



The Committee for Justice in Canada
B'NAI BRITH CANADA
Le comité pour la justice au Canada

Supplement Brief to Mandating Public Disclosure of Records Regarding Nazi War Criminals and Establishing a Public Archive of Canada's Holocaust Records

May 25, 2023

I. Introduction

This is a supplement to the February 14, 2023 brief submitted by B'nai Brith Canada ("B'nai Brith") to the Standing Committee on Access to Information, Privacy and Ethics (the "Committee"), for the Committee's study of the *Access to Information Act*, RSC 1985, c. A-1 ("AIA").

In its February 2023 brief (and April 18, 2023 testimony before the Committee), B'nai Brith recommended that the Committee consider amendments to the AIA to mandate disclosure of records relating to the history of Canada's responses to Nazi war criminals who moved to Canada after World War II. B'nai Brith also urged the Government of Canada (the "Government") to create a publicly accessible digital archive of all Holocaust materials possessed or controlled by the federal institutions.

This supplement addresses an error in B'nai Brith's brief and provides additional detail in response to several questions from Committee members to B'nai Brith's witnesses, at the Committee's April 18 meeting.

II. Correction regarding scope of records covered by B'nai Brith's proposed amendments

At page 8 of its February, 2023 brief, B'nai Brith stated that its proposed amendments are aimed at removing all exemptions from the Government's general duty to disclose records under the AIA, "with respect to records relating to Nazi war criminals in Canada **and to Holocaust records more generally.**" (Emphasis added.)

The highlighted part of that statement is incorrect. The proposed amendments attached to B'nai Brith's brief only cover records relating only to Nazi war criminals (and their collaborators) in Canada.¹

That said, B'nai Brith continues to believe that the Government should create a public archive of all Holocaust materials, in *unredacted* form, as discussed in subheading (2) of part V (page 9) of B'nai Brith's brief.

¹ The scope of B'nai Brith's proposed amendments is correctly stated in the bullet item on page 2 of B'nai Brith's brief. (See also subparagraphs (1)-(3) of proposed new AIA sections 19(3) and 26.1 in Appendix A of the brief.)

III. The IHRA Definition of Holocaust Materials

In its brief, B'nai Brith recommended that, for purposes of defining the scope of "Holocaust materials" to put in a public archive, the Government should use the "Working Definition of Holocaust-Related Materials" in guidelines published by the International Holocaust Remembrance Alliance ("IHRA").²

At the Committee's April 18 meeting, Michael Barrett, Member of Parliament for Leeds-Grenville-Thousand Islands, asked B'nai Brith about the scope of that IHRA definition. B'nai Brith echoes Mr. Matas' oral response that the IHRA definition is quite "elaborate," "specific," and "detailed" (spanning three pages of the IHRA guidelines document). By way of further explanation, the IHRA definition covers records relating to

- A period from the end of WWI to the close of displaced persons camps in the 1950s (including later war crimes trials and testimonials), with a core period of 1933-1945; and,
- The legal, political, social, economic and cultural status of groups that became subject to state policies and/or persecution during the core period, with the "most important" subtopic being the "systematic and state-sponsored murder of approximately six million Jews and approximately half a million Roma in Europe and North Africa by the Nazi Regime and collaborators."

The IHRA definition also covers a wide variety of physical types and formats of materials, from textual records, to films, photos, and recordings.

As Mr. Matas testified, Canada is a member of IHRA and was a signatory to the foundational 2000 Stockholm Declaration. In clause 7 of that Declaration, the participating countries committed to "take all necessary steps to facilitate the opening of archives to ensure that all documents bearing on the Holocaust are available to researchers."

At the April 18 meeting, Mr. Matas also stated that an archive of Holocaust records is "there at Library and Archives Canada but the[records] are not accessible, so we can't see them." B'nai Brith clarifies here that, while Library and Archives Canada ("LAC") has many records that fall within the IHRA definition of Holocaust materials, it is unclear what efforts have been made (by LAC and other government institutions) to *ensure* that LAC has received all of the Government's Holocaust materials. It is also uncertain whether sufficient efforts have been made to ensure that all such materials are being diligently preserved.

IV. The United States' model for Holocaust Archives

In the April 18, 2023 meeting, Lisa Hepfner, Member of Parliament for Hamilton Mountain, asked B'nai Brith's witnesses whether the US had a "more open system" with respect to public access to Holocaust materials and what lessons Canada could learn from that system. In response, Messrs. Matas and Wenig provided brief references to a US legislatively mandated declassification program. B'nai Brith provides more detail on this program below.

Adopted by Congress in 1998, the *Nazi War Crimes Disclosure Act*³ required the US President to establish the "Nazi War Crimes Interagency Working Group" ("IWG"). That body was led by high-level officials from key Executive Branch agencies—the Defense and Justice Departments, State Department, and the FBI, CIA, and National Security Council—as well as the US' Archivist and head of the US

² B'nai Brith's February 2023 brief, p. 9 n. 37. The IHRA guidelines are available online at: <https://www.holocaustremembrance.com/resources/reports/guidelines-archival-documentation>.

³ Public Law 105-246, 5 USC § 552 (statutory notes and related subsidiaries).

Holocaust Memorial Museum, and three public members. (Congress later expanded the IWG’s mandate to include records relating to Japanese war crimes.⁴)

The act was prompted in large part by public frustration with US intelligence agencies’ vague responses to questions about those agencies’ use of Nazi war criminals in their post-WWII intelligence.⁵ Accordingly, the act required the IWG to essentially collect, declassify, and make public Nazi (and Japanese) war criminal records held by US agencies, and to report its interim and final results to Congress.

The IWG’s work, which occurred between 1999-2007, was the “largest congressionally mandated, single-subject declassification effort in history”. This program resulted in the declassification and public release of over 8.5 million pages of records which “had very little prospect of being released in a timely manner through routine declassification mechanisms.”⁶

The IWG’s work and its enabling legislation were both problematic in some respects, including insufficient funding and personnel, lack of clarity on the IWG’s authority, controversial disclosure exemptions, and inefficiencies in declassifying records on a single-subject basis.⁷ These shortcomings are worth further study so they can be avoided in Canada. Nevertheless, in a preface to the IWG’s final report, one of the IWG’s acting chairs described the group’s work as “tremendously successful.” As noted by former US Congresswoman Elizabeth Holtzman, who served as a public member of the IWG, the “work of declassification, of finding and telling the truth, even these many years later, begins in a small way to repair the damage of our government’s indifference to the crimes of the Nazis.”⁸ In the IWG chair’s view:

[h]istorians, political scientists, journalists, novelists, students, and other researchers will use the records the IWG has brought to light for many decades to come.⁹

Among other things, the IWG’s effort showed that “disaster does not befall America when intelligence agencies declassify old intelligence operations records.”¹⁰

Appendix A attached is a more detailed description of the *Nazi War Crimes Disclosure Act*.

The US’ declassification program is not the only relevant model. B’nai Brith is aware that other countries—at least, the Netherlands and France—and the Vatican, have also made significant efforts to archive Holocaust-related records. A recent New York Times article discusses a Dutch initiative to open a confidential archive of 32 million documents relating to Nazi war criminals and collaborators. The article also notes that: in 2015, France opened a large archive of records relating to the prosecution of war criminals in military and maritime tribunals and the Vichy government’s collaboration with Nazis; and, in 2020, the Vatican released 2,700 Holocaust-related files.¹¹

⁴ *Japanese Imperial Government Disclosure Act*, Public Law 106-567 (Dec. 27, 2000)

⁵ IWG, *Final Report to Congress* (April 2007) (“IWG Final Report”), p. 77, online: <https://www.archives.gov/iwg/reports/final-report-2007.html>.

⁶ *Ibid*, pp. 1 and 77.

⁷ *Ibid*, Chapter 1, p. 2 and Chapter 6, pp. 77-80.

⁸ *Ibid*, p. 93.

⁹ *Ibid*, p. xi.

¹⁰ *Ibid*.

¹¹ Nina Siegal, “Dutch to Make Public the Files on Accused Nazi Collaborators,” New York Times (April 25, 2023), online: <https://www.nytimes.com/2023/04/25/arts/dutch-files-accused-nazi-collaborators.html>.

Canada should study all these archival programs to develop its own robust archive of Holocaust records.

APPENDIX A

DETAILED SUMMARY OF THE US NAZI WAR CRIMES DISCLOSURE ACT

The *Nazi War Crimes Disclosure Act* starts by creating an interagency working group (“IWG”) consisting of the Director of the US’ Holocaust Museum, the Historian of the State Department, the Archivist of the US, the heads of any other agency the President considered appropriate (or their delegates), and up to four public members.¹²

The act then obligated the IWG to, within one year of the act’s passage, “locate, identify, inventory, recommend for declassification, and make available to the public at the National Archives and Records Administration, all classified Nazi war criminal records of the United States,” and to “take such actions as necessary to expedite the release of such records to the public...”¹³ (Congress extended the IWG’s charter several times, to 2007.)

The act defines “Nazi war criminal records” broadly as “classified records or portions of records” relating to any person who the US Government “has grounds to believe” “ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion” during the period from March 1933 to May 1945, “under the direction of, or in association with” the Nazi Government of Germany or another government occupied by or collaborating with the Nazi Government. The act’s definition also includes records relating to any “transaction” in which “assets” were “taken from persecuted persons” during this same period and under the same authorities.¹⁴

The act also required the IWG to “release” the collected Nazi war criminal records “in their entirety,” subject to several exemptions when agency heads have discretion to withhold records. One of these exemptions is when a released record would be a “clearly unwarranted invasion of personal privacy”; the other exemptions relate essentially to *present* national security threats or foreign relations concerns.¹⁵

The act places a high bar on agencies’ use of an exemption to withhold a Nazi war criminal record. The act declares a “presumption” that release of these records is in the “public interest,” and specifically precludes an agency from withholding a record based on an exemption unless the agency finds that its release “would be harmful to a specific interest identified” in the exemption. The act also requires agencies who use an exemption to withhold a record to report that instance to the appropriate Congressional committees, including the Senate Judiciary committee.¹⁶

Finally, the act provides a special, fast track for “persecuted” persons (as defined under the act’s definition of “Nazi war criminal records”) to obtain Nazi war criminal records under the US *Freedom of Information Act* (“FOIA”). That act requires each agency to enact regulations providing for “expedited processing” of records requests in cases where a requestor shows a “compelling need” for the requested records (and in any other circumstances determined by the agency).¹⁷ Under section 4 of the *Nazi War Crimes Disclosure Act*, any persecuted “requester” of a Nazi war criminal record is deemed to have a “compelling need for such record,” for purposes of FOIA’s expedited processing provisions.

¹² Pub. L. 105-246, § 2(b)(2).

¹³ *Ibid*, § 2(c).

¹⁴ *Ibid*, § 3(a).

¹⁵ *Ibid*, § 3(b)(1) and (2).

¹⁶ *Ibid*, § 3(b)(3).

¹⁷ 5 USC § 552(a)(6)(E).