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## OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

### PRACTICE NOTE 1

#### APPLYING 'HARMS' TESTS

“Harms” tests arise in several places in the *Freedom of Information and Protection of Privacy Act*. Sections 15, 16, 17, 19, 20, 24, 27 all contain “harms” tests i.e. a record may or must not be disclosed if it will cause harm to a matter. A notable example is in section 19(1)(a) of the Act which states:

19(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

(a) **harm** a law enforcement matter

The Commissioner, in Order 96-003, attempted to explain what is meant by “harm” and what is expected of the public body to show that harm may occur should a record be disclosed. The reasoning in that Order was based in part upon some decisions of the Federal Court.

In the case of *Canada Packers Inc. v. Canada (Minister of Agriculture)* [1989 1 F.C.47 at 59-60 the Federal Court of Appeal stated that an exception to access in the *Access to Information Act*, R.S.C., 1985, c. A-1, which contains the element of harm, must be based on a, “reasonable expectation of probable harm.”. This appears to be consistent with the purpose of the Alberta Act. Such a statement emphasizes the need for the harm to be genuine and conceivable and that there be a link between disclosure and harm.

Since there are varying degrees of harm, it would be helpful to define what is “reasonable” by the use of a threshold test. The general threshold that must be reached is that disclosure would cause damage or detriment, not simply hindrance or minimal interference. The threshold may vary depending on the context of the “harm”. For example, in issues of threats to personal safety the threshold might be lower than with law enforcement matters.

The burden to establish that this threshold has been reached is placed on the public body: section 67. To discharge the burden, detailed and sufficient evidence must be presented to show a “reasonable expectation of probable harm”. “[The] evidence must demonstrate a probability of harm from disclosure and not just a well-intentioned but unjustifiably cautious approach to the avoidance of any risk whatsoever because of the sensitivity of the matters at issue.” (*Canada (Information Commissioner) v. Canada (Prime Minister)* [1992] F.C.J. No. 1054)

The most important factor for the public body to consider is whether or not disclosure is in fact linked or connected to the expected harm. Basically, there must be a clear cause and effect relationship, that is, disclosure of the record must cause the harm.

The next factor for the public body to consider is whether or not the expected harm passes the general threshold. Generally, the threshold to be reached is that disclosure would not merely cause interference or inconvenience but actually cause damage or detriment. This threshold may vary depending on the context of the “harm”.

The final factor the public body must consider is the probability of the harm. The likelihood of the occurrence of harm must be genuine and conceivable. In other words, the probability of the harm must be more than a chance occurrence.

In order to discharge the burden of proof, a public body must provide detailed evidence to satisfy the inquiry that there is a “reasonable expectation of probable harm”.

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