

Guidelines for Public Interest Override

Introduction

Section 3 of the *Access to Information and Protection of Privacy Act, 2015 (ATIPPA, 2015)* states that first and foremost the Act's purpose is to "facilitate democracy". The section then goes on to list three means to achieve this goal – ensuring that citizens have the information required to participate meaningfully in the democratic process; increasing transparency in government and public bodies so that elected officials, officers and employees of public bodies remain accountable; and protecting the privacy of individuals with respect to personal information about themselves held and used by public bodies.

Therefore the *ATIPPA, 2015* is intended to favour disclosure of information by public bodies, with a limited number of exceptions. While some exceptions are mandatory, most are discretionary, permitting a public body to decide, after considering all relevant factors, that it is appropriate to disclose the requested information even though an exception could be applied.

The *ATIPPA, 2015* has enhanced this discretion by adding a Public Interest Override in section 9:

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.

(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.



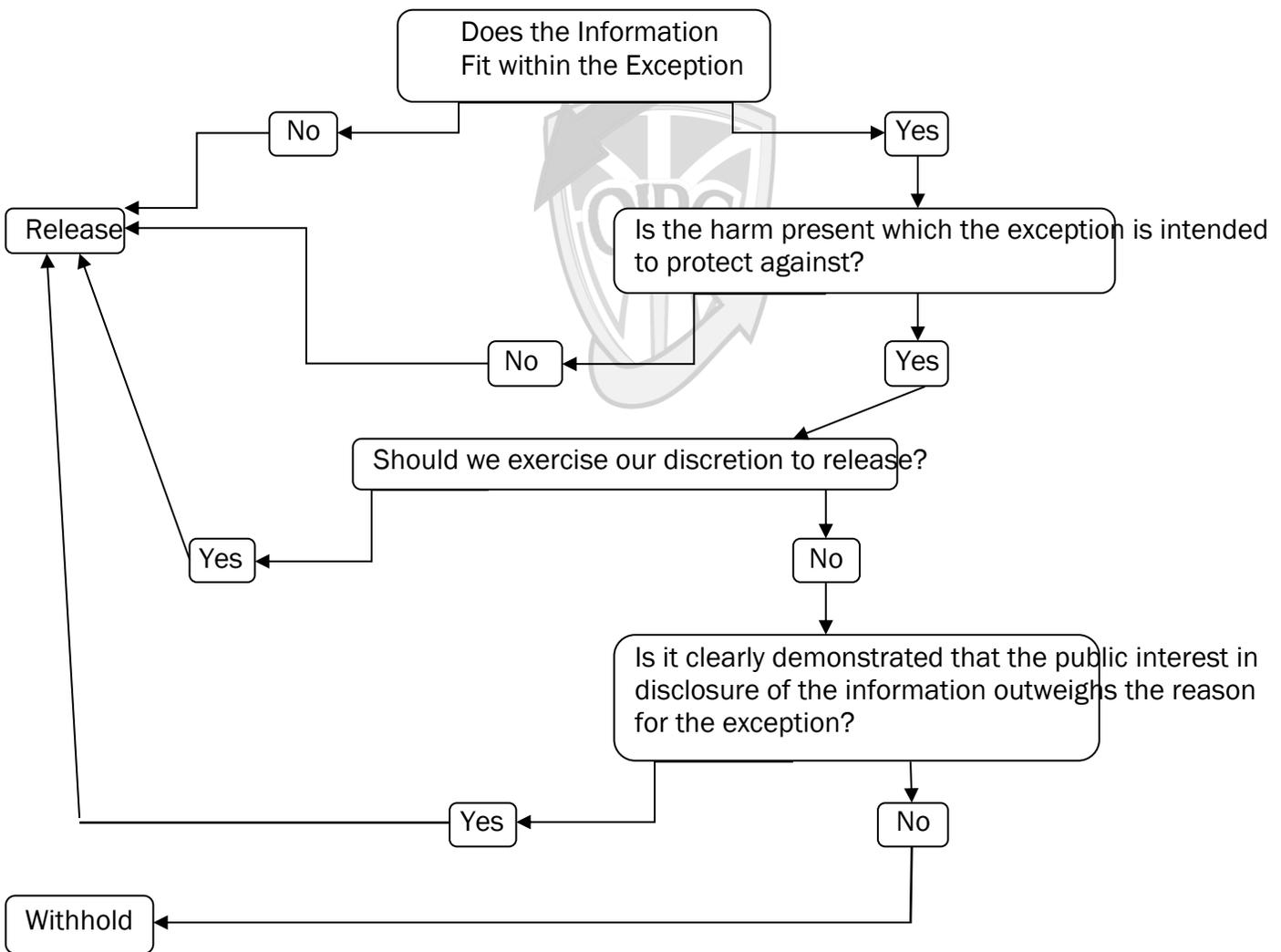
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Even before the changes in *ATIPPA, 2015*, the exercise of discretion required the public body to consider each request on its own merits and to take into consideration the particular circumstances of the case. The public interest has always been an implied factor for public bodies to consider when deciding whether to exercise discretion and release information, even if the information was subject to a discretionary exception. The public interest override provision clarifies and codifies the process of exercise of discretion and creates a clearer threshold for a decision to release or withhold information.

The purpose of adding this public interest override includes promoting democracy by increasing public participation in order to facilitate better informed decision-making. As well, it can increase scrutiny, discussion, comment and review between citizens and the government. Fundamentally, it is grounded in the idea that government information is managed for public purposes and that the public are the owners of the information.

Under *ATIPPA, 2015*, there is a directive in section 9 that discretionary exceptions “shall not apply where it is clearly demonstrated that the public interest in disclosure of the information outweighs the reason for the exception”. Therefore, each and every time a discretionary exception to which the public interest override is considered, the public body must go through the following exercise:



When considering the public interest override the public body should create a list of factors in favour of withholding and public interest factors for releasing. This will help when it comes to assessing the relative weight of the factors.

Factors which Support Withholding the Information

The considerations for withholding are limited to the harms that the exception is supposed to protect against. For more information about each of these exceptions please refer to the *ATTIP Manual*. The following is a brief description of each.

1. local public body confidences (section 28) – to prevent the harm that is presumed to occur if the substance of deliberations of a privileged meeting is disclosed;
2. policy advice or recommendations (section 29) – to protect the full and frank discussion of policy alternatives within government;
3. legal advice (subsection 30(1)) – to protect communications between the public body and its solicitor;
4. confidential evaluations (section 32) – to promote open and frank evaluations by protecting the confidentiality of the process;
5. disclosure harmful to intergovernmental relations or negotiations (section 34) – to prevent harm to intergovernmental relations or the supply of intergovernmental information;
6. disclosure harmful to the financial or economic interests of a public body (section 35) – to prevent one of the harms enumerated in section 35 from occurring;
7. disclosure harmful to conservation (section 36) – to protect against damage to or interference with conservation; and
8. disclosure harmful to labour relations interests of public body as employer (section 38) – to protect relations between the public body and unions representing its employees.

Factors Supporting Release

The public interest considerations in favour of disclosing are broad. While this list is not exhaustive, the following are some of the key factors to consider.

1. General public interest in transparency – There is a general public interest in promoting transparency, accountability, public understanding and involvement in the democratic process. Since the purpose of the *ATIPPA, 2015* is to promote democracy, general public interest is always given weight.
2. Public interest in the issue – for example, if a policy decision has a widespread or significant impact on the public, or if there is public interest in informing the debate on the issue (recognizing that there is still a need for a safe space in which to formulate and develop policy as contemplated by the advice and recommendations exception). Also note that “There is a wide difference between what is interesting to the public and what it is in the public interest to make known”.¹

¹ *Guardian Newspapers Ltd and Heather Brooke v the Information Commissioner and the British Broadcasting Corporation*, EA/2006/0011 and 0013 (Information Tribunal), paragraph 34.

3. Public interest in the specific information – for example, to help people understand their legal rights and obligations.
4. Suspicion of wrongdoing by public body – Disclosure must serve the wider public interest rather than the private interests of the applicant and the suspicion must be more than a mere allegation. There must be a plausible basis for the suspicion. This can be assessed by considering whether one or more of the following are applicable:
 - (a) facts suggest the basis of the actions are unclear or open to question;
 - (b) there has been an independent investigation;
 - (c) the content of the information may refute the suspicion or may be a ‘smoking gun’, both of which favour disclosure;
 - (d) evidence of public concern regarding the issue;
 - (e) there is a public interest in disproving suspicions in that release would restore confidence in the public body. Note - the Office of the Information and Privacy Commissioner (OIPC) cannot assess wrongdoing, it can only assess whether there is public interest in releasing the information.
5. Presenting a full picture – to aid the public in fully understanding the reasons for a public body’s decisions, to remove any suspicion of misrepresentation or misinformation. Present the full picture and let people reach their own view. Also, if the information that underpinned the decision was limited or if information that is already public is misleading, there is value in the public knowing that. Public bodies should be careful not to choose to only release information which is favorable to them, as this would amount to a misuse of the override.

Factors That Should Not Be Considered

Generally, a public body should not consider factors such as embarrassment, loss of confidence in the government, potential misunderstanding, or that release could result in unnecessary confusion and debate. Some examples of irrelevant factors are listed below.

1. Identity or motive of the applicant – when considering the public interest in releasing, it is release to the public not to the specific applicant that must be considered.
2. Private interests of applicant – if the interest of the applicant in obtaining the information is a private interest, the public interest override will not apply. Bear in mind, however, a public body can release information involving private interests of the applicant simply by exercising its discretion. The public interest override would not be part of that assessment.
3. Information may be misunderstood – there is a right to information under *ATIPPA 2015*; information is not required to be complete, accurate or up to date in order for it to be released to an applicant. Public bodies should release information with an explanation if clarity or accuracy is a concern, rather than withhold it. Inaccuracy can only be used as an argument for withholding information if such an explanation is not possible or will not limit the damage caused by release.
4. Other means of scrutiny – just because other means of scrutiny are available does not in itself weaken the public interest in disclosure. We must ask how far these other means go to

meet the specific public interest in transparency and what information is available to the public by these other means.

Assigning Weight

The process of assigning weight to the various factors is not an exact process but it should be approached as objectively as possible. Remember that for the public interest override to apply it must be clearly demonstrated that the public interest in disclosure of the information outweighs the reason for the exception. Part of this exercise is an acknowledgement that exceptions to the right of access exist in order to protect legitimate interests, and in some cases there can also be a public interest in ensuring that information is withheld when it is appropriate to do so.

The following are some factors to consider.

1. Likelihood of harm – how likely is the harm that the exception is trying to protect against? A real and significant risk of harm will add weight to the public interest in withholding the information.
2. Severity of harm – the severity of the impact of the harm is important, as a trivial amount of harm will be a weaker argument for withholding the information.
3. Age of the information – generally speaking, the public interest in withholding the information will diminish over time.
4. Impact of release on the public interest – how far will disclosing the information go toward the public interest identified. If very little help, less weight is given to release; if very helpful, more weight is given to release.
5. Similar information already in the public domain – if the new information would not significantly add to similar information already in the public domain, less weight will be assigned to releasing it; however, the existence of similar information in the public domain may also lessen the harm in releasing it.

Timing and Authority to Decide

When deciding which public interest factors may be relevant, the public body should consider all factors that exist at the time the request is made. The override should be applied at the time of the request.

If access to a record is refused and a complaint is brought to the OIPC by the applicant, the OIPC will consider the circumstances that existed at the time the request was made, but also has the discretion to assess whether new factors have subsequently come into play.

The ATIPP Coordinator should carry out this balancing exercise and bring a recommendation to the Head for approval. The process for deciding on release of information under *ATIPPA, 2015* is:

1. request for information received;
2. information located;

3. information reviewed by ATIPP Coordinator to determine if any exceptions to disclosure apply;
4. if mandatory exception applies (i.e. the information fits within the definition of information protected by that section), the information is withheld (unless section 27, then see Clerk's discretion described below);
5. if a discretionary exception applies, the Coordinator must determine if:
 - (a) the harm that the exception is intended to protect against is present in the case; if yes then
 - (b) decide whether the public body will exercise its discretion to release; if no then
 - (c) for those exceptions listed in section 9, is it clearly demonstrated that there is a public interest in releasing the information that overrides the harm that the exception contemplates;
6. the recommendation of the Coordinator to release or withhold is brought to the Head for approval.

OIPC Review

The burden of proof regarding the public interest override rests on the public body. The language of section 9, that a discretionary exception **shall not** apply if the conditions for the override are met, means that the public body must prove that it considered the public interest override and that the information failed to meet that provision in order to justify reliance on the discretionary exception.

When complaints are received at the OIPC regarding the use of a discretionary exception listed in section 9, the public body will be called upon to provide evidence that the override was considered and applied appropriately with due consideration to all relevant factors. The OIPC may in its review disagree with the public body's application of the override and may recommend release. Therefore, explanation and evidence of the factors considered in the application of the override will assist in explaining the decision reached to rely on the discretionary exception.

Cabinet Confidences

The application of the public interest override to Cabinet Confidences is procedurally different. Section 27 states:

(2) The head of a public body shall refuse to disclose to an applicant

(a) a cabinet record; or

(b) information in a record other than a cabinet record that would reveal the substance of deliberations of Cabinet.

(3) Notwithstanding subsection (2), the Clerk of the Executive Council may disclose a cabinet record or information that would reveal the substance of deliberations of Cabinet

where the Clerk is satisfied that the public interest in the disclosure of the information outweighs the reason for the exception.

If a public body intends to rely on the cabinet confidences exception the public body should notify the Clerk. This is done so that the Clerk may turn his or her mind to the public interest that may be present and decide whether to override the exception.

While the factors considered by the Clerk will be the same, the Clerk's satisfaction is the only measure. The Clerk may be called upon to explain how he or she assessed and considered the relevant factors should a complaint be filed with the OIPC. When exercising the discretion set out in section 27(3), the Clerk is required to act in good faith for a reason which is rationally connected to the purpose for which the discretion was granted.

When the OIPC considers a complaint involving the section 27 exception, it will ensure that the decision was properly made within the statutory framework and on the basis of considerations relevant to the decision-making function with which the Clerk is charged. If the information is found to fall under the cabinet confidences exception, the appropriate remedy on the finding of an inappropriate application of the discretion in section 27(3) is, through a recommendation in a Commissioner's Report, to remit the matter back to the Clerk to reconsider.

Resources

Report of the 2014 Statutory Review, by Clyde K. Wells, Doug Letto, and Jennifer Stoddart
<http://www.parcnl.ca/news/committeereport>

UK ICO, *The Guide to Freedom of Information* <https://ico.org.uk/for-organisations/guide-to-freedom-of-information/>

UK ICO, *The Public Interest Test*
https://ico.org.uk/media/for-organisations/documents/1183/the_public_interest_test.pdf

UK ICO, *Decision Notice FS50560473*, 19 March 2015.

UK ICO, *Decision Notice FS50296349*, 30 March 2011.

British Union for the Abolition of Vivisection v. Information Commissioner and Newcastle University, EA/2010/0064 (First Tier Tribunal, UK).

Ontario OIPC, *Order PO-3164*, February 20, 2013.

Ontario (Public Safety and Security) v. Criminal Lawyers' Association [2010] 1 S.C.R. 815.

Oakwood Development Ltd. v. St. Francois Xavier (Rural Municipality) [1985] S.C.J. No. 49.