apply this test, see our Public Interest Override Guidance Document.