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Department of Executive and Intergovernmental Affairs
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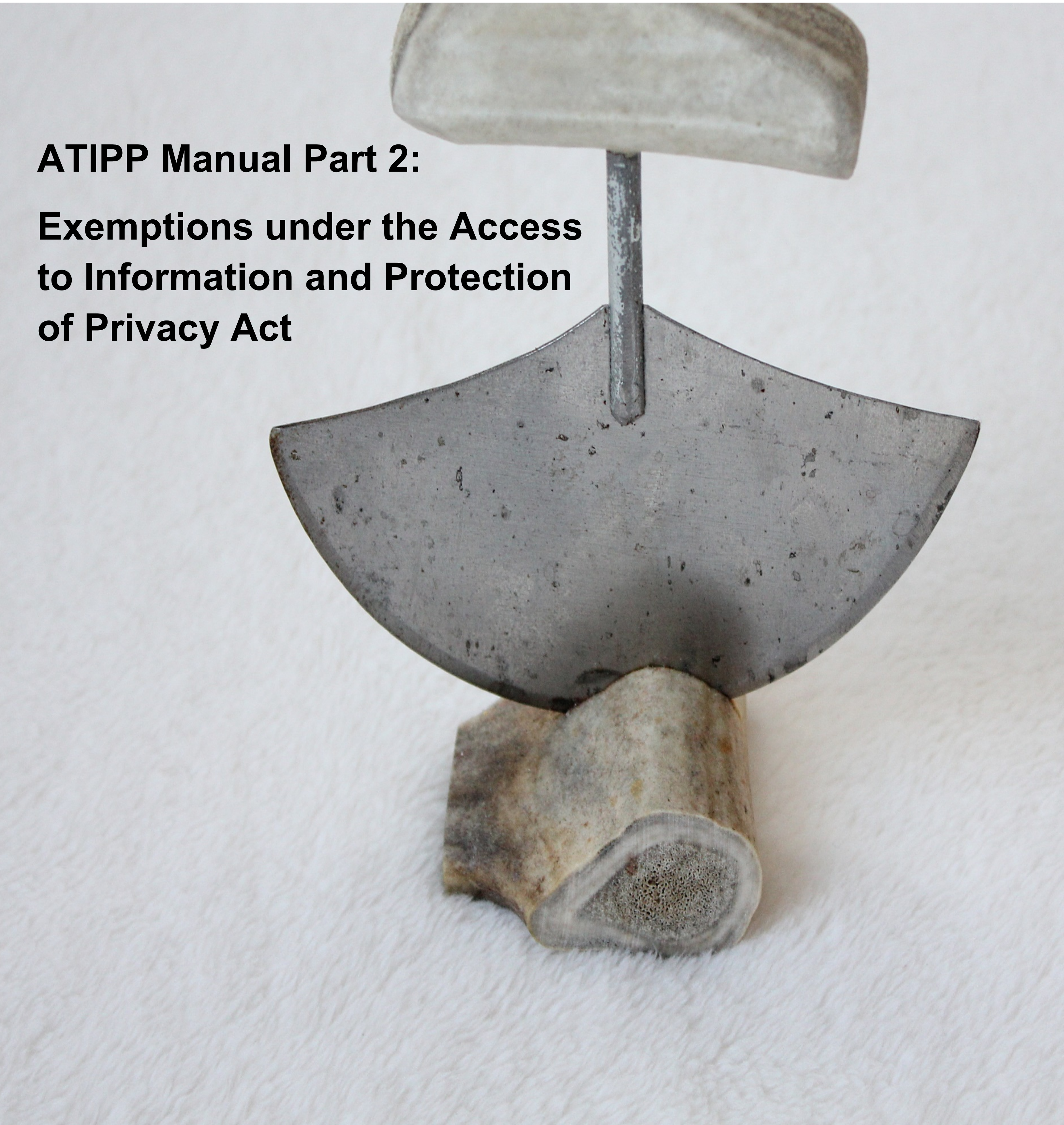
Ministère de l’Exécutif et des Affaires Intergouvernementales

ATIPP Manual Part 2:

Exemptions under the Access to Information and Protection of Privacy Act



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1—Introduction

1.1 About the ATIPP Manuals

This manual is part 2 of a 4-part comprehensive guide on the *Access to Information and Protection of Privacy (ATIPP) Act* and Regulations for processing access to information requests. These manuals are meant to provide clarity, direction and practical examples to help you understand the *ATIPP Act,* however it is not meant to replace the *ATIPP Act* as a reference for ATIPP requests. All ATIPP Coordinators are expected to be familiar with the most up to date version of the *ATIPP Act* and its provisions.

Part 1 covers the foundations of the *ATIPP Act*, the people and organizations involved in the ATIPP process, and the request process in general. You are currently reading Part 2, covering exemptions listed under the *Act* and how to properly apply them. Part 3 covers the role of the Information and Privacy Commissioner, reviews by her office and best practices for responding to her recommendations. Part 4 of these manuals covers the assessment of fees for ATIPP requests.

If you are looking for a short, step-by-step guide to processing an ATIPP request, please see the *ATIPP Processing Guidelines*. For other ATIPP-related documents, please see the ATIPP Intranet page or the *Access to Information and Protection of Privacy* folder on the v-drive.

1.2 Definitions

There are many terms and acronyms surrounding the ATIPP Act and ATIPP requests. These are some of the most frequently used ones:

- *Applicant*: The person or organization that is making an ATIPP request.
- *ATIPP Act* (or the '*Act'*): Nunavut's *Access to Information and Protection of Privacy Act*. The law that states that people have access to information held by the Government of Nunavut and other public bodies, and lays out how privacy must be protected. This is sometimes referred to as "*ATIPPA*".
- *ATIPP Coordinator*: An employee of a public body who is responsible for handling ATIPP requests for their public body. They are also often responsible for privacy related issues such as privacy breaches or privacy impact assessments. The ATIPP coordinator role may be a dedicated role or something done on the corner of an employee's desk.
- *ATIPP Regulations* (or the '*Regulations*'): Nunavut's *Access to Information and Protection of Privacy Regulations*. Last updated in 2015, these are a specific legal document that clarifies many of the things mentioned in the *ATIPP Act* itself. This includes things like what fees can be charged, how requests for information can be made, the list of public bodies, and so on.
- *ATIPP request/request for information*: A request for any information held by a public body. The *ATIPP Act* has rules for how these requests must be handled by the public body.

- *Deputy Head*: This position is the highest ranking public servant in each department. The name may change department to department but they are often referred to as the *Deputy Minister*. This position has certain authority delegated from the Minister and is ultimately responsible for all operations of a public body. They may need to be included at certain stages of the ATIPP process. It is important that discussions happen internally in each department regarding when this happens and when the Deputy Head is involved.
- *Executive Council*: The cabinet of Nunavut's territorial government.
- *Exemption*: One of several specific reasons why a public body may refuse to give out information listed in the *ATIPP Act*.
- *Head of the Public Body*: The Minister, or another senior designated individual, responsible for a department or public agency. The Head is ultimately in charge of everything ATIPP related, but usually formally delegates this responsibility to one or more ATIPP Coordinators and the Deputy Head of a public body.
- *Information and Privacy Commissioner* (*IPC*): An independent official in charge of monitoring the Government of Nunavut and its public bodies to make sure access to information and privacy rights are being upheld. The IPC investigates possible privacy issues and, if an applicant requests, will review the decisions of a public body relating to an ATIPP request. The IPC is the subject of Part 3 of these manuals.
- *Nunavut Court of Justice*: The consolidated Nunavut court. Following a review by the Information and Privacy Commissioner, if an applicant is unhappy with a decision made by a public body, they can appeal the decision to the court.
- *Office of Primary Interest* (*OPI*): The division or person within a public body who likely has the records being requested.
- *Personal information*: Information about someone that can be identified to them specifically. Personal information is defined in section 2 of the *ATIPP Act* and includes:
    a) The individual's name, home or business address or home or business telephone number,
    b) The individual's race, colour, national or ethnic origin or religious or political beliefs or associations,
    c) The individual's age, sex, sexual orientation, marital status or family status,
    d) An identifying number, symbol or other particular assigned to the individual,
    e) The individual's fingerprints, blood type or inheritable characteristics
    f) Information about the individual's health and health care history, including information about a physical or mental disability,
    g) Information about the individual's educational, financial, criminal or employment history, anyone else's opinion about the individual, and,
    h) The individual's personal opinions, except where they are about someone else.
- *Public body*: Any department of the Government of Nunavut, as well all of the government-related organizations listed under Schedule A of the *ATIPP Regulations*.
- *Record*: Information in any form; written, photographed, videoed, or recorded in any other way.

- *Third party*: Another person or organization, who is not the applicant or a public body. Usually used in the context of 'information about a third party' or 'third party review'.

1.3 Exemptions and the ATIPP Act

Section 1 of the *ATIPP Act* states that "*The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by (a) giving the public a right of access to records held by public bodies*". In other words, the public has a right to information held by public bodies, and the public bodies have a responsibility to make their records available to the public. It is crucial to note that this is the starting point any time a public body is considering releasing information.

Section 1 also states that there are some "*limited exceptions to the rights of access*", meaning that under certain very specific conditions, a public body can refuse to release information that the public would normally have the right to access. These are the exemptions, listed in division B of the *Act*, sections 13 to 25.1. In addition, section 4 allows for another Act to override the *ATIPP Act* if that Act clearly says it does.

All exemptions to the right to information are based on the idea that disclosing the information would harm the public or private interest more than *not* releasing the information would harm the public or private interest, despite the applicant's right to information.

1.4 ATIPP Requests and Exemptions

Since applicants have a right to information held by public bodies, you must release the information requested only if:

1. A specific, enumerated (sections 13-25.1), exemption applies, and
2. All factors related to release have been considered.

Any information not subject to an exemption, even if it is part of the same document, must be released.

Access is to Information, not to Documents:

When determining whether to release information, the form the document takes ie. A briefing note, request for decision, opinion paper etc. is less important than the actual content of the document.

They are called "access to information" requests and not "access to document" requests. Any factual, innocuous or harmless information must be released, even if there is sensitive information in the document.

A common example of this is briefing notes. The "background" and "current status" sections are likely releasable, whereas any advice or recommended speaking notes may require severing (after exercising the appropriate discretion).

It is not enough to say that documents "may" contain information subject to exemption. All records requested by an applicant must be reviewed line by line and discretion must be exercised on a case-by-case basis. Any sentence, word or phrase that does not fall under a specific exemption must be released.

It is very important to make sure that exemptions to disclosure are used appropriately and sparingly. If in doubt as to whether or not to release information, the default assumption is to release the information.

Use of exemptions unnecessarily can result in reviews by the information and privacy commissioner, reviews by the Nunavut Court of Justice and criticism in the media. The right to access to information is a quasi-constitutional right and exemptions should be limited and specific.

Public bodies should make sure that their reasons for using an exemption are strong, justifiable, and documented, because the IPC will scrutinize them during a review.

1.5 Mandatory vs. Discretionary Exemptions

There are two types of exemptions: mandatory (M) and discretionary (D).

In the *Act*, mandatory exemptions say *"The head of a public body* **shall** *refuse to disclose"*, and information fitting the criteria of the exemption must not be released to an applicant. Some analysis may have to take place to determine whether or not the information fits the exemption, and the Act must be read narrowly in favor of disclosure. There are 4 mandatory exemptions:

- **s.13** Cabinet records
- **s.20.1** Active coroner's investigation
- **s.23** Invasion of privacy
- **s.24** Harm to business interests of a third party

Discretionary exemptions in the *Act* begin with *"The head of a public body* **may** *refuse to disclose"*, and require more active decision-making. It is not enough to justify the exemption by stating the material fits the criteria in the section, the public body must also justify why possible harm from release is more important than the applicant's right to the information. There are 11 discretionary exemptions:

- **s.14** Advice from officials
- **s.15** Privileged information
- **s.16** Harm to intergovernmental relations
- **s.17** Harm to economic or other interests of public bodies*****
- **s.18** Testing procedures
- **s.19** Harm to heritage sites and endangered life
- **s.20** Prejudice to law enforcement*****
- **s.21** Harm to individuals' safety

s.22 Confidential evaluations

s.25 Information that is or will be publicly available

s.25.1 Employee relations material

*Note that the discretionary exemptions 17 and 20 have mandatory sub-sections (17. (2), 20. (3) and 20. (5)) where information must be released.

These exemptions do not apply automatically, and an ATIPP coordinator still has a responsibility to review the material in question line-by-line to see if exemptions are applicable. There are two parts to the test; first, to determine if the information fits the criteria of the exemption; and second, decide what harm would result if the information was released. If in the opinion of the ATIPP coordinator, releasing the information would result in more harm than benefit, the coordinator should withhold that information.

Determining Harm: When determining harm, the coordinator should decide if the harm is:

- **specific:** Is it possible to identify the specifics of the harm (who or what will be harmed) rather than identifying it only vaguely?
- **current:** Is it possible to identify the harm at the time the exception is claimed or in the foreseeable future? Records which have been protected from disclosure in the past should be reassessed when a new request is received to ensure that the harm is still a factor
- **probable**: Is the harm likely to happen?

What is the Public Interest?

When determining whether to release information, the public interest is what is weighed against the potential harm in releasing. Some jurisdictions, such as Ontario, have specific public interest overrides, however in Nunavut, considering the public interest is something that is done informally, rather than in legislation. Ontario's Freedom of information and Protection of Privacy Manual provides the following factors for determining if something is in the public interest:

"Factors that Coordinators should consider when determining whether the public interest override applies include:

- Where there is a relationship between the record and the legislation's central purpose of shedding light on the operations of government?
- Where the record serves the purpose of informing the public to make a political choice and express public opinion? Or
- Whether the interest in the record is public or private.

Generally, a public interest does not exist where the requester's interest in a record are essentially private in nature."

1.6 Discretionary Exemptions and Exercising Discretion

Some factors that should be taken into account when exercising discretion include:

- that Section 1 establishes that the public has a right to information and the default position is to release information;

- the wording of the discretionary exemption and the interests which the exception attempts to balance;
- whether the applicant's request could be completed by severing the record and by providing the applicant with as much information as is reasonably practicable;
- what the public body and other public bodies have done in the past with similar types of information;
- how sensitive the information is to the public body and other effected parties;
- whether releasing the information will increase public confidence in the public body;
- how old the information is;
- whether there is a compelling need to release the information; and
- whether the Information and Privacy Commissioner has recommended that similar types of records or information should or should not be released.

1.7 What does it mean to Exercise Discretion?

From the Nunavut IPC's review report 06-22:

> *"As I have said many times, where the Act provides a discretionary exception to disclosure, that discretion must be actively exercised. It is not enough to say simply "we have a discretion and we're using it to deny access." The discretion must not only be exercised, but it must be seen to be exercised. In my opinion, this means providing an explanation to the Applicant as to why a record is not being disclosed. Once exercised, it is not for the Commissioner to say whether or not the discretion was properly exercised. However, if the discretion has not been exercised in a manner which makes it obvious what considerations went into the decision, I will direct that specific reasons for the exercise of discretion be given to the Applicant in every case. In a situation such as this one, where the public body is relying on discretionary exemptions for refusing to disclose a large number of records, that discretion must be seen to be exercised for each record individually."*

1.8 How to determine if something is provided "In confidence"

Sections 16(1)(c), 20(1)(l), 22(c), 23(2)(f) and 24(1)(b) all factor whether information was supplied explicitly or implicitly in confidence as a determining factor for disclosure or exemption of information. In determining whether something was supplied implicitly or explicitly in confidence consider:

- whether or not an explicit indication of confidentiality exists;
- the representations of a third party as to their understanding of confidentiality in reply to a third party notice (see section 5.5 of Manual 1 for more information on third party notices);
- past practice of the public body, particularly if similar information has normally been kept confidential in the past;
- the type of information, including the confidentiality with which it is maintained by the third party;
- whether the information was supplied voluntarily by the third party, at the request of the public body or required by law and the consequences for the third party if it does not supply the information; and

- actions taken by, or conduct of, the public body and third party which may indicate an understanding of confidentiality.

E-mail disclaimers:

Some individuals have e-mail disclaimers on the bottom of their e-mails stating that the information therein is not to be disclosed to third parties. These disclaimers on their own do not establish that the information:

- Was provided in confidence;
- Is subject to solicitor client privilege; or
- Cannot be disclosed as part of an ATIPP request.

While you may want to use more caution when considering the release of e-mails that have these disclaimers, you must establish that the specific information in the e-mail fits an exemption under the *ATIPP Act*. Because these disclaimers are automatically generated, no discretion has gone into their use, nor has discretion been exercised by those with the delegated authority to do so.

Remember, only the head of the public body or those they delegate are authorized to make decisions regarding whether information can be exempted from disclosure during an ATIPP request. A paragraph at the bottom of the e-mail has not been delegated to make this decision.

2—Exemptions

2.1 Introduction

This section examines each exemption under the *ATIPP Act* in detail. If you are an ATIPP Coordinator and are looking for a simple, step-by-step guide on how to deal with a request, please see the ATIPP Processing Guidelines document on the v-drive or the Government of Nunavut intranet page. A copy of this guide can also be requested of the Territorial ATIPP Office.

Detailed information on each request below has been separated into three distinct sections:

- From the Act,
- How to use this Section, and
- Guidance from the Information and Privacy Commissioner.

The version of the *ATIPP Act* being referred to is the consolidation current to March 31, 2018. When referencing the *ATIPP Act,* you should ensure that you are referencing the most up to date version of the legislation and the Regulations.

Below a (M) or (D) is used to distinguish between mandatory (M) and discretionary (D) exemptions at a glance, and effort has been made to note where a provision was updated as of Bill 48 in 2017, which is the most recent amendment to the Legislation.

It is important to note here that the section on "Guidance from the Information and Privacy Commissioner" is not supposed to be definitive nor exhaustive of what has been said. These quotations were pulled from reviews that may be helpful when trying to understand the exemption being discussed. It is recommended that you read the full review and consult the Territorial ATIPP Office if you have any questions regarding these quotations or are looking to quote them yourself in correspondence to the Information and Privacy Commissioner or third parties. Part 3 of this manual will deal with reviews by the Information and Privacy Commissioner more in depth.

Before you exempt information from disclosure, it is important to remember the stated purpose of the Act:

> *Purpose of the Act*
> 1. *The purpose of this Act are to make public bodies more accountable to the public and to protect personal privacy by*
>   a. *Giving the public a right of access to records held by public bodies;*
>   b. *Giving individuals a right of access to and a right to request correction of, personal information about themselves held by public bodies;*
>   c. *Specifying **limited** exceptions to the right of access;*
>   d. *Preventing the unauthorized collection, use or disclosure of personal information by public bodies; and*
>   e. *Providing for an independent review of decisions made under this Act.*

All use of exemptions should be limited to the extent necessary, not done out of convenience or without proper justification. We have a responsibility to err at all times on the side of disclosure.

2.4 Section 13 - Cabinet records (M) – *Updated in 2017 as part of Bill 48*

From the Act:	How to use this Section:
Definition of Cabinet Record 13. (1) In this section "cabinet record" means (a) advice, proposals, requests for decisions, recommendations, analyses or policy options submitted or prepared for submission to the Executive Council or any of its committees; (b) draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees; (c) a discussion paper, policy analysis, proposal, advice or briefing material prepared for the Executive Council or one of its committees, excluding the sections of these records that contain factual or background material; (d) an agenda, minute, or other record of the Executive Council or any of its committees recording deliberations or decisions of the Executive Council or any of its committees; (e) a record used for or which reflects communications or discussions among ministers on matters relating to making government decisions or the formulation of government policy; (f) a record created for or by a minister for the purpose of briefing that minister on a matter for the Executive Council or any of its committees; and (g) a record created during the process of developing or preparing a submission for the Executive Council or any of its committees; and (h) that portion of a record which contains information about the contents of a record within a class of information referred to in paragraphs (a) to (g).	**Purpose:** The purpose of section 13 generally, is to preserve the unique role of cabinet within the parliamentary government system in Nunavut. This is based on the convention that every minister is responsible for the supporting all government positions, even positions that relate to other departments or that they may personally disagree with. In order to facilitate this, cabinet's collective decision making process is protected by the rule of confidentiality. This allows ministers to safely and openly discuss proposed government decisions behind closed doors, and then present a united front to the public when decisions are made. **Application:** Section 13 applies to cabinet (the 'executive council') and its committees, which include the Financial Management board, Cabinet Committee on Legislation and others. Thus, any information that would reveal discussion of the Financial Management Board or another committee must be severed under section 13; however, it only applies when a minister is carrying out directions from cabinet and it does not apply to ministers who are acting on their own. Section 14 may apply in cases of ministers acting on their own. **Other Committees:** Committees are formed and changed slightly with every new government, if you're not sure if the document is related to a cabinet committee you should inquire with the Territorial ATIPP Office, or the Cabinet Secretariat at Executive and Intergovernmental Affairs.

From the Act:	How to use this Section:
Cabinet Record (2) The head of a public body shall refuse to disclose to an applicant (a) a cabinet record; or (b) information in a record other than a cabinet record that would reveal the substance of deliberations of the Executive Council or any of its committees. 15 year limit (3) this section does not apply to information that has been existence in a record for more than 15 years.	**Annotation:** when you are annotating a severed portion of a record, you'll want to quote **both** which cabinet record definition the information falls under and either 13(2)(a) or 13(2)(b), which gives the authority for the exemption. 13(2)(a) would be used for information in a cabinet record such as a Request for Decision (commonly called an RFD), whereas 13(2)(b) would be used to exempt information that would be in one of those records (ie. The record says: "a RFD was prepared for a decision on…") **Other information:** It is important to remember that information can implicitly reveal the discussions under section 13 if that information could reasonably be combined with other known information to reveal the information in question. If releasing information would implicitly reveal information covered under section 13, the information must be withheld. **Mandatory Exemption:** Section 13(2) is a mandatory exemption, so your justification for its use is a one step test: does the information meet the definition provided under section 13(1)? **Historical record:** This provision acknowledges that, while it's important for ministers to be able to come to decisions and discuss government priorities behind closed door, eventually time and changes in government will render this consideration unimportant. **Archives:** These records are not commonly requested and you may need to work with Nunavut's Territorial Archivist who works for the Department of Culture and Heritage.

Guidance from Information and Privacy Commissioner (IPC) Reviews:

Cabinet records, never submitted to cabinet, are exempt: from Nunavut Review Report 15-89, on whether something prepared for cabinet, but never submitted, is exempt under section 13(2):

> *"In my opinion, if a record falls with the definition of "cabinet confidence", then it is protected from disclosure whether or not it ever came before cabinet or became the subject of a cabinet discussion and/or decision."* (NU Review 15-89, pg. 6)

Information in a submission: also from Nunavut Review Report 15-89, the IPC provided the following comments regarding whether background material, or material otherwise publically available, should be released:

> ***"****Some of the records included in the package of records prepared for submission to cabinet are not and have never been confidential. Some constitute background information, and at least some of which are publicly available documents. […] These records should be disclosed."* (NU Review 15-89, pg. 6)

2.5 Section 14 - Disclosure of advice from officials (D) – *Updated in 2017 as part of Bill 48*

From the Act:	How to use this Section:
Disclosure of advice from officials 14. (1) the head of a public body may refuse to disclose information to an applicant where the disclosure to an applicant where he disclosure could reasonably be expected to reveal (a) advice, proposals, recommendations, analyses or policy options developed by or for a public body, a member of the Executive Council or a member of a municipal council of a municipality that is designated as a public body in the regulations; (b) consultations or deliberations involving; (i) offices or employees of a public body, (ii) a member of the Executive Council, (iii) the staff of a member of the Executive Council, or (iv) a member of a municipal council of a municipality that is designated as a public body in the regulations; (c) positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the Government of Nunavut or a public body, or considerations that relate to those negotiations; (d) plans that relate to the management of personnel or administration of a public body that have not yet been implemented; (e) the contents of draft legislation, regulations and orders: (f) the contents of agendas or minutes of meetings of an agency, board, commission, corporation, office or other body that is a public body; or (g) information, including the proposed plans, policies, or projects of a public body, the disclosure of which could reasonably be expected to result in disclosure of a pending policy or budgetary decision.	**Disclaimer:** this section is one of the broadest and most frequently used discretionary exemptions in the *ATIPP Act*, and as such, it's important to make sure we're actively using our discretion as a public body and not just severing any and all information that fits these provisions. This provision should not be used out of convenience, but when you have a real harm you are trying to prevent. The use of section 14 may be common, but it's also one of the most commonly reviewed sections by IPC. Remember that exemptions must be used narrowly and sparingly. Disclosure is the default. **Purpose**: The purpose of this section of the act is to protect the decision-making process within the government. This section protects the ability of government employees to make open and frank proposals and suggestions to their superiors and ultimately to their ministers. By allowing public servants to make multiple candid suggestions outside of public scrutiny, decision-makers have better options to work with and will end up making better decisions. **Annotation**: be sure that each time you sever information under this provision that you indicate, on top of the severed information or in the margins, the subsection of 14(1) that you are relying on for the exemption. **Justifying the exemption**: this is a discretionary exemption and a two step process is necessary, 1. State how the information fits the criteria of the subsection, 2. State a possible harm to release, making sure it is current, probable and specific. (See section 1.5 for more information)

From the Act:	How to use this Section:
Exceptions (2) Subsection (1) does not apply to information that (a) has been in existence for more than 15 years; (b) is a statement of the reason for a decision that is made in the exercise of a discretionary power or an adjudicative function; (c) is the result of product or environmental testing carried out by or for a public body, unless the testing was done (i) for a fee as a service to a person other than a public body, or (ii) for the purposes of developing methods of testing or testing products for possible purchase; (d) is a statistical survey; (e) is the result of background research of a scientific or technical nature undertaken in connection with the formulation of a policy proposal; (f) is an instruction or guideline issued to officers or employees of a public body; or (g) is a substantive rule or statement of policy that has been adopted by a public body for the purpose of interpreting an enactment o administering a program or activity of a public body.	**Factual or Background Information:** the general rule for use of section 14 is that factual or background information or information of a technical nature should be disclosed. The provision protects the decision making process, not factual information that may be used in a decision. **Checking subsection (2):** When weighing factors to determine whether or not to disclose information, reviewing subsection 14(2) is necessary to determine if the information is subject to exemption under 14(1). **Revealing information:** Keep in mind to not release information that would implicitly reveal severed information. For example, factual information such as backgrounders should be released whenever possible, but there are situations where releasing the background material would implicitly reveal information about information already withheld under section 14. In cases like that, any factual information that would implicitly reveal the severed information should also be withheld under the appropriate subsection of section 14. **Policy documents:** section 14(1) generally doesn't apply once a policy decision has been made and becomes the official position of the public body. Proactive disclosure of policies, guidelines or other directive material is recommended.

Guidance From Information and Privacy Commissioner (IPC) Reviews:

Specific to subsection 14(1)(a): The IPC gives common advice based on Alberta Order 96-006 when determining what is considered advice, proposals, proposals, recommendation, analyses and policy options:

> *"Accordingly, in determining whether section [14(1)(a)] will be applicable to information, the advice, proposals, recommendations analyses or policy options ("advice") must meet the following criteria:*
>
> *The [advice, proposals, recommendations, analyses and policy options] should:*
> 1. *Be sought or expected, or be part of the responsibility of a person by virtue of that person's position,*
> 2. *Be directed towards taking an action,*
> 3. *Be made to someone who can take or implement an action."*

Specific to Subsection 14(1)(b): the IPC also commonly gives the following advice, also based on Alberta Order 96-006, when determining if information is consultation or deliberations:

> "I therefore believe a "consultation" occurs when the views of one or more officers or employees is sought as to the appropriateness of particular proposals or suggested actions. A "deliberation" is a discussion or consideration, by the persons described in the section, of the reasons for and against an action. Here again, I think that the views must either be sought or be part of the responsibility of the person from whom they are sought and the views must be sought for the purpose of doing something, such as taking an action, making a decision or a choice."

Factual Information is not advice: the IPC also often quotes Alberta Order 96-006 pertaining to disclosure of facts related to sections 14(1)(a) or 14(1)(b):

> *"In passing, I want to note that the equivalent section of the British Columbia Act (section 13) specifically states that "factual material" (among other things) cannot be withheld as "advice and recommendations". As I stated, I fully appreciate that our section differs significantly from that of our neighbours. However, I cannot accept that the bare recitation of facts, without anything further, constitutes either "advice etc" under [section 14(1)(a)] or "consultations or deliberations" under [section 14(1)(b)]."*

2.6 Section 15 - Privileged information (D) – *Updated in 2017 as part of Bill 48*

From the Act:	How to use this Section:
Privileged Information 15. (1) The head of a public body may refuse to disclose to an applicant (a) information that is subject to any type of privilege available at law, including solicitor client privilege (b) information prepared by or for an agent or lawyer of the Minister of Justice or a public body in relation to a matter involving the provision of legal services; or (c) information in correspondence between an agent or lawyer of the Minister of Justice or a public body and any other person in relation to a matter involving the provision of advice or other services by the agent or lawyer Approval of the holder of privilege: (2) The head of a public body shall not disclose information referred to in paragraph (1)(a) without the written approval of the holder of privilege. Approval of the Minister of Justice or public body (3) The head of a public body shall not disclose information referred to in paragraphs 1(b) and (c) without the written approval of the Minister of Justice or the head of the public body on whose behalf the information was prepared.	**Purpose:** section 15 protects communications around legal advice provided to a public body or an employee of a public body, or any other legal privilege. In practice, this usually refers to solicitor-client privilege, but it does include other legal privileges. Solicitor-client privilege protects the advice from a lawyer to their client from being disclosed. Its purpose is to ensure that advice and strategies developed by lawyers can be kept secret, so that their position isn't compromised in court. **Annotation:** When be sure that each time you sever information under this provision that you indicate, on top of the severed information or in the margins, the subsection of 15(1) you are relying on. For requests completed before Bill 48 became law, you may see section 15 annotated without subsection (1) ie. 15(a), 15(b) or 15(c). **Holder of Privilege:** The holder of privilege in the Government of Nunavut is the Commissioner in Executive Council. To waive privilege, you require approval at this level. Generally it is unadvisable to seek waiver of solicitor-client privilege as it may affect legal positions we need to take to protect our interests in court. **Lawyers aren't always giving advice:** every piece of communication sent by a lawyer to a Government of Nunavut employee isn't legal advice or subject to solicitor client privilege (no matter what their e-mail disclaimers may say). Solicitor-client privilege applies to correspondence to request legal advice, and the legal advice received. **Discretion:** This is a discretionary exemption, be sure to use the two step process. See section 1.5 of this manual for more details.

Guidance from Information and Privacy Commissioner Reviews:

What is Subject to Section 15(1)(a)?: The Nunavut IPC in Review Report 19-149 quotes Ontario Order PO-1879(Ontario(Attorney General)(Re), 2001 Canlii 26080(ON IPC):

> *"In order for a record to be subject to the common law solicitor-client communications privilege, the institution must provide evidence that the record satisfies the following test:*
> *(a) There is a written or oral communication, and*
> *(b) The communication must be of a confidential nature, and*
> *(c) The communication must be between a client (or his agent) and a legal advisor, and*
> (d) *The communication must be directly related to seeking, formulating or giving legal advice"* [Order 49]

What is solicitor-client privilege?: Also in Review Report 19-149, the IPC quotes the Supreme Court of Canada on what solicitor-client privilege is:

> *"… all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attaching to confidentiality. This confidentiality attaches to all communications made within the framework of solicitor-client privilege…"*
> (Descoteaux v. Mienwinski, supra, at 618, cited in order P-1409)

The Nunavut IPC continues, referring to the **continuum of communications** that exits:

> *"… the test is whether the communication or document was made confidentially for the purpose of legal advice. Those purposes have to be construed broadly. Privilege obviously attaches to documents conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communications and meetings between the solicitor and client… Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as "please advise me what I should do." But, even if it does not, there will usually be implied in the relationship and overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context."*
> (Balabel v. Air India, [1988] 2 W.L.R 1036 at 1046 (Eng. C.A.), cited in Order P-1409)

2.7 Section 16 - Disclosure prejudicial to intergovernmental relations (D)

From the Act:	How to use this Section:
Disclosure prejudicial to intergovernmental relations 16. (1) The head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to (a) impair relations between the Government of Nunavut and any of the following or their agencies: (i) the Government of Canada or a province or territory, (ii) an aboriginal organization exercising governmental functions, including, but not limited to (A) A band council, and (B) An organization established to negotiate or implement, on behalf of aboriginal people, a treaty or land claim agreement or treaty with the Government of Canada, (iii)a municipal or settlement council or other local authority, (iv) the government of a foreign state, (v) an international organization of states; (b) prejudice the conduct of negotiations relating to aboriginal self-government or to a treaty or land claims agreement; or (c) reveal information received, explicitly or implicitly, in confidence from a government, local authority or organization referred to in paragraph (a) or its agency.	**Purpose:** the purpose of section 16 is to ensure that the Government of Nunavut can engage in intergovernmental collaboration without fear from our partners that we will release information that could harm them. Additionally, it allows for information to be exempted from disclosure if it could affect the Government of Nunavut's position in negotiations or our relationship with other entities. **Annotation:** be sure that each time you sever information under this provision that you indicate, on top of the severed information or in the margins, the government or body under subsection (a) that is relevant to the information. 16(1)(a) is the more general of the three provisions, and section 16(1)(c) should be used for information that other governments or bodies have marked as confidential or when it is implied that it is confidential. **Justifying whether information was provided in confidence**: for a list of considerations, please see section 1.8 of this manual. The burden of determining whether something was supplied in confidence lies with the public body. You need to justify why you consider the information was supplied in confidence, with evidence, to rely on this exemption. **Justifying the exemption**: this is a discretionary exemption and a two step process is necessary, 1. State how the information fits the criteria of the subsection, 2. State a possible harm to release, making sure it is current, probable and specific. (See section 1.5 for more information)

From the Act:	How to use this Section:
Approval of Commissioner in Executive Council (2) The head of a public body shall not disclose information referred to in paragraphs 1(a) and (b) without the approval of the Commissioner in Executive Council. Approval of Commissioner in Executive Council and consent of other government (2.1) The head of a public body shall not disclose information referred to in paragraph 1(c) without the approval of the Commissioner in Executive Council and the written consent of the government, local authority, organization or agency that provided the information. 15 year limit (3) This section does not apply to information that has been in existence in a record for more than 15 years unless the information relates to law enforcement.	**Mandatory subsections**: if you exercise your discretion to release information that may be exempt under section 16(1), there are several mandatory subsections that you need to satisfy. Both of these subsection require you to get approval of cabinet, likely through the request for decision (RFD) process. **Third Party Notification:** For release of information subject to exemption under section 16(1)(c), you also must get the consent of the government, body, agency etc. that provided the information. This is different than the third party notification process under section 26, as it's mandatory to not release the information without consent whereas for notifications under section 26, the public body has discretion following submissions by third parties. **Exception:** subsection 3 is similar to 15 year limits under sections 13 and 14 but with one twist, information that relates to law enforcement continues to be exempt. This information may also be exempt under section 20(1).

Guidance from Information and Privacy Commissioner Reviews:

Harm must be probable: regarding use of this exemption, the commissioner has given some direction regarding the likelihood of harm to the public body:

> *In order to qualify for an exemption under this section of the Act, there must be a reasonable expectation that disclosure of that information would result in harm to the relationship between the Government of Nunavut and another public government in Canada […] The public body must provide some basis for such an assertion. It is not sufficient simply to state, as a given fact, that the harm is reasonably likely to occur. […]There must be some objective and realistic possibility of harm.*
> (Page 16, 2017 NUIPC 18, Review Report 17-131)

In the same review, she further "*refers to a decision of the Supreme Court of Canada in Ontario: (Community Safety and Correctional Services), 2014 SCC 31 (CanLII) in which the Court applied the harm test set out in Merck Frosst Canada Ltd. V. Canada (Health), 2012 SCC 3 (CanLII), [2012] 1 S.C.R. 23 as follows*:

> *This Court in Merck Frosst adopted the 'reasonable expectation of probable harm' formulation and it should be used wherever the "reasonably be expected to" language is used in access to information statutes. As the Court in Merck Frosst emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence 'well beyond' or 'considerably above' a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and 'inherent probabilities or improbabilities or the seriousness of the allegations or consequences': Merck Frosst, at para. 94, citing F.H. v. McDougall, 2008 SCC 53 (CanLII), [2008] 3 S.C.R. 41 at para. 40."*
> (Page 16, 2017 NUIPC 18, Review Report 17-131)

2.8 Section 17 - Economic and other interests of public bodies (D)

From the Act:	How to use this Section:
Economic and other interests of public bodies 17. (1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the economic interest of the Government of Nunavut or a public body or the ability of the Government to manage the economy, including the following: (a) trade secrets of the Government of Nunavut or a public body; (b) financial, commercial, scientific, technical or other information in which the Government of Nunavut or a public body has a proprietary interest or a right of use and that has, or is reasonably likely to have monetary value; (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 contractual or other negotiations of, the Government of Nunavut or a public body; and (d) scientific or technical information obtained through research by an employee of a public body, the disclosure of which could reasonably be expected to deprive the employee or public body of priority publication., Product an environmental testing (2) A head shall not refuse, under subsection (1) to disclose the results of product or environmental testing carried out or by or for a public body unless the testing was done (a) for a fee as a service for a person other than a public body, or (b) for the purpose of developing methods of testing or testing products for possible purchase.	**Purpose:** This section is a discretionary exemption that allows the Government of Nunavut to sever information from ATIPP requests when it could affect our business or economic interests. It's similarly worded, but different from, section 24 which is a mandatory exemption related to business or economic interests of a third party. Section 17 does not prevent a public body from releasing information that might lead to a lawsuit or financial loss due to potential wrongdoing. **Definitions:** a comprehensive definition for "trade secret" can be found in section 2 of the *ATIPP Act*. It's recommended that you test a possible "trade secret" against the criteria therein before you rely on section 17 for an exemption. **Annotation:** be sure that each time you sever information under this provision that you indicate, on top of the severed information or in the margins, the section and subsection that you're justifying the redaction under. For example; 17(1)(c)(i). **Justifying the exemption**: this is a discretionary exemption and a two step process is necessary, 1. State how the information fits the criteria of the subsection, 2. State a possible harm to release, making sure it is current, probable and specific. (See section 1.5 for more information) **Product or Environmental Testing**: it's important to be aware of the mandatory subsection that requires release of product or environmental testing, two things that in the public interest and ensures their safety.

Guidance from Information and Privacy Commissioner Reviews:

Reasonable Expectation: section 17(1) hasn't been subject to many reviews, however one passage from Review Report 12-60 is of particular relevance, and provides a simple test to determine whether there is a "reasonable expectation of harm":

> *In Alberta, the Information and Privacy Commissioner has established a test (Order 96-003) to establish when there is a "reasonable expectation" of harm by the disclosure of information. The party who is asserting the claim must provide objective evidence of three things:*
>
> *a) there must be a clear cause and effect relationship between the disclosure and the harm;*
> *b) the disclosure must cause harm and not simply interference or inconvenience;*
> *c) the likelihood of harm must be genuine and conceivable*

2.9 Section 18 - Testing procedures, tests and audits (D)

<table>
<tr>
<td>From the Act:

Testing procedures, tests and audits
18. 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,
Where disclosure could reasonably be expected to prejudice the use or results of particular tests or audits.</td>
<td>How to use this Section:

Purpose: the purpose of this section is to ensure that people can not get access to information that would give them an unfair advantage on a test or audit. It's to ensure the ATIPP Act is not used to alter a level playing field.

Annotation: when relying on this section, you'll want to make sure you note, on top of the severed information or in the margins, which subsection the information relates to. For example; 18(a)

Justifying the exemption: this is a discretionary exemption and a two step process is necessary,
1. State how the information fits the criteria of the subsection,
2. State a possible harm to release, making sure it is current, probable and specific.
(See section 1.5 for more information)</td>
</tr>
<tr>
<td colspan="2">Guidance from Information and Privacy Commissioner Reviews:

Reasonable Expectation: section 18 hasn't been subject to any review specifically about its application, however one passage from Review Report 12-60, referencing section 17(1), may also be useful when justifying "reasonable expectation of harm":

In Alberta, the Information and Privacy Commissioner has established a test (Order 96-003) to establish when there is a "reasonable expectation" of harm by the disclosure of information. The party who is asserting the claim must provide objective evidence of three things:
a) there must be a clear cause and effect relationship between the disclosure and the harm;
b) the disclosure must cause harm and not simply interference or inconvenience;
c) the likelihood of harm must be genuine and conceivable</td>
</tr>
</table>

2.10 Section 19 - Disclosure harmful to the conservation of heritage sites (D)

<table>
<tr>
<td>From the Act:

Disclosure harmful to the conservation of heritage sites
19. The head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to result in damage to or interfere with the conservation of
(a) fossil sites or natural sites;
(b) sites having an anthropological or heritage value or aboriginal cultural significance; or
(c) any rare, endangered or vulnerable form of life.</td>
<td>How to use this section:

Purpose: the purpose of this section is to ensure that Nunavut culture, history and wildlife isn't lost to those with malicious intent or out of ignorance due to the intrusion of improperly trained individuals on sensitive areas.

Annotation: when relying on this section, you'll want to make sure you note, on top of the severed information or in the margins, which subsection of section 19 you are relying on for the exemption.

Justifying the exemption: this is a discretionary exemption and a two step process is necessary,
1. State how the information fits the criteria of the subsection,
2. State a possible harm to release, making sure it is current, probable and specific.
(See section 1.5 for more information)</td>
</tr>
<tr>
<td colspan="2">Guidance from Information and Privacy Commissioner (IPC) Reviews:

Reasonable Expectations: The IPC has only reviewed section 19 once, in Review Report 18-136 and in it she said the following:

"The subject matter of the Request for Information in this matter is clearly an historically significant discovery over which the Government of Nunavut claims jurisdiction. I have no problem concluding that the subject matter of the records in question relates to a site or sites having an anthropological, heritage or cultural significance. This alone, however, is not sufficient for section 19(b) to apply. As noted above, there must be some evidence provided by the public body that the disclosure of the information could "reasonably be expected" to result in damage to the site or interfere with conservation efforts on the site."</td>
</tr>
</table>

2.11 Section 20 - Disclosure prejudicial to law enforcement (D)

From the Act:	How to use this section:
Disclosure prejudicial to law enforcement 20. (1) The head of a public body may refuse to disclose information to an applicant where there is a reasonable possibility that disclosure could (a) prejudice a law enforcement matter; (b) prejudice the defence of Canada or any foreign state allied to or associated with Canada or harm the detection, prevention or suppression of espionage, sabotage or terrorism; (c) impair the effectiveness of investigative techniques and procedures currently used, or likely to be used, in law enforcement; (d) reveal the identity of a confidential source of a law enforcement information; (e) endanger the physical health or safety of a law enforcement officer or any other person (f) deprive a person of the right to a fair trial or impartial adjudication; (g) reveal a record that has been confiscated from a person by a peace officer in accordance with a law; (h) facilitate the escape from custody of an individual who is being lawfully detained; (i) facilitate the commission of an unlawful act or hamper the control of a crime; (j) reveal technical information relating to weapons or potential weapons; (k) prejudice the security of any property or system, including a building, a vehicle, a computer system or a communications system; or (l) reveal information in a correctional record supplied, explicitly or implicitly in confidence.”	**Purpose:** the purpose of this section is to allow exemptions to releasing information that, if public, would affect the pursuit of justice or the function of law enforcement. **Definition:** the term “Law enforcement” has a definition under section 2 of the ATIPP Act. It is recommended that you read this section before applying this exemption. **Reasonable Possibility:** this test requires a lower standard of proof than tests that rely on “reasonable expectations”, however you still need to justify use of the exemption. More information on this can be found under the section “guidance from the Information and Privacy Commissioner” below. **Annotation:** when relying on this section, you’ll want to make sure you note, on top of the severed information or in the margins, which subsection of 20(1) you are relying on. **Justifying the exemption**: this is a discretionary exemption and a two step process is necessary, 1. State how the information fits the criteria of the subsection, 2. State a possible harm to release, making sure it is current, probable and specific. (See section 1.5 for more information **Existence of a record:** there may be instances where simply revealing the information exists could cause a harm to law enforcement efforts. Section 9(2) allows for a public body to deny the applicant information on whether the record exists or not. This is a discretionary decision and it should be appropriately justified.

From the Act:	
Disclosure exposing person to civil liability (2) The head of a public body may refuse to disclose information to an applicant where the information (a) is in a law enforcement record and the disclosure could reasonably be expected to expose to civil liability the author of the record or an individual who has been quoted or paraphrased in the record; or (b) is about the history, supervision or release of an individual who is under the control or supervision of a correctional authority and the disclosure could reasonably be expected to hamper the proper control or supervision of that individual.	**Purpose of subsection (2(a)):** the purpose of this subsection is to, on a discretionary basis, protect from disclosure information from a law enforcement informant. This is to ensure that individuals who have knowledge about a crime being committed can come forward and speak with police without fear of their claims being used against them as a reprisal for speaking out against a third party.
Disclosure of an offence under an Act of Canada (3) The head of a public body shall refuse to disclose information to an applicant where the information is in a law enforcement record and disclosure would be an offence under an Act of Canada.	**Consult legal counsel:** If you believe that disclosure of the record would be an offence under an Act of Canada, consult legal counsel right away. Information falling under this mandatory exemption is unlikely to come up in a routine request for disclosure and is presumably marked in some way. An example of this would be a record that could reveal the identity of an individual whose name is under a court mandated publication ban. **20(3) is a mandatory** subsection in an otherwise discretionary exemption, there is only a one part test to exempt information from disclosure; does the information fit the terms of section 20(3)?
Routine inspection or statistical report (4) Subsections (1) and (2) do not apply to (a) a report prepared in the course of routine inspections by an agency that is authorized to enforce compliance with an Act; or (b) a report, including a statistical analysis on the degree of success achieved in a law enforcement program unless disclosure of the report could reasonably be expected to have a result referred to in subsection (1), (2), or (3)	**Proactively disclosed:** Many of these reports under subsection (4) are released proactively. Check the Statistics Canada website if you're unsure of what is currently publically available, you may be able to simply direct the applicant to the information rather than requiring a formal ATIPP request be completed.

From the Act:	How to use this Section:
Disclosure of reasons not to prosecute (5) After a law enforcement investigation is completed, the head of a public body shall not refuse to disclose under this section the reasons for a decision not to prosecute (a) to a person who knew of and was significantly interested in the investigation, including a victim or a relative or a friend of a victim; or (b) to any other member of the public, where the fact of the investigation was made public.	**Nunavut does not have territorial prosecutors:** All prosecutors in Nunavut are federal officials working for the Public Prosecution Service of Canada (PPSC). If you come across a decision not to prosecute, it was likely provided as part of intergovernmental communication. Before releasing this information or making a decision, you should consult PPSC. This is a **mandatory** exception to an exemption.

Guidance from Information and Privacy Commissioner (IPC) Reviews:

Reasonable possibility: the IPC made the following statement as part of Review Report 15-88:

> *"In order to quality for an exemption pursuant to section 20(1)(a), there must be a demonstrably 'reasonable possibility' that disclosure could 'prejudice a law enforcement matter'. It is not enough to simply [say] that the record is part of a law enforcement matter. There must be some evidence that the disclosure will 'prejudice' that 'law enforcement matter'."*

2.12 Section 20.1 - Coroner's investigation or inquest (M) – *newly added in 2017 as part of Bill 48*

From the Act:	How to use this Section:
Coroner's investigation or inquest 20.1 The head of a public body shall refuse to disclose to an applicant information relating to an active coroner's investigation or inquest.	**Purpose:** This section was added in 2017 for two reasons, 1. The Chief Coroner has a legislated authority, responsibility and discretion to disclose information in her investigations or inquests in the public interest to ensure prevention of deaths, and the coroner's office is the appropriate body to make this determination; and 2. The investigation and inquests of the Chief Coroner should be subject to the same protections that law enforcement investigations are subject to, so that decisions can be made in an objective manner, free of prejudice from public opinion or interference from parties interested in the investigation. **Mandatory Exemption:** section 20.1 is a mandatory exemption and so the only point of justification you need to make is, do the records fit within the scope of the wording provided in section 20.1? **Unique to Nunavut:** This provision is unique to Nunavut, most other jurisdictions deal with Coroner related disclosure and privacy considerations in the *Coroners Act* for their jurisdiction. As this is the case, there is little precedent for its usage. **Temporary Provision:** Once the investigation and inquest is complete, this provision no longer applies, however other exemptions, notably section 23(1) dealing with personal privacy of third parties, may still apply. **Annotation:** when relying on this section, you'll want to make sure you note, on top of the severed information or in the margins, that section 20.1 is the section being relied on.

Guidance from Information and Privacy Commissioner (IPC) Reviews:	Response from the Government of Nunavut:
Narrow interpretation: The IPC gave the following direction as part of Review Report 18-145: *"The Supreme Court of Canada has clearly and unequivocally determined that, because access to information is a right, where it comes to exceptions under access to information legislation, these provisions must be read narrowly. That said, the section is mandatory, and if the information meets the criteria, the public body is prohibited from disclosing the information so long as there is an active investigation or inquiry. Once the investigation or inquiry is complete, the section will no longer apply to provide an exception to disclosure.* *In my opinion, section 20.1 was intended to protect the integrity of the investigation into the facts and circumstances of particular incidents. I do not read this as protecting extraneous communications which might take place during an investigation but which are not directly related to a specific investigation and do not reveal anything about the evidence with respect to the specific incident. In this case, much of the redacted information relates not to the evidence being gathered for the purpose of investigating the death, but instead relates to wider issues concerning the jurisdiction of various officials generally when investigating a death. They are process issues, and, while discussed in tangentially in the context of a particular investigation, do not reveal anything about the evidence gathered in or related to the investigation itself."*	**Legislative intention:** While ultimately the inquest and investigation completed before the Information and Privacy Commissioner (IPC) completed her review, the Department of Justice did not agree with the IPC's opinion regarding the purpose of the provision. They had the following to say: *"Section 20.1 was added to the ATIPP Act following consultations between the Department of Justice and the department of Executive and Intergovernmental Affairs with your, [the IPC's] office. Based on your recommendations, the language was purposely kept broad in section 20.1 in order that privacy protections of the ATIPP Act to apply to the office of the Chief Coroner but to still allow for the exemption of large amounts of information from disclosure.* *When enacting this section the government's concern wasn't simply evidence or facts of investigations but the significant obligations under Part A of the ATIPP Act related to the release of information when the Chief Coroner has alternative methods of releasing information and satisfying the public interest.* *The provision in question make no mention of facts or evidence, simply that the information has to be related to an investigation. Administration of the investigation isn't just tangentially related to an investigation, it is the investigation. It is the Department's view that if the investigation or inquest had not been completed that section 20.1 applies where it was used during the review."*

2.13 Section 21 - Disclosure harmful to another individual's safety (D)

From the Act:	How to use this Section:
Disclosure harmful to another individual's safety 21. (1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, where the disclosure could reasonably be expected to endanger the mental or physical health or safety of an individual other than the applicant. Disclosure harmful to applicant's safety (2) The head of a public body may refuse to disclose to an applicant personal information about the applicant if, in the opinion of a medical or other expert, the disclosure could reasonably be expected to result in immediate and grave danger to the applicant's mental or physical health or safety.	**Purpose:** The purpose of section 21 is to allow public bodies to exempt information from disclosure if release of the information could endanger either the applicant or a third party. It is a discretionary exemption and must be justified accordingly. Section 23(1) may be the more appropriate exemption for information that could endanger the safety of an individual other than the applicant. **Annotation:** when relying on this section to justify exempting information from disclosure, ensure that you indicate the appropriate subsection you are relying on, either 21(1) or 21(2) depending on whether the information would harm an individual other than the applicant, or the applicant respectively. **Justifying the exemption**: these are discretionary exemptions and a two step process is necessary, 1. State how the information fits the criteria of the subsection, 2. State a possible harm to release, making sure it is current, probable and specific. (See section 1.5 for more information) **Existence of a record:** there may be instances where simply revealing the information exists could cause a harm to either the applicant or a third party. Section 9(2) allows for a public body to deny the applicant information on whether the record exists or not. This is a discretionary decision and it should be appropriately justified.

Applicable Regulations:	What it means for use of section 21:
Disclosure of Health Care Information 4. (1) The head of a public body may disclose information relating to the mental or physical health of an individual to a medical or other expert for an opinion as to whether disclosure of this information could reasonably be expected to result in immediate and grave danger to the individual's mental or physical health or safety. (2) A medical or other expert to whom information is disclosed under subsection (1) shall only use the information for the purposes described in that subsection. (3) The head of the public body shall require a medical or other expert to whom information will be disclosed under this section to enter into an agreement relating to the confidentiality of the information. (4) If a copy of a record containing information relating to the mental or physical health of an individual is given to a medial or other expert for examination, the medical or other expert shall, after giving the opinion referred to in subsection (1), return the copy of the record to the head of the public body or dispose of it in accordance with the agreement made under subsection (3). (5) The head of the public body may require than an applicant who makes a request for access containing information relating to the applicant's mental or physical health must examine the record in the presence of a medical or other expert, a member of the applicant's family or some other person approved by the head who can clarify the nature of the record and assist the applicant to understand the information in the record.	**Seeking an expert opinion:** if you are looking to get an expert opinion under section 21(2), section 4 of the *ATIPP Act* Regulations sets out how to accomplish this in a manner that also respects the privacy of the applicant. **Consult legal sooner rather than later** if you believe parts of the records may fall under section 21(2). They will need to be involved in preparing the agreement under section 4(3) of the regulations.

2.14 Section 22 - Confidential evaluations (D) – Updated as part of Bill 48 in 2017

From the Act:	How to use this Section:
Confidential Evaluations 22. The head of a public body may refuse to disclose to an applicant personal information that (a) is evaluative or opinion material; (b) is compiled solely for the purpose of (i) determining the applicant's suitability, eligibility or qualifications for employment, or (ii) awarding government contracts or other benefits; and (c) has been provided to the public body, explicitly or implicitly in confidence.	**Purpose:** purpose of section 22 is to allow public bodies to receive detailed and honest evaluations in confidence, protecting the opinions of individuals relied on for these evaluations. This provision was updated as part of Bill 48 to more explicitly give discretion to not disclose employment references. **Annotation:** when relying on this section, you'll want to make sure you note, on top of the severed information or in the margins, which subsection of section 22 you are relying on. **Justifying the exemption**: these are discretionary exemptions and a two step process is necessary, 1. State how the information fits the criteria of the subsection, 2. State a possible harm to release, making sure it is current, probable and specific. (See section 1.5 for more information)

Guidance from Information and Privacy Commissioner (IPC) Reviews:

In Review Report 17-124, the IPC has the following general recommendations regarding the use of section 22:

> *"Section 22 Should be interpreted with the following principles in mind:*
>
> 1. *Disclosure of public records is always the rule, even where a discretionary exception exists.*
>
> 2. *Only in very unusual circumstances should an individual be denied access to his own personal information, including opinions expressed about the individual by third parties.*
>
> 3. *In those unusual circumstances in which discretion is exercised to refuse disclosure pursuant to section 22, the public body should be able to provide clear and cogent reasons for the refusal, based on all the circumstances of the particular case. This means that the decision cannot be based solely on the fact that the referee has indicated a desire for confidentiality, though that would be one factor to be considered. Other factors may include, for example, the existence (or lack) of an ongoing working relationship between the referee and the job applicant, a history (or absence) of a difficult working relationship between the candidate and the referee; and whether there is truly any realistic probability that the disclosure of the information might result in "intimidation and reprisal" of or against the referee. Where discretion is exercised to refuse disclosure, a public body should be prepared to provide the Applicant with detailed reasons for the decision.*
>
> 4. *Those providing references for prospective employees should be advised that, notwithstanding a request that the opinions provided be confidential, there remains the possibility that an Applicant may make an Access to Information Request and that such a request may result in the disclosure of the opinions expressed. They should be further advised that if there are unusual circumstances in the particular case that would support their request for confidentiality, those circumstances should be outlined at the time of the interview.*
>
> 5. *The identity of the person giving the opinion should, where possible, be protected. This may require that some edits of both "factual" and "opinion" material in the interviewer's notes be withheld. This would require a line by line, sentence by sentence and sometimes even a word by word review of each record. Section 5(2) requires, however, that where protected information can reasonably by severed from a record, an Applicant should be provided with the remainder of the record."*
>
> (Review Recommendation 17-124 at page 8)

2.15 Section 23 - Personal privacy of third party (M)

From the Act:	How to Use this Section:
Personal privacy of third party 23. (1) The head of a public body shall refuse to disclose personal information to an applicant where the disclosure would be an unreasonable invasion of a third party's personal privacy	**Purpose:** The purpose of section 23 is to allow an ATIPP Coordinator to protect the privacy rights of third parties if their information appears in the responsive records of an ATIPP request. Section 23 is the longest exemption in the ATIPP Act, and is the most commonly relied on exemption in the Act. It is important to note that it is also reviewed more than any other section in the act by the Information and Privacy Commissioner. **Personal information:** Personal information is one of those things that, generally speaking, you know it when you see it, but there is also a thorough definition of this term in section 2 of the Act. It's recommended that you familiarize yourself with this term, specifically sections (h) and (i) regarding opinions. **Unreasonable invasion:** Once you know the information is personal information of a third party (as defined by section 2 of the Act), the test becomes; would releasing this information be an "unreasonable invasion" of this third party's personal privacy? Direction regarding what is an "unreasonable invasion" can be found below under section 23(2). **Mandatory:** Section 23 is a mandatory exemption. If personal information of a third party appears in records related to an ATIPP request, you must review it in light of the factors under section 23(2) which outlines where there is a presumption that release would be an "unreasonable invasion". If the information does not fit under section 23(2), then you should weigh the factors in subsection 23(3). Section 23(4) is a list of circumstances where there is no presumed "unreasonable invasion".

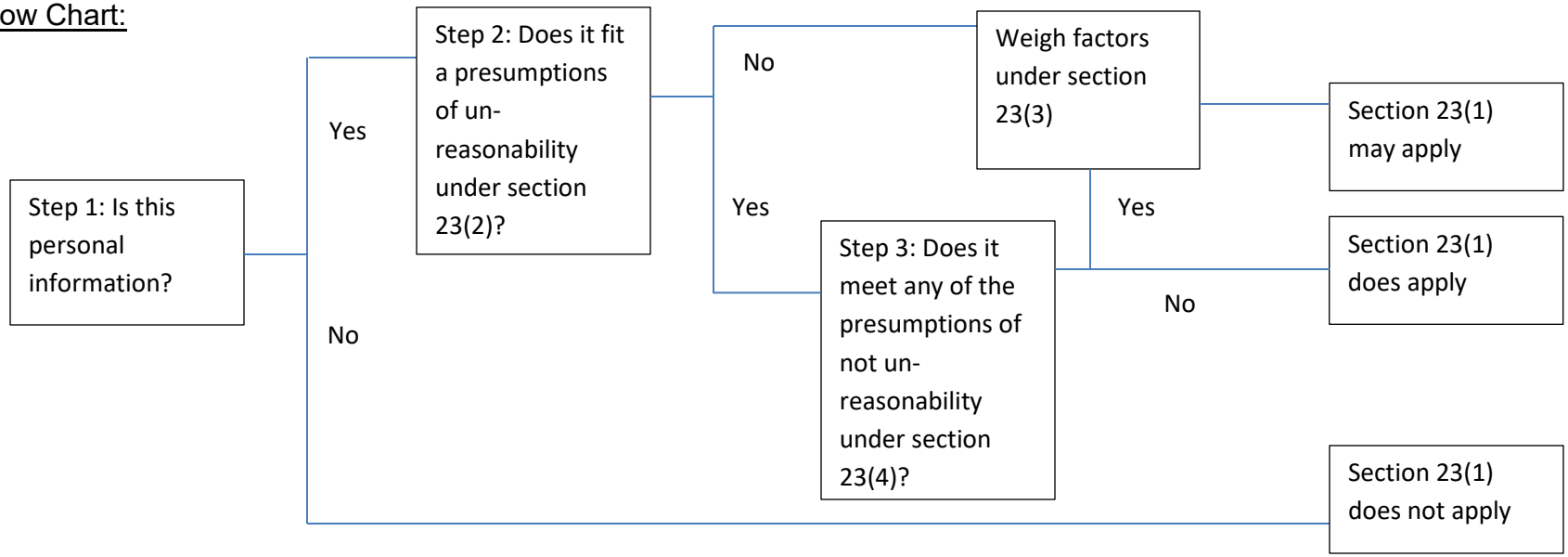
From the Act:	How to Use this Section:
Presumption of unreasonable invasion of privacy (2) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy where (a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation; (b) the personal information was compiled and is identifiable as part of an investigation into a possible contravention of law, except to the extent that disclosure is necessary to prosecute the contravention or continue the investigation; (c) the personal information relates to eligibility for social assistance, student financial assistance, legal aid or other social benefits or to the determination of benefit levels; (d) the personal information relates to employment, occupation or educational history; (e) the personal information was obtained on a tax return or gathered for the purpose of collecting a tax; (f) the personal information describes the third party's finances, income, assets, liabilities, net worth, bank balances, financial history or activities or credit worthiness; (g) the personal information consists of personal recommendations or evaluations about the third party, character references or personal evaluations; (h) the personal information consists of the third party's name where (i) it appears with other personal information about the third party, or (ii) the disclosure itself would reveal personal information about the third party (i) the disclosure could reasonably be expected to reveal that the third party supplied, in confidence, a personal recommendation or evaluation (j) the personal information indicates the third party's race, religious beliefs, colour, gender, ancestry or place of origin.	**What is unreasonable?:** Subsection 23(2) details numerous situations where information is presumed to be an unreasonable invasion of a third party's personal privacy. **Don't forget about 24(4):** If the information fits any of the descriptions under section 23(2), exemption from disclosure would be mandatory, unless it fits the criteria under subsection 23(4). Most commonly, we see this as written consent for a third party to apply under the ATIPP Act under someone else's behalf. **Annotation:** when relying on this section, you'll want to make sure you note, on top of the severed information or in the margins, that section 23(1) applies, and any supporting information ie. A subsection of 23(2) that the information would be presumed an unreasonable invasion of a third party's personal privacy under. Example. S. 23(1), S. 23(2)(a)

From the Act:	How to Use this Section:
Consideration of relevant circumstances (3) In determining whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Nunavut or a public body to public scrutiny; (b) the disclosure is likely to promote public health and safety or to promote the protection of the environment; (c) the personal information is relevant to a fair determination of the applicant's rights; (d) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people; (e) the third party will be exposed unfairly to financial or other harm; (f) the personal information has been supplied in confidence; (g) the personal information is likely to be inaccurate or unreliable; and (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.	**Balancing rights:** Section 23(3) is a good section to reference when a piece of personal information isn't clearly presumed to be an unreasonable invasion of a third party's privacy under section 23(2) and it isn't clearly reasonable under section 23(4). This section helps you balance the interests of the third party. Subsections (a) to (d) are factors in favor of release, whereas subsections (e) to (h) are factors in favor of exemption. **Third Party Notification**: If it's not clear whether the information should be exempt or disclosed, but there are factors in favor of release, this would be an opportune time to consult the third party directly using the process provided under section 26 of the ATIPP Act related to "Third Party Notification". Representations from the third party will help you come to a more informed decision, and you may receive the consent necessary under section 23(4)(a). More information on third party notifications can be found in section 5.5 of part 1 of this manual.

From the Act:	How to Use this Section:
Circumstances where no unreasonable invasion of privacy (4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy where (a) the third party has, in writing, consented to or requested the disclosure; (b) there are compelling circumstances affecting the health or safety of any person and notice of disclosure is mailed to the last known address of the third party; (c) an Act of Nunavut or Canada authorizes or requires the disclosure; (d) the disclosure is for research purposes and is in accordance with section 49. (e) the personal information relates to the third party's classification, salary range, discretionary benefits or employment responsibilities as an officer, employee or member of a public body or as a member of the staff of a member of the Executive Council; (f) the personal information relates to expenses incurred by the third party while travelling at the expense of a public body; (g) the disclosure reveals details of a license, permit or other similar discretionary benefit granted to the third party by a public body, but not personal information supplied in support of the application for the benefit; (h) the disclosure reveals details of a discretionary benefit of a financial nature granted to a third party by a public body, but not personal information supplied in support of the application for the benefit or that is referred to in paragraph 2(c); (i) the disclosure reveals financial and other details of a contract to supply goods or services to a public body; or, (j) the information is disclosed in accordance with prescribed procedures and relates to the third party's remuneration as an employee of a public body, as an employee as defined in the Public Service Act, or as a member of the staff of a member of the Executive Council.	**Consent:** Subsection 23(4)(a) is a common one that we see in the Government of Nunavut, generally when one person makes a request on behalf of another individual. Section 5 of the regulations specifies that consent must: a. Be in writing; and b. Must specify to whom the personal information may be disclosed or how the personal information may be used. **Consult legal:** For research agreements, it's recommended that you consult legal counsel in the Department of Justice to assist with the drafting of the agreement and so that you meet all the necessary requirements under section 49. **Employees doing their job:** generally speaking, if an Government of Nunavut employee is representing a public body or doing work related to their responsibilities as a public servant, disclosing their name, government e-mail, work phone number, and other contact information is not an unreasonable invasion of their personal privacy.

From the Act:	How to Use this Section:
Summary of refusal information (5) On refusing under this section, to disclose personal information supplied in confidence about an applicant, the head of the public body shall give the applicant a summary of the information unless the summary cannot be prepared without disclosing the identity of a third party who supplied the personal information. Summary prepare by third party (6) The head of a public body may allow the third party to prepare the summary of personal information under subsection (5).	**Why a summary?** This subsection is important for the same reason section 22 of the ATIPP Act is complex to rely on, because a person's opinion about a third party is both their own personal information, and the personal information of the third party, who has a right to the information. For more information on third party notifications, please see section 26 of the ATIPP Act and section 5.5 of Part 1 of this Manual.

Flow Chart:



Guidance from Information and Privacy Commissioner (IPC) Reviews:

Not all personal information is exempt: As part of Review Report 13-65 the IPC considers the scope of section 23, and what information is exempt from disclosure:

> *"There are few initial observations to be made here. First, if the exemption applies, it is mandatory - that is, the public body is prohibited from disclosing the information. Secondly, personal information, as defined in the Act, refers to information about an identifiable individual. Companies and corporate entities do not have "personal information". Thirdly, the Act clearly contemplates that the exemption does not apply as a blanket exemption to the disclosure of all personal information. Disclosure is prohibited only if the disclosure would constitute an unreasonable invasion of the third party's privacy. Subsections 23(2), (3) and (4) provide guidance to assist public bodies in determining when the disclosure of personal information might constitute an unreasonable invasion of privacy."*

General rule regarding business information: In Review Report 08-42, the Information and Privacy Commissioner references a Ontario Order that discusses whether business information is considered personal information:

> *"In Order PO-2587, the Ontario Information and Privacy Commissioner made the following comments: As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621], but even if information relates to an individual in a professional, official or business capacity, it may still qualify as "personal information" if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225, PO-2435]".*

On presumptions under section 23(2): the information and privacy commissioner had this to say as part of Review Report 16-107 regarding the presumptions available under section 23(2), regarding whether or not disclosure would be an unreasonable invasion of a third party's personal privacy:

> *"When it comes to section 23(2), it is also important to note that while the section provides instances in which there is a presumption that disclosure will amount to an unreasonable invasion of privacy, these presumptions are not absolute and may be rebutted by the facts. One must, therefore, consider all of the circumstances and consider whether the presumptions might not apply. For some of the presumptions, it will be difficult to rebut as, for example, where the matter involves a third party's personal health information, or when talking about a person's personal finances. Others are more easily rebutted as, for example where the information relates to a person's current employment when that employment information is publicly available."*

2.16 Section 24 - Business interests of third party (M)

From the Act:	How to use this Section:
Business Interests of third party 24. (1) Subject to subsection (2), the head of a public body shall refuse to disclose to an applicant (a) information that would reveal trade secrets of a third party; (b) financial, commercial, scientific, technical or labour relations information (i) obtained in confidence, explicitly or implicitly, from a third party, or (ii) that is of a confidential nature and was supplied by a third party in compliance with a lawful requirement; (c) information the disclosure of which could reasonably be expected to (i) result in undue financial loss or gain to any person, (ii) prejudice the competitive position of a third party, (iii) interfere with contractual or other negotiations of a third party, or (iv) result in similar information not being supplied to a public body; (d) information about a third party obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax; (e) a statement of financial account relating to a third party with respect to the provision of routine services by a public body; (f) a statement of financial assistance provide to a third party by a prescribed corporation or board; or (g) information supplied by a third party to support an application for financial assistance mentioned in paragraph (f).	**Purpose:** the purpose of this section is to ensure that businesses can share proprietary or otherwise important information with the Government of Nunavut without fear that the information will be disclosed in a manner that could threaten their business or interests. **"Trade Secret":** Section 2 of the *ATIPP Act* contains a definition of trade secret, as well as factors to determine whether or not the information in question qualifies as a "trade secret". It is important if you're considering severing information from disclosure under section 24(1)(a) that you first reference this definition in section 2. **Mandatory Exemption:** Section 24(1) is a mandatory exemption, which means that if the information fits the criteria provided under section 24 then you must exempt the information from disclosure. **Third Party Notification:** As it is not always straight forward whether information fits the criteria under section 24 without knowing the technical industry environment, section 24 requires third party notification, to obtain their representations as to whether the information in question fits within the scope of section 24. More information on third party notifications can be found in section 26 of the ATIPP Act or in section 5.5 of Manual 1. **What is "in confidence?":** section 1.8 of this manual has factors to weigh when determining if information was provided either explicitly or implicitly in confidence. **Annotation:** It is important to note which subsection of 24(1) you are relying on, on top of the information that is severed and as part of the exemption rationale.

From the Act:	How to use this Section:
Disclosure with consent or legislative authority (2) A head of a public body may disclose information described in subsection (1) (a) with the written consent of the third party to whom the information relates; or (b) if an Act or regulation of Nunavut or Canada authorizes or requires the disclosure.	**Proactive Disclosure:** The Government of Nunavut already releases information related to procurement on the Department of Community and Government Services website, in addition, the Government of Nunavut tables three reports on agreements entered into by public bodies; 1. The Procurement Activity Report, 2. the Leasing Activity Report, and 3. the Contracting Activity Reports (Also referred to as PAR, LAR and CAR).

Guidance from Information and Privacy Commissioner (IPC) Reviews:

Regarding burden of proof: in Review Report 18-144, the IPC said the following:

> *"The Third Party in this case argued that at the request and response stage, the Department was required to refuse to disclose the records in question "and to prove to an applicant why they are justified in doing so". I disagree. At the request and response stage the only "burden" that lies on the public body is to apply the provisions of the Act to the records in question, with disclosure as the rule subject only to any applicable exception. It is their duty to provide access to as much of each record as is allowed under the Act. In undertaking this duty, they are required, pursuant to section 26 of the Act, to give notice to a Third Party when they are considering giving access to any record that "may contain" information that affects the interest of a third party under Section 24. In this case, they were considering disclosing records that they felt "may contain" information that might affect several third parties. They did what they were required to do under the Act and made their decision based on their understanding of the law."*

What is harm?: Quoting an order from the Alberta Information and Privacy Commissioner, Nunavut's Information and Privacy Commissioner provided this test to determine harm:

> *"The party who is asserting the claim (in this case the Third Party Companies) must provide objective evidence of three things: a) there must be a clear cause and effect relationship between the disclosure and the harm; b) the disclosure must cause harm and not simply interference or inconvenience; c) the likelihood of harm must be genuine and conceivable."*

2.17 Section 25 - Information that is or will be available to the public (D)

<table>
<tr>
<td>From the Act:

Information that is or will be available to the public
25. (1) The head of a public body may refuse to disclose to an applicant information that is otherwise available to the public or that is required to be made available within six months after the applicant's request is received, whether or not for a fee.

Notifying applicant of availability
(2) Where the head of a public body refuses to disclose information under subsection (1), the head shall inform the applicant where the information is or will be available.</td>
<td>How to use this Section:

Purpose: the purpose of this section is to allow for public bodies to direct applicants to public information, or, to allow public bodies time to finish and publish a report that will be made public within 6 months.

Annotation: when relying on this section, you'll want to make sure you note, on top of the severed information or in the margins, that section 25(1) is applicable to the information.

Justifying the exemption: these are discretionary exemptions and a two step process is necessary,
1. State how the information fits the criteria of the subsection,
2. State a possible harm to release, making sure it is current, probable and specific.
(See section 1.5 for more information)</td>
</tr>
<tr>
<td colspan="2">Guidance from Information and Privacy Commissioner (IPC) Reviews:

Applies to records where disclosure is a requirement: the IPC as part of Review Report 12-59 had this to say regarding the use of section 25(1):

"A careful reading of this paragraph will show that, in order for this exception to apply to allow the public body to refuse disclosure of a record, there must be a requirement that the record is to be made available to the public within six months after the applicant's request. In this case, there may have been an intention to make the report available, but there was no requirement to that effect. While the public body says (and I have no reason not to believe) that they were, in good faith, working toward the public release of this record, there was no legislation or other directive that required them to release the record within the stated time frame. There are, in fact, very limited circumstances in which this section will justify a refusal to disclose. This was not one of those circumstances. The section did not provide the public body with a viable exemption to disclosure."</td>
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2.18 Section 25.1 - Employee relations (D) - newly added *in 2017 as part of Bill 48*

From the Act:	How to use this Section:
25.1. The head of a public body may refuse to disclose to an applicant (a) information relating to an ongoing workplace investigation; (b) information created or gathered for the purpose of a workplace investigation, regardless of whether such an investigation actually took place, where the release of such information could reasonably be expected to cause harm to the applicant, a public body or a third party; and (c) information that contains advice given by the employee relations division of a public body for the purpose of hiring or managing an employee.	**Purpose:** the purpose of this section is to both allow an employee relations investigation to occur without interference and to allow for complainants to come forward about their coworkers' wrongdoing or poor behaviour without fearing reprisals. **Annotation:** when relying on this section, you'll want to make sure you note, on top of the severed information or in the margins, which subsection of 25.1 you are relying on. **Temporary Provision:** section 25.1(a) is a temporary provision, which means that it no longer applies once a workplace investigation has been completed. Section 25.1 applies after the investigation is complete, but you must justify that harm is reasonably expected to occur. **Justifying the exemption**: these are discretionary exemptions and a two step process is necessary, 1. State how the information fits the criteria of the subsection, 2. State a possible harm to release, making sure it is current, probable and specific. (See section 1.5 for more information) **Purpose of the ATIPP Act:** one of the stated purposes of the ATIPP Act is to allow individuals a right to access and correct information about themselves in the custody of the public body. The consequences of an employee relations investigation can be substantial to the affected employee and so it's vitally important that we provide applicants with as much information as we can. Use of section 25.1 should be done sparingly and only when the public body can adequately justify harm with real evidence.

Guidance From Information and Privacy Commissioner (IPC) Reviews:

Section 22 as a guide: Section 25.1 is a new exemption under the ATIPP Act and comparable provisions are not found in other jurisdictions. Section 22's advice from the IPC may be generally helpful when considering whether or not to release records that would fit under the criteria established under section 25.1. You should review the advice above under section 22 to get an idea of the general direction you should take in these cases, being sure to release as much as possible and strongly justify any use of the exemption.