



# **Policy Guidance on the Disclosure of Historical Records under the Access *to Information Act***

Published: 2024-05-27

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Published by Treasury Board of Canada, Secretariat  
90 Elgin, Ottawa, Ontario, K1A 0R5, Canada

Catalogue Number: BT39-83/2024E-PDF  
ISBN: 978-0-660-72277-1

This document is available on the Government of Canada website at [www.canada.ca](http://www.canada.ca)

This document is available in alternative formats upon request.

Aussi offert en français sous le titre : Document d'orientation sur la divulgation de documents historiques  
en vertu de la Loi sur l'accès à l'information

# Policy Guidance on the Disclosure of Historical Records under the *Access to Information Act*

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From: Treasury Board of Canada Secretariat

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# Purpose

This policy guidance is intended to promote access to Canada's history by outlining recommended time thresholds (that is, sunset clauses) to encourage heads of institutions and their delegates to consider the passage of time as a relevant factor when they exercise discretion in determining whether to release historical records under the *Access to Information Act* (ATIA).

# Scope

This guidance focuses on historical records, which in this context are defined as records that are at least 20 years old. This is in keeping with the general guidelines for the release of records in other like-minded countries and is consistent with the statutory time limits that apply to the exercise of discretion under certain sections of the ATIA.

# Application

This policy guidance applies to government institutions as defined in section 3 of the ATIA, including parent Crown corporations and any wholly owned subsidiary of these corporations; however, it does not apply to the Bank of Canada.

# Context

This policy guidance has been developed in alignment with the purpose of the ATIA, which is intended to enhance the accountability and transparency of federal institutions, promote an open and democratic society, and enable public debate, subject to limited and specific exceptions. The timely release of historical records where feasible and appropriate is integral to this purpose.

While the ATIA provides for the exercise of discretion by heads of institutions and their delegates in the application of specific exemptions, there is limited guidance related to the consideration of the impact of the passage of time as a factor to be considered among other factors when exercising discretion and, in particular, on the sensitivity of historical records held by federal institutions.

This policy guidance is intended to address that gap and is complemented by detailed information on the application of exemptions contained in the *Access to Information Manual*. Institutions are encouraged to consult the manual when considering whether to apply the recommended time thresholds outlined herein.

## **Objective and intended results**

The objective of this guidance is to increase the number of historical records released by providing guidance to heads of institutions and their delegates regarding the consideration of time thresholds in the exercise of their discretion when applying certain exemptions under the ATIA.

Moreover, this guidance is intended to enable a more efficient and consistent approach to the review and potential disclosure of historical records, including minimizing consultations where appropriate, as well as enhancing risk tolerance when considering the release of historical records. The Treasury Board of Canada Secretariat will consult with institutions on the effectiveness of this policy guidance and whether it supports the achievement of its objective and intended results.

## **Exercise of discretion**

Certain provisions in the ATIA are discretionary exemptions. Discretionary exemptions authorize the head of a government institution to refuse to disclose information if it meets the relevant applicable class or injury test. In

exercising discretion under the Act, the head of the institution or their delegate must act in a fair, reasonable and impartial manner.

It is important to note, however, that certain types of records carry enduring sensitivities and may fall outside recommended time thresholds. In such cases, discretionary exemptions could be invoked to refuse disclosure. In other words, there may be viable and appropriate circumstances to refuse the disclosure of a record that may be in existence for longer than the recommended time thresholds set out for consideration in this policy guidance.

When information requested under the ATIA is subject to a mandatory exemption, the head of a government institution or their delegate is required to refuse to disclose the information. However, several mandatory exemptions authorize government institutions to release information if certain conditions are met. If these conditions are met and no other exemptions apply, the head of the institution or their delegate is authorized to disclose the information after considering relevant factors for and against disclosure.

This guidance does not constrain or preclude heads of institutions and their delegates from exercising their discretion under the ATIA to disclose records before or after the recommended time thresholds, subject to applicable privileges and exemptions. Additional details on the application of class and injury tests, as well as discretionary and mandatory exemptions, are provided in the *Access to Information Manual*.

## **Inter-institutional consultations**

In addition to encouraging heads of institutions and their delegates to consider the passage of time as a relevant factor when exercising discretion, the time thresholds recommended in this policy guidance are intended to

support institutions in determining whether inter-institutional consultation is required when assessing whether a historical record should be released or protected.

In alignment with requirements of the *Directive on Access to Information Requests*, institutions are encouraged to conduct inter-institutional consultation on historical records that are older than the time thresholds recommended herein only if they require more information for the proper exercise of discretion to withhold information or when they intend to disclose potentially sensitive information.

To further enable streamlined inter-institutional consultation in the context of historical records, institutions are encouraged to develop and share lists with one another of subjects that no longer require consultation or require consultation as a matter of course even if they are older than the time thresholds recommended in this policy guidance.

## **Time thresholds for the exercise of discretion under the *Access to Information Act***

Certain exemptions under the ATIA (for example, sections 16(1)(a), 19, 21, and 69) already have time thresholds for the release of records based on the passage of time. These are known as time-limited exemptions. Time-limited exemption is based on the fundamental notion that information becomes less sensitive over time. In the case of discretionary exemptions, the passage of time may reduce or eliminate the sensitivity of records and can be considered alongside other relevant factors when deciding to exercise discretion to release a record.

The tables below present recommended maximum time thresholds that heads of institutions and their delegates are encouraged to consider when exercising discretion in the application of discretionary exemptions under the ATIA. The tables also present the statutory timeline requirements that are applicable for certain mandatory exemptions. Recommended time

thresholds are intended to encourage heads of institutions and their delegates to consider the passage of time as a relevant factor when exercising discretion on whether to release records of historical value to Canadians. The tables are divided into two sections: discretionary and mandatory exemptions.

Recommended time thresholds do not supersede any time limits established by the ATIA. Moreover, they do not preclude heads of institutions and their delegates from exercising their discretion to release records in advance of these thresholds. They also do not limit the exercise of discretion to refuse the disclosure of records that have been in existence longer than the recommended time thresholds where other relevant factors justify such a refusal.

## Discretionary exemptions

► In this section

### Section 14: Federal-provincial affairs

- **Section of the ATIA:** 14: Federal-provincial affairs
- **Time threshold:** 30 years

Section 14 is a discretionary exemption based on an injury test that aims to protect the role of the federal government in its conduct of federal-provincial affairs. To invoke this exemption for historical records, a government institution should be convinced that disclosure of specific information could reasonably be expected to be injurious to the current conduct, by the federal government, of federal-provincial affairs.

In the context of historical records, examples of the types of information that may be subject to exemption include but are not limited to:

- information on ongoing federal-provincial consultations or deliberations, or



- information on strategy or tactics adopted by the Government of Canada relating to the conduct of federal-provincial affairs

Institutions should consider the application of exemptions based on whether there is a current and reasonable expectation of probable harm to federal-provincial affairs if the record were released today.

## **Section 15: International affairs and defence**

- **Section of the ATIA:** 15: International affairs and defence
- **Time threshold:** 50 years

Section 15 is a discretionary exemption based on an injury test as applied to three general public interest areas:

1. the conduct of international affairs
2. the defence of Canada or any state allied or associated with Canada
3. the detection, prevention or suppression of subversive or hostile activities

These three general areas of public interest can be considered independently even though they are closely interrelated and frequently overlap.

In the context of historical records, for the exemption to apply to any category of information described in the provision, the head of an institution or their delegate must be able to demonstrate that there is a current and reasonable expectation of probable harm to one of the three specified public interests flowing from disclosure.

## **Section 16(1)(b), (c)(i) and (iii), (d): Law enforcement and investigations**

- **Section of the ATIA:** 16: Law enforcement and investigations
- **Time threshold:** 20 years

Section 16 of the ATIA contains a series of discretionary and mandatory exemptions and class-based and injury-based exemptions that aim to protect:

- effective law enforcement, including criminal law enforcement
- the integrity and effectiveness of other types of investigations (for example, ordinary administrative investigations under an Act of Parliament, investigations in regulatory areas, and air accident investigations)
- the security of penal institutions

Section 16(1)(a) applies to records that came into existence less than 20 years ago; therefore, it already includes a time threshold. This does not mean that records covered by this exemption must automatically be disclosed once they are 20 years old, because section 16(1)(c) can be applied if there is still a need to protect them. Section 16(1)(b) is a discretionary class test exemption, and no time limit restricts the application of this exemption. Section 16(1)(c) and (d) are discretionary exemptions based on an injury test.

In the context of historical records, institutions should consider the application of exemptions based on whether there is a current and reasonable expectation of probable harm to law enforcement and investigations if the record were released today.

## **Section 17: Safety of individuals**

- **Section of the ATIA:** 17: Safety of individuals
- **Time threshold:** 20 years after death or 110 years after birth

Section 17 is a discretionary exemption based on an injury test. A government institution may refuse access to information if it has reasonable grounds to expect that the disclosure of the information could threaten the

safety of an individual. The time threshold is consistent with paragraph 3(m) of the *Privacy Act* and paragraph 6(c) of the *Privacy Regulations* as they relate to personal information under the control of Library and Archives Canada.

In the context of historical records, the information protected covers any identifier or other kind of information that would, by its release, tend to reasonably be expected to threaten the safety of individuals today.

## **Section 18: Economic interests of Canada**

- **Section of the ATIA:** 18: Economic interests of Canada
- **Time threshold:** 30 years

Section 18 sets out a series of discretionary exemptions aimed at protecting:

- trade secrets or financial, commercial, scientific and technical information belonging to the government
- priority of publication of government researchers
- the financial interests of the Government of Canada
- the government's ability to manage the economy of Canada

Exemptions are based on both class tests (sections 18(a) and 18.1) and injury tests (sections 18(b), 18(c), 18(d)).

In the context of historical records, institutions should consider the application of exemptions based on whether there is a current and reasonable expectation of probable harm to the economic interests of Canada if the record were released today.

## **Section 21: Operations of government – advice, etc.**

- **Section of the ATIA:** 21: Advice, etc.
- **Time threshold:** 20 years

Section 21 the ATIA already includes a time threshold of 20 years, with limited exceptions. It is a discretionary class-based exemption that aims to protect certain classes of information about the internal decision-making

processes of government, the disclosure of which could interfere with the operations of government institutions.

The rationale for the exemption is that disclosure could have a chilling effect on the candidness of advice, recommendations, consultations and deliberations given or received by the federal public service and can lead to a reluctance to deal frankly with difficult questions.

In the context of historical records, while there is no statutory duty to apply an injury test for this exemption or to prove the existence of an injury, the exercise of discretion requires that the head of the institution or their delegate consider the consequences of releasing the information and must weigh arguments in favour of release against arguments in favour of non-release.

## **Section 22: Operations of government – testing procedures, tests and audits**

- **Section of the ATIA:** 22: Testing procedures, tests and audits
- **Time threshold:** 15 years

Section 22 of the ATIA already includes a time threshold of 15 years and is a discretionary exemption based on an injury test. It provides protection for procedures and techniques involved in testing and auditing, and for details relating to specific tests about to be given and audits about to be conducted, if such disclosure would prejudice the use or results of particular tests or audits. In other words, the exemption applies if the disclosure of the information would:

- invalidate the results of a specific test to be given or of an audit to be conducted, or one that is currently in progress, or
- jeopardize the future use of the tests or audits, or of the testing or auditing procedures

The discretionary exemption does not apply to information about previous tests or audits unless the same procedures are being used or will be used in the future and disclosure would consequently cause the injury described in section 22.

In the context of historical records, institutions should consider the application of the exemption based on whether there is a current and reasonable expectation of probable harm if the record were released today.

## **Section 23: Solicitor-client privilege**

- **Section of the ATIA:** 23: Solicitor-client privilege
- **Time threshold:** 100 years

Section 23 is a class-based discretionary exemption that protects from disclosure information that is subject to solicitor-client privilege, the professional secrecy of advocates and notaries, and/or litigation privilege. Solicitor-client privilege belongs to the client, which in this context is the Crown and not individual government institutions. Though the application of solicitor-client privilege to information in a specific case may be of greater interest to one or more institutions, that decision ultimately affects the interests of the Crown client as a whole. Thus, any decision by the head of one government institution to exercise the discretion in section 23 to disclose solicitor-client privileged information must take into account those broader Crown interests.

When a head of an institution or their delegate, in the exercise of their discretionary authority, discloses information that is subject to section 23 of the ATIA, privilege is waived with regard to that information, and it may also be waived with regard to related information. Institutions should first consult the Department of Justice if they are unsure whether the information being considered for disclosure is solicitor-client privileged. In the exceptional situation where an institution is considering the disclosure of a document that is subject to solicitor-client privilege or the professional

secrecy of advocates and notaries, the head of an institution must make their decision in consultation with the Department of Justice, the Privy Council Office and possibly others, including Cabinet. This enables the head of an institution to take into account the interests of the Crown as a whole in making their decision. It is not necessary for institutions to continue to consult the Department of Justice and others in cases where the head of an institution intends to exercise their discretion in favour of applying the solicitor-client privilege exemption to withhold a record from disclosure.

A time threshold of 100 years is proposed for the exercise of the discretion in section 23. This means that once 100 years have passed since a record that is subject to solicitor-client privilege was created, the head of an institution or their delegate should also consider the passage of this period of time when exercising their discretion under section 23, notwithstanding any other applicable departmental policy. However, the passage of this period of time does not change the need to consult with the Department of Justice and others as noted above, prior to an exercise of the discretion to disclose information subject to solicitor-client privilege so that the head of an institution has a full understanding of the implications on the Crown's interests should the discretion be exercised in favour of disclosure.

## Mandatory exemptions

► In this section

### Section 13: Information obtained in confidence

- **Section of the ATIA:** 13: Information obtained in confidence
- **Time threshold:** Not applicable

Subsection 13(1) is a mandatory class exemption that does not have any time limit for its application. It provides that the head of a government institution shall refuse to disclose any record that contains information

obtained in confidence from the government of a foreign state, an international organization of states, the government of a province, a municipal or regional government, or an Aboriginal<sup>1</sup> government.

There are exceptions where disclosure is permissible, however, including where there is consent to disclose the information was made public. It may therefore be the case that time threshold provisions in other jurisdictions have resulted in information covered under section 13 being made public in that jurisdiction. These exceptions apply to historical records as defined in this policy guidance (that is, 20 years old).

## Section 19: Personal information

- **Section of the ATIA:** 19: Personal information<sup>2</sup>
- **Time threshold:** 20 years after death or 110 years after birth

Subsection 19(1) is a mandatory exemption based on a class test that provides that, subject to three exceptions in subsection 19(2), the head of a government institution shall refuse to disclose any record requested under the ATIA containing personal information as defined in section 3 of the *Privacy Act*.

The recommended time threshold is consistent with paragraph 3(m) of the *Privacy Act*, which states that information is no longer considered “personal information” for use and disclosure purposes 20 years after the death of the individual. Library and Archives Canada may disclose personal information for research and statistics purposes 110 years after the birth of an individual, in accordance with paragraph 6(c) of the *Privacy Regulations*.

Section 8(2) of the *Privacy Act* describes the circumstances under which, subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed without the consent of the individual to whom the information pertains.

As it relates to historical records, the following subsections are the most notable:

- section 8(2)(j): provides that personal information may be disclosed to any person or body for research or statistical purposes under specific conditions
- section 8(2)(k): provides that personal information may be any Aboriginal government, association of Aboriginal people, Indian band, government institution or part thereof, or to any person acting on behalf of such government, association, band, institution or part thereof, for the purpose of researching or validating the claims, disputes or grievances of any of the Aboriginal peoples of Canada
- section 8(2)(m): provides that personal information may be disclosed for any purpose where, in the opinion of the head of the institution, the public interest clearly outweighs any invasion of privacy, or the disclosure would clearly benefit the individual to whom the information relates

Refer to the *Access to Information Manual* and *Personal Information Request Manual* for additional considerations regarding the disclosure of personal information.

## **Section 20: Third-party information**

- **Section of the ATIA:** 20: Third-party information: trade secrets and other information
- **Time threshold:** Not applicable

Section 20 of the ATIA deals with third-party information, including but not limited to:

- trade secrets
- confidential financial, commercial, scientific or technical information
- information used for emergency plans

As set out in section 3 of the Act, “third party” means any person, group of persons or organization other than the person that made the request or a government institution.



Subsection 20(1) contains mandatory class test exemptions in paragraphs (a), (b) and (b.1) and mandatory injury test exemptions in paragraphs (c) and (d). Once a decision is made that the information qualifies for exemption under the above-mentioned subsection and related paragraphs, disclosure must be refused unless the exemption is overridden by subsection 20(5) or (6).

Exceptions where disclosure is permissible include where there is consent from the third party and when the disclosure would be in the public interest as it relates to public health, public safety or protection of the environment and the disclosure clearly outweighs any prejudice, interference or financial loss or gain impacting a third party. These exceptions apply to historical records as defined in this policy guidance (that is, 20 years old).

Sections 20(2) and 20(4) are exceptions based on class tests. Refer to the *Access to Information Manual* for specific guidance related to exceptions related to product and environmental testing.

## **Section 24: Statutory prohibitions**

Section 24 of the ATIA is a mandatory exemption and provides for the refusal of any record that contains information the disclosure of which is restricted by or pursuant to any provision set out in Schedule II of the ATIA. This policy guidance does not supersede these statutory prohibitions.

## **Section 69: Cabinet confidences**

- **Section of the ATIA:** Cabinet records
- **Time threshold:** 20 years

Pursuant to paragraph 69(3)(a) of the ATIA, a Cabinet confidence that has been in existence for more than 20 years cannot be excluded under subsection 69(1) of the Act. After that time, the record becomes subject to the Act and may be released subject to any applicable exemptions.

The Clerk of the Privy Council is responsible for policies on the administration of confidences of the King's Privy Council for Canada and for the ultimate determination of what constitutes such confidences and must be consulted in a manner consistent with the guidance set out in the *Access to Information Manual*.

## Appendix A: Definitions

### **exercise of discretion**

Where a decision maker is given a choice of options within a statutorily imposed set of boundaries. In legislation or policy, discretion is indicated using the word "may" as opposed to "must" or "shall."

### **head of a government institution**

In the case of a department or ministry of state, this refers to the member of the King's Privy Council for Canada who presides over the department or ministry, or in any other case, either the person designated under subsection 3.2(2) to be the head of the institution for the purposes of the ATIA or, if no such person is designated, the chief executive officer of the institution, whatever their title.

### **historical record**

Any documentary material, regardless of medium or form, that is at least 20 years old.

### **time threshold (that is, sunset clause)**

Refers to the date after which the head of a government institution or their delegate is encouraged to consider the passage of time as a relevant factor among other relevant factors in determining whether to disclose a record requested under the ATIA.

## Appendix B: References

- *Access to Information Act*
- *Privacy Act*
- *Library and Archives Canada Act*

- [Access to Information Regulations](#)
  - [Privacy Regulations](#)
  - [Policy on Access to Information](#)
  - [Directive on Access to Information Requests](#)
  - [Access to Information Manual](#)
  - [Personal Information Requests Manual](#)
  - [Access to Information Implementation Notice 2023-02: Leveraging Access to Information to Promote Declassification and Downgrading of Government Documents](#)
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- 1 The term “Aboriginal” is used in this policy guidance to reflect the use of this term in the *Access to Information Act*, which came into force in 2002. The Government of Canada now uses the term “Indigenous” to align with international usage.
  - 2 Note that even if the designated time limit had not passed, personal information will be reviewed with the application of section 8(3) of the *Privacy Act* regarding the injury and sensitivity of the information.
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**Date modified:**

2024-05-29