Joint Submission to the Standing Committee on Access to Information, Privacy and Ethics and First Nations Experience with Access to Information

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Prepared by Directors of Claims Research Units from Across Canada

Comments on Government Proposals to Revitalize Access to Information

Who We Are

This brief has been prepared by and on behalf of Claims Research Units (CRU's), Tribal Councils, individual First Nations and other First Nation associations from across Canada who are involved in accessing information from the federal government and its departments and agencies. We are mandated by First Nations to document and develop evidence related to their history, claims, disputes, and grievances.

What Are Our Interests?

Our interest in accessing federal records is at least two fold:

First, as provided for in paragraph 8(2)k of *The Privacy Act*, "researching or validating the claims, disputes or grievances of the aboriginal peoples of Canada," the federal government has treaty, fiduciary and legislative obligations to First Nations, including the administration of Reserve lands and assets. Past government conduct gives rise to these claims, disputes and grievances, some of which these fall under existing policy frameworks (ie., Specific and Comprehensive claims)[1] while others are the subject of litigation or other forms of dispute resolution.

The majority of the evidence related to these claims, disputes, and grievances is in the possession of the federal government, which is also a party to these disputes. This puts First Nations in a vulnerable situation *vis a vis* the release of federal records relating to their claims, disputes, and grievances; and it puts the federal government in a potential conflict of interest, based on its ability to control what information is made available - information that relates directly to Crown conduct which may have given rise to the claims, disputes and grievances. We often rely on the *Access to Information Act* and the Office of the Information Commissioner, to obtain access to materials that are necessary to document and to resolve our claims, disputes, and grievances.

Secondly, First Nations and their representative organizations also access federal government records for public policy purposes, and to obtain access to information on matters directly affecting their political, social, economic and cultural interests. The reason for this category of request is that, often, federal departments and agencies are reluctant to freely provide information on their activities as they relate to First Nation interests. Just with respect to specific claims policy and procedures, we have submitted over 37 Access to Information and

[1] Specific Claims relate to the Government of Canada's lawful obligations owed to First Nations with respect to its management of First Nations' lands, resources, assets, and entitlements. Comprehensive claims relate to First Nations' assertions of unextinguished Aboriginal title and rights within their traditional territories.

Privacy (ATIP) requests and 9 complaints to the Office of the Information Commissioner (OIC) in the past 16 months. Our involvement in the ATIP process has demonstrated to us that there are fundamental issues regarding the transparency of the federal government and the dissemination of information involving specific claims policies and procedures.

Taking the abovementioned into account, it can be seen that First Nations' interests in obtaining access to federal records are qualitatively different than for other sectors of the Canadian public. Our special circumstances are reflected in paragraph 8(2)k of the *Privacy Act*, which provides that:

> [...] personal information under the control of a government institution may be disclosed […] to 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 the aboriginal peoples of Canada.

Since 1982, various federal departments and agencies (in particular, Indigenous and Northern Affairs (INAC), and the Library and Archives Canada (LAC)) have put into place special measures to provide for ease of informal access to federal records which relate to First Nation claims, disputes or grievances. The rule of thumb has been, that informal requests should prevail, and formal requests are only required in special circumstances.

Rolling Back the Right of Access

Despite our particular rights and interests, and despite the legislative and policy measures that have been put into place to facilitate access to federal records for First Nations - particularly with respect to claims, disputes or grievances - over the years we have seen a gradual rolling back of access. The past ten years have seen the imposition of arbitrary measures, seemingly intended to prevent or needlessly restrict First Nations from obtaining information to which they have a right. What could once be done through informal requests now has to be done by way of formal ATIP requests. Rejected and delayed requests have increased significantly, leading to more complaints to the OIC, and more costs and delays for all parties.

Part of this was a result of across-the-board measures taken by the federal government to restrict access to information. Access staff at various departments was cut, and staff that remained seemed to operate in a manner that prevented the free flow of information. Wait times turned from weeks to months to years. Requests for information that clearly did exist were often met with the initial response that "no such records exist."
But part of it was also directed squarely at First Nations and their representative organizations. The experience of the Truth and Reconciliation Commission and the challenges they faced in obtaining the release of federal records on the residential schools is a case in point.

In this regard, we have found that the OIC has been instrumental in ensuring that First Nations can continue to exercise their right of access to information, and to assist us when we face government obfuscation. This has been done by way of investigations, mediation, and judicial review. The OIC plays an essential role in ensuring that we can avail ourselves of our right of access.

Recent Moves to Improve Access

Given the experience of the past ten years, we are encouraged by the apparent change in direction that the current federal government has signalled. This can be seen in the mandate letters that went from Prime Minister Trudeau to members of cabinet, including to the Honourable Scott Brison, President of the Treasury Board, and Minister Carolyn Bennett, Minister of Indigenous & Northern Affairs, which included the following instructions:

> No relationship is more important to me and to Canada than the one with Indigenous Peoples. It is time for a renewed, nation-to-nation relationship with Indigenous Peoples, based on recognition of rights, respect, co-operation, and partnership.
>
> We have also committed to set a higher bar for openness and transparency in government. It is time to shine more light on government to ensure it remains focused on the people it serves. Government and its information should be open by default.

We also take note of the Treasury Board Secretariat's Interim Directive on the Administration of the Access to Information Act, which was announced on May 5th, 2016, and which has the following objective and results at its core:

> 5.1 Objective
>
> 5.1.1 To establish, across all government institutions, consistent practices and procedures for the processing of access to information requests, including requirements to make every reasonable effort to assist applicants without regard to their identity.
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> 5.2 Expected results
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> 5.2.1 Effective, well-coordinated and proactive administration of the Act in government institutions.
>
> 5.2.2 Complete, accurate and timely responses to requests made under the Act.

These are good words, but they need to translate into tangible action if they are to mean anything. We still find that there are many challenges and barriers to obtaining access to

federal records. Some of these relate to the Act itself, but many of them relate to the policies and procedures established to administer the ATIP matrix. The next section of this brief will highlight some of these problems.

Continuing Barriers to Access

1. Informal *vs* Formal ATIP Requests

It should be stated at the outset that our general practise has been to first make an informal request for information to the department or agency holding the records in question. In the past, this was usually enough to ensure that timely and fulsome access would be provided. INAC did have a policy in place in the 1990s that almost all requests should be handled informally. However, over the past number of years, many departments (including INAC) appear to have moved away from that approach, and instead require that formal ATIP requests be made. This increases bureaucracy, cost, and potential delays. One notable exception to this rule has been LAC, which has recently worked closely with the research community to ensure that our right of access is facilitated.

Our preference is that the majority of requests should be dealt with informally at all departments, including at INAC.

2. Timeliness

Informal requests can take months to process. Formal requests do not seem to fare much better. Federal departments are legally required to fulfill a formal ATIP request within 30 days, but delays are so common that expectations of timely responses are very low. We have observed that some departments simply seek continuing delays possibly in the hope that requesters will lose interest and give up. At Parks Canada, for instance, delays have stretched from months into years. At INAC, delays are the norm, though not as lengthy. Delays are at least partly related to a lack of staffing, but also because of a lack of understanding on the part of departmental staff about our research requirements and the nature of our work. Significant time is often spent educating ATIP and departmental personnel to justify the basis of a request.

Although our preference is to try and obtain records by way of informal request, at least formal ATIP requests require notice of extension. The OIC and those submitting an ATIP request must be notified of an extension to fulfill a request if "a request involves a search for or through a large number of records and would unreasonably interfere with operations." The OIC states that generally, if the fulfilment of a request involves more than 1000 pages of information, an extension is warranted. In the case of formal ATIP requests, we regularly receive notices that INAC is extending its deadline to fulfill our requests. These extensions range in length from 30 days to 90 days beyond the original 30 day mandated deadline, and the vast majority of documents returned to us within the extension time line range between 10 and 300 pages.

3. Overly Broad Interpretation & Application of Exemptions

In many cases federal departments, including INAC, seem to rely on an extremely broad and arbitrary interpretation of the Act's exemptions, in order to prevent information from being released. This is the case with 8(2)k requests as well as with public policy requests. Some of the exemption categories which are particularly and increasingly common are:

- Section 14 - Federal provincial relations
- Section 19 - Personal information (notwithstanding paragraph 8(2)k of the *Privacy Act*)
- Section 20 - Third party information
- Section 21 - Advice/Recommendations
- Section 23 - Solicitor Client Privilege (even when the documents in question may be 50 or 100 years old)

In cases where the same records are requested more than once, there does not appear to be any consistency in the exemptions which are invoked, between departments, or even within the same department. Files which we were able to access fully 10 or 20 years ago are now sliced and diced, with many documents screened out, based on exemptions that were not relied on before. Part of the reason for increased reliance on these exemptions may be a lack of understanding about what is required for First Nations to document their claims, disputes or grievances. Significantly, there is growing mistrust among First Nations that the exemptions are being invoked to prevent or frustrate First Nations in their efforts to document their claims, disputes or grievances. This perception certainly undermines Prime Minister Trudeau's stated goals with respect to renewing his government's relationship with First Nations.

According to statistics provided by the OIC, many of the exemptions which are invoked will fail if the refusal is appealed to the OIC. This strongly suggests that departmental and ATIP staff are using the exemptions too broadly, costing all parties time, money and, ultimately, good will.

4. Consultations with Third Parties

There are two issues here. One is the delays that can result from the requirement to consult third parties. Quite often, formal and informal access requests are delayed because of the need to consult third parties (sometimes other First Nations, sometimes provinces or municipalities). The delays can stretch for quite some time, delaying response times.

Other times, there does not appear to be adequate reason to need to consult the third party, but nonetheless this is invoked by ATIP or departmental program staff, leading to delay.

5. Incomplete Response / No Access to Physical Files / Destruction of Information

In order to carry out proper research - especially for claims or litigation - one must review the entire file in question, in order to establish the context, and then make decisions about what is relevant. In some cases, when formal ATIP requests are made, departmental staff go through a

variety of files and decide for themselves what is relevant, then compile a response on CD ROM with documents that might come from a number of sources, re-ordered and re-paginated. The requester is often given no idea as to the origin or provenance of the materials provided, and whether, or how much, material has been excised, and is not given access to the physical files themselves. Key materials can be missing, or not provided. This kind of partial disclosure is an example of a process which may make things simpler for the bureaucracy, but which compromises the research process, and frustrates the ability of First Nations to properly document their claims, disputes or grievances.

Another related issue concerns the destruction of information, or efforts to avoid creating evidence of decision making. We have found, by way of ATIP requests and also by way of disclosure from federal civil servants, that records have in some cases been wilfully destroyed - either to reduce the responsibility of maintaining data, or in order to prevent information from being accessed through the ATIP process. We have also heard that some decision making is being done in the absence of written or electronic records - again, to avoid such decisions leaving a trail. This is of obvious concern, at a general level, but also when the decisions in question relate directly to the claims, disputes or grievances of First Nations, or the federal government's management of such claims, disputes and grievances. We point out that in all of these circumstances, the federal government is in a potential conflict of interest since it is often the cause of the claim, dispute, or grievance which is being documented.

6. Increased Bureaucracy and Centralization, Lack of Communication

As we understand it, the Treasury Board Secretariat sets policy with respect to ATIP across government. Over the past ten years we have noticed many changes to ATIP process and policy, in particular at INAC. In the past, requests for information were handled by staff who were familiar with what was required to document claims, disputes or grievances. There was personal contact and an ability to discuss, explain and problem solve. Now, procedures have become far more centralized and bureaucratic. There is a lack of personal contact, and the people who are often dealing with information requests do not have a clear understanding of the nature and scope of what is required when documenting First Nation claims, disputes or grievances. There are few, if any, opportunities to explain and problem solve. As already explained, this has led to delays, incomplete responses, complaints to the OIC, and ultimately, additional costs and delays for all parties.

One example involves the Quebec regional office of INAC. It used to be that requests for information held at the regional office would be dealt with by regional office staff directly, in communication with the requester. Sometime in the past year, procedures were changed unilaterally without any form of consultation. Now, regional office files must be ordered online, from INAC Headquarters in the National Capital Region. There is no opportunity to speak with someone, have personal contact, or clarify issues. This approach seems entirely focussed on solving the bureaucracies' problems, without actual consideration of the additional costs, needs, or right of access, of the requester.

In this context, we are alarmed at the suggestion, found on the Treasury Board Secretariat (TBS) website, which the federal government intends to migrate to "a simple, central website where Canadians can submit requests for information." Our experience with respect to the nature and scope of the research that we carry out, and our right of access to federal records, is that centralization only benefits the bureaucracy, and works against us. A "one size fits all" portal cannot and will not respect our right of access.

7. Treasury Board Secretariat & Federal Departments: Lack of Consultation

Despite all of the changes that have been brought about by the TBS over the past decade regarding to the administration of the Act, and their impact on the work that we do, as far as we are aware, during this period there has been no effort to actually consult with First Nations, their associations, or the Claims Research Units - either by Treasury Board, or by INAC. No one has consulted us about the impacts of these changes, the increased costs and inefficiencies that they have created, or about what works and what does not work.

Considering the costs and inefficiencies brought about by these changes (some outlined above), this is of concern. Taking into account the commitments this government has made to a renewed relationship with First Nations and open government, it appears that there is now a chance to improve this dismal track record, and develop a meaningful and substantive approach to the matter of First Nation access to federal records.

We appreciate being able to intervene in this public consultation regarding modernization of the Act, but we feel that, going forward, TBS and federal departments need to do a lot more to consider and address, on an ongoing basis, the particular requirements associated with our right of access to information that relates to our communities, and their claims, disputes or grievances. This can begin by engaging with the organizations that have a mandate to document the claims, disputes and grievances of the First Nations.

Reccommendations

We want to take this opportunity to provide some constructive recommendations - both with respect to legislative change, and with respect to administrative measures associated with implementation of the ATIA. Many of the following recommendations should be acted on regardless of whether or not amendments to the ATIA proceed.

1. Consult

In the preceding section we highlighted the arbitrary and unilateral measures which have been imposed across government with respect to ATIP, in the absence of meaningful consultation. This must change. In the early 1990s, INAC struck a working group on ATIP which proved very

helpful in identifying issues and cooperative problem solving. More recently, LAC has taken very positive moves to listen and act on our needs with respect to ATIP. We think that TBS and INAC should take similar measures. Consultation is needed to develop policies in applying existing regimes, and as new ones are developed.

2. Resources

Some (but by no means not all) of the problems encountered with ATIP relate to deficiencies in resourcing - too few staff to process requests.

3. Train Staff

Many of the people who process requests - even at INAC - have little or no knowledge of what is required to document the claims, disputes and grievances of First Nations. They also appear to be largely unaware of the potential for conflict of interest where files which are requested relate to federal acts of commission or omission that may have given rise to claims. This affects their treatment of requests, their screening of files etc., and it creates inefficiencies, delays and extra costs for all parties. With other departments, the lack of understanding is even more pervasive. This even relates to staff understanding of the purpose and scope of paragraph 8(2)k of the *Privacy Act*. Training should involve input from First Nation associations that are directly involved in the work of documenting claims, disputes and grievances.

4. Decentralize and Encourage Human Contact

We are very concerned at government's apparent attempts to increasingly centralize and de-humanize the ATIP process. In our experience this approach undermines the ability of First Nations to obtain timely and fulsome access to federal records. As far as we can see, TBS' suggestion that all ATIP requests be migrated to "a simple, central website where Canadians can submit requests for information" would be a disaster for us. Centralization and automation works against First Nation rights of access to federal records.

Information Commissioner's Recommendations

We have taken note of the recommendations made by Madame Suzanne Legault, Information Commissioner of Canada, with respect to modernizing the access to information regime.

We are aware that the federal government has floated the idea that there should be a ministerial veto over planned new powers for the information commissioner.[2] We protest this in the strongest terms. It defeats the purpose of having an arm's length arbiter and it leaves the system open to abuse for political ends. Over the past ten years we have had a lot of experience with what can happen when Ministers abuse their powers to the prejudice of First

[2] http://www.huffingtonpost.ca/2016/05/15/ministerial-veto-could-trump-information-czar-s-planned-new-powers_n_9982078.html

Nations. It is not in the interests of Canadians generally, or First Nations, for this kind of interference to be permitted; furthermore, we explicitly recommend that the OIC have the power to fully review Cabinet confidence complaints.

We support all of the recommendations of the Office of the Information Commissioner inasmuch as they affect our work and our right of access. In particular we would highlight the following as especially relevant to our right of access:

> Recommendation 2.2
> The Information Commissioner recommends establishing a duty to report to Library and Archives Canada the unauthorised destruction or loss of information, with a mandatory notification to the Information Commissioner and appropriate sanctions for failing to report.
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> Recommendation 3.1
> The Information Commissioner recommends that extensions be limited to the extent strictly necessary, to a maximum of 60 days, and calculated with sufficient rigour, logic and support to meet a reasonableness review.
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> Recommendation 3.6
> The Information Commissioner recommends that a third party is deemed to consent to disclosing its information when it fails to respond within appropriate timelines to a notice that an institution intends to disclose its information.
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> Recommendation 4.5
> The Information Commissioner recommends that, where consultation has been undertaken, consent be deemed to have been given if the consulted government does not respond to a request for consent within 60 days.
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> Recommendation 4.6
> The Information Commissioner recommends requiring institutions to disclose information when the originating government consents to disclosure, or where the originating government makes the information publicly available.
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> Recommendation 4.7
> The Information Commissioner recommends replacing international and federal-provincial "affairs" with international and federal-provincial "negotiations" and "relations."

Recommendation 4.22
The Information Commissioner recommends explicitly removing factual materials, public opinion polls, statistical surveys, appraisals, economic forecasts, and instructions or guidelines for employees of a public institution from the scope of the exemption for advice and recommendations.

Recommendation 4.23
The Information Commissioner recommends reducing the time limit of the exemption for advice and recommendations to five years or once a decision has been made, whichever comes first.

Recommendation 4.24
The Information Commissioner recommends imposing a 12-year time limit from the last administrative action on a file on the exemption for solicitor-client privilege, but only as the exemption applies to legal advice privilege.

Recommendation 5.1
The Information Commissioner recommends strengthening oversight of the right of access by adopting an order-making model.

Recommendation 5.2
The Information Commissioner recommends providing the Information Commissioner with the discretion to adjudicate appeals.

Recommendation 5.3
The Information Commissioner recommends that the Act provide for the explicit authority to resolve appeals by mediation.

Recommendation 5.4
The Information Commissioner recommends that any order of the Information Commissioner can be certified as an order of the Federal Court.

Recommendation 7.1
The Information Commissioner recommends that obstructing the processing of an access request (or directing, proposing or causing anyone to do so) be added as an offence under the Act.

Recommendation 7.2
The Information Commissioner recommends that section 67.1 prohibit destroying, mutilating, altering, falsifying or concealing a record or part thereof or directing, proposing or causing anyone to do those actions.

Recommendation 7.3
The Information Commissioner recommends that failing to document or preserve a decision-making process with intent to deny the right of access (or directing, proposing or causing anyone to do so) be prohibited under the Act.

Recommendation 7.4
The Information Commissioner recommends that failing to report to Library and Archives Canada and/or notify the Information Commissioner of the unauthorised destruction or loss of information (or directing, proposing or causing anyone to do so) be prohibited under the Act.