

## 6. DISCLOSURE IN THE PUBLIC INTEREST

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### Overview

This chapter covers

- when disclosure in the public interest is required;
- how to determine public interest;
- the scope of **section 32**;
- notice requirements; and
- review of a failure to disclose information.

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### 6.1 When Disclosure is Required

#### Information to which section 32 applies

The head of a public body must, without delay, disclose to the public, to an affected group of people, to any person or to the applicant

- information about a risk of significant harm to the environment or to the health or safety of the public, an affected group of people, a person or the applicant (**section 32(1)(a)**); or
- information the disclosure of which is, for any other reason, clearly in the public interest (**section 32(1)(b)**).

**Section 32** overrides all other sections of the Act. Any information that meets the criteria set out in the provision must be disclosed, even if there has not been a formal access request under the Act.

This means that if **section 32(1)(a)** or **(b)** above applies, a public body must disclose information, including personal information if necessary, despite

- **section 17**, which sets out the exception to disclosure of personal information if it would be an unreasonable invasion of a third party's personal privacy; and
- **section 40**, which sets out the purposes for which personal information may be disclosed.

**Section 32(1)** cannot be applied to records that are excluded from the operation of the Act (*IPC Order 2000-034*). For example, **section 32(1)** does not apply to the disclosure of health information by a public body that is a custodian under the *Health Information Act*. Health information, as defined in the *Health Information Act*, that is in the custody or under the control of a custodian, as defined in that Act, is excluded from the application of the *FOIP Act* under **section 4(1)(u)**. Any disclosure of health information by a custodian under the *Health Information Act* is subject to that Act's disclosure provisions.

The public interest disclosure provision represents a very significant exception to the rules for privacy protection because it could involve a considerable invasion of personal privacy. Any decision by the head of the public body to disclose under

**section 32** of the Act should be carefully considered and rationally defensible (see *IPC Investigation Report 98-IR-011*).

### Disclosure without delay

The provision requires that action be taken *without delay*. The assumption is that any situation that warrants consideration of disclosure under **section 32** requires quick action. No delay should occur where disclosure is demanded by events that could have an impact on public safety or where disclosure is in the public interest. The actual assessment of what constitutes without delay must be made on a case-by-case basis. Some factors that should be considered in the assessment are as follows:

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

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## 6.2

### Nature of Disclosure

#### Records and information

**Section 32** refers to *information*, not *records*. Where a request for disclosure in the public interest is made by an applicant as part of a FOIP request, the decision of the public body will, most likely, be focused on particular records.

Where no FOIP request is made but the public body is considering disclosure in the public interest to the general public, an affected group or a person other than an applicant, the emphasis will almost always be on information as opposed to records. Disclosure might be of the facts surrounding an event or issue, as opposed to the documents recording those facts (see *IPC Order 97-009*).

The fact that **section 32** applies to *information* rather than *records* means that the obligation to release information does not depend on the existence of recorded information (*IPC Order 96-011*).

The reference to *information* in the wording of this section also means that the investigation of a **section 32** decision will not necessarily result in the release of a specified record to an applicant. Ultimately, the head of a public body may release the actual record, a summary of it or a warning of the risk based on the content of the record (*IPC Orders 96-011* and *97-009*). For example, a public body might release the location, nature and extent of the contamination of a building or site but not necessarily all the scientific, exposure, emergency response and property records that relate to the event.

**Section 32** anticipates disclosure in four different ways:

- to the public generally;
- to an affected group of people;
- to any person; or
- to an applicant making a request.

In all cases, only the minimum amount of personal information necessary to alert the public affected about the risk should be disclosed (see *IPC Investigation Report 98-IR-011*).

#### ***Disclosure to the public***

Where the public interest dictates disclosure to the general public, a public body must ensure that the information is released in a manner designed to reach the public at large. This could include the use of radio, television, newspapers, and electronic networks.

For example, disclosure about an armed or dangerous criminal who is suspected to be in a particular area of Alberta would be made to the general public in that particular area.

#### ***Disclosure to an affected group***

Where the information relates to circumstances that affect only a specific group of people, rather than the public at large, the head must ensure that effective ways are used to reach the affected group. If the information is of a sensitive nature, it is important that steps are taken to ensure that only the affected group is informed.

For example, if a safety hazard, such as an unstable trench, were discovered at a workplace, only those people on site who could come into contact with the hazard before it was fixed would need to be warned.

#### ***Disclosure to any person, including an applicant***

Where information relates to any person, including an applicant, the public body must employ notification measures that provide the information to the person concerned and no one else, unless the public interest dictates wider disclosure of the information.

An example would be disclosure of the fact that an individual has been released on parole and continues to threaten the safety of his or her spouse.

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### **6.3 Public Interest**

#### **Information to be disclosed**

**Section 32** provides for disclosure in the public interest where the information is

- about a risk of significant harm to the environment or to the health or safety of the public; or
- for any other reason, clearly in the public interest.

**Disclosure of information about a risk of significant harm to the environment or to public health or safety**

**Section 32(1)(a)** This provision applies to information that reveals a risk of significant harm to the general public, a specific group of people, or an individual, including an applicant.

*Risk of harm* means the chance or danger of injury, damage or loss.

The determination that there is a risk of harm to the environment or to public health or safety is usually made by professionals working for the public body or contracted by the public body to assess situations where there is a possible risk of harm. Determining the nature and extent of the risk is part of the management process.

Since this provision refers to *significant* harm, the head of a public body must believe that the risk of harm is considerably greater than in normal circumstances.

*Harm to the environment* refers to the damage to or degradation of any component of the earth, including air, land, and water; any layer of the atmosphere; and any organic and inorganic matter. Harm to the environment also includes damage to, or degradation of, the interacting natural systems that include components of these things, through either natural calamity or illegal or improper use. An example of a risk of significant harm to the environment might be information about toxic emissions from an industrial plant.

*Harm to health* means damage to the well-being of the body or mind of an individual, or the health of the general public. An example of a risk of significant harm to health might be the presence of contaminants or a highly contagious virus in school buildings or contamination of a water supply.

*Harm to safety* means injury to the individual or to the collective condition of being free from danger or risk. A risk of significant harm to safety might be created by a natural gas leak or a bomb threat in a populated area.

**Section 32** of the Act, together with the Alberta Justice Protocol for the application of the provision, has been used, for example, by law enforcement bodies to disclose personal information about the location of a violent offender released from a correctional facility in cases where the individual is still considered to be a serious risk to a community (see *IPC Investigation Report 98-IR-011*).

In another example, where an applicant requested a Contamination Assessment Report on the site of a former service station but the report did not show an immediate or significant risk to the environment or to public health or safety, the public body was not required to disclose the report under **section 32(1)** (see *IPC Order 98-017*).

**Disclosure of information clearly in the public interest**

**Section 32(1)(b)** This general provision is intended to cover any other situation where the head of a public body may decide that disclosure of information is in the public interest.

### Determination of public interest

Disclosure of the information must be *clearly in the public interest*. This determination must be made on a case-by-case basis. Public bodies must balance the public interest in releasing the information with the public and private interests in protecting the information.

Public bodies should refer to *IPC Order 97-018* (which summarizes *Adjudicator's Order 96-014* and *IPC Order 96-011*) as well as *IPC Order 98-019*. The Information and Privacy Commissioner noted that the Legislature did not intend **section 32** to operate simply because a member of the public asserts interest in the information. The requirement that disclosure of the information must be clearly in the public interest means that the information must relate to a matter of compelling public interest, and not just be of interest or of curiosity to the public, a group of people, or individuals. What constitutes a compelling public interest is defined narrowly (*IPC Order 96-011*). The following are some examples where disclosure may clearly be in the public interest:

- a public body has been alerted about a contagious disease or about an individual who is the carrier of a contagious or dangerous disease;
- a violent or dangerous offender has been released into the community;
- an individual seeking employment in child care on the basis of a false resumé is found to have a history of child molestation that is recorded in a register of employment references for child-care workers; and
- information has come to light about corruption or serious misuse of public funds.

The following are some of the instances where the Commissioner has, in reviewing decisions under **section 32**, found that the public body was *not* required to disclose the requested information.

- A public body was not required to disclose records relating to the government's involvement in a commercial enterprise, even though the Commissioner found that this was a matter of compelling public interest. The public interest requirement had been satisfied when the Auditor General's report on the matter was publicly released (*IPC Order 99-023*).
- A public body was not required to disclose information concerning contracts with health-care service providers. The Commissioner found that, although there was public interest in the quality of health care, the information in the records requested concerned the legal interpretation of words and phrases. The applicant had not established that this particular information related to a compelling public interest (*IPC Order 2000-031*).
- A public body was not required to disclose operating manuals under a photo radar contract. The Commissioner decided that disclosure of the manuals, which the applicant argued would enable people to defend themselves in a court of law, was not clearly in the public interest (*IPC Order 2000-017*).
- A public body was not required to disclose information about the payouts and severance pays of former police chiefs. The spending of public funds does not, by itself, create a matter of public interest that overrides the exceptions in the *FOIP Act* that permit a public body to refuse disclosure (*IPC Order F2006-010*).

- A public body was not required to disclose information about the legal fees incurred by the government in proceeding with the case *Reference Re: Firearms Act*. There may be public interest in government legal bills related to the case, but the applicant failed to prove that the interest was compelling (*IPC Order F2004-017*).
- A public body was not required to disclose information relating to the charges against, and trial of, a former government official found guilty of accepting a benefit. Since the issue had been dealt with through the legal process and related court documents were available to the public, there was no compelling public interest requiring disclosure under **section 32** (*IPC Order F2004-030*).
- A public body was not required to disclose information regarding a law firm's bill for legal services provided to the public body. The information was subject to solicitor–client privilege, and the public interest in maintaining solicitor–client confidentiality outweighed the public interest in disclosing solicitor–client communications (*IPC Order F2007-014*).

Criteria applied by public bodies to determine whether a fee waiver should be granted in the public interest under **section 93(4)(b)** are not the criteria to be applied for determining whether disclosure is in the public interest under **section 32** (see *IPC Order 2000-005* and Chapter 3, section 3.5 on excusing fees).

### **Duty to disclose information under section 32**

A public body has a duty to disclose information if **section 32** applies. If a complaint were made to the Commissioner that a public body did not disclose information in the public interest, the public body would have to show why it did not do so in that particular situation.

Public bodies may find it helpful to plan for the release of information in emergency-like situations by developing an assessment of the conditions under which **section 32** might arise, the information that might be involved, and considerations that might be relevant to the decision-making process. It is recommended that a senior official in the public body, such as a Deputy Minister or Chief Administrative Officer, retain the authority for decisions on **section 32** disclosures.

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## **6.4**

### **Notification**

#### **Notification prior to disclosure**

**Section 32(3)** provides that, before disclosing information under **section 32(1)**, the public body must, if practicable,

- notify any third party to whom the information relates;
- give the third party an opportunity to make representations relating to the disclosure; and
- notify the Information and Privacy Commissioner.

Normally, notice must be given to affected third parties and the Commissioner *before* the information is released under **section 32(1)**. This obligation to notify third parties and the Commissioner must be balanced against the obligation to disclose the information without delay. Notification is to take place only where practicable, and

the head of the public body must ensure that there is no delay adversely affecting the public interest. The factors governing release without delay apply here.

Notice should take a similar form to the notice required by **section 30(1)** of the Act. Since the matter may be of some urgency, notice should be delivered by fax or courier and accompanied by a telephone call advising the third party of the importance of quickly delivering any representations they may have about the disclosure to the public body. Depending on the urgency, the third party may be asked to respond immediately or within a short period of time.

**Model Letter P** in Appendix 3 can be used in this situation.

The third party notice should be sent to any person, group of persons or organization that is a subject of the information or the record(s), other than the person who made the request or the public body involved.

A similar notice, or a copy of the one sent to the affected person together with a covering note, must be sent to the Commissioner to inform that office that a disclosure in the public interest is being made.

Public bodies that intend to disclose information in the public interest should not inappropriately disclose personal information of a third party. The amount and type of personal information that is disclosed should be limited to what is necessary to make the public or the affected group or individual sufficiently aware of the risk or danger to their health or safety or to the environment.

#### Notice of disclosure

**Section 32(4)** requires that, where notification is not practicable under **section 32(3)**, the public body must give written notice that disclosure has occurred

- to the third party, and
- to the Commissioner.

The form of the notice to be given to the third party is prescribed in **Schedule 3** of the FOIP Regulation. **Model Letter Q** in Appendix 3 meets the requirements of the Regulation and can be used in this situation. A copy of the letter and a covering note can serve as notice to the Commissioner.

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#### 6.5 Review

If there is a complaint about the failure of a public body to release information in the public interest, the Information and Privacy Commissioner can review the head of the public body's decision in the following situations:

- if a FOIP request has been made, under the powers provided in **section 65(1)** of the Act, which enables an applicant to request a review of the decision and sets out the process, and
- if no FOIP request has been made, under the general powers of the Commissioner set out in **section 53(1)** of the Act, which permits an investigation of various matters relating to the legislation.

*IPC Order 96-011* discusses the powers of review and investigation of the decision of the head of a public body in dealing with disclosures under **section 32**. In that Order, the Commissioner clearly indicated that a person would have to first approach the head of a public body to request disclosure in the public interest. The Commissioner may then review or investigate a decision of the head to disclose or not to disclose information under **section 32**, but only to the extent of deciding whether discretion has been exercised properly and whether the decision is rationally defensible. The Commissioner will not substitute his view for that of the head of the public body as to whether the decision is the correct one.

In a review where an applicant argues that the public body should disclose the requested information because it is in the public interest to do so, the burden of proof is on the applicant. The applicant must prove that a matter of compelling public interest requires the public body to disclose certain information that would normally not be disclosed, for example, under **sections 16** or **17** (see *IPC Order 2000-003*). Once the applicant has met the burden, the onus shifts to the public body, which must then establish that a decision not to disclose the information is rationally defensible (*IPC Order F2006-010*).

For more information on the issue of burden of proof, refer to FOIP Bulletin No. 9: *Burden of Proof*, published by Access and Privacy, Service Alberta.

The powers of the Commissioner are discussed in more detail in Chapter 10.