

Tipsheet for users of the *revised* Access to Information Act

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The federal Access to Information Act (ATIA) was significantly amended in June 2019 by Bill C-58, in part to require proactive disclosure of certain government records, many of which were already accessible under the original Act.

The new legislation, for example, requires the scheduled proactive release of many (but not all) Question Period notes for ministers; of the titles of briefing notes (called “memoranda”) for ministers and deputy ministers; of materials created to brief a minister for an appearance before a Parliamentary committee; and of transition books for newly appointed ministers and deputy ministers. All of these records were subject to the Act prior to the passage of Bill C-58 and were the frequent subject of requests.

The revised law also compels the release of ministerial mandate letters within 30 days after issue (beginning in 2015, these had been released as Liberal government policy rather than as a legislated requirement). Ministers’ annual office expenses must now be released within 120 days after March 31 (these expenses are also available in the annual Public Accounts of Canada, Vol. 3, Section 10, but on a later timetable, usually in November, covering the previous fiscal year).

The amendments also give the Information Commissioner of Canada (ICC) a watered-down form of order-making power. The ICC can order a department or institution to release records, though without the legal authority of a court order; a department or institution can challenge any ICC order in Federal Court, where a justice can review the case from the beginning (*de novo* review) and even hear new arguments in favour of non-disclosure.

The revised Act also allows departments and institutions to apply to the ICC for the authority to decline to act on an ATIA request if it “is vexatious, is made in bad faith or is otherwise an abuse of the right to make a request for access to records.” The first-ever such “vexatious” request was certified by the ICC in January 2020, and the requester was denied. Similarly, the ICC can decline to act on a user complaint about an institution’s response to an ATIA request if “the complaint is trivial, frivolous or vexatious or is made in bad faith.” These provisions were absent in the original Act.

Under the earlier version of the law, successful requests were often the result of good homework; that is, careful research that helped to craft a focused, well-targeted request. Under the new regime of proactive disclosure, thorough research before filing a request is becomes even more important. Requestors should review

proactively released records, as well as previously released ATIA records, to understand what is already available and what remains undisclosed. This research can also help identify areas of federal activity not previously known. The federal government maintains online searchable databases, central repositories for most large and many small departments, that can help requesters carry out this pre-request research, as follows:

Access-to-information summaries of previously released records

Searchable summaries of more than 30,000 ATIA records released since 2012, showing the wording of the request, release date, pages disclosed, file reference number and institution or department. Enabled for keyword searches. The previously released records can then be requested informally:

open.canada.ca/en/search/ati

Proactively released non-cabinet records

Searchable databases of Question Period notes for ministers (full documents), disclosed twice a year, normally June and December, but only those “in use on the last sitting day” of the House of Commons; transition books (full documents) for ministers and deputies, disclosed within 120 days after issue; and briefing note titles only, with dates, departments, minister or deputy minister, disclosed within 30 days of the end of the month in which they were created. All enabled for keyword searches. (Note this site also has other proactively released records that were not part of the Bill C-58 reforms.)

open.canada.ca/en/proactive-disclosure

Mandate letters and revised mandate letters for ministers

Disclosed within 30 days of their issuance.

pm.gc.ca/en/mandate-letters

As noted above, Question Period notes, transition books, briefing note titles, and briefing material for a minister’s appearance before Parliamentary committees have always been accessible through direct requests under the original Act. The revised timelines in the amended Act for proactive release are not always aligned with timelines for release through ATIA requests. For example, Question Period notes are proactively released twice a year, while an ATIA request could access them much earlier; and indeed, not all Question Period notes will be released proactively, only those “in use” on the last day of sitting. These no-longer-in-use notes can still be accessed through an ATIA request, for example.

Briefing note titles are proactively released on a 30-day timetable; an access-to-information request for monthly lists of such titles would produce them no more quickly, since the law provides for an initial 30-day response time for any ATIA request. Transition books are released on a 120-day timetable under the revised law. From experience, this timetable is more expedient than using an access-to-information request – indeed, some transition books in the past have required years to process.

Note that the federal government’s searchable databases for proactive disclosure do not yet include all departments, institutions and agencies covered by the revised Act (more than 260 entities), so a requestor may need to check individual websites.

The proactive releases noted above add to the important task of reviewing other open-source information before crafting a targeted request. Other familiar open-source documents and databases include the tendering site buyandsell.ca, the annual Public Accounts of Canada, Departmental Plans (DPs, formerly referred to as Estimates, Part III) released before March 31 each year, projecting various departments’ spending and activity for the coming fiscal year; Departmental Results (DRs, formerly known as Performance Reports), released each fall referring to the previous fiscal year; and many others.

Filing requests

After thorough research, filing a new request can be relatively quick and simple. Each new request requires a \$5 application fee (almost never waived), but currently requires no further payment. On May 5, 2016, the government directed all federal institutions to waive any additional fees, such as for processing, photocopying, etc. (This is government policy, not law or regulation, and could be rescinded at any time. Bill C-58 did not change the fee structure in the Act, which continues to allow application fees of up to \$25, as prescribed by regulation, in addition to other fees.) Some institutions still require paper-only applications and \$5 cheques, but most of the large departments have joined an online service that allows requests and fees to be submitted digitally:

atip-aiprp.tbs-sct.gc.ca

The wording of your request should be concrete, in plain language, with a limited time-frame. A three-month spread is good, shorter is better. Try to refer to document types, such as expense claims, receipts, minutes, correspondence, contracts, inventories. Your research will have alerted you to other document types, including when they were created and which official sent or received them. Drill down into the operations and administration of departments, rather than simply cite broad topics or subject areas. Ask in advance for the draft version if the final version is not yet complete. Be open to discussing requests with ATIA offices, to help them understand your focus; they are frequently a source of good advice and are almost always apolitical. Consider asking for audio-visual materials, which are

captured by the Act, including security-camera footage, photographs, and audio recordings of incidents.

Keep a careful file for each request, with notes on every telephone call involving the institution, and copies of correspondence and email received or sent. Datebook every delivery commitment by the institution, and challenge every failure to meet commitments.

Be prepared to wait. Although the Act contemplates a 30-day turnaround period, institutions have a relatively free hand to take whatever extension they deem appropriate. Experience suggests journalists can expect a 90-day wait, and often more. Backlogs in many departments are getting worse – partly because of the new proactive-disclosure regime, which requires more staff resources.

Complaints

Aggrieved requesters can make a formal complaint to the Information Commissioner of Canada (ICC), whether over excessive delays or inappropriate redactions. The most troublesome and abused sections of the Act allow institutions to withhold “advice” (Section 21), cabinet confidences (Section 69), defence information (Section 15) and police and security records (Section 16). These, along with other exemptions and exclusions are spelled out in the revised [Act: laws-lois.justice.gc.ca/eng/acts/A-1/](https://laws-lois.justice.gc.ca/eng/acts/A-1/)

There is no fee for making a complaint to the ICC, which can be submitted online:

oic-ci.gc.ca/en/make-complaint-online

There are severe backlogs in this office as well. Many complaints have taken more than five years to resolve, and not always in favour of the requester. Typically, a complaint requires about eight months to come to a resolution after it is assigned to an investigator (which itself can take months).

As noted earlier, Bill C-58 has changed the landscape. Previously, the ICC was restricted to using moral suasion or, occasionally, the courts to compel release of records that the office has deemed improperly withheld. The revised Act now gives the commissioner watered-down order-making power, which institutions can challenge in the courts. To date, this power has been used only once, in January 2020. It’s too early to tell whether the change will make a material difference that results in more records released in a more-timely manner.