



# Policy on the Treatment of Applications for Non-Disclosure of Information

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Operations Branch

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## 1. Purpose

The purpose of this policy is to outline the principles governing the treatment of applications for non-disclosure of information.

## 2. Application

This policy applies to applications for non-disclosure of information made by the Minister of Public Safety and Emergency Preparedness under section 86(1) of the *Immigration and Refugee Protection Act (IRPA)*. It applies to both the Immigration Division (ID) and the Immigration Appeal Division (IAD) of the Immigration and Refugee Board of Canada (IRB).

The policy builds on existing policies and practices, and replaces any documents or portions of documents or statements previously issued by the IRB that conflict with it.

## 3. Definitions

For purposes of this policy:

**“Confidential hearing”** is a hearing held by the ID and IAD in the presence of only one party, the Minister. The person who is the subject of the application for non-disclosure of information, their counsel and the public are not permitted to attend a confidential hearing.<sup>1</sup>

**“Information”** means “security or criminal intelligence information and information that is obtained in confidence from a source in Canada, from the government of a foreign state, from an international organization of states or from an institution of either of them.”<sup>2</sup>

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<sup>1</sup> Paragraphs 78(d) and 78(e) and section 86 of *IRPA*.

<sup>2</sup> Section 76 of *IRPA*.



“**Summary**” is relevant information and other evidence submitted at the confidential hearing and provided by the ID or IAD to the person who is the subject of the application for non-disclosure of information. The summary excludes information or evidence that, in the opinion of the member, would be injurious to national security or to the safety of any person, if disclosed.<sup>3</sup>

## 4. Context

Among the cases heard by the ID and IAD are cases dealing with criminal activity and threats to national security. The Minister’s evidence in these cases may consist of confidential criminal and security intelligence information and other information obtained from a source in Canada or from a foreign government or international body.

Usually, at hearings before the ID and IAD, each party is provided with all the evidence submitted in their case and is given an opportunity to respond to it at the hearing before the tribunal makes a decision. In addition, most ID and IAD hearings are public. However, in cases dealing with criminal activity and threats to national security, the person who is the subject of the hearing will not be provided with all the evidence in their case, if the evidence includes information that would be injurious to national security or the safety of any person, if disclosed. In these cases, a confidential hearing is held to consider the Minister’s application for non-disclosure of information.

The right of the person to know the case he or she has to meet and the need to protect national security and the safety of individuals are fundamental. Under *IRPA*, Parliament has balanced the competing objectives of providing a fair hearing and protecting national security and personal safety. *IRPA* sets out a procedure that allows the Minister to present information and other evidence before the ID and IAD in a manner that ensures its confidentiality and reasonably informs the person of the circumstances of his or her case. This procedure is the application for non-disclosure of information.

### **The Application for Non-Disclosure of Information**

Under *IRPA* Parliament vested responsibility in the ID and IAD to consider the application, and any information where disclosure would be harmful to national security or any person’s safety, at a confidential hearing.<sup>4</sup>

When the Minister makes an application for non-disclosure of information in a detention review or an admissibility hearing before the ID or an appeal before the IAD, these Divisions

<sup>3</sup> Paragraphs 78(g) and 78(h) and section 86 of *IRPA*.

<sup>4</sup> Paragraphs 78(b), 78(d) and 78(e) of *IRPA*.



apply the procedure followed by the Federal Court in security certificate cases and may adapt it as required by the circumstances.<sup>5</sup>

At the confidential hearing, the Minister submits information and other evidence.<sup>6</sup> Information and other evidence that are relevant to decide the person's release, admissibility or appeal cannot be disclosed to the person if, in the member's opinion, doing so would be injurious to national security or to the safety of any person.<sup>7</sup>

If the information and other evidence are relevant and cannot be disclosed, the member accepts the application and provides the person with a summary. The summary must enable the person to be reasonably informed of the circumstances giving rise to the application. The person is given an opportunity to be heard and to respond at their detention review, admissibility hearing or appeal.<sup>8</sup>

The ID may decide the detention review or admissibility hearing, and the IAD may decide the appeal, based on relevant information and other evidence that cannot be disclosed, if a summary is provided to the person.<sup>9</sup>

The ID and IAD decision is not based on information and other evidence submitted at the confidential hearing if:

- The member determines that the information or evidence is not relevant;
- The member concludes that the relevant information or evidence should be part of the summary but the Minister disagrees; or
- The Minister withdraws the application.

In these cases, the member returns the information and other evidence to the Minister.<sup>10</sup>

<sup>5</sup> Sections 78 and 86 of *IRPA* and Rule 41 of the *Immigration Division Rules*.

<sup>6</sup> Sections 76, 78, and 86 of *IRPA*.

<sup>7</sup> Paragraphs 78(b), 78(e), 78(g) and 78(h), and section 86 of *IRPA*.

<sup>8</sup> Paragraphs 78(h) and 78(i) and subsection 86(2) of *IRPA*.

<sup>9</sup> Paragraph 78(g) and section 86 of *IRPA*.

<sup>10</sup> Paragraph 78(f) and section 86 of *IRPA*.



## 5. Policy Statement

The IRB is guided by the following principles in treating applications for non-disclosure of information:

- ◆ Disclosing information to the extent permissible under the law while protecting national security and the safety of persons;
- ◆ Protection of information submitted by the Minister;
- ◆ Adjudicative independence; and
- ◆ Processing that is simple, quick and fair.

### 5.1 *Disclosing information to the extent permissible under the law while protecting national security and the safety of persons*

When the Minister makes an application for non-disclosure of information, the ID or IAD holds a confidential hearing to decide the application.

During the confidential hearing, the Minister must make full and frank disclosure of all the information in his possession, including information that is favourable to the person's case.<sup>11</sup>

When the ID or IAD accepts an application, the summary provided to the person excludes only information or other evidence that, in the member's opinion, would be injurious to national security or the safety of any person.

The obligation of the decision maker to disclose information and other evidence to the person is ongoing.<sup>12</sup>

Guided by these principles, members should consider exercising their discretion to:

- Request that the Minister propose a draft summary, subject to the changes and final approval of the member; and

<sup>11</sup> *Charkaoui, Adil v. M.C.I. and Sol. Gen.* (F.C.A., no. A-603-03), Décary, Létourneau, Richard (concurring), December 10, 2004; 2004 F.C.A. 421.

<sup>12</sup> *Charkaoui, Adil v. M.C.I. and Sol. Gen.* (F.C.A., no. A-603-03), Décary, Létourneau, Richard (concurring), December 10, 2004; 2004 F.C.A. 421.



- **Examine, from time to time, previous or any new information and other evidence submitted by the Minister to determine whether additional information or evidence can be disclosed.**

### **5.2 Protection of information submitted by the Minister**

**The ID and IAD must ensure the confidentiality of information that if disclosed would be injurious to national security or the safety of any person.<sup>13</sup>**

**In addition, the IRB handles classified and protected information according to the *Government Security Policy*. The IRB provides appropriate facilities and takes measures to safeguard persons, information and assets. Only IRB personnel with the appropriate security clearance or reliability status are authorized to deal with applications for non-disclosure of information.**

### **5.3 Adjudicative independence**

**A person's right to a fair hearing includes the right to be heard by a member who will decide the application for non-disclosure of information independently and impartially.**

**The role of the member as an independent and impartial decision-maker is unchanged even though the person is not present at the confidential hearing. The Minister is required to establish the relevance of the information and other evidence and the reason why it cannot be disclosed.<sup>14</sup>**

**In the person's absence, the member takes an active role at the hearing to ensure full scrutiny of the information and other evidence submitted by the Minister.<sup>15</sup> Members are required to test the evidence, ask probing questions of witnesses, and may request that the Minister make available witnesses to testify concerning the information.<sup>16</sup>**

**Accepting an application does not, in and of itself, dictate the outcome of the detention review, admissibility hearing or appeal. Rather, it simply allows the**

<sup>13</sup> Paragraph 78(b) and section 86 of *IRPA*.

<sup>14</sup> *Sogi, Bachan Singh v. M.C.I.* (F.C., no. IMM-4866-05 and IMM-7355-05), Blais, April 28, 2006; 2006 FC 536.

<sup>15</sup> *Charkaoui, Adil v. M.C.I. and Sol. Gen.* (F.C.A., no. A-603-03), Décary, Létourneau, Richard (concurring), December 10, 2004; 2004 F.C.A. 421.

<sup>16</sup> *Sogi, Bachan Singh v. M.C.I.* (F.C., no. IMM-4866-05 and IMM-7355-05), Blais, April 28, 2006; 2006 FC 536.



**ID and IAD to decide the case based on the evidence received at the confidential hearing and on all other evidence received from the person and the Minister.**

**The ID and IAD do not decide the case based on information or evidence received at the confidential hearing if the information or evidence is irrelevant or if the Minister disagrees with disclosing it in the summary or withdraws the application.<sup>17</sup>**

**Ultimately, the member is responsible for deciding each case based solely on the evidence.**

**Guided by these principles, the ID and IAD will process applications in a manner that maintains and promotes the independence and impartiality of the decision maker.**

#### **5.4 *Processing that is simple, quick and fair***

**The ID and IAD deal with proceedings informally, quickly and fairly.<sup>18</sup>**

**In deciding applications for non-disclosure of information, the Divisions apply the procedure followed by the Federal Court in security certificate cases and modify it if circumstances require. According to Federal Court procedure, a judge examines the information and other evidence quickly - within seven days of the referral of the security certificate.<sup>19</sup>**

**Guided by these principles, the ID and IAD will:**

- **Schedule the hearing of the application for non-disclosure of information within seven days of receiving it unless circumstances require that the application be heard within a different delay. In all cases, the application will be heard as soon as possible. Minister's counsel is expected to be prepared to proceed on the date of the hearing. The ID may schedule the hearing of the application to coincide with the date of the person's detention review.**
- **Schedule admissibility hearings and appeals in which an application for non-disclosure has been made as soon as practicable following the decision on the application.**

<sup>17</sup> Paragraph 78(f) of *IRPA*.

<sup>18</sup> Paragraph 78(c) and section 86 of *IRPA* as well as subsection 162(2) of *IRPA*.

<sup>19</sup> Paragraph 78(d) of *IRPA*.



## 6. Implementation

Member and public service management are accountable for the implementation of this policy. National procedures will be developed and implemented to ensure that the principles of this policy are met. Regional offices will organize their operations in accordance with the requirements of this policy and associated procedures.

The IRB provides continuous training to members and staff in order to support them in fulfilling the IRB's mandate and applying the principles set out in this policy. All IRB personnel receive regular training on relevant legislative provisions, higher court decisions and security policies and procedures.

## 7. Monitoring

Program monitoring and evaluation of this policy will be carried out under the direction of the Operations Committees of the ID and IAD, with the support of the Divisions, Legal Services, and the Operations Branch.

## 8. References

Legislation and Policies:

- ❖ [Immigration and Refugee Protection Act](#), [Privacy Act](#) and the [Access to Information Act](#);
- ❖ [Immigration Appeal Division Rules](#);
- ❖ [Immigration Division Rules](#);
- ❖ [Government Security Policies and Publications](#);
- ❖ [IRB Mission and Vision Statements](#).





## 9. Enquiries

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