

National Claims Research Directors

The Honourable Marc Miller
Minister, Crown-Indigenous Relations and Northern Affairs Canada
Sent via email only: marc.miller@parl.gc.ca

April 26, 2023

Open Letter: Calling on Minister to Address Outstanding Issues Related to Informal Access to Information Procedures That Continue to Stall First Nations' Specific Claims

Dear Minister Miller,

The National Claims Research Directors (NCRD) writes to thank you for your letter of March 31, 2023, in response to our February 15th open letter to you and Minister Lametti. While we are encouraged by the constructive tone of your reply, there remain areas of acute concern to First Nations that must be addressed immediately so that research on First Nations claims can proceed.

As you know, our February 15th letter brought to your attention new requirements being imposed by your department (CIRNAC) and Indigenous Services Canada (ISC) on specific claims researchers applying for informal access to departmentally held records for the purpose of validating First Nations' historical claims against the federal government. Since January 2023, under the guise of meeting Canada's obligations under the *Privacy Act*, researchers applying for informal access to departmental records have been asked to disclose an astonishing and legally unjustifiable level of detail to Canada about First Nations' claims in order to receive approval by the ATIP Director for both departments and proceed through the access process. Our letter emphasized that researchers are already authorized by Band Council Resolutions to access First Nations' records held by CIRNAC and ISC, and that section 8(2)(k) of the federal *Privacy Act* permits the disclosure of personal information for the purposes of validating the historical claims of First Nations. We also highlighted that as Canada is a defendant in First Nations' claims, disclosing the level of detail to the federal government as part of an access to information request may harm a First Nation's interests and the just and fair resolution of their claims. Our letter urged you and Minister Lametti to withdraw the new informal access requirements, stressing that the unilateral imposition of the requirements violates Canada's obligations to uphold the *United Nations Declaration on the Rights of Indigenous Peoples* (UN Declaration), its fiduciary obligations to First Nations, and the honour of the Crown.

Many of the points you raise in your letter are positive, such as your explicit recognition that First Nations require full access to relevant records to validate their claims, the expressed commitment to address issues raised in the open letter through the Claims Research Unit-Canada Access to Information Working Group, and your reassurance that researchers can share records with the First Nations who provided them with the authorization to obtain them. However, there are several outstanding issues that continue to impede research on First Nations historical claims:

- Your statement that “the existing 8(2)(k) form process will remain in place until our teams have had further discussions” is ambiguous since CIRNAC/ISC have developed new forms and have

been sending out the new 8(2)(k) requirements included in those forms to researchers since January. We ask that you *please clarify explicitly and immediately* whether “the existing 8(2)(k) form process” refers to the process in place prior to January 2023, or the one introduced in late January and currently in use by CIRNAC and ISC analysts. We note that when asked to clarify this point at an April 12th meeting of the BC Specific Claims Working Group, your response was vague. We are currently receiving email inquiries asking us to confirm interpretations of your comments, and these interpretations are varied and at odds with one another. Clarification of this matter is essential.

- There is no indication that any instructions have been provided by your office to departmental staff, such as ATI analysts, to process researchers’ ATIP authorizations and record requests currently stalled at ATIP headquarters without additional information being provided. Repeated email queries by researchers to departmental staff asking about the status of their informal requests, many of which are months old, are not being answered. As a result, research remains stalled, compromising First Nations’ access to justice, and jeopardizing funding to claims research units since annual funding applications are assessed against demonstrated research progress. An explicit clarification of what procedure is in place now must be communicated to all departmental staff and clear instructions given to release records without researchers having to provide additional information so that research on First Nations claims can resume.
- Your letter does not address significant concerns regarding communications between your office and other department officials who misinformed/misled your staff about this issue when our open letter was first released. The Director of ATIP (Tammy Martin) and the individual overseeing information management and the informal ATI process at ISC (Remy Payette) were not copied to your letter and we have no indication about how they are directing their staff to address informal access requests. We can only infer that the instructions are to not release file lists or records since researcher inquiries are being met with silence. Canada’s lack of consistency and truthfulness in this regard fails to uphold the honour of the Crown and undermines the reconciliatory objective of resolving specific claims.
- Your letter did not provide any explanation as to why the new requirements being imposed on researchers who submit 8(2)(k) forms for approval through the informal access process are necessary for Canada to comply with its obligations under the *Privacy Act* (which has not changed). We note that you were asked this question directly at the April 12th BC Specific Claims Working Group meeting and deferred to your staff. The attempt to clarify this issue by ATIP Director Tammy Martin, who suggested researchers are confusing the right of access to information with privacy rights, is patronizing and baffling since a) the National Claims Research Directors made a lengthy submission to the review of both federal acts in the fall, focussing on the relationship between the two pieces of legislation and their impact on the resolution of specific claims, and b) Ms. Martin provided no concrete examples of how researchers were confusing the two. Since this is the rationale for Canada’s recent actions, First Nations must be informed about how and why the former process is at odds with Canada meeting its legal obligations, particularly in light of Canada’s inconsistent implementation of such procedures across federal institutions, such as Library and Archives Canada, where the 8(2)(k) process has not changed.

This is an extremely complex and serious issue with many implications for First Nations, including access to justice and governance. Understanding the root of these recent developments and resolving this issue is of critical importance to First Nations.

It is imperative that CIRNAC and ISC ATIP staff comply with the federal government's legal obligations under the UN Declaration and uphold the honour of the Crown. The new requirements associated with the informal access to information process are unlawful, compromise the resolution of First Nations claims, and further disadvantage them in a process that is inherently unfair. Research is currently stalled, and we require immediate clarification of the issues outlined above, prior to the reconvening of the joint working group established to address these crucial issues. We look forward to receiving your response to this letter by May 15, 2023, ahead of the Our Gathering meeting scheduled to take place that week in Vancouver.

Sincerely,

National Claims Research Directors

CC/

David Lametti, Minister of Justice and Attorney-General

Patty Hajdu, Minister of Indigenous Services

Stefan Matiation, Director General, Specific Claims Branch, CIRNAC

National Chief RoseAnne Archibald, Assembly of First Nations

Assembly of First Nations Chiefs Committee on Lands Territories and Resources

BC Specific Claims Working Group

Senate Standing Committee on Indigenous Peoples BC

BC Assembly of First Nations

First Nations Summit