Access to Information Review Indigenous-specific What We Heard Report

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Message from the President of the Treasury Board

Indigenous peoples expect the government to be open and transparent. To help meet that expectation, our government modernized the Access to Information Act in 2019 and introduced a requirement to review the Act every 5 years to ensure it remains relevant and effective.

During engagement on the 2019 modernization of the Act, Indigenous governing bodies and organizations clearly noted that an Indigenous-specific engagement process was critical to addressing their unique issues and concerns with access to information. This report is a summary of what we have heard from the current Access to Information Review's Indigenous-specific engagement process, as well as earlier conversations with stakeholders. I want to thank all participants for sharing their views about the access to information system, starting with the fundamental need to update the definition of 'aboriginal government' in the Act to be inclusive of Indigenous governments and governing bodies.

Recognizing that the right of access to information is one that requires our constant attention and a commitment to continuous improvement, we will continue to work closely with Indigenous peoples, governing bodies and organizations. Our commitment to Indigenous engagement reflects the Government's pledge and obligation to advance reconciliation and renew the relationship with Indigenous peoples, based on the recognition of rights, respect, cooperation and partnership.

I invite you to read this report to learn about access to information issues unique to Indigenous peoples, and to find out about proposals to create meaningful and sustainable improvements in the current system.

Executive Summary

This report summarizes input received from Indigenous peoples as part of the review of the federal access to information regime (ATI Review). It includes input from the Bill C-58 consultations in 2017, as well as input from participation in the initial engagement stages of the *Privacy Act*

Modernization led by the Department of Justice, and further input from Indigenous peoples and organizations during the ATI Review's engagement process from spring to fall of 2022.

The engagement process prioritized inclusion and respect and was run on a parallel track to the rest of the ATI Review's engagement. Also, to better coordinate efforts and reduce engagement fatigue, the Department of Justice and Treasury Board of Canada Secretariat (TBS) recognize the importance of collaborating on common issues and implications under both Acts as appropriate, to improve the ATI and Privacy regimes for Indigenous peoples. In line with the Government's commitment to reconciliation and the *United Nations Declaration on the Rights of Indigenous Peoples Act* (UN Declaration Act), TBS offered technical and financial assistance to support participation of Indigenous peoples.

Throughout the engagement period, three key themes emerged: Indigenous data sovereignty, Indigenous right of access and the definition of 'aboriginal government' in the *Access to Information Act* (ATIA).

- **Indigenous Data Sovereignty:** A priority of First Nations, Inuit, and Métis peoples is to have control over records and data pertaining to them and support for Indigenous data sovereignty initiatives.
- **Indigenous Right of Access**: The operational and legislative barriers preventing the right of access to important records for Indigenous peoples.
- **Definition of 'aboriginal government'**: The ATIA's current definition of an 'aboriginal government' is limited and excludes most Indigenous governments and organizations.

These key themes are presented and further discussed in this report along with the summarized feedback from the Indigenous engagement process.

The report concludes with recommendations for engagement based on input received from Indigenous peoples during the Indigenous-specific engagement process.

About the Review

The ATI Review was launched in June of 2020 and is the first legislated review of the ATIA since the legislation was updated in 2019 with Bill C-58 coming into force. In 2016, the Government of Canada committed to reviewing the ATIA and this commitment followed in two phases:

- Phase 1: Targeted amendments to the ATIA under Bill C-58, *An Act to amend the Access to Information Act and the Privacy Act* and to make consequential amendments to other Acts; and
- Phase 2: A comprehensive review of the *Access to Information Act*

The ATI Review responds to a new requirement to review the Act every five years, with the first review beginning within one year of Bill C-58 receiving Royal Assent. The ATI Review consists of two components: engagement and issues analysis. Per its mandate, the ATI Review focuses on multiple streams of issue examination, including:

- reviewing the legislative framework;
- identifying opportunities to improve proactive publication to make information openly available;
- assessing processes and systems to improve service and reduce delays; and
- furthering understanding of Indigenous access to information issues.

The President of the Treasury Board must table her report to Parliament on the outcome of the ATI Review. Her report is informed by input received during the engagement processes and the analysis of issues identified in

the streams outlined above.

About this Report

This report builds upon the ATI Review's December 2021 Interim What We Heard Report, which summarized input received during the public engagement process. This Indigenous-specific What We Heard Report summarizes input received from Indigenous peoples during the ATI Review.

This report also builds on input on ATI issues received from representatives of 14 Indigenous governments and organizations during the initial engagement stages of the modernization of the *Privacy Act*.

In addition, this report brings forward outstanding issues raised by Indigenous peoples in the engagement and legislative process around Bill C-58 and not addressed in that first phase of the review of the ATIA. In the context of these engagement activities, Indigenous peoples provided vital feedback about their communities' unique access to information issues through submissions, bilateral meetings and testimonials to both the House of Commons Standing Committee on Access to Information, Privacy and Ethics (ETHI) and the Standing Senate Committee on Legal and Constitutional Affairs (LCJC).

Input from Indigenous peoples through the Bill C-58 engagement process was essential to the understanding of Indigenous access issues and provided the necessary foundation for the ATI Review's Indigenous engagement. This ATI Review was significantly informed by Indigenous peoples' feedback and submissions gained throughout the Indigenous engagement process, as summarized in this report.

What follows is an interpretation of what was heard from Indigenous peoples. The information provided was summarized and contextualized. Readers are invited to reflect on the written submissions from Indigenous governments and organizations in their own words (see Annex A.)

The Commitment to Indigenous Engagement

The purpose of the ATI Review's dedicated Indigenous engagement was to learn from the experiences of Indigenous peoples with the ATIA and access to information processes and systems. By gaining this perspective, TBS looks to improve the ATI regime to better reflect the respective needs and expectations of Indigenous peoples in Canada.

TBS is grateful to all Indigenous governments and organizations who shared their perspectives to help broaden the team's understanding of the ATI regime and its impact on Indigenous peoples. Informed by this input, TBS is looking forward to working together to take meaningful steps to improve Indigenous peoples' access to information.

In line with preferences expressed by Indigenous peoples, Indigenous engagement followed a parallel track to the public engagement process. In April 2022, the Government of Canada launched an open process by which Indigenous groups and representatives could engage in the Review and make submissions to inform the Government's work to improve the way access to information works. The discussions that followed improved the Government's understanding of the importance of ensuring that relevant institutions are involved in all discussions to better coordinate engagement efforts. This was seen to help ensure that issues are uniformly addressed.

In response to this improved understanding, the ATI Review team coordinated closely with the Department of Justice's *Privacy Act* Modernization team due to the linkages between both Acts.

In line with the Government of Canada's commitment to reconciliation and the recent coming into force of the UN Declaration Act, TBS offered technical and financial assistance to support the participation of Indigenous peoples.

The Government of Canada is committed to respecting and supporting Indigenous self-determination in Canada and recognizes that more time is needed to better understand unique access to information issues in this context. This engagement will continue as part of a broader, ongoing conversation between the Government of Canada and Indigenous peoples.

Key Themes

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Indigenous Data Sovereignty

Background

Data sovereignty pertains to the administration and governance of data. It concerns data collection and storage, and who can access it. Indigenous data sovereignty relates to the objective of First Nations, Inuit and Métis peoples to have control over records collected from and pertaining to them.

In the spirit of self-determination, Indigenous governments and organizations seek to create, collect, and make use of culturally relevant information that reflects their worldviews, needs and priorities. Indigenous

peoples maintain their right to assert decision-making powers over how Indigenous data and Traditional Knowledge, which refers to knowledge systems embedded in the cultural traditions of specific Indigenous peoples, are used. This involves the transfer of Indigenous records from federal institutions to locales approved by Indigenous organizations. These might include archival institutions, or the Indigenous organizations and governing bodies to which these records relate.

The location of records has several implications, where changes in location may present complexities. For example, there are ethical implications for federal bodies who are effectively gatekeepers of records related to Indigenous peoples and raises practical concerns for Indigenous using access to information to navigate fragmented federal holdings. These implications are of critical importance, as Indigenous peoples rely on records for various purposes, including:

- For the purpose of advancing claims pursuant, but not limited to, historical grievances such as those related to residential schools and child welfare, commercial and trade-related rights or modern treaty negotiations;
- For facilitating decision-making, as these records can include subject matter relating to the economic, social or cultural interests of an Indigenous government; and,
- For the purpose of accessing genealogical information and data held by the Government in order to establish status.

What We Heard

> “Data sovereignty is an element of self-determination and self-government. Access to data and information about a nation’s citizens, lands, waters, economies, natural resources, etc., is critical to good governance and sustainable development. Without data and information, governments are unable to determine what policies and programs may be needed or the impact they might be having. Good governance requires reliable data and information.”
>
> — Joint Advisory Committee on Fiscal Relations

The concept of Indigenous data sovereignty was raised during the Bill C-58 engagement process and continued to be a prominent theme during the ATI Review. While preferred mechanisms for achieving Indigenous data sovereignty differ, there was support for the federal government’s current initiatives to advance Indigenous-led data governance strategies and data capacity-building as laid out in both Indigenous Services Canada’s (ISC) and Crown-Indigenous Relations and Northern Affairs Canada’s (CIRNAC) departmental plans of 2022-23, Budget 2021, and Statistics Canada’s work in support of these activities.

In an individual submission tabled during Parliamentary Committee review of Bill C-58, the National Claims Research Directors (NCRD) argued that Indigenous records should not be held by federal institutions like INAC, (Indian and Northern Affairs Canada, now known as Crown-Indigenous Relations and Northern Affairs Canada and Indigenous Services Canada, respectively), but rather by Library and Archives Canada (LAC), which is better positioned to properly store these records. In support of transferring records to LAC, the NCRD asserted that there is no clear business value for INAC to retain such records.

> “Claims researchers also cite the documented departmental practice whereby Crown-Indigenous Relations retains records deemed to have “business value to the department” instead of transferring them to Library and Archives Canada. What “business value” actually entails has never been explained by the department. Consequently, tens of thousands of boxes of records remain at department offices or warehouses, compromising the physical integrity of the materials and First Nations’ access to a complete historical record.”
>
> — National Claims Research Directors and British Columbia Indian Chiefs

During C-58 consultations, the Claims Research Units (CRU) said the need to deal with records transfers is urgent. In their testimony, they suggested that federal institutions may be destroying files, while making policy or program decisions without appropriate evidence. Many of these records, they claimed, may relate to legal proceedings the Crown is party to.

During the ATI Review, many Indigenous governments and organizations expressed the need for support in achieving Indigenous data sovereignty initiatives. The First Nations Information Governance Centre (FNIGC) was funded under Budget 2018 Reconciliation initiatives to develop and release their *First Nations Data Governance Strategy*, which was published during the course of the ATI Review. The FNIGC emphasizes that data sovereignty is part of the right to self-government.

FNIGC and other Indigenous governments and organizations also expressed concern about overcollection of data by the Crown. The FNIGC recommends establishing a standard of reasonableness that is contextually sensitive to weigh the implications of data collection against a public interest. Indigenous governments and organizations have expressed a need for support in achieving data sovereignty.

> “Canada’s information management regime is in breach of the Crown’s moral and legal obligations to respect First Nations rights to self-determination and self-government. A system-wide, First Nations driven overhaul is required to accommodate First Nations data sovereignty premised on a Nation-to-Nation relationship”
>
> — First Nations Information Governance Centre

Accessing Government of Canada services, including through the access to information regime, can require institutions to verify the identities of service recipients. Indigenous requesters make the point that data sovereignty issues include respect for, and alignment with, how Indigenous governments and organizations do this. For example, the Manitoba Métis Federation noted that Canada collects census data about Métis people, where the basis for identifying as Métis in the Census includes an option for self-identification. This data is then made publicly available and used to make important decisions such as social transfer payments, or program and service funding. Self-identification for Métis may not meet Métis identification standards.

> “This is unacceptable- the MMF has rigorous standards by which Métis identity is determined and verified, and Canada and those receiving federal funding must abide by these standards across all programs and services, including those related to ATI and the collection of data on and about the Red River Métis”
>
> — Manitoba Métis Federation

Overall, the importance of Indigenous data sovereignty has been highlighted by several Indigenous governments and organizations who assert that federal institutions need to recognize the Indigenous

information they hold belongs to the Indigenous peoples it describes. Many Indigenous participants focused on increased control over Indigenous records - personal and collective information relative to their community or governing body. Further, some organizations recommended increased Indigenous authority over records disclosure and access, while others supported records transfers to archival institutions or their respective Indigenous communities. Indigenous participants, including the Assembly of First Nations and the FNIGC, noted this issue goes beyond the ATIA and *Privacy Act* and requires a holistic review of other relevant federal legislation, including the *Statistics Act*, the *Library and Archives Canada Act*, and the *Personal Information Protection and Electronic Documents Act*.

> "To respect First Nations' data sovereignty, the information management regime amendments must go far beyond those issues and beyond the Privacy Act and Access to Information Act. A system-wide review of Canada's information management regime is required"
>
> — First Nations Information Governance Centre

Indigenous participants also asked for a comprehensive review by the Government of Canada, in consultation and cooperation with Indigenous peoples, of all federal legislation relevant to the ATI and privacy regimes to ensure these laws are consistent with the UN Declaration, in accordance with section 5 of the UN Declaration Act. This input is also being brought forward into the renewal of the Government of Canada Data Strategy currently underway.

Indigenous Right of Access

Background

Federal institutions hold many records of critical importance to Indigenous peoples. These records can provide the foundation for Indigenous peoples, groups, and governing bodies to negotiate with the Crown, represent citizen concerns, pursue commercial interests and plan for the future of their governments and communities. The types of Indigenous records and information held by federal bodies can include:

- Historical records relating to treaties
- Socio-economic data
- Specific information (for example information such as membership lists, information about reserves, commercial interests and trade rights, registration under the *Indian Act*)
- Cultural and social information
- Traditional Knowledge and practices

Indigenous peoples and organizations often need to make requests under the ATIA and informal requests to access this information. However, in doing so, they noted that they face a series of barriers to access, including but not limited to the following:

- Delays in receiving information
- Records and information that are of poor quality and sometimes unreadable
- Difficulty dealing with ATI and Privacy (ATIP) offices in the context of the specific and time-sensitive needs of Indigenous requesters
- Inconsistent application of exemptions, leading to gaps in information
- Lack of basic access to internet, information technology systems and infrastructure

What We Heard

> “Accurate personal information plays a pivotal role in addressing areas such as: registration under the Indian Act; locating children in government care; locating and re-establishing contact with those taken in the 60s Scoop or who have survived the legacy of residential schools; addressing Truth and Reconciliation Commission recommendations; collective claims; and protecting Red River Métis rights and interests in relation to infrastructure developments”
>
> — Manitoba Métis Federation

The right of access to information plays an important role for Indigenous peoples. It was noted in multiple submissions to the ATI Review and, due to specific community needs as noted above by the Manitoba Métis Federation, this also includes access to personal information, either through the ATIA or the *Privacy Act*. During Bill C-58 consultations, the Indigenous Bar Association asserted that the ATIA and specific provisions of the *Privacy Act* are intended to protect and support increased access to information for Indigenous researchers and claimants working on historical grievances and treaty negotiations. The Indigenous Bar Association further stated that despite this, Indigenous ATIP system users share common issues of delays, poor quality records and inconsistent application of exemptions that are consistent with the experiences of non-Indigenous requesters.

> “…First Nations cannot exercise their right to redress for historical grievances if they cannot obtain the supporting evidence the process requires. Neither the legislative remedies under the Privacy Act or the Access to Information Act since the passing of Bill C-58 provides claims researchers with full access to the records they need.”
>
> — National Claims Research Directors and Union of British Columbia Indian Chiefs

The ATI regime presents various barriers for many Indigenous requesters. Some of the issues that follow are also reported by non-Indigenous requesters. Indigenous organizations, however, note the 'differential impact' for their communities compared to others, since Indigenous peoples rely on ATI requests for critical, time-sensitive and delicate purposes.

> "Barriers to accessing information present a serious barrier to access to justice: this is particularly problematic because the government is theoretically representative of, and democratically obligated to be responsive to, the claimants. It just seems obtuse, unjust and undemocratic to obfuscate information in that [the claims] context"
>
> — National Claims Research Directors

These issues are longstanding and were raised consistently throughout the Bill C-58 legislative process, most notably from the CRU, and also in a joint submission from the Indigenous Bar Association, Union of British Columbia Indian Chiefs (UBCIC), and NCRD. They remain a key element of many current submissions, stating the Indigenous right of access has been recognized in the *Privacy Act* and through federal jurisprudence.

Specifically, organizations pointed to paragraph 8(2)(k) of the *Privacy Act* which states personal information may be disclosed to certain Indigenous governments, associations and Indian Bands, or to any person acting on their behalf for the purpose of: "researching or validating the claims, disputes or grievances of any of the aboriginal peoples of Canada." They also cite *Canada (Information Commissioner) v. Canada (Minister of Industry)*, [2006] 4 FCR 241, 2006 FC 132 to further validate that Indigenous peoples have a legislated right of access. At paragraphs 45-46 of this decision, the Federal Court states: "This duty to negotiate in good faith, which is an

implied part of section 35, means that the Crown disclose census records in the possession of the Crown which are relevant to the proof of Aboriginal title. (…) It would be absurd and wrong if the Crown had the evidence the Aboriginal people required to prove their land claim, but the Government was entitled to suppress it."

This conclusion is consistent with Indigenous organizations' assertion of the Crown's potential conflict of interest in legal proceedings. The Crown is a respondent or defendant in many land claims, grievances or dispute resolution processes with Indigenous peoples. Indigenous participants noted that this poses potential challenges as the Crown holds records necessary for Indigenous researchers to establish evidence in these proceedings and ultimately decides which records are disclosed.

The NCRD and UBCIC have also raised the issue of chronic delays in obtaining records. These delays ranged from months to years, in contrast to the service standards at LAC, where users can fill out a form to request access to documentation a minimum of 10 days before a planned visit. This process is simpler than going through an ATIP request and the NCRD and UBCIC have identified Library and Archives Canada as their institution of choice to house Indigenous records.

The NCRD and UBCIC note the issue of poor-quality records, alongside inadequate facilities at federal institutions to review records. The NCRD and UBCIC state that federal institutions such as Crown-Indigenous Relations and Northern Affairs Canada and Indigenous Services Canada lack the appropriate resources to support researchers. Indigenous peoples pointed to possible issues with staffing and appropriate training on the legal imperative and the intricacies of land claims research requirements as reasons for delays they have experienced in receiving records, underlining the importance of a well-resourced ATIP office.

Record quality and completeness are equally an issue for Indigenous organizations. The CRU also raised concerns that the records they receive are only partially disclosed. They and others reported a persistent issue of overly broad and inconsistent application of exemptions. Organizations shared how records available in previous years became more heavily redacted in successive request response(s) under an application of exemptions not previously invoked, reducing trust in nation-to-nation relations. Partially disclosed information is compounded by the institution's officials deciding what information is relevant to a request, and providing that information out of sequence. These factors can result in missing information on key materials.

Some Indigenous peoples expressed a preference for the informal process over the formal process for submitting an ATI request. Indigenous peoples felt the formal process is more impersonal, increasingly costly and bureaucratic. This leads to a more centralized and digitized system less responsive to their needs. In contrast, the informal process facilitates personal contact, and enables collaborative problem-solving between Indigenous peoples and ATIP analysts on the types of issues outlined here.

This perspective was emphasized in a CRU submission during the Bill C-58 engagement process: "centralization only benefits the bureaucracy and works against us. A 'one size fits all' portal cannot and will not respect our right of access." The Tsawwassen First Nation shared this concern around centralization during the ATI Review, highlighting "difficulty filling out forms, following phone chains, and generally interacting with the bureaucracy," making the formal process exceedingly challenging. Dealing with the bureaucracy can also be especially difficult for Indigenous requesters who are seeking information on estranged or deceased loved ones.

A submission prepared by the Union of British Columbia Indian Chiefs, NCRD and the Indigenous Bar Association during the Bill C-58 engagement process recommended the establishment of an Indigenous Review Officer (IRO) working alongside the Information Commissioner, with the power to investigate complaints from Indigenous governments concerning the federal ATI system. The IRO would have the ability to review decisions where Indigenous peoples' access requests were denied, make recommendations on improving Indigenous access to information, and meaningfully responding to Indigenous complaints. Indigenous peoples stated clearly that the establishment of any such office would have to be co-designed with Indigenous peoples. The Manitoba Métis Federation has suggested the possibility of having specific IROs for First Nations, Inuit, and Métis peoples.

> "Canada must recognize its duty of full disclosure and uphold the honour of the Crown by working in full partnership with First Nations to develop a mechanism of independent oversight that ensures First Nations' full and timely access to records held by federal government institutions for purposes of substantiating historical claims."
>
> — National Claims Research Directors and Union of British Columbia Indian Chiefs

During the course of the Review, participants proposed establishing an independent mechanism to assist Indigenous requesters. It was suggested that such a mechanism could provide translation services for Indigenous languages and assist those with barriers to access, at no cost to the requester.

Definition of Aboriginal Government

Background

The *ATIA* allows the federal government to protect information obtained in confidence from other governments, including from an 'aboriginal government.' This provision is a mandatory, class-based exemption which assures the specified governments that information provided in confidence to the Government of Canada will be protected.

The ATIA's current definition of 'aboriginal government' is limited to nine First Nations government and councils, as well as band councils as defined in the *Indian Act*. Many Indigenous governments and organizations exercising governmental functions are excluded from the definition, and the information protections it confers.

Discussions related to either the ATI Review or the *Privacy Act* Modernization (led by the Department of Justice) often trigger considerations of provisions or concepts relevant to both.

In the context of ATI Review, Indigenous participants raised certain points of intersection between the ATIA and the *Privacy Act*. Specifically, these linkages include the shared definition of 'aboriginal government' found in subsections 8(7) of the *Privacy Act* and 13(3) of the ATIA.

We note that although the same definition of 'aboriginal government' is found in both Acts, its application differs. In the ATIA, the definition serves as protection from disclosure of records that were obtained in confidence from "an aboriginal government." In contrast, the *Privacy Act* definition relates to paragraph 8(2)(k), which authorizes government institutions to disclose personal information to certain Indigenous entities, including those defined under the *Privacy Act* as an 'aboriginal government' for the purpose of researching the claims, disputes or grievances of any of the "aboriginal people of Canada." Further, paragraph 8(2)(f) allows the

disclosure of personal information to specific Indigenous governments, on the basis of an agreement or an arrangement between the parties, for the purpose of administering or enforcing any law or for lawful investigations.

Also, section 19 of the *Privacy Act* sets out an exemption providing that any personal information obtained in confidence from certain organizations and governments, including Indigenous governments, has to be protected from disclosure when an individual requests access to it. However, unlike subsection 13(3) of the ATIA, this exemption does not refer to the definition of 'aboriginal government.' Rather, the exemption applies to a smaller list of Indigenous entities.

Issues pertaining to the definition of 'aboriginal government' and access to personal information under the *Privacy Act* more generally are the subject of ongoing engagement with Indigenous participants in connection with *Privacy Act* modernization.

What We Heard

> "...these governments have no protection for their confidential records provided to the federal government and its institutions. This omission means that First Nation governments are denied the same recognition and protections that the ATIA gives to all other governments, including municipalities, putting confidential First Nation records and communications at risk despite those First Nations not being subject to the ATIA"
>
> — First Nations Tax Commission

Many submissions during this engagement noted that the narrow scope of the definition of 'aboriginal government' under section 13 of the ATIA presents considerable challenges for Indigenous peoples, impacting daily

operations and interfering with self-determination. Virtually all Indigenous peoples engaged with during the Bill C-58 and the ATI Review engagement processes have been concerned with the current wording of section 13 of the ATIA. Specifically, Indigenous participants asserted that the definition should be amended and expanded in legislation to better reflect the current landscape of Indigenous governance. While there were varying perspectives on how the definition should be improved, general consensus is to expand the definition to better reflect the modern landscape and diversity of Indigenous governance.

Some of the various recommendations for a modernized definition appear below:

- Changing 'aboriginal' in the English terminology to 'Indigenous' to reflect current terminology, and aligning with other modernized legislation
- The Congress of Aboriginal Peoples (CAP) demonstrated support for a more inclusive and broadened definition such as an "Indigenous governing body." This type of definition is found in recent federal legislation including the *Fisheries Act*, and is used among several other Canadian laws, and is sufficiently broad to include, "a council, government or other entity that is authorized to act on behalf of an Indigenous group."
- The Métis National Council (MNC) suggested looking at the 2019 Bills C-91 and 92 which also mention an "Indigenous governing body"
- The FNTC states that the ATIA does not adequately protect information provided to federal government institutions or protect communications between aboriginal governments or organizations exercising governmental functions, and the Government of Canada. They recommend the current definition be deleted and a defined term for 'aboriginal government' be in section 3 of the ATIA.

- The First Nations Finance Authority (FNFA) and the First Nations Financial Management Board (FMB) agreed with expanding the definition to cover different types of governing bodies.
- Multiple organizations explained the diversity of Indigenous governance could be captured in a new definition by recognizing the various legal regimes at play, including the *Indian Act*, modern treaties, and self-government agreements.
- Many participants referred to the definition of Indigenous organizations used in provincial jurisdictions. For example, the shíshálh Nation, the FNFA, and the FNTC used the example of British Columbia where the definition of Indigenous governing entity used under the *Freedom of Information and Protection of Privacy Act* is more inclusive of Indigenous governments and governing bodies.

Indigenous organizations further highlighted how a more accurate definition of 'aboriginal government' would better reflect the Government of Canada commitments to promote self-determination, improve communications, and facilitate nation-to-nation relationships.

> "Often, proponents and the Crown use the term "Indigenous" as a blanket statement when referring to project engagement and/or consultation activities involving the Red River Métis and First Nations. This is not acceptable as the Red River Métis hold the same Constitution Act 1982 Section 35 Aboriginal rights as First Nations and Inuit peoples and should be recognized as a distinct people and not in a pan-indigenous manner"
>
> — Manitoba Métis Federation

Indigenous participants indicated that the current definition of ‘aboriginal government’ has adverse impacts on these objectives. In a legal review prepared by the Indigenous Bar Association, NCRD and the Union of British Columbia Indian Chiefs, the submission concluded that the definition leads to the “differential treatment” of Indigenous requesters compared to their federal, provincial and municipal counterparts whose governments are protected under Section 13 of the ATIA. The current definition risks perpetuating historical discrimination against Indigenous peoples and governments, as noted by Marlene Poitras, Regional Chief for Alberta, Assembly of First Nations. She testified at the Standing Senate Committee on Legal and Constitutional Affairs regarding Bill C-58:

> “A new relationship requires Canada to properly acknowledge First Nation governments while we transition in our own way and at our own pace in order to exercise more fully our right to self-determination. For First Nations who either choose or don’t have a choice but to interact through the Indian Act, it is not Canada’s place to ignore our leadership and our governments.”
>
> — Assembly of First Nations

In addition to facilitating relationship building, the majority of Indigenous peoples explained a broadened definition of ‘aboriginal government’ would provide increased protection of personal and collective Indigenous information shared with the federal government. The First Nations Tax Commission explained that this omission effectively “denie[s] the same recognition and protections that the ATIA gives to all other governments, including municipalities, putting confidential First Nation records and communications at risk.” This puts First Nations information at risk of disclosure as a consequence of their necessary dealings with the FNTC.

On a related note, the scope of protection from disclosure under section 14 and subsection 21(1) of the ATIA was frequently mentioned by Indigenous peoples. Section 14 extends protection to information potentially injurious to federal-provincial affairs, and subsection 21(1) extends protection to advice or recommendations developed by or for governments and their institutions. Neither of these provisions mention ‘aboriginal governments’ and the information they share with the Government of Canada. Different Indigenous governments suggested these sections would benefit from alignment with corresponding provincial and territorial legislation that better protect these communications.

Improving the Engagement Process and Next Steps

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Improving the Engagement Process

In addition to engaging on Indigenous-specific access to information issues, the ATI Review sought feedback on the Indigenous engagement process. Over time, feedback received through engagement with institutions subject to the ATIA also informed the Indigenous engagement process. As this is the first legislated ATI Review since the ATIA was updated in 2019 and engagement remains ongoing, feedback received informs future engagement processes to meaningfully address Indigenous-specific access to information issues.

> “We have been entirely left out of decision-making about how our data and information is managed and used. This legacy has resulted in a lack of trust in Canada’s information gathering and sharing processes among Indigenous communities, as well as the loss of our cultural and historical information”
>
> — First Nation of Na-cho Nyäk Dun

During the Bill C-58 engagement process, Indigenous organizations found the extent of the Canadian government’s consultation with Indigenous peoples insufficient and advocated for improved engagement in future processes. In response to these concerns, TBS committed to specifically engaging with Indigenous peoples and their representative organizations to build an inclusive, respectful, and supportive Indigenous engagement process both informed by best practices and guided by feedback from Indigenous peoples.

In response to an initial outreach to Indigenous organizations, the Land Claims Agreements Coalition (LCAC) requested the ATI Review directly engage with modern treaty and self-government holders, echoed by additional advice from the Tsawwassen First Nation, Manitoba Métis Federation, and Assembly of First Nations, emphasizing the importance of connecting with First Nations, Inuit and Métis directly. This outreach was undertaken, and invitations to participate in the ATI Review were sent to 36 modern treaty and self-government holders.

As explained by the FNIGC, an improved ATI regime should enable First Nations to have input into access decisions which impact them, and therefore Indigenous engagement processes should explore ways to increase the participation of First Nations in the ATI system.

Following the launch of the ATI Review in 2020, the UN Declaration Act came into force on June 21st, 2021. The UN Declaration Act provides a framework for federal implementation of the UN Declaration, including statutory to take measures to ensure federal laws are consistent with the Declaration, develop an action plan, and report annually – all in consultation and cooperation with Indigenous peoples. These obligations inform both the ongoing engagement practices and the feedback received during the process to date.

Different Indigenous entities referred to the UN Declaration Act in their submissions. For example, in their June 2022 submission, the First Nation of Na-Cho Nyäk Dun provided several recommendations for strengthening the ATIA's alignment with the UN Declaration, including a free, prior, and informed consent-based approach to Canada's use and disclosure of information about Indigenous peoples, an expanded definition of 'aboriginal government', and an expansive understanding of confidentiality and consent. The shíshálh Nation advocated for an expansion of the definition of 'aboriginal government' to include all Indigenous governments for alignment with article 31 under the UN Declaration, the right to control and protect Traditional Knowledge.

It should be noted that feedback on Indigenous access to information issues was received from non-Indigenous entities as well. Through engagement with other institutions subject to the ATIA, some departments acknowledged that the ATIA neither adequately protects Indigenous Knowledge, nor accommodates Indigenous needs for government information. Such needs include consultations, control of records, and language considerations. Institutions heavily involved in the Government of Canada's Indigenous reconciliation efforts were most vocal about these

issues and will continue to be engaged for their insight and expertise in in the ongoing work to improve Indigenous peoples' access issues in partnership with Indigenous peoples.

Other initiatives that were not highlighted during the Indigenous engagement process were also analysed to provide additional perspectives. For example, as reported by the Inuit Tapiriit Kanatami, the National Inuit Data Management Committee has begun work on an Inuit Data Strategy and implementation plan.

Next Steps

This Indigenous-specific What We Heard Report presents a summary of the feedback received from Indigenous peoples, organizations and governments during the Bill C-58 consultations and the ATI Review and highlights the important themes of Indigenous Right of Access, Definition of Aboriginal Government and Indigenous Data Sovereignty that emerged from these engagements. However, it marks only the beginning of the discussions and collaborations needed between the Government of Canada and Indigenous governments, organizations and peoples. TBS remains committed to seeking out perspectives from all Indigenous governments, organizations, and peoples.

This report is a step towards understanding the solutions and tools needed to ensure the necessary and rightful access to records and data that Indigenous peoples require to resolve claims, seek redress and move further into their self-governing identities.

The ATI Review team once again wants to thank all Indigenous governments, organizations and peoples who shared their time and efforts to help provide important perspectives of the ATI regime and its impact on

Indigenous peoples in Canada. The ATI Review team extends their genuine appreciation for all Indigenous governments, organizations and peoples that have contributed to this first full review of the ATIA.

Annex A: Input and Submissions

Submissions to the ATI Review

The submissions to the ATI Review are all available online. For a full understanding of what we heard during the Indigenous engagement process, we recommend reviewing each unique submission. Thank you to everyone who took the time to contribute to the Review.

First Nations Tax Commission

The First Nations Tax Commission (FNTC) provided a submission to the ATI Review on December 18th, 2020 advocating for ATIA modernization extending protections for confidential information and intergovernmental communications to additional aboriginal governments and aboriginal organizations.

First Nations Financial Management Board (FMB)

The First Nations Financial Management Board (FMB) provided a submission to the ATI Review on September 14th, 2021, including a suggested amendment to the definition of 'aboriginal government', a concern around statutory prohibition against disclosure, a request to be treated similarly to entities listed in the ATIA's sections 20.1-20.3, and voiced their concerns over Digital Policy and Services' failing to follow up from an invitation to consult.

First Nations Tax Commission (FNTC)

The First Nations Tax Commission (FNTC) provided a submission to the ATI Review on September 15th, 2021, detailing their previous recommendation to amend section 13 of the ATIA, a new recommendation for an ATIA manual, and their concerns over the application and scope of the ATIA's section 20. As per the FNTC's request, this submission replaced their earlier submission from December 18th, 2020.

shíshálh Nation

The shíshálh Nation shared a submission to the ATI Review on May 4, 2022, detailing current issues with section 13 of the ATIA and how the definition of 'aboriginal government' should be improved.

Grand Council of the Crees

The Grand Council of the Crees (Eeyou Istchee) Cree Nation Government reached out to the ATI Review team on June 1st, 2022, concerning the 2018 amendment to the *Access to Information Act* recognizing the Cree Nation Government and Cree First Nations of Eeyou Istchee as 'aboriginal governments' and how modification of this amendment would require Cree Consent.

First Nation of Na-Cho Nyäk Dun

The First Nation of Na-Cho Nyäk Dun, a self-governing First Nation with Traditional Territory covering areas of both Yukon and the Northwest Territories, provided this submission on June 30th, 2022, with 8 concerns and recommendations to the ATI Review.

First Nations Finance Authority (FNFA)

The First Nations Finance Authority, a statutorily created and independent organization providing financing to Indigenous governments, provided this submission on June 30th, 2022, focusing on the definition of "Indigenous

entity" and permissive exceptions to disclosure to the ATI Review.

First Nations Tax Commission (FNTC)

The First Nations Tax Commission shared a list of potential amendments to the ATIA with the ATI Review on June 27th, 2022, that aims to ensure Indigenous governments and governing bodies have access to the same protection as other governments and institutions.

The Cowichan Tribes First Nation

The Cowichan Tribes First Nations reached out to the Treasury Board of Canada Secretariat on July 27, 2022, to indicate their support for the First Nations Tax Commission's June 2022 submission.

The Assembly of First Nations

The CEO of the Assembly of First Nations corresponded with the Secretary of the Treasury Board of Canada Secretariat on October 11, 2022, and highlighted the importance of consulting and cooperating with Indigenous peoples to satisfy the requirements of free, prior, and informed consent as well as any review of legislation needing to comply with the UN Declaration Act to promote First Nations data sovereignty.

The Manitoba Métis Federation

The Manitoba Métis Federation provided a review of proposed changes to the ATIA. This submission details the challenges the Manitoba Métis Federation government and citizens as well as the community of Red River Métis have experienced in trying to access, secure, and protect important information.

The National Claims Research Directors and Union of British Columbia Indian Chiefs

The National Claims Research Directors and Union of British Columbia Indian Chiefs provided a submission to the ATI Review that uses a human rights lens to examine how Canada's control of access to information held by federal institutions impacts the resolution of First Nations' historical grievances against the Crown.

Input Received During Bill C-58

Input provided to the House of Commons Standing Committee on Information, Privacy and Ethics (ETHI)

- Directors of Claims Research Units – June 29th, 2016
- National Claims Research Directors – October 16th, 2017
- British Columbia Assembly of First Nations – October 16th, 2017

Input provided to the Standing Senate Committee on Legal and Constitutional Affairs (LCJC)

- First Peoples Law – October 25th, 2018
  *Please note that the submission shared by the Directors of Claims Research Units can be found in this PDF document compiling submissions to Bill C-58.
- Indigenous Bar Association – October 25th, 2018
  *Please note that the submission shared by the Directors of Claims Research Units can be found in this PDF document compiling submissions to Bill C-58.
- National Claims Research Directors – November 1st, 2018
  *Please note that the submission shared by the Directors of Claims Research Units can be found in this PDF document compiling submissions to Bill C-58.
- Marlene Poitras, Regional Chief for Alberta, Assembly of First Nations – November 1st, 2018

- Hon. Renée Dupuis – November 8th, 2018
- British Columbia Specific Claims Working Group – November 30th, 2018

Input provided to Treasury Board Secretariat

- First Nations Financial Management Board – June 6th, 2016
- John D Hamilton - 2016

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