



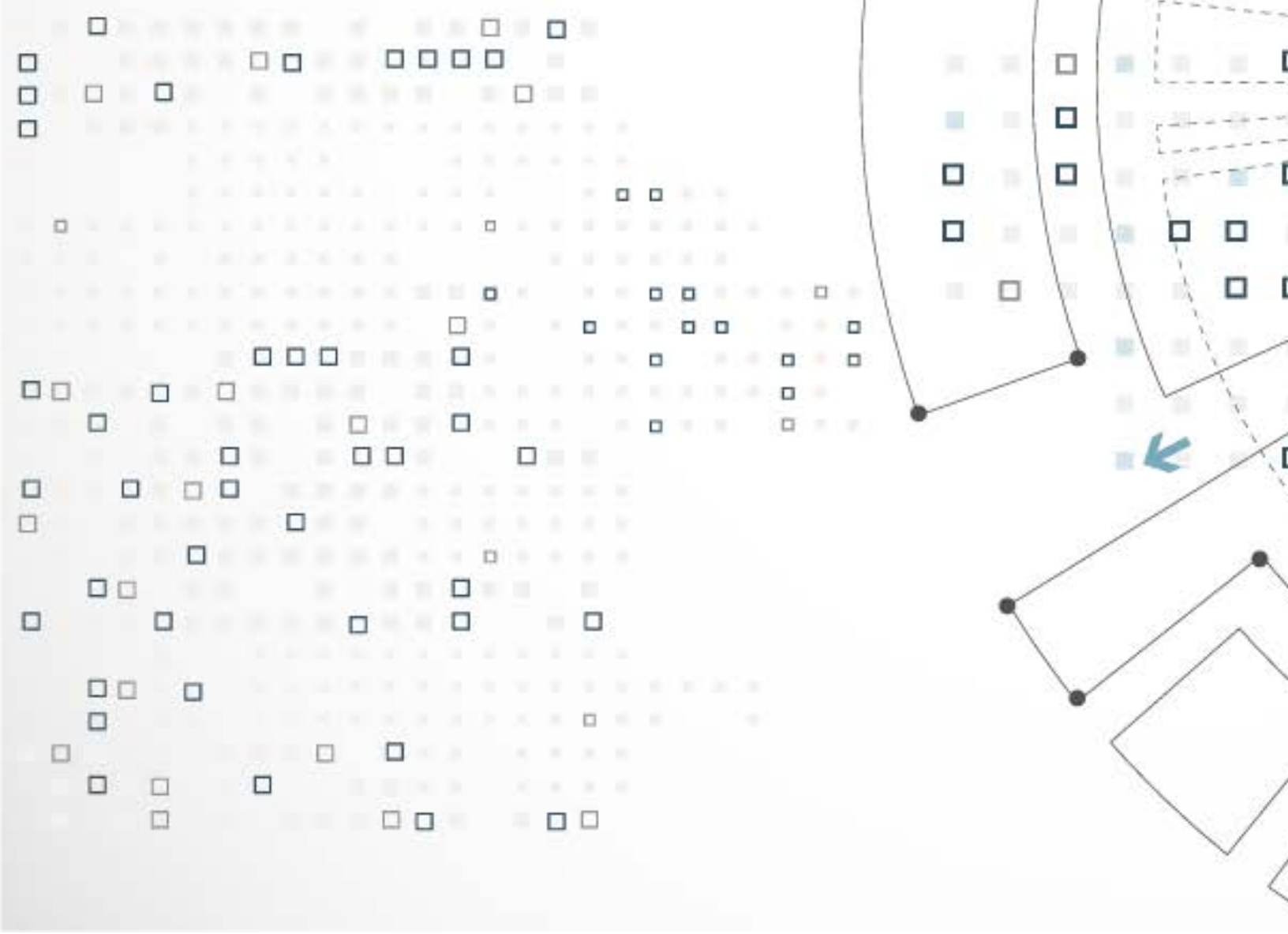
OFFICE OF THE
INFORMATION &
PRIVACY COMMISSIONER
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GUIDANCE DOCUMENT | FIPPA

SECTION 25: THE DUTY TO WARN AND DISCLOSE

DECEMBER 2018



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PURPOSE OF THIS GUIDANCE DOCUMENT

This guidance document explains section 25 of the *Freedom of Information and Protection of Privacy Act* (FIPPA), which requires public bodies to proactively disclose information:

- about a risk of significant harm; or
- that is clearly in the public interest.

Section 25 reads as follows:

- 25(1)** Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information
- (a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or
 - (b) the disclosure of which is, for any other reason, clearly in the public interest.
- (2) Subsection (1) applies despite any other provision of this Act.
- (3) Before disclosing information under subsection (1), the head of a public body must, if practicable, notify
- (a) any third party to whom the information relates, and
 - (b) the commissioner.

REQUIREMENTS FOR PROACTIVE DISCLOSURE UNDER s. 25

Section 25 imposes an obligation to disclose information even if there has been no request for the information. This obligation overrides every other section in FIPPA, including the mandatory exceptions to disclosure found in Part 2 and the privacy protections contained in Part 3.

Given this broad override of privacy interests, the threshold for proactive disclosure under s. 25 is very high, and only applies in the *clearest and most serious* situations.¹ This determination is contextual and evaluated on a case-by-case basis.

Section 25(1)(a) - Duty to warn of a risk of significant harm

Public bodies have a duty to warn when the risk of harm would cause harmful effects on the environment and/or negative impacts on the health or safety of individuals.

The risk need not be imminent, but it must be a risk that is likely to happen. The existence of a risk would normally imply some degree of time sensitivity. Disclosure under this subsection cannot be the outcome of a risk that has already occurred. However, the risk may relate to a past event that poses future risks.

Order 02-38² states that while each determination will rely on the specific circumstances of the case, some information should be disclosed under s. 25(1)(a) after a risk has been identified, including information that:

- discloses the existence of the risk;
- describes the nature of the risk and the nature and extent of any anticipated harm ; and
- allows the public to take the necessary action to mitigate the risk or avoid harm.

If the disclosure involves personal information, the public body should only disclose the minimum amount necessary to mitigate the risk.

Section 25(1)(b) - Clearly in the public interest

What constitutes “clearly in the public interest” is determined on a case-by-case basis. A public body must consider whether a disinterested and reasonable observer, knowing what the information is and knowing all of the circumstances, would conclude that the disclosure is plainly and obviously in the public interest.

¹ See, for example, [Order 02-38](#), 2002 CanLII 42472 (BC IPC) at paras. 45-46, citing Order No. 165-1997, [1997] BCIPD No. 22 at p. 3.

² [Order 02-38](#), 2002 CanLII 42472 (BC IPC).

The following factors should be considered:

- is the matter the subject of widespread debate in the media, the Legislature, or by other Officers of the Legislature or oversight bodies; or
- does the matter relate to a systemic problem rather than to an isolated situation?

While information disclosed under s. 25(1)(b) does not always need to be the subject of public debate, it does serve to increase the public interest in disclosure.

In addition, would the disclosure:

- educate the public;
- contribute in a substantive way to the body of information that is already available;
- enable or facilitate the expression of public opinion or enable the public to make informed political decisions; or
- contribute in a meaningful way to holding a public body accountable for its actions or decisions?

Once a public body has determined that the information engages the public interest, it should also consider the nature of the information to determine if it meets the high threshold for disclosure. Proactive disclosure must be of such import and significance that it justifies the override of the exceptions to access and the privacy protective provisions of FIPPA that would otherwise apply.

In any given set of circumstances there may be competing public interests, weighing for and against disclosure. The threshold will vary according to those interests. The amount and sensitivity of the personal information are relevant factors, with greater amount or higher sensitivity weighing against disclosure.

There is a difference between information that has *piqued* the interest of the public and disclosure of information that that is *in* the public interest. As stated by BC Supreme Court: “s. 25(1)(b) cannot be so broad as to encompass anything that the public may be interested in learning and the term is not defined by the various levels of public curiosity.”³

The disclosure must contribute something new and purposeful to the public discourse. Former Commissioner Denham said that examples of information that could be in the public interest include matters of public finance or financial management, or matters relating to proper public administration.⁴

³ [Clubb v. Saanich \(Corporation of The District\)](#), 1996 CanLii 8417 (BCSC)

⁴ [IR F15-02](#), p. 30

HOW TO DISCLOSE INFORMATION

Disclosure must be proactive and without delay

The proactive disclosure of information must be done as soon as possible and not delayed by considerations about how to package, explain, or characterize the information.

Information, but not always records

Section 25 may not require the disclosure of the record itself. While Part 2 of FIPPA generally applies to “records,” s. 25 applies to “information.” In response to an access request, a public body is required by s. 4 of FIPPA to disclose an entire record (subject to legislated exceptions), but s. 25 contains no such requirement.

If a record in the custody of a public body describes a risk of significant harm, the public body could satisfy its obligation to disclose, in most cases, by issuing an accurate summary of the information. Whether information or records should be disclosed under s. 25(1)(b) depends on the public interest that is being served. For example, in Investigation Report F16-02 former Commissioner Denham found that specific disclosure of records was required to restore public confidence in government’s actions.⁵

Disclosure to the public, to an affected group of people, or to the applicant

Disclosure regarding a risk of significant harm must be made, at minimum, to the people at risk. The information should be disclosed widely if, for example, many people across the province need to take steps to mitigate the risk. If the risk is localized and limited in scope, then communications should target the affected group of people.

Use the most effective and efficient means to communicate the information to the public or affected group of people. If the risk has widespread implications, or the matter is of public interest province-wide, information should be posted without delay on the website of the public body and/or conveyed publicly via media release and social media.

If the risk of significant harm only pertains to a certain geographical area, disclosure could be made, for example, through local police, regional districts, municipalities or health authorities, stakeholder groups with active membership networks, ads in local newspapers, and/or signage.

Notification to a third party and the Information and Privacy Commissioner

Section 25(2) requires that, if information is to be disclosed, the head of the public body must notify the Information and Privacy Commissioner and any third party to whom the information

⁵ *Clearly in the public interest: The disclosure of information related to water quality in Spallumcheen*; [IR F16-02](#).

relates. If practical, this should be done before disclosing the information to the public. If not practical, the head of the public body must mail a notice of disclosure to the Commissioner and to the last known address of the third party. This notice must be in the form prescribed in [Schedule 2 of the FIPPA Regulation](#).

The OIPC will review the proposed disclosure and may provide comments or ask questions. The OIPC may also confirm that the third party has been notified.

COMPLIANCE WITH S. 25

All public bodies should develop policies that provide guidance to employees and officers about the public body's obligations under s. 25 of FIPPA. The policies should set out criteria for determining what constitutes a risk of significant harm to the environment or to the health and safety of the public, and for determining if disclosure is clearly in the public interest. The policies should be tailored to specific program areas, anticipating the range of harms that may occur within each area.

The public body should set out specific steps an employee should take to bring relevant information to the head of the public body for decision. The policy should set out procedures for how to disclose the relevant information to the public or affected group of people without delay. Employees should understand that disclosure pursuant to s. 25 can only be authorised by the head of the public body. Notification to third parties and the Commissioner is required.

Public bodies must ensure that its employees and officers are aware of the policy and trained in its application.

These guidelines are for information purposes only and do not constitute a decision or finding by the Office of the Information and Privacy Commissioner for British Columbia. These guidelines do not affect the powers, duties, or functions of the Information and Privacy Commissioner regarding any complaint, investigation, or other matter under FIPPA or PIPA.