

# ACCESS FACT SHEET

## Public interest disclosure

Ontario's freedom of information laws give the public the right to access government-held information so they can participate meaningfully in the democratic process and hold elected officials and public servants accountable.

The public interest in disclosure is a key factor that Ontario's public sector organizations must consider when deciding whether to release records in response to certain access requests under the *Freedom of Information and Protection of Privacy Act* and its municipal counterpart.

Ontario's access laws contain a "public interest override" provision, which is found in **s.23 of FIPPA** and **s.16 of MFIPPA**. It requires a public sector organization to "override" the application of certain exemptions and disclose a record in situations where there is a compelling public interest in doing so that clearly outweighs the purpose of the exemption. This provision allows for a balance between certain exemptions from freedom of information requests and the public's right to know.

The acts may also require government to disclose certain records in the public interest even when no one is asking for them. The requirement to disclose records even in the absence of an access request is found in **s.11 of FIPPA** and **s.5 of MFIPPA**. It applies where a record reveals a grave environmental, health or safety hazard *and* it is in the public interest to release it, despite any other provisions in *FIPPA* and *MFIPPA*.

The purpose of this fact sheet is to help public sector organizations and the public understand:

- the public interest override provision
- the requirement to disclose where a record reveals a grave environmental, health or safety hazard



Information and Privacy  
Commissioner of Ontario

Commissaire à l'information et à la  
protection de la vie privée de l'Ontario

## PART ONE: PUBLIC INTEREST OVERRIDE

### When can a public sector organization rely on the public interest override to disclose a record in response to an access request?

Ontario's access and privacy laws contain two types of exemptions: mandatory and discretionary.

An institution may rely on the public interest override<sup>1</sup> when a requester seeks access to records that are exempt from disclosure under even these two *mandatory* exemptions:

- third party commercial information [s.17 *FIPPA*/s.10 *MFIPPA*]
- personal privacy [s.21 *FIPPA* /s.14 *MFIPPA*]

Example: in Order **MO-3295**,<sup>2</sup> a public health agency received a request for access to a report about an alleged conflict of interest in the appointment of the agency's chief financial officer, and concerns of possible loss or misappropriation of funds. While the agency determined that the personal privacy exemption applied to the record, it applied the public interest override in deciding to grant access to the entire report. An affected party appealed to the Information and Privacy Commissioner of Ontario (IPC) claiming that disclosure would infringe on her personal privacy.

The IPC agreed with the agency's decision that there was a compelling public interest in disclosure of the full report, even though the majority of the personal information was highly sensitive. The IPC concluded that the public interest in disclosure clearly outweighed the purpose of the personal privacy exemption.

The IPC explained that the affected party's personal information was inextricably linked to whether a conflict of interest existed in the appointment of the Chief Financial Officer of a public institution, and that the public had an interest in knowing about this, as well as the concerns about possible loss or misappropriation of funds.

The public interest override can also be relied on where the requested records are exempt from disclosure under these *discretionary* exemptions:

- advice and recommendations [ss.13 *FIPPA* /ss.7 *MFIPPA*]
- relations with other governments [ss.15 *FIPPA* /ss.9 *MFIPPA*]
- relations with Aboriginal communities [ss.15.1 *FIPPA* /ss. 9.1 *MFIPPA*]
- economic interests of an institution [ss.18 *FIPPA* /ss.11 *MFIPPA*]

- danger to safety or health [ss.20 FIPPA /ss.13 MFIPPA]
- fish and wildlife species at risk [ss.21.1 FIPPA]

Example: the records at issue in Order **PO-2355** related to a company's proposal to expand a quarry. The institution that received the proposal claimed the records were exempt under the "advice and recommendations" exemption. The requester claimed the public interest override applied, and the records should be disclosed regardless of whether they were exempt.

The IPC found that the company's quarry proposal had attracted strong interest and attention in the affected community. The matter also had been covered in the local media and was subject to public debate. The IPC concluded that a compelling public interest in disclosure outweighed the purpose of the exemption, and agreed that, if approved, the proposal could have significant consequences for the environment and the health and safety of a great number of residents.

The public interest override may *not* be relied on when the records are subject to the following exemptions:

- cabinet records [s.12 FIPPA]
- defence [s.16 FIPPA]
- draft by-laws [s.6 MFIPPA]
- law enforcement [ss.14, 14.1 & 14.2 FIPPA /ss.8, 8.1 & 8.2 MFIPPA]<sup>3</sup>
- solicitor-client privilege [ss.19 FIPPA /ss.12 MFIPPA] <sup>4</sup>
- closed meetings [s.18.1 FIPPA]
- information soon to be published [ss.22 FIPPA /ss.15 MFIPPA]

### **What are the criteria for the public interest override?**

Two requirements must be met for the public interest override to apply:

1. there must be a compelling public interest in disclosure of the record, *and*
2. the compelling public interest must clearly outweigh the purpose of the exemption (**Order P-24**)

### **What does "compelling public interest" mean?**

Public sector organizations must weigh the compelling public interest to disclose, where one is found to exist, against the purpose of the applicable exemption. In its orders, the IPC has offered some guidance on how to define the terms "compelling" and "public interest." The IPC has also explained how to determine if a compelling public interest outweighs the purpose of an exemption.

*Public interest:* The override applies to information that addresses an inherently “public” interest, such as where disclosure would serve to inform or enlighten people about the activities of their government or its agencies (Order **PO-2556**).

Below are some questions to consider when determining whether there is a public interest in disclosure:

- Is there a relationship between the record and the central purpose of Ontario’s access laws which is to shed light on the operations of government? (Order **MO-2179-F**)
- Does the information contained in the record serve the purpose of informing the public about the activities of their government, adding in some way to the information it has to make effective use of when expressing public opinion or making political choices? (Orders **P-984** and **PO-2556**)

Generally, a public interest does not exist where the requester’s interests in a record are private in nature (Order **MO-2179-F**). However, a public interest may be found to exist even when a requester has a private interest in the records, if the records also raise issues of a more general character (Orders **MO-1564<sup>5</sup>** and **MO-2563**).

Example: in Order **MO-2563**, a request was made for records of the current salaries, and the annual percentage increase of those salaries, for the chief and deputy chiefs of the York Regional Police (YRP). The YRP claimed the records were exempt under the personal privacy provision. The requester responded that the public interest override applied.

The requester wanted the information to assist in collective bargaining negotiations with the police. The IPC found that the interests of the requester, as a representative in collective bargaining negotiations, are, largely, a private interest. However, while the requester appeared to be motivated by a private interest, the information was also of broader interest to all taxpayers as a means of shedding light on the affairs of government. The IPC concluded there was a compelling public interest in disclosure of the information and the public interest outweighed the purpose of the personal privacy exemption, finding that the public has a right to know to the fullest extent possible how taxpayer dollars have been allocated to public servants’ salaries, especially those at senior levels. As such, the IPC ordered the disclosure of the withheld portions of the records at issue.

Widespread curiosity about the contents of a record, which may be newsworthy,<sup>6</sup> does not automatically lead to the application of the public interest override. The contents of the record must be assessed in deciding whether the broader public interest would actually be served by the disclosure (Order **PO-3025**).

*Compelling*: IPC orders define compelling as “rousing strong interest or attention” (Order **P-984**). The organization must review the particular circumstances of each request to determine whether the public interest in disclosure rises to the level of “compelling” (Order **PO-3544**).

For there to be a compelling public interest in disclosure of a record, the information must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices. (Orders **P-984**, **PO-2607**, and **PO-2556**).

A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation (Order **P-1398**<sup>7</sup>)
- the integrity of the criminal justice system has been called into question (Order **PO-1779**)
- public safety issues relating to the operation of nuclear facilities have been raised (Orders **P-1190**<sup>8</sup> and **PO-1805**)
- disclosure would shed light on the safe operation of petrochemical facilities (Order **P-1175**) or the province’s ability to prepare for a nuclear emergency (Order **P-901**)
- the records contain information about contributions to municipal election campaigns<sup>9</sup>

A public interest in the **non-disclosure** of the record may bring the public interest in disclosure below the threshold of “compelling” (Orders **PO-2072-F**, **PO-2098-R**, and **PO-3197**). As such, any public interest that may exist in the non-disclosure of a record must also be considered.<sup>10</sup>

Example: A requester sought access to Ontario Lottery and Gaming Corporation (OLG) research and discussion documents, including studies, reports and memos regarding the development, establishment and expected success of the “Big Ticket Lottery.” The OLG claimed the records were exempt under s. 18(1)(c) because disclosure could prejudice its economic interests or competitive position. The requester claimed the public interest override applied.

In Order **PO-2199**, the IPC decided there was a strong public interest in non-disclosure of this information. It found that, should the records be disclosed, the OLG could reasonably be expected to suffer competitive and economic harm that would adversely impact its ability to fund charitable causes and other entities that depended on it for financial support. For this reason, the IPC ruled that there was no compelling public interest in disclosure.

Also, where there is a significant amount of information that has already been released to address any public interest considerations, the public interest to disclose the information will be less compelling (Orders **P-532**, **P-568**, **PO-2626**, **PO-2472**, and **PO-2614**).

Other examples where a compelling public interest has been found *not* to exist include the following:

- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding (Orders **M-249** and **M-317**)
- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter (Order **P-613**)
- the records do not respond to the applicable public interest raised by the requester (Orders **MO-1994** and **PO-2607**)
- another public process or forum has been established to address the public interest considerations (Orders **P-123/124**, **P-391**, and **M-539**)

### **When will a compelling public interest clearly outweigh the purpose of the exemption?**

*Clearly outweigh the purpose of the exemption:* If a compelling public interest is established, it must then be balanced against the purpose of any exemptions that have been found to apply to determine whether it clearly outweighs that purpose. The public interest override provision recognizes that while exemptions serve to protect valid interests, they must occasionally yield to an overriding public interest to access the information that has been requested.

Example: in Order **PO-3617**<sup>11</sup>, a journalist requested the record pertaining to the total dollar amounts paid annually to the top 100 OHIP billers, their names and their medical specialties, for the years 2008-2012. The Ministry of Health and Long-Term Care disclosed the dollar amounts and most of the specialties, but withheld the physicians' names and some of the specialties under the personal privacy exemption. One of the parties to the appeal also raised the third party information exemption.

The ministry's decision was appealed to the IPC. The IPC found that had the record contained personal information, the privacy interests that would have been protected were limited in nature, and balanced that against the compelling public interest in disclosure and how closely the disclosure relates to transparency in government spending. Ultimately, the IPC concluded that the compelling public interest in disclosure of the record clearly outweighed the purpose of the personal privacy exemption.

An important consideration when determining whether the public interest in releasing the information clearly outweighs the purpose of the exemption is the extent to which denying access to the information in the circumstances would be consistent with the very purpose of the exemption (Order **P-1398**<sup>12</sup>).

Example: in Order **MO-3046**, a newspaper reporter asked the City of Waterloo for a complete list of materials transported by rail along a particular rail line through the city. The city denied access to the record in full based on the third-party information exemption. The requester raised the possible application of the public interest override.

Even though the IPC accepted that there was a public interest in the disclosure of the record, it decided that this public interest did not clearly outweigh the purpose of the exemption. The IPC concluded that denying access to the record was in line with the exemption's purpose of ensuring the continued flow of information between governments and third parties, which serves to maintain public safety by ensuring local governments have sufficient information to respond to any railway incidents.

## **Best practices for Public Sector Organizations**

As a matter of best practices, public sector organizations should:

- proactively consider whether the public interest override applies to a record and invite the requester and any affected parties to address its potential application
- where a decision is made to disclose a record because of the public interest override, ensure it complies with any third party notice requirements

In cases where a discretionary (as opposed to mandatory) exemption applies, and the public interest override is either not available or does not apply, the public sector organization should still consider any public interest that favors disclosing the records notwithstanding the discretionary exemption.

## **What can a requester do if they believe the public interest override applies to a record?**

A requester should raise the possible application of the public interest override early in the request process. If the requester is not satisfied with the public sector organization's response to its access request, they can file an appeal with the IPC within 30 days of receiving the decision.

Details about the appeal process can be found in the IPC fact sheet, *The Appeal Process and Ontario's Information and Privacy Commissioner*, and the IPC's Info Matters **Episode 3: Demystifying the**

**FOI Process.** The form to file an appeal can be found on the IPC's **Filing an Appeal** webpage.

### **IPC's determination of whether the public interest override applies**

The determination of whether a record should be disclosed based on the public interest override is made on a case-by-case basis and each case is determined by its own facts and the evidence put forward by the parties. The IPC will review the requested records and the representations filed by the parties during the inquiry to help decide whether the public interest override applies (Order **P-244**).

The IPC may order a public sector organization to disclose a record if it finds that the public interest override applies to the record, and after taking into consideration the particular and relevant circumstances of the case.

## **PART TWO: REQUIREMENT TO DISCLOSE RECORDS FOR ENVIRONMENTAL, HEALTH, OR SAFETY REASONS**

### **When must a public sector organization disclose records for environmental, health or safety reasons?**

Under **s.11 of FIPPA** and **s.5 of MFIPPA**, a public sector organization is **required** to disclose a record, even without a request, if:

- there are reasonable and probable grounds to believe the record reveals a grave environmental, health, or safety hazard to persons or the public, *and*
- it is in the public interest to disclose it

In addition, in order for this public interest disclosure obligation to apply:

- the information must be in record form
- the situation must be grave (serious and likely to produce great harm or danger)

This obligation to disclose supersedes all other provisions in Ontario's access laws. It is important to note the requirement to disclose only applies to records that are covered by the access laws and does not apply to excluded records (Order **PO-2639**).

The requester may raise the obligation to disclose. However, a requester is not required to prompt the public sector organization to consider its obligation of disclosing the record.

### **What must a public sector organization do when it decides to disclose a record under s.11 of FIPPA and s.5 of MFIPPA?**

If a public sector organization decides to disclose a record under this provision, it must do so in a timely manner, considering all the circumstances, and in a way that ensures the public and affected persons receive it. For instance, the disclosure could be made by either an



announcement to the public or by its release to those people who are specifically affected by the information in the record.

Notice must also be given to any person to whom the information relates, including a third party who would be affected by the release, if it is practicable to do so. The notice must contain the following elements:

- a statement that the organization intends to release a record that may affect the person's interests
- a description of the contents of the record that relate to the person
- a statement that if the person makes representations, without delay, to the organization as to why the record should not be disclosed, the organization will consider those representations

Where notice is given, the person to whom the information relates may make representations "forthwith"<sup>13</sup> to the public sector organization as to why the record should not be disclosed. The organization should take into account the gravity of the particular circumstances in each case when considering how much time to provide to a notified party to submit its representations before the organization discloses the record.

The duties in **s.11 of FIPPA** and **s.5 of MFIPPA** belong to the organization alone. As a result, the IPC does not have the power to make an order under this provision (Orders **P-482, P-65, P-187, P-1403 and MO-2205**) and the requester does not have the right to raise the application of this section on appeal to the IPC (Order **MO-3766**).

### **Best practices for Public Sector Organizations**

Public sector organizations should develop and publish policies for determining if a record reveals a grave environmental, health, or safety hazard to persons or the public and whether it is in the public interest to disclose the record. The policies should also document how the information will be disclosed and how affected parties will be notified.

Some factors to consider when determining whether to disclose a record include:

- the likelihood of the harm occurring
- the severity of harm
- how soon the harm might occur
- measures that might be taken to avoid the harm

For more information about the public interest override or the obligation to disclose, please contact our office at [info@ipc.on.ca](mailto:info@ipc.on.ca).

## ENDNOTES

1 *FIPPA* s. 23: “An exemption from disclosure of a record under sections 13, 15, 15.1, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.”

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

2 Upheld on appeal in *Barker v. Ontario (Information and Privacy Commissioner)*, 2019 ONCA 275, reversing the Divisional Court decision in 2017 ONSC 7564, leave to appeal refused 2019 CanLII 120708 (SCC).

3 The Supreme Court of Canada ruled that the omission of the law enforcement exemption from the public interest override was constitutionally valid: see *Ontario (Public Safety and Security) v. Criminal Lawyers’ Association*, 2010 SCC 23, reversing the Ontario Court of Appeal decision in *Criminal Lawyers’ Association v. Ontario (Ministry of Public Safety and Security)* (2004), 70 O.R. (3d) 332.

4 The Supreme Court of Canada also ruled that the omission of the solicitor-client privilege exemption from the public interest override was constitutionally valid: *Ibid.*

5 Upheld on judicial review in *York (Police Services Board) v. (Ontario) Information and Privacy Commissioner*, 2012 ONSC 6175.

6 Related to this issue, it should be noted that the public interest is not automatically established where the requester is a member of the media (Orders **M-773** and **M-1074**).

7 Upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 484 (C.A.).

8 Upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.).

9 See *Gombu v. Ontario (Assistant Information and Privacy Commissioner)* [2002], 59 O.R. (3d) 773 (Div. Ct.).

10 See *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.).

11 Upheld on judicial review in *Ontario Medical Association v. Ontario (Information and Privacy Commissioner)* 2017 ONSC 4090; upheld in *Ontario Medical Association v. (Ontario) Information and Privacy Commissioner*, 2018 ONCA 673, leave to appeal to the Supreme Court of Canada refused (April 19, 2019), Doc. 38343 (S.C.C.).

12 Upheld in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 484 (C.A.), leave to appeal to the Supreme Court of Canada refused (January 20, 2000), Doc. 27191 (S.C.C.).

13 “Forthwith” is generally understood to mean “immediately” and would require a notified party to submit representations to the organization within a very short period of time.