

## Economic and Other Interests of a Public Body [Section 28]<sup>395</sup>

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### ■ Summary of Exceptions

The exceptions in subsection 28(1) are designed to protect diverse economic, financial and other interests of the Government of Manitoba or a **public body**.

Subsection 28(1) contains discretionary exceptions to the right of access under section 7 of the Act, as the **head** of the **public body** "may" refuse to disclose the requested **record** if an exception applies.

The exception in the opening words of subsection 28(1) and the exceptions in clauses 28(1)(c) and 28(1)(e) contain a 'reasonable expectation of harm' test.

The exceptions in clauses 28(1)(a), (b) and (d) are 'class exceptions' as they protect a type or kind of information.

Subsection 28(2) limits the exceptions in subsection 28(1).

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<sup>395</sup> Replaces section 43 of the 1985 *Freedom of Information Act*.

■ **Scope of the Exceptions for Economic and Other Interests of a Public Body [Subsection 28(1) ]<sup>396</sup>**

**28(1)** The **head** of a **public body** may refuse to disclose information to an **applicant** if disclosure could reasonable be expected to harm the economic or financial interests or negotiating position of a **public body** or the Government of Manitoba, including the following information:

- (a) ....
- (b) ....
- (c) ....
- (d) ....; or
- (e) ....

The Government of Manitoba and **public bodies** hold significant amounts of financial and economic information critical to the financial management of **public bodies** and the management of the provincial economy. Subsection 28(1) gives the **public body** receiving a request for access under Part 2 of FIPPA the discretion to protect information which, if released, could harm the economic or financial interests or negotiating position of the **public body** receiving the request, of another **public body** or of the Government of Manitoba in the broad, 'corporate' sense.

*Relationship with section 18 - Business interests of **third parties***

Under FIPPA, the economic and other interests of **public bodies** are addressed by the exceptions to disclosure in subsection 28(1), not by the exceptions in subsections 18(1) and 18(2).

Subsections 18(1) and 18(2) protect sensitive commercial and business information from or about **third parties** who are not other **public bodies**. "**Third party**" is defined in section 1 of FIPPA to mean "a person, group of persons or an organization other than the **applicant** or a **public body**."

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<sup>396</sup> Subsection 28(1) was amended by *The Statute Law Amendment Act, 1998* to correct a drafting error. The discussion in this Manual is based on the wording of subsection 28(1) as amended.

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### *Discretionary exceptions*

Subsection 28(1) contains discretionary exceptions to the right of access under section 7 of the Act, as the **head** "may" refuse to disclose the requested information. The **head**:

- must first determine whether an exception in subsection 28(1) applies to information in the requested **record**, and
- must then consider whether it is appropriate to release the information, even though an exception in subsection 28(1) applies, unless an exception in another section of FIPPA applies.<sup>397</sup>

### *Severing - subsection 7(2)*

The term information, rather than the term **record**, is used in subsection 28(1) to indicate that the exception applies to the information in a **record** and not necessarily to the whole **record**. Subsection 7(2) of FIPPA requires that, where an exception applies to a portion of the information in a **record**, only that portion is severed and the **applicant** is entitled to access to the remainder of the **record** unless an exception in another section of FIPPA applies.<sup>398</sup>

### *"Of a public body"*

The exceptions in subsection 28(1) protect economic or financial interests, negotiating positions, etc. "of a **public body**".

In most cases, the **public body** whose interests are involved and are protected by subsection 28(1) will be the **public body** with custody or control of the requested **record**.

In some situations, however, a **public body** may have custody or control of information about another **public body** whose interests may be affected by disclosure. The interests of this other **public body** can also be protected under subsection 28(1), as the phrase "a **public body**" is used in the exceptions.

Consultation among the **public bodies** affected is advisable to determine whether the harm contemplated by the exception could result.

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<sup>397</sup> See "Exercise of Discretion" in the *Introduction* to this Chapter.

<sup>398</sup> For a discussion of severing and subsection 7(2) see "Exceptions Apply to Information in a Record - Severing" in the *Introduction* to this Chapter and *Severing* in Chapter 3.

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### *"Of.... the Government of Manitoba"*

The exceptions in subsection 28(1) also protect the interests of the Government of Manitoba in the broad 'corporate' sense.

The use of the phrase "Government of Manitoba" is broader than the concept "**public body**". Government is the machinery by which the sovereign power in a state expresses its will and exercises its functions; the framework of political institutions, departments and offices by means of which the executive, judicial, legislative and administrative business of the state is carried on.<sup>399</sup> The Government of Manitoba is Her Majesty the Queen, acting for the Province of Manitoba.<sup>400</sup>

In the context of subsection 28(1), "harm" to economic or financial interests, negotiating positions, etc. includes not only hurt or damage to the interests of a single **public body** (such as a Manitoba government **department**), but also hurt or damage to policies and programs for which the Government of Manitoba is responsible and which affect the overall economy or interests of the Province of Manitoba.

### *Scope of the exception in subsection 28(1) - "including"*

The word "including", used to introduce clauses 28(1)(a) to (e), indicates that the **records** or information listed in clauses (a) to (e) are not the only **records** or information which fall within the exception.

There may be information or **records** which are not described in clauses 28(1)(a) to (e) which nonetheless "could reasonably be expected to harm the economic or financial interests or negotiating position of a **public body** or the Government of Manitoba"; such information or **records** fall within the exception to disclosure in the opening words of subsection 28(1).

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<sup>399</sup> *Black's Law Dictionary, 6<sup>th</sup> Edition.*

<sup>400</sup> *The Interpretation Act of Manitoba, section 17 and the Schedule of Definitions.*

■ **Economic or Financial Interests or Negotiating Position of a Public Body or the Government of Manitoba - Opening wording of subsection 28(1)**

**28(1)** The **head** of a **public body** may refuse to disclose information to an **applicant** if disclosure could reasonable be expected to harm the economic or financial interests or negotiating position of a **public body** or the Government of Manitoba, including...<sup>401</sup>

*Reasonable expectation of harm*

The exceptions to disclosure in the opening wording of subsection 28(1) contain a 'reasonable expectation of harm' test.<sup>402</sup>

The **head** of the **public body** must determine whether disclosure of the information could "reasonably be expected" to cause the harm described in the opening wording of subsection 28(1). The circumstances must be carefully assessed, and the determination must be based on objective grounds.

"Harm" means hurt or damage.<sup>403</sup>

*Economic interests*

"Economics" means the science of the production and distribution of wealth; the condition of a country etc. as regards material prosperity.<sup>404</sup> "Economy" means the wealth and resources of a community, especially in terms of the production and consumption of goods and services; the careful management of (especially financial) resources.<sup>405</sup>

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<sup>401</sup> Replaces part of clause 43(d) of the 1985 *Freedom of Information Act*.

<sup>402</sup> See "Reasonable Expectation of Harm" in the *Introduction* to this Chapter.

<sup>403</sup> *The Concise Oxford Dictionary, 9<sup>th</sup> Edition*.

<sup>404</sup> *The Concise Oxford Dictionary, 9<sup>th</sup> Edition*.

<sup>405</sup> *The Concise Oxford Dictionary, 9<sup>th</sup> Edition*.

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"Economic interests" relate to the broad interest of the Government of Manitoba or a **public body** (a **department**, **government agency** or **local public body**) in managing the production, distribution and consumption of goods and services in Manitoba, and the more specific interests of the government or a **public body** in the management of its financial and other resources.

### *"Financial interests"*

"Financial" interests relate to the management of money and monetary resources.<sup>406</sup> Financial interests include matters such as the management of assets and liabilities, the ability of a **public body** or the government to protect its interests in financial transactions with others, the ability to collect taxes and generate revenues, etc.

### *"Negotiating position"*

To "negotiate" means to confer with others in order to reach a compromise or agreement.<sup>407</sup> A "negotiating position" can relate to contractual negotiations, negotiations relating to the settlement of a lawsuit, etc.

### *"Of a **public body** or the Government of Manitoba"*

The exception in the opening wording of subsection 28(1) protects economic or financial interests or the negotiating position of:

- the **public body** which has received the request for access,
- another **public body**, and
- the interests of the Government of Manitoba in the broad, 'corporate' sense.<sup>408</sup>

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<sup>406</sup> *The Concise Oxford Dictionary, 9<sup>th</sup> Edition.*

<sup>407</sup> *The Concise Oxford Dictionary, 9<sup>th</sup> Edition.*

<sup>408</sup> See "Scope of the Exception for Economic and Other Interests of a Public Body" earlier in this Chapter, for a more detailed discussion.

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### ■ Trade secret of a public body or the government - clause 28(1)(a)

**28(1)** The **head** of a **public body** may refuse to disclose...

(a) a trade secret of a **public body** or the Government of Manitoba;<sup>409</sup>

#### *Meaning of "trade secret"*

The exception to disclosure in clause 28(1)(a) is a 'class exception' as it protects a type or kind of information.

The term "trade secret" has been described as follows:

The term "trade secret" refers to some identifiable business or technical information which is kept private for the purpose of economic gain. The creator of that information expends resources (and often considerable resources) of one kind or another to gain a competitive edge in product or services over a competitor. If the nature of the information were publicly known, the competitive advantage would be lost.

There are potentially four categories of trade secrets: specific product secrets (such as chemical formula); technological secrets (that is, knowledge of some process or know-how that nobody else has yet developed); strategic business information (secret marketing information or customer lists); and specialized compilations of information that, in sum, are not publicly known and have unique value on that account.<sup>410</sup>

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<sup>409</sup> Replaces clause 43(a) of the 1985 *Freedom of Information Act*.

<sup>410</sup> *Trade Secrets, a Report of the Institute of Law Research and Reform (Edmonton, Alberta) and a Federal Provincial Working Party on Trade Secrets (Report No. 46)*, July 1986, at page 6.

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In summary:

"trade secret" means information including but not limited to a formula, pattern, compilation, programme, method, technique or process or information contained or embodied in a product, device or mechanism which

- i. is or may be used in a trade or business,
- ii. is not generally known in that trade or business,
- iii. has economic value from not being generally known, and
- iv. is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.<sup>411</sup>

*"Of a **public body** or the Government of Manitoba"*

"Trade secret" of a **public body** or the Government of Manitoba means that a **public body** or the Government must own the trade secret or have a legal right or claim to the trade secret information (for example, under a license agreement).

The exception in clause 28(1)(a) protects a trade secret of:

- the **public body** which has received the request for access,
- another **public body**, or
- the Government of Manitoba in the broad, 'corporate' sense.<sup>412</sup>

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<sup>411</sup> Order M-29, Ontario Access and Privacy Commissioner (Re Etobicoke Board of Education, July 30, 1992) which adopts the definition from *Trade Secrets*, cited above.

<sup>412</sup> See "Scope of the Exception for Economic and Other Interests" earlier in this Chapter for a more detailed discussion.

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### ■ Financial, commercial, scientific, technical or other proprietary information - clause 28(1)(b)

**28(1)** The head of a public body may refuse to disclose...

(b) financial, commercial, scientific, technical or other information in which a **public body** or the Government of Manitoba has a proprietary interest or right of use;

*"Financial, commercial, scientific, technical or other information"*

The exceptions to disclosure in clause 28(1)(b) are 'class exceptions' as they protect a type or kind of information.

"Financial information" is information relating to finance - money and the monetary resources of a person, company, etc.<sup>413</sup> Examples include information on pricing practices, profit and loss data, overhead and operating expenses.<sup>414</sup>

"Commercial information" is information related to or connected with trade or commerce,<sup>415</sup> with the buying, selling or exchange of merchandise or services.<sup>416</sup> Examples include price lists, lists of suppliers and customers, market research surveys and other similar information relating to the commercial operation of a business.<sup>417</sup> The term "commercial information" can apply to both profit-making enterprises and non-profit enterprises.<sup>418</sup>

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<sup>413</sup> *The Concise Oxford Dictionary, 9<sup>th</sup> Edition.*

<sup>414</sup> Order 80, Ontario Access and Privacy Commissioner (Re Ministry of Health, July 26, 1989).

<sup>415</sup> Order 179, Ontario Access and Privacy Commissioner (Re Ministry of Health, June 20, 1990).

<sup>416</sup> Order P-493, Ontario Access and Privacy Commissioner (Re Ministry of Municipal Affairs, July 9, 1993).

<sup>417</sup> Order 16, Ontario Access and Privacy Commissioner (Re Ministry of Agriculture and Food, Sept. 8, 1988).

<sup>418</sup> Order P-493, Ontario Access and Privacy Commissioner (Re Ministry of Municipal Affairs, July 9, 1993).

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"Scientific information" refers to information relating to or exhibiting the methods or principles of science. In particular, it is information belonging to an organized field of knowledge in the natural, biological or social sciences or mathematics which relates to the observation and testing of specific hypotheses or conclusions and which is undertaken by an expert in the field.<sup>419</sup>

"Technical information" usually refers to information of or involving or concerned with the mechanical arts and applied sciences.<sup>420</sup> Examples of mechanical arts and applied sciences include architecture, engineering and electronics. An example of "technical information" is a description of the deficiencies in the structure of a building.<sup>421</sup>

The "other information" referred to in the exception is information in which a **public body** or the Government of Manitoba has a proprietary interest or right of use.

### *"Proprietary interest or right of use"*

A "proprietary interest" is a legal property interest in the information which would arise through ownership or through contractual rights. A "right of use" would arise through contractual rights or a licensing agreement.

### *"Of a **public body** or the Government"*

The exception in clause 28(1)(b) protects financial and other proprietary information in which the **public body** receiving the request for access, another **public body** or the Government of Manitoba (in the broad 'corporate' sense) has a proprietary interest or right of use.<sup>422</sup>

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<sup>419</sup> Order P-454, Ontario Access and Privacy Commissioner (Re Ontario Native Affairs Secretariat, May 7, 1993).

<sup>420</sup> *The Concise Oxford Dictionary, 9<sup>th</sup> Edition.*

<sup>421</sup> Order P-444, Ontario Access and Privacy Commissioner (Re Ministry of Health, April 2, 1993).

<sup>422</sup> See "Scope of the Exception for Economic and Other Interests" earlier in this Chapter, for a more detailed discussion.

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- **Result in financial loss, prejudice competitive position or interfere with negotiations - clause 28(1)(c)**

**28(1)** The **head** of a **public body** may refuse to disclose...

(c) information the disclosure of which could reasonably be expected to

- (i) result in financial loss to,
- (ii) prejudice the competitive position of, or
- (iii) interfere with or prejudice contractual or other negotiations of,

a **public body** or the Government of Manitoba;

The three exceptions to disclosure in clause 28(1)(c) provide similar protection for the business and commercial activities of a **public body** or the Government of Manitoba as is provided for the activities of private sector **third parties** under clause 18(1)(c).

### *Reasonable expectation of harm test*

The exceptions in paragraphs 28(1)(c)(i), (ii) and (iii) involve a 'reasonable expectation of harm' test.<sup>423</sup> The **head** of the **public body** receiving the request for access must determine whether disclosure of the information could "reasonably be expected" to result in any one of more of the harms described in paragraphs 28(1)(c)(i), (ii) or (iii). The individual circumstances of each request for such information must be carefully assessed, and the determination must be based on objective grounds.

### *"Result in financial loss" - paragraph 28(1)(c)(i)*<sup>424</sup>

The loss under this exception must be "financial" - that is, must be monetary or have a monetary equivalent or value (for example, a loss of revenue, loss of reputation, loss of goodwill in the marketplace).

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<sup>423</sup> See "Reasonable Expectation of Harm" in the *Introduction* to this Chapter.

<sup>424</sup> Replaces part of clause 43(d) of the 1985 *Freedom of Information Act*.

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*"Prejudice the competitive position" - paragraph 28(1)(c)(ii)* <sup>425</sup>

"Prejudice" in the context of paragraph 28(1)(c)(ii) means that disclosure of the information would harm or injure the competitive position of a **public body** or of the Government of Manitoba. <sup>426</sup>

There can be prejudice to a competitive position of a **public body** or the government even if there is no immediate loss. However, for this exception to apply there must be:

- a competitive community or an existing or potential competitor, and
- a reasonable expectation that harm, such as loss or reduction in market, could result from a competitor's knowledge of the information.

*"Interfere with or prejudice contractual or other negotiations" - clause 28(1)(c)(iii)* <sup>427</sup>

To "interfere with" means to obstruct, to meddle, hinder or get in the way of something. <sup>428</sup>

"Prejudice" in the context of paragraph 28(1)(c)(iii) means that disclosure of the information would harm or injure the negotiations of a **public body** or of the Government of Manitoba. <sup>429</sup>

To "negotiate" means to confer with others in order to reach a compromise or agreement. <sup>430</sup> "Negotiations" in this context means discussions and communications where the intent is to arrive at an agreement or a settlement. The "negotiations" referred to in paragraph 28(1)(c)(iii) can include contractual negotiations, negotiations relating to the settlement of a lawsuit, etc.

Note: Clause 23(1)(c) contains a related exception for positions, plans, procedures, criteria or instructions developed for contractual or other negotiations.

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<sup>425</sup> Replaces part of clause 43(c) of the 1985 *Freedom of Information Act*.

<sup>426</sup> *The Concise Oxford Dictionary, 9<sup>th</sup> Edition*.

<sup>427</sup> Replaces part of clause 43(c) of the 1985 *Freedom of Information Act*.

<sup>428</sup> *The Concise Oxford Dictionary, 9<sup>th</sup> Edition*

<sup>429</sup> *The Concise Oxford Dictionary, 9<sup>th</sup> Edition*.

<sup>430</sup> *The Concise Oxford Dictionary, 9<sup>th</sup> Edition*.

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*"Of a **public body** or the Government of Manitoba"*

The exceptions in clause 28(1)(c) protect the **public body** which has received the request for access, another **public body** and the Government of Manitoba in the broad 'corporate' sense from the harm contemplated in paragraphs 28(1)(c)(i), (ii) and (iii).<sup>431</sup>

### ■ Innovative scientific or technical research - clause 28(1)(d)

**28(1)** The **head** of a **public body** may refuse to disclose...

(d) innovative scientific or technical information obtained through research by an **employee** of a **public body** or the Government of Manitoba; or<sup>432</sup>

*"Innovative scientific or technical information obtained through research"*

The exception to disclosure in clause 28(1)(d) is a 'class exception' as it protects a type or kind of information.

"Innovative" means a new method or idea or something changed or altered.<sup>433</sup>

"Scientific information" refers to information relating to or exhibiting the methods or principles of science. In particular, it is information belonging to an organized field of knowledge in the natural, biological or social sciences or mathematics which relates to the observation and testing of specific hypotheses or conclusions and which is undertaken by an expert in the field.<sup>434</sup>

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<sup>431</sup> See "Scope of the Exception for Economic and Other Interests of a Public Body" earlier in this Chapter, for a more detailed discussion.

<sup>432</sup> Replaces clause 43(b) of the 1985 *Freedom of Information Act*.

<sup>433</sup> *The Concise Oxford Dictionary, 9<sup>th</sup> Edition*.

<sup>434</sup> Order P-454, Ontario Access and Privacy Commissioner (Re Ontario Native Affairs Secretariat, May 7, 1993).

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"Technical information" usually refers to information of or involving or concerned with the mechanical arts and applied sciences.<sup>435</sup> Examples of mechanical arts and applied sciences include architecture, engineering and electronics. An example of "technical information" is a description of the deficiencies in the structure of a building.<sup>436</sup>

"Research" means the systematic investigation into and study of materials, sources, etc. in order to establish facts and reach new conclusions and an endeavour to discover new or to collate old facts, etc. by scientific study or by a course of critical investigation.<sup>437</sup>

### ***"Employee of a public body or the Government of Manitoba"***

For the exception in clause 28(1)(d) to apply, the scientific or technical information must have been obtained through research by an **"employee of a public body or the Government of Manitoba"**.

The term **"employee"** is defined in section 1 of FIPPA:

**"employee"**, in relation to a **public body**, includes a person retained under a contract to perform services for the **public body**.

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<sup>435</sup> *The Concise Oxford Dictionary, 9<sup>th</sup> Edition.*

<sup>436</sup> Order P-444, Ontario Access and Privacy Commissioner (Re Ministry of Health, April 2, 1993).

<sup>437</sup> Order P-666, Ontario Access and Privacy Commissioner (Re Ministry of Health, April 27, 1994).

- **Undue loss or benefit to a person or premature disclosure of a pending policy decision - clause 28(1)(e)**

**28(1)** The **head** of a **public body** may refuse to disclose...

- (e) information the disclosure of which could reasonably be expected to result in an undue loss or benefit to a person, or premature disclosure of a pending policy decision, including but not limited to,
  - (i) a contemplated change in taxes or other source of revenue,
  - (ii) a contemplated change in government borrowing,
  - (iii) a contemplated change in the conditions of operation of a financial institution, stock exchange, or commodities exchange, or of any self-regulating association recognized by The Manitoba Securities Commission under an **enactment** of Manitoba, or
  - (iv) a contemplated sale or purchase of securities, bonds or foreign or Canadian currency.

*"Including, but not limited to"*

The wording "including, but not limited to", used to introduce paragraphs 28(1)(e)(i) to (iv), indicates that the information listed in paragraphs (i) to (iv) is not the only information which falls within the exception.

There may be information which is not described in paragraphs 28(1)(e)(i) to (iv) which nonetheless "could reasonably be expected to result in an undue loss or benefit to a person, or premature disclosure of a pending policy decision"; such information falls within the exception to disclosure described in the opening words of clause 28(1)(e).

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*"Undue loss or benefit to a person, or premature disclosure of a pending policy decision"*  
- *Exceptions in opening wording of clause 28(1)(e)*<sup>438</sup>

**28(1)** The **head** of a **public body** may refuse to disclose...

(e) information the disclosure of which could reasonably be expected to result in an undue loss or benefit to a person, or premature disclosure of a pending policy decision, including....

The opening wording of clause 28(1)(e) contains two exceptions, which contain a reasonable expectation of harm test.

- "Result in an undue loss or benefit to a person"

An "undue" loss or benefit is a loss or benefit which is excessive, disproportionate; not suitable; not owed.<sup>439</sup> The loss or benefit need not be financial in nature. "Person" means a natural person (human being) and includes a corporation and the heirs, executors, administrators or other legal representatives of a person.<sup>440</sup>

- "Result in.... premature disclosure of a pending policy decision"

This exception is temporary.

A "premature" disclosure is one occurring before the usual or proper time; one which is too early or too hasty.<sup>441</sup> "Pending" means awaiting decision or settlement, undecided; about to come into existence.<sup>442</sup> Once the policy decision has been made and implemented it is no longer "pending" and this exception no longer applies. A decision is implemented when those who are expected to carry it out have been authorized and instructed to do so.

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<sup>438</sup> Replaces part of clause 43(d) of the 1985 *Freedom of Information Act*.

<sup>439</sup> *The Concise Oxford Dictionary, 9<sup>th</sup> Edition*.

<sup>440</sup> *The Interpretation Act of Manitoba, section 17* and the Schedule of Definitions.

<sup>441</sup> *The Concise Oxford Dictionary, 9<sup>th</sup> Edition*.

<sup>442</sup> *The Concise Oxford Dictionary, 9<sup>th</sup> Edition*

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Note: Clause 23(1)(f) also refers to disclosure of a pending policy or budgetary decision.

The **head** of the **public body** must determine whether disclosure of the information could "reasonably be expected" to cause the harm described in the opening to subsection 28(1). "Harm" means hurt or damage.<sup>443</sup> The circumstances must be carefully assessed, and the determination must be based on objective grounds.

*Examples of the exceptions - clauses 28(1)(e)(i) to (iv)*<sup>444</sup>

**28(1)** The **head** of a **public body** may refuse to disclose...

- (e) information the disclosure of which could reasonably be expected to result in an undue loss or benefit to a person, or premature disclosure of a pending policy decision, including but not limited to,
  - (i) a contemplated change in taxes or other source of revenue,
  - (ii) a contemplated change in government borrowing,
  - (iii) a contemplated change in the conditions of operation of a financial institution, stock exchange, or commodities exchange, or of any self-regulating association recognized by The Manitoba Securities Commission under an **enactment** of Manitoba, or
  - (iv) a contemplated sale or purchase of securities, bonds or foreign or Canadian currency.

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<sup>443</sup> *The Concise Oxford Dictionary, 9<sup>th</sup> Edition.*

<sup>444</sup> These paragraphs replace paragraphs 43(d)(i) to (iv) of the 1985 *Freedom of Information Act*.

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Clauses 28(1)(e)(i) to (iv) are examples of situations where disclosure of information would result in undue loss or gain by a person or premature disclosure of a pending policy decision.

The focus of these examples is largely financial (contemplated change in taxes or other source of revenue, contemplated change in government borrowing, etc.).

The exceptions in paragraphs 28(1)(e)(i) to (iv) are 'class exceptions' as they protect a type or kind of information.

The exceptions in clause 28(1)(e) are not limited to the examples in paragraphs 28(1)(e)(i) to (iv), or to financial matters. There may be information which is not described in these paragraphs which nonetheless "could reasonably be expected to result in an undue loss or benefit to a person, or premature disclosure of a pending policy decision" if the information were to be disclosed; such information falls within the exception to disclosure described in the opening words of clause 28(1)(e).

### ■ **Limit to the Exceptions for Economic and Other Interests of a Public Body [Subsection 28(2)]**

**28(2)** Subsection (1) does not apply to the results of a product or environmental test conducted by or for the **public body**, unless the test was done for the purpose of developing methods of testing or for the purpose of testing products for possible purchase.

The exceptions to disclosure in subsection 28(1) do not apply to the results of a product or environmental test conducted by or for the **public body**, unless the test was done to develop methods of testing or to test products for possible purchase. Other exceptions in FIPPA may apply to the results of a product or environmental test (for example, section 18 - Business interests of **third parties**).

This limit to the economic interests exceptions in subsection 28(2) applies whether the testing is carried out by the **public body** itself or "for" the **public body** by another person, organization, etc.

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"Product" means a thing or substance produced by natural process or manufacture, a result.<sup>445</sup>

"Environment" refers to the physical surroundings, conditions, circumstances, etc. in which a person lives; the area surrounding a place; external conditions as affecting plant and animal life; the totality of the physical conditions on the earth or a part of it, especially as affected by human activity.<sup>446</sup>

The limit does not apply, and the exceptions to disclosure in subsection 28(1) may apply to the information, if the product or environmental test was done:

- for the purpose of developing methods of testing, or
- for the purpose of testing products for possible purchase.

Note: Clause 18(3)(d) also refers to results of product or environmental tests. If the test has been carried out by or for the **public body** for a fee paid by a **third party**, an exception in subsection 18(1) may apply to the information.

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<sup>445</sup> *The Concise Oxford Dictionary, 9<sup>th</sup> Edition.*

<sup>446</sup> *The Concise Oxford Dictionary, 9<sup>th</sup> Edition.*

■ **Section 28: Related Provisions in FIPPA**

Section 1 (Definitions):	<b>"applicant"</b> <b>"employee"</b> <b>"head"</b> <b>"public body"</b>
Subsection 7(2)	<b>Severing information</b>
Subsection 12(1)	<b>Contents of response</b>
Clause 18(1)(a)	<b>Trade secret of a third party</b>
Clause 18(3)(d)	<b>Results of a product or environmental test</b>
Clause 23(1)(c)	<b>Positions, etc. developed for contractual or other negotiations</b>
Clause 23(1)(f)	<b>Disclosure of a pending policy or budgetary decision</b>
Clause 23(2)(d)	<b>Results of a product or environmental test</b>

## Testing Procedures, Tests and Audits [Section 29]<sup>447</sup>

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### ■ Summary of the Exception

The exceptions to disclosure in section 29 provide protection for procedures and techniques involved in testing and auditing and for details relating to specific tests to be given or audits to be conducted.

Section 29 contains discretionary exceptions to the right of access under section 7 of the Act.

The exceptions in section 29 contain a 'reasonable expectation of harm' test.

### ■ Scope of the Testing Procedures, Tests and Audits Exceptions [Section 29]

- 29** The **head** of a **public body** may refuse to disclose to an **applicant** information relating to
- (a) testing or auditing procedures or techniques; or
  - (b) details of specific tests to be given or audits to be conducted;
- if disclosure could reasonably be expected to prejudice the use or results of particular tests or audits.

The exceptions in section 29 protect procedures and techniques involved in testing and auditing and details relating to specific tests or audits to be given or conducted where disclosure of information could reasonably be expected to prejudice the use, or results, of particular tests or audits.

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<sup>447</sup> Substantially the same as section 46 of the 1985 *Freedom of Information Act*.

## DISCRETIONARY EXCEPTIONS TO DISCLOSURE: SECTION 28

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### *Discretionary exceptions*

Section 29 contains discretionary exceptions to the right of access under section 7 of the Act, as the **head** "may" refuse to disclose the requested information. The **head**:

- must first determine whether an exception in section 29 applies to information in the requested **record**, and
- must then consider whether it is appropriate to release the information, even though an exception in section 29 applies, unless an exception in another section of FIPPA applies.<sup>448</sup>

### *Severing - subsection 7(2)*

The term information, rather than the term **record**, is used in section 29 to indicate that the exceptions apply to the information in a record and not necessarily to the whole **record**. Subsection 7(2) of FIPPA requires that, where an exception applies to a portion of the information in a **record**, only that portion is severed and the **applicant** is entitled to access to the remainder of the **record** unless an exception in another section of FIPPA applies.<sup>449</sup>

### *Reasonable expectation of harm*

The exceptions in section 29 contain a 'reasonable expectation of harm' test.<sup>450</sup>

The **head** of the **public body** must determine whether disclosure of the information could "reasonably be expected" to cause the harm described in section 29. The circumstances must be carefully assessed, and the determination must be based on objective grounds.

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<sup>448</sup> See "Exercise of Discretion" in the *Introduction* to this Chapter.

<sup>449</sup> For a discussion of severing and subsection 7(2) see "Exceptions Apply to Information in a Record - Severing" in the *Introduction* to this Chapter and *Severing* in Chapter 3.

<sup>450</sup> See "Reasonable Expectation of Harm" in the *Introduction* to this Chapter.

## DISCRETIONARY EXCEPTIONS TO DISCLOSURE: SECTION 28

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### *"Prejudice the use or results of particular tests or audits"*

The exception in section 29 protects the testing or auditing procedure. The exception applies to specific types of information: testing or auditing procedures or techniques or details of specific tests to be given or audits to be conducted. Where disclosure of this information would prejudice the use of particular tests or audits or the results of testing or auditing, access may be refused.

Section 29 does not provide a basis for refusing to disclose the results of test or audits.

"Prejudice" in the context of section 29 means to impair the validity of <sup>451</sup> the testing or auditing procedures or techniques or of the results of the test or audit.

An "audit" is an official examination of accounts or a systematic review. <sup>452</sup>

The terms "test" and "audit" can include staffing tests, financial audits, program audits, etc.

The test or audit can be carried out by the **public body** itself or by consultants or contractors on behalf of the **public body**.

Note: Clause 4(h) of FIPPA provides that FIPPA does not apply to "a question that is to be used on an examination or test". <sup>453</sup>

Clauses 18(3)(d) and 23(2)(d) and subsection 28(2) deal with disclosure of final results of a product or environmental test conducted by or for a **public body**.

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<sup>451</sup> *The Concise Oxford Dictionary, 9<sup>th</sup> Edition.*

<sup>452</sup> *The Concise Oxford Dictionary, 9<sup>th</sup> Edition.*

<sup>453</sup> See *Records That Do Not Fall Under FIPPA* in Chapter 1.

**■ Section 29: Related Provisions in FIPPA**

Section 1 (Definitions):	<b>"applicant" "head" "public body"</b>
Clause 4(h)	<b>FIPPA does not apply to a question that is to be used on an examination or test</b>
Subsection 7(2)	<b>Severing information</b>
Subsection 12(1)	<b>Contents of response</b>
Clause 18(3)(d)	<b>Results of a product or environmental test</b>
Clause 23(2)(d)	<b>Results of a product or environmental test</b>
Subsection 28(2)	<b>Results of a product or environmental test</b>

## Confidential Evaluations [Section 30]<sup>454</sup>

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### ■ Summary of the Exception

The exception to disclosure in section 30 protects **personal information** about the **applicant** requesting access to a **record** under Part 2 which has been provided in confidence for the purpose of determining the **applicant's** suitability, eligibility or qualifications for employment or for the purpose of awarding a contract.

Section 30 is a discretionary exception to the right of access under section 7 of the Act.

The exception in section 30 is a 'class exception' as it protects a type or kind of information.

### ■ Scope of Confidential Evaluations Exception [Section 30]

**30** The **head** of a **public body** may refuse to disclose to an **applicant personal information** that has been provided in confidence, explicitly or implicitly, for purposes of determining the **applicant's** suitability, eligibility or qualifications for employment, or for the purpose of awarding a contract.

The exception to disclosure in section 30 is a 'class exception' as it protects a type or kind of information.

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<sup>454</sup> New provision.

## DISCRETIONARY EXCEPTIONS TO DISCLOSURE: SECTION 28

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### *Scope of the exception*

The exception to disclosure in section 30 gives the **head** of a **public body** the discretion to refuse to disclose information to an applicant under Part 2 of FIPPA if three conditions are met:

- (i) the information is **personal information** <sup>455</sup> about the **applicant**;
- (ii) the **personal information** has been provided in confidence, explicitly or implicitly, by someone other than the **applicant**;

The exception only applies where the **personal information** has been "provided" to the **public body**; it does not apply to **personal information** created or generated by the **public body**.

**Personal information** is "explicitly" provided in confidence when the party providing it expressly requests or indicates that it is to be kept confidential. The intention to provide information in confidence can be stated in the **record** of the information itself, in an agreement or verbally. It is advisable to keep a written **record** of a verbal request.

**Personal information** is "implicitly" provided in confidence when an intention or expectation that the information will be treated as confidential can be implied from the circumstances in which it was provided - for example, from the manner in which the information is provided and received, <sup>456</sup> past practices followed with respect to such information, stated policies, etc.

- (iii) the **personal information** has been provided
  - for purposes of determining the **applicant's** suitability, eligibility or qualifications for employment, or
  - for the purpose of awarding a contract.

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<sup>455</sup> The term "**personal information**" is defined in section 1 of FIPPA and is discussed in *Key Definitions* in Chapter 1.

<sup>456</sup> Order P-274, Ontario Access and Privacy Commissioner (Re Ministry of Correctional Services, Feb. 21, 1992) (made in the context of third party privacy).

## DISCRETIONARY EXCEPTIONS TO DISCLOSURE: SECTION 28

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"Suitability" means fitness for the purpose, appropriateness.<sup>457</sup> "Eligibility" means fitness or entitlement.<sup>458</sup> "Qualifications" means accomplishments fitting a person for a position or purpose.<sup>459</sup>

A contract referred to in section 30 can be a contract for goods, for services or for both goods and services.

### *Discretionary exception*

Section 30 is a discretionary exception to the right of access under section 7 of the Act, as the **head** "may" refuse to disclose the requested information. The **head**:

- must first determine whether the exception in section 30 applies to information in the requested **record**, and
- must then consider whether it is appropriate to release the information, even though the exception in section 30 applies, unless an exception in another section of FIPPA applies.<sup>460</sup>

### *Severing - subsection 7(2)*

The term information, rather than the term **record**, is used in section 30 to indicate that the exception applies to the information in a **record** and not necessarily to the whole **record**. Subsection 7(2) of FIPPA requires that, where an exception applies to a portion of the information in a **record**, only that portion is severed and the **applicant** is entitled to access to the remainder of the **record** unless an exception in another section of FIPPA applies.<sup>461</sup>

Note: Legal counsel should be consulted with respect to the relationship between section 30 and *The Personal Investigations Act*.

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<sup>457</sup> *The Concise Oxford Dictionary, 9<sup>th</sup> Edition.*

<sup>458</sup> *The Concise Oxford Dictionary, 9<sup>th</sup> Edition.*

<sup>459</sup> *The Concise Oxford Dictionary, 9<sup>th</sup> Edition.*

<sup>460</sup> See "Exercise of Discretion" in the *Introduction* to this Chapter.

<sup>461</sup> For a discussion of severing and subsection 7(2) see "Exceptions apply to Information in a Record - Severing" in the *Introduction* to this Chapter and *Severing* in Chapter 3.

**■ Section 30: Related Provisions in FIPPA**

Section 1 (Definitions):	<b>"applicant"</b> <b>"head"</b> <b>"personal information"</b> <b>"public body"</b>
Clause 4(h)	<b>FIPPA does not apply to a question that is to be used on an examination or test</b>
Subsection 7(2)	<b>Severing information</b>
Subsection 12(1)	<b>Contents of response</b>
Clause 17(2)(h)	<b>Personal recommendations or evaluations, character references or personnel evaluations</b>

## Preservation of Heritage Resources and Life Forms [Section 31]<sup>462</sup>

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### ■ Summary of the Exceptions

Subsection 31(1) provides that the **head** of a **public body** has the discretion to refuse to disclose information to an **applicant** requesting a **record** under Part 2 if the disclosure of information could reasonably be expected to result in damage to or interfere with the conservation of a heritage resource or any rare, endangered, threatened or vulnerable life form, including plants, vertebrates and invertebrates.

The exceptions in subsection 31(1) contain a 'reasonable expectation of harm' test.

Subsection 31(2) provides that the **head** of a **public body** has the discretion to refuse to disclose information relating to a contemplated designation of a heritage site, a municipal heritage site or a heritage object.

The exception in subsection 31(2) is a 'class exception' as it protects a type or kind of information.

The exceptions in subsections 31(1) and 31(2) are discretionary exceptions.

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<sup>462</sup> Subsection 31(2) replaces paragraph 38(d)(vi) of the 1985 *Freedom of Information Act*.

■ **Scope of Preservation of Heritage Resources and Life Forms  
Exceptions [Subsection 31(1)]**

**31(1)** The **head** of a **public body** may refuse to disclose information to an **applicant** if disclosure could reasonably be expected to result in damage to or interfere with the preservation, protection or conservation of

(a) a heritage resource as defined in *The Heritage Resources Act*; or

(b) any rare, endangered, threatened or vulnerable life form, including plants, vertebrates and invertebrates.

Subsection 31(1) provides that the **head** of a **public body** may refuse to disclose information if disclosure could reasonably be expected to:

- result in damage to a heritage resource as defined in *The Heritage Resources Act*;
- result in damage to any rare, endangered, threatened or vulnerable life form, including plants, vertebrates and invertebrates;
- interfere with the preservation, protection or conservation of a heritage resource; or
- interfere with the preservation, protection or conservation of any rare, endangered, threatened or vulnerable life form, including plants, vertebrates and invertebrates.

## DISCRETIONARY EXCEPTIONS TO DISCLOSURE: SECTION 28

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### *Discretionary exceptions*

Subsection 31(1) contains discretionary exceptions to the right of access under section 7 of the Act, as the **head** "may" refuse to disclose the requested information. The **head**:

- must first determine whether an exception in subsection 31(1) applies to information in the requested **record**, and must then consider whether it is appropriate to release the information, even though an exception in subsection 31(1) applies, unless an exception in another section of FIPPA applies.<sup>463</sup>

### *Reasonable expectation of harm*

The exceptions in subsection 31(1) contain a 'reasonable expectation of harm' test.<sup>464</sup>

The **head** of the **public body** must determine whether disclosure of the information could "reasonably be expected" to cause the harm described in subsection 31(1). The circumstances must be carefully assessed, and the determination must be based on objective grounds.

### *Severing - subsection 7(2)*

The term information, rather than the term **record**, is used in subsection 31(1) to indicate that the exceptions apply to the information in a **record** and not necessarily to the whole **record**. Subsection 7(2) of FIPPA requires that, where an exception applies to a portion of the information in a **record**, only that portion is severed and the **applicant** is entitled to access to the remainder of the **record** unless an exception in another section of FIPPA applies.<sup>465</sup>

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<sup>463</sup> See "Exercise of Discretion" in the *Introduction* to this Chapter.

<sup>464</sup> See "Reasonable Expectation of Harm" in the *Introduction* to this Chapter.

<sup>465</sup> For a discussion of severing and subsection 7(2) see "Exceptions Apply to Information in a Record - Severing" in the *Introduction* to this Chapter and *Severing* in Chapter 3.

## DISCRETIONARY EXCEPTIONS TO DISCLOSURE: SECTION 28

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### "Heritage resource" - clause 31(1)(a)

A "heritage resource" is defined in section 1 of *The Heritage Resources Act* of Manitoba:

"heritage resource" includes

- (a) a heritage site,
- (b) a heritage object, and
- (c) any work or assembly of works of nature or of human endeavour that is of value for its archaeological, palaeontological, pre-historic, historic, cultural, natural, scientific or aesthetic features, and may be in the form of sites or objects or a combination thereof;

A "heritage site" is a site designated by the minister responsible for *The Heritage Resources Act* as a heritage site under Part 1 of that Act.

A "heritage object" is defined in subsection 43(1) of *The Heritage Resources Act*:

"heritage object" includes

- (a) an archaeological object,
- (b) a palaeontological object,
- (c) a natural heritage object, and
- (d) any object designated as a heritage object by the Lieutenant Governor in Council under subsection 43(2);

The terms "archaeological object", "palaeontological object" and "natural heritage object" are also defined in subsection 43(1) of *The Heritage Resources Act*:

"archaeological object" means an object

- (a) that is the product of human art, workmanship or use, including plant and animal remains that have been modified by or deposited due to human activities,
- (b) that is of value for its historic or archaeological significance, and
- (c) that is or has been discovered on or beneath land in Manitoba, or submerged or partially submerged beneath the surface of any watercourse or permanent body of water in Manitoba;

"palaeontological object" means the remains or fossil or other object indicating the existence of extinct or prehistoric animals, but does not include human remains;

"natural heritage object" means a work of nature consisting of or containing evidence of flora or fauna or geological processes.

## DISCRETIONARY EXCEPTIONS TO DISCLOSURE: SECTION 28

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### *"Rare, endangered, threatened or vulnerable life form" - clause 31(1)(b)*

A "life form" in clause 31(1)(b) includes but is not limited to plants, vertebrates and invertebrates.

A "vertebrate" is an animal which has a spinal column, such as a mammal, bird, reptile, amphibian or fish.<sup>466</sup>

An "invertebrate" is an animal which does not have a spinal column, such as a crayfish or crab, an insect, spiders and mites, a starfish or jellyfish.

"Life form" includes any other living organism which is neither plant, vertebrate nor invertebrate but is in the classification of all living things, such as fungi.

"Rare" means seldom found or occurring, uncommon, unusual.<sup>467</sup> A "rare" life form includes any life form that is in a special category because it does not occur in great abundance in nature, because it is not prolific or its population or range has been adversely affected by modern civilization, etc.

"Endangered" means placed in danger.<sup>468</sup> An "endangered life form" includes any life form that is threatened with imminent extinction throughout all or a significant portion of its natural range. Endangered species can be identified from the national endangered species list compiled by the Committee on the Status of Endangered Wildlife in Canada, can be designated as endangered by federal or provincial legislation, etc.

"Threatened" in the context of clause 31(1)(b) means to be likely to injured; to be in danger.<sup>469</sup> A "threatened life form" includes any life form that is likely to become endangered if the factors affecting its vulnerability are not reversed. Threatened species can be identified from the national threatened species list compiled by the Committee on the Status of Endangered Wildlife in Canada, can be designated as threatened by federal or provincial legislation, etc.

"Vulnerable" means may be wounded or harmed.<sup>470</sup> A "vulnerable life form" includes any life form which is of concern because it is naturally scarce or likely to become threatened as a result of disclosure of information about it.

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<sup>466</sup> *The Concise Oxford Dictionary, 9<sup>th</sup> Edition.*

<sup>467</sup> *The Concise Oxford Dictionary, 9<sup>th</sup> Edition.*

<sup>468</sup> *The Concise Oxford Dictionary, 9<sup>th</sup> Edition.*

<sup>469</sup> *The Compact Edition of the Oxford English Dictionary.*

<sup>470</sup> *The Concise Oxford Dictionary, 9<sup>th</sup> Edition.*

## **DISCRETIONARY EXCEPTIONS TO DISCLOSURE: SECTION 28**

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### *Result in damage to heritage resource or life form*

"Damage" means harm or injury impairing the value or usefulness of something or the loss of what is desirable.<sup>471</sup>

In the context of subsection 31(1) "damage" includes destruction, deterioration or reduction in value of a heritage resource, harm to a habitat, impairing the health or safety of a population of a rare, endangered, threatened or vulnerable life form.

### *Interfere with preservation, protection or conservation of heritage resource or life form*

To "interfere with" means to obstruct, to meddle, hinder or get in the way of something.<sup>472</sup>

"Conservation" means preservation, keeping safe from harm or damage, especially for future use.<sup>473</sup> In the context of subsection 31(1), "conservation" is the safeguarding of a heritage resource or life form for the future by active physical preservation, legal protection or both.

Interference with conservation means any activity that might threaten the safety, integrity or continued existence of a heritage resource or of a rare, endangered, threatened or vulnerable life form.

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<sup>471</sup> *The Concise Oxford Dictionary, 9<sup>th</sup> Edition.*

<sup>472</sup> *The Concise Oxford Dictionary, 9<sup>th</sup> Edition.*

<sup>473</sup> *The Concise Oxford Dictionary, 9<sup>th</sup> Edition.*

■ **Scope of Exception for Contemplated Designation of Heritage Sites or Objects [Subsection 31(2)]**

**31(2)** The **head** of a **public body** may refuse to disclose to an **applicant** information relating to a contemplated designation of a heritage site, a municipal heritage site or a heritage object under *The Heritage Resources Act*.<sup>474</sup>

*Scope of the exception*

The exception in subsection 31(2) is a 'class exception' as it protects a type or kind of information - information relating to a contemplated designation under *The Heritage Resources Act* of:

- a heritage site;
- a municipal heritage site; or
- a heritage object.

A "contemplated" designation is an intended designation;<sup>475</sup> a designation which is being considered.

A "heritage site" is a site designated by the minister responsible for *The Heritage Resources Act* as a heritage site under Part I of that Act.

A "municipal heritage site" is a site designated by a municipality by by-law as a municipal heritage site under Part III of *The Heritage Resources Act*.

A "heritage object" is defined in subsection 43(1) of *The Heritage Resources Act*.

"heritage object" includes

- (a) an archaeological object,
- (b) a palaeontological object,
- (c) a natural heritage object, and
- (d) any object designated as a heritage object by the Lieutenant Governor in Council under subsection 43(2);

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<sup>474</sup> Replaces paragraph 43(d)(vi) of the 1985 *Freedom on Information Act*.

<sup>475</sup> *The Concise Oxford Dictionary, 9<sup>th</sup> Edition*.

## DISCRETIONARY EXCEPTIONS TO DISCLOSURE: SECTION 28

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The terms "archaeological object", "palaeontological object" and "natural heritage object" are also defined in subsection 43(1) of *The Heritage Resources Act* (see the discussion under subsection 31(1), above).

### *Discretionary exceptions*

Subsection 31(2) contains a discretionary exception to the right of access under section 7 of the Act, as the **head** "may" refuse to disclose the requested information. The **head**:

- must first determine whether the exception in subsection 31(2) applies to information in the requested **record**, and
- must then consider whether it is appropriate to release the information, even though the exception in subsection 31(2) applies, unless an exception in another section of FIPPA applies.<sup>476</sup>

### *Severing - subsection 7(2)*

The term information, rather than the term **record**, is used in subsection 31(2) to indicate that the exception applies to the information in a **record** and not necessarily to the whole **record**. Subsection 7(2) of FIPPA requires that, where an exception applies to a portion of the information in a **record**, only that portion is severed and the **applicant** is entitled to access to the remainder of the **record** unless an exception in another section of FIPPA applies.<sup>477</sup>

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<sup>476</sup> See "Exercise of Discretion" in the *Introduction* to this Chapter.

<sup>477</sup> For a discussion of severing and subsection 7(2) see "Exceptions Apply to Information in a Record - Severing" in the *Introduction* to this Chapter and *Severing* in Chapter 3.

**■ Section 31: Related Provisions in FIPPA**

Section 1 (Definitions):      **"applicant"**  
   **"head"**  
   **"public body"**

Subsection 7(2)                      **Severing information**

Subsection 12(1)                    **Contents of response**

## Information That is or Will be Available to the Public [Section 32]<sup>478</sup>

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### ■ Summary of the Exceptions

Clause 32(1)(a) gives the **head** of a **public body** discretion to refuse to disclose information that is freely available to the public or is available for purchase by the public.

Clause 32(1)(b) gives the **head** discretion to decide whether or not to withhold information that will be published or released within 90 days after the **applicant's** request under Part 2 of FIPPA is received. Clause 32(2)(a) requires the **head** to notify the **applicant** when the information becomes available.

Clause 32(2)(b) provides that, if the exception in clause 32(1)(b) is relied upon and the publication or release does not occur within 90 days, the **applicant's** request must be treated as a new request received on the last day of the 90 day period. The exception in clause 32(1)(b) may not be used a second time to refuse disclosure of information that has already been withheld from an **applicant** under this clause.

Subsection 32(1) contains discretionary exceptions to the right of access under section 7 of the Act.

The exceptions in subsection 32(1) are 'class exceptions' as they protect a type or kind of information.

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<sup>478</sup> Replaces section 47 of the 1985 *Freedom of Information Act*.

■ **Scope of Exceptions for Information That is or Will be Available to the Public [Subsections 32(1) and (2)]**

**32(1)** The **head** of a **public body** may refuse to disclose to an **applicant** information

(a) that is freely available to the public or is available for purchase by the public; or

(b) that will be made available to the public within 90 days after the **applicant's** request is received.<sup>479</sup>

The exceptions in subsection 32(1) are 'class exceptions' as they protect a type or kind of information.

*Discretionary exceptions*

Subsection 32(1) contains discretionary exceptions to the right of access under section 7 of the Act, as the **head** "may" refuse to disclose the requested information. The **head**:

- must first determine whether an exception in subsection 32(1) applies to information in the requested **record**, and
- must then consider whether it is appropriate to release the information, even though an exception in subsection 32(1) applies, unless an exception in another section of FIPPA applies.<sup>480</sup>

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<sup>479</sup> Replaces section 47 of the 1985 *Freedom of Information Act*.

<sup>480</sup> See "Exercise of Discretion" in the *Introduction* to this Chapter.

## DISCRETIONARY EXCEPTIONS TO DISCLOSURE: SECTION 28

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### *Severing - subsection 7(2)*

The term information, rather than the term **record**, is used in subsection 32(1) to indicate that the exceptions apply to the information in a **record** and not necessarily to the whole **record**. Subsection 7(2) of FIPPA requires that, where an exception applies to a portion of the information in a **record**, only that portion is severed and the **applicant** is entitled to access to the remainder of the **record** unless an exception in another section of FIPPA applies.<sup>481</sup>

### ■ **Freely available to the public or available for purchase by the public - clause 32(1)(a)**

**32(1)** The **head** of a **public body** may refuse to disclose to an **applicant** information

(a) that is freely available to the public or is available for purchase by the public;<sup>482</sup> or

"Freely available to the public" means that the information is generally available at no cost.

"Available for purchase by the public" means that the information is generally available for purchase from the **public body**, the government, a private book store, etc.

Notes: Clause 3(a) of FIPPA provides that FIPPA is "in addition to and does not replace existing procedures for access to **records** or information normally available to the public, including any requirement to pay fees".

Section 76 of FIPPA provides that the **head** of a **public body** may specify **records** or categories of **records** that are available to the public without an application for access under FIPPA.

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<sup>481</sup> For a discussion of severing and subsection 7(2) see "Exceptions Apply to Information in a Record - Severing" in the *Introduction* to this Chapter and *Severing* in Chapter 3.

<sup>482</sup> Replaces clause 61(a) of the 1985 *Freedom of Information Act*.

## **DISCRETIONARY EXCEPTIONS TO DISCLOSURE: SECTION 28**

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Where a person applies under Part 2 for access to a **record** which is available to the public, the **public body** should advise the person that an application is not required and should also advise the person where he or she can obtain or purchase a copy of the **record**.

■ **Information will be made available to the public within 90 days - clause 32(1)(b)**

**32(1)** The **head** of a **public body** may refuse to disclose to an **applicant** information

(b) that will be made available to the public within 90 days after the **applicant's** request is received.<sup>483</sup>

There may be situations where a request is made under Part 2 of FIPPA for information that is about to be published or otherwise made available to the public. In order to rely on the exception in clause 32(1)(b), the **public body** must intend to publish or make the information available to the public within 90 days from the date the **applicant's** request is received.

This exception only applies to the information being published or made available, and not to surrounding data, research and background materials. These other **records**, if requested by an **applicant**, will have to be dealt with under other provisions of FIPPA.

*Notification when information becomes available - subsection 32(2)(a)*

**32(2)** The **head** of a **public body** may refuse to disclose information under clause (1)(b), the **head** shall

(a) notify the applicant when the information becomes available; and

If the **head** of a **public body** has refused to disclose information under clause 32(1)(b) because it is to be made available to the public, the **head** must notify the **applicant** once the information has become available. The **head** should also notify the **applicant** of the location where he or she can have access, how access will be given and of the cost of the information (if any).

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<sup>483</sup> Replaces section 47 of the 1985 *Freedom of Information Act*.

## DISCRETIONARY EXCEPTIONS TO DISCLOSURE: SECTION 28

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*If the information is not made available to the public - clause 32(2)(b)*

- 32(2)** When the **head** of a **public body** has refused to disclose information under clause (1)(b), the **head** shall
- (b) if the information is not available to the public within 90 days after the **applicant's** request is received, reconsider the request as if it were a new request received on the last day of the 90 day period and not refuse access to the information under clause (1)(b).

If the requested information is not published or made available to the public within 90 days after the **applicant's** request under Part 2 of FIPPA is received, the **head** is required to reconsider the **applicant's** request as if it were a new request received on the 90th day. The **head** has 30 days to respond to the request, starting from the 90th day (unless there are grounds to extend this time period under section 15 of FIPPA).

The **head** cannot rely on the exception in clause 32(1)(b) in reconsidering the request. Clause 32(1)(b) can not be used a second time as a basis for refusing to give the **applicant** access to the requested information.

■ **Section 32: Related Provisions in FIPPA**

Section 1 (Definitions):	<b>"applicant" "head" "public body"</b>
Clause 3(a)	<b>Act does not replace procedures for access to information normally available to the public</b>
Subsection 7(2)	<b>Severing information</b>
Subsection 12(1)	<b>Contents of response</b>
Paragraph 17(4)(i)	<b>Publicly available record containing personal information</b>
Paragraph 18(3)(b)	<b>Publicly available third party business information</b>
Paragraph 20(3)(b)	<b>Other government makes information it provided in confidence publicly available</b>
Section 76	<b>Records available without an application</b>