

GUIDELINES FOR THE INTERPRETATION OF SECTION 68.1 OF THE *ACCESS TO INFORMATION ACT*

Recommended and drafted by the Guidelines Committee

Purpose of guidelines and Committee

As a news outlet, CBC/Radio-Canada believes strongly in the principles of transparency and accountability. CBC/Radio-Canada subscribes to these principles and wishes to facilitate access to information about the Corporation's administration.

CBC/Radio-Canada believes it is important to set out formal guidelines for the application of the *Access to Information Act's (the Act)* exclusion specific to the Corporation regarding its journalistic, creative or programming activities, to help employees to understand them clearly.

To this end, the Guidelines Committee was struck in the fall of 2010. The Committee is headed by Sylvie Gadoury, CBC/Radio-Canada's Associate General Counsel for Media Law and Coordinator, Access to Information and Privacy. The Committee has the following members:

Marie-Philippe Bouchard – Executive Director, Strategic Planning, French Services

Christine Wilson – Executive Director, Content Planning, English Services

Martine Ménard – Senior Director, Corporate Communications

Marco Dubé – Director, Communications Services and Corporate Spokesperson, Corporate Communications

Peter Hull – Director, Access to Information and Privacy, Legal and Corporate Secretariat

Chantal Amand – Senior Training, Policy and Responsible Officer, Legal and Corporate Secretariat

Geneviève McSween – Legal Counsel, Law Department

The Guidelines Committee has two purposes:

1. To draft guidelines to explain the standards that guide CBC/Radio-Canada in its application of the exclusion provision of the *Act*
2. To serve as a forum for reflection, dialogue and recommendations on how to handle further ad-hoc issues that may arise concerning application of the guidelines

The Guidelines Committee, of course, can only make recommendations. The power to make decisions concerning the application of the exclusion specific to CBC/Radio-Canada belongs to the Coordinator, Access to Information and Privacy, or anyone else to whom the President and CEO of CBC/Radio-Canada may delegate that authority.

Scope of Act

Exemptions and exclusions covering the general right to access to information are defined in the *Act*. Organizations subject to the *Act* may (and sometimes must) cite exemptions and exclusions that result in their refusing to disclose requested information, but certain conditions provided for in the *Act* must be fulfilled. This is true for CBC/Radio-Canada just as it is for the other institutions subject to the *Act*.

An exemption is, however, not the same as an exclusion.

Exemptions and exclusions

Exemptions allow for the protection of certain interests identified by the *Act*, even though the *Act* applies to such information. The *Act* contains two types of exemptions: mandatory and discretionary.

- Mandatory exemptions apply to information that an institution must refuse to disclose when requested, such as private information (concerning a particular person) or information relating to a third party. As a general rule, such information may not be disclosed without the consent of those concerned.



- Discretionary exemptions are those that an institution may decide to invoke, without being obliged to do so. They apply to a wide range of information, especially any that, if disclosed, could prejudice the organization's competitive position, as well as to opinions or recommendations. Generally speaking, an institution that wishes to claim an exemption must prove that it would suffer some harm if it were to disclose such information.

Exclusions are defined as information to which the *Act* simply does not apply. The legislature decided to exclude very little information from the application of the *Act*, but did nonetheless deem that, in certain circumstances, there were interests that trumped the access to information principle. Thus the *Act* provides for only a few clearly defined exclusions, as follows:

1. Published material or material available for purchase by the public
2. Library or museum material preserved for public reference or exhibition purposes
3. Material placed in the Library and Archives of Canada or certain museums by or on behalf of persons or organizations other than government institutions
4. Any information that is under the control of Atomic Energy of Canada Limited (with a few well-defined exceptions)
5. Confidences of the Queen's Privy Council for Canada
6. Information for which a certificate prohibiting its disclosure has been issued under the *Canada Evidence Act*

CBC/Radio-Canada exclusion

The *Act* also contains an exclusion specific to CBC/Radio-Canada:

*68.1 This Act does not apply to any information that is under the control of the Canadian Broadcasting Corporation that relates to its **journalistic, creative or programming** activities, other than information that relates to its general administration.*

Thus, although the *Act* applies to information that relates to its general administration, Parliament decided to exclude information that relates to its "journalistic, creative or programming activities." The *Act* simply does not apply to such information, which would not be disclosed to a requester regardless of whether its disclosure could harm CBC/Radio-Canada.

The exclusion is founded on principles laid out in the *Broadcasting Act*, which recognizes that broadcasters enjoy freedom of expression as well as journalistic, creative and programming independence. As a public broadcaster, CBC/Radio-Canada is no exception, and is specifically mentioned:

*46(5) The Corporation shall, in the pursuit of its objects and in the exercise of its powers, enjoy freedom of expression and **journalistic, creative and programming independence.***

The fact that Section 68.1 of the *Act* uses the same language demonstrates that it was drafted in the same spirit as the *Broadcasting Act*.

This independence granted to CBC/Radio-Canada by the legislator enables the Corporation to make impartial decisions based on *Broadcasting Act* requirements and Canadians' constitutionally protected right to information, without any political or economic influence, or influence from private interests.

The exclusion intended by the legislator therefore safeguards CBC/Radio-Canada's independence and freedom of expression. For example, if the exclusion had not been included, a person under investigation could ask for journalists' files, view their investigative materials, and determine the identity of confidential sources. This is clearly not in keeping with basic journalistic values and freedom of the press, which are essential to a healthy democracy. Likewise, CBC/Radio-Canada programming decisions in the various regions could become public knowledge before they have even been implemented, and the Corporation would be deprived of the latitude needed to make decisions free of influence of any kind.

In making its decisions with regard to its journalistic, creative and programming activities, CBC/Radio-Canada must be guided by public interest and its mandate under the *Broadcasting Act*. When it comes to transparency and accountability, the *Act* specifically stipulates in Sub-section 52(2) that CBC/Radio-Canada "is not required to:



- a) submit to the Treasury Board or to the Minister or the Minister of Finance any information the provision of which could reasonably be expected to compromise or constrain the journalistic, creative or programming independence of the Corporation; or
- b) include in any corporate plan or summary thereof submitted to the Minister [...] any information the provision of which could reasonably be expected to limit the ability of the Corporation to exercise its journalistic, creative or programming independence.”

The legislator therefore clearly intended to protect CBC/Radio-Canada’s journalistic, creative and programming independence.

Applying an exclusion

The Section 68.1 exclusion was drafted with a great deal of latitude in mind, because it applies to *“any information that is under the control of the Canadian Broadcasting Corporation **that relates to its journalistic, creative or programming activities.**”* In a similar fashion, the definition of “programming” as developed by the courts provides just as much latitude, in that *“the word ‘programming’ extends to more than the mere words which go out over the air but the total process of gathering, assembling and putting out the programmes generally.”*¹

Administration, however, is defined in highly specific terms. According to the *Act*, *“information that relates to the general administration of a government institution includes information that relates to expenses paid by the institution for travel, including lodging and hospitality.”*² This precision also guides CBC/Radio-Canada in its interpretation of the exclusion.

Although the *Act* and current jurisprudence clearly allow for wider interpretation of the Section 68.1 exclusion, CBC/Radio-Canada believes that it is inappropriate to interpret the language that way, given the legislator’s objectives as regards access to information, and the Corporation’s desire to be transparent and accountable.

¹ *CKOY Ltd c. R.*, [1979] 1R.C.S. 2

² Section 3.1 of the *Act*.

CBC/Radio-Canada therefore based itself on the principles underlying Sub-section 52(2) of the *Broadcasting Act*, along with the general philosophy it proffers with respect to the importance of striking a balance between accountability and transparency, on the one hand, and the public broadcaster's independence on the other. Therefore, when the Corporation is faced with an access to information request for information subject to CBC/Radio-Canada's exclusion, it can disclose it as long as doing so allows it to maintain its journalistic, creative and programming independence.

In analyzing whether or not to disclose information, one must consider the overall context rather than fencing it in by approaching analysis on a case-by-case basis. When in doubt regarding application of the *Act's* Section 68.1 exclusion, CBC/Radio-Canada will give preference to disclosure, based on the above mentioned principle.

The effect of voluntary disclosure

Disclosing information does not make it subject to the *Act* and does not necessarily render information of a similar nature subject to the *Act* in future. Analysis will therefore continue to be based on context, as described above.

Definitions and examples

Based on these principles, for the purposes of CBC/Radio-Canada, the definitions for the terms used in section 68.1 of the *Act* include, but are not limited to, the following :

Journalistic activities: Activities covered by the *Journalistic Standards and Practices* adopted by CBC/Radio-Canada. They include all steps involved in gathering, processing (writing, editorial decisions, analysis, editing, etc.) and disseminating information in any format and on any platform; this also concerns the development of policies governing such activities.

Administration Examples (non-exhaustive)	Journalism Examples (non-exhaustive)
<ul style="list-style-type: none"> • Journalists' positions and salary scales • Camera purchase costs 	<ul style="list-style-type: none"> • Editorial decisions regarding subjects covered • Journalists' files (research, sources, investigative methods) • Footage

Creative activities: Research, development and manufacture of goods or content for or connected to potential or eventual programming, including steps preliminary to such programming.

Administration Examples (non-exhaustive)	Creation Examples (non-exhaustive)
<ul style="list-style-type: none"> • Creation of logos unrelated to programming (corporate) • PowerPoint presentations created for administrative purposes • Corporate videos 	<ul style="list-style-type: none"> • Creation of programming-related logos • Creation of costumes and sets • Writing of scripts or synopses • Pilot projects

Programming activities: Research, analysis, planning, selection, acquisition, financing, production, postproduction, scheduling, promotion, and distribution of content in any format and on any platform. This applies, among other things, to content that has not been selected for use, as well as to the development of policies governing such activities.

Administration Examples (non-exhaustive)	Programming Examples (non-exhaustive)
<ul style="list-style-type: none"> • Advertising revenue (except for product placement in shows) • Spending on purchase of transmission equipment • Contract for signal broadcast (RDI, CBC News Network, etc.) • Costs of corporate communications activities 	<ul style="list-style-type: none"> • Programming schedule • Program budget • Minutes of programming meetings • Licences (broadcasting rights) • Spending on advertising for a specific program

Some information may fall into more than one or more of these categories (journalism, creation, programming). For instance, certain information may be related to both creation and programming or to journalism and programming. Conversely, certain information might not be excluded under the journalism heading, for example, but could be excluded because it is related to programming activities.

And some information categorized as administrative may be exempt under a provision of the *Act*. For instance, the Corporation can redact information pertaining to third parties and information that, once disclosed, could hamper CBC/Radio-Canada’s ability to compete.



Procedure applicable to CBC/Radio-Canada's Access to Information Office

1. The final decision as to exclusion under section 68.1 of the *Act* is up to the Coordinator, Access to Information and Privacy, to whom the President of CBC/Radio-Canada has delegated that authority, or anyone else to whom the President may delegate that authority.
2. When, after reading an access to information request the person mentioned in the preceding paragraph concludes that the requested information is excluded from application of the *Act* in its entirety by virtue of section 68.1, the department in question must, according to the Access to Information Commissioner's recommendations, provide it to the Access to Information Office regardless. However, in the event that the research time exceeds five hours, we must clearly inform requesters of this fact when we ask for the additional payment stipulated in the *Act*. Requesters must also be informed that, despite their having paid the additional amount provided under the *Act*, they will likely receive no information.
3. If information requested under the *Act* seems to be excluded under section 68.1, but the matter is not perfectly clear, the department in question must provide it to the Access to Information Office for processing according to the usual procedure.
4. If a requested document contains both information potentially excluded under section 68.1 of the *Act* and information covered by the *Act*, the document must be provided to the Access to Information Office for processing according to the usual procedure.