National Claims Research Directors

The Honourable Marc Miller
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Open Letter: Calling on Canada to Withdraw New, Egregious Informal Access to Information Requirements that Compromise First Nations' Access to Justice

Dear Ministers Miller and Lametti,

The National Claims Research Directors (NCRD) writes to you urgently regarding new measures being imposed on First Nations claims researchers applying for informal access to records held by Crown-Indigenous Relations and Northern Affairs (CIRNAC) and Indigenous Services (ISC). It has come to our attention that CIRNAC and ISC's Privacy Policy Unit has recently introduced new, egregiously inappropriate requirements for gaining informal access to departmentally held records and that these requirements may adversely affect First Nations and compromise their access to justice for the redress of their historical claims.

Under the guise of meeting Canada's obligations under the federal *Privacy Act*, the new measures were discussed and developed internally, without any consultation whatsoever with First Nations to obtain their free, prior, and informed consent as required by Article 19 of the *United Nations Declaration on the Rights of Indigenous Peoples* (UN Declaration). They are now being implemented in violation of Canada's legal obligation to take all measures to ensure the UN Declaration's objectives are met as required by the *United Nations Declaration on the Rights of Indigenous Peoples Act* (UN Declaration Act). The new requirements and the unilateralism that characterizes their development and implementation are particularly reprehensible since they run counter to each and every principle and recommendation articulated by the NCRD to the Treasury Board Secretariat and Department of Justice at the beginning of November in a detailed written submission to their respective reviews of the *Access to Information Act* and the *Privacy Act*, processes which ostensibly prioritized and valued Indigenous engagement. We insist the new requirements and any new policy related to First Nations claims researchers' informal access to records be withdrawn immediately and that substantive engagement with First Nations and their representative organizations take place to ensure First Nations' rights under the UN Declaration are upheld.

Full access to information is necessary for First Nations to participate in Canada's processes of redress for historical claims, such as the specific claims process. Specific claims are historical grievances brought against the federal government by First Nations when Canada fails to fulfill its lawful obligations as set out in statutes, treaties, agreements, or the Crown's reserve creation policies. Canada's specific claims policy requires First Nations to provide complete and fully referenced documentary evidence that substantiates the allegations set out in the claim. Federal government institutions, particularly CIRNAC, control the vast majority of historical records First Nations require to support their claims. CIRNAC, by their own admission, retains centuries-old records instead of transferring them to Library and Archives Canada if they represent a "business case" to the department. Since Canada controls access to federally held records through the *Access to Information Act* and the *Privacy Act*, it is in an unfair and untenable conflict of interest in the fair and just resolution of First Nations' claims.

Since 1999, claims researchers have utilized an informal access to information process to attenuate this aspect of Canada's conflict of interest. The informal access process was established in recognition of First Nations' information rights, and their frequent need to obtain departmentally held records to substantiate their historical claims and grievances against the federal government. Indian and Northern Affairs Canada (INAC) and the First Nations claims research community worked in partnership to develop initiatives to facilitate informal access to records held by the department in response to claims researchers' frustrations with gaining timely and fair access to departmental records through formal access mechanisms. A June 17, 1999 internal directive circulated by INAC to the department's staff affirmed that "First Nations have a right to information held by the department to validate their claims, disputes, and grievances." The directive acknowledged that First Nations researchers request numerous departmental records on an ongoing basis and that these requests ought to be processed informally and formal access procedures utilized as a last resort.

Claims researchers applying for access to records through the informal process were required to submit a band council resolution (BCR) authorizing them to access and obtain copies of that First Nation's information held by the department for the purposes of conducting historical claims research. The researcher would then receive a file list and order files to review. Files deemed personal information under the *Privacy Ac*t required the researcher to fill out an application for access under section 8(2)(k) of the Act, a provision which allows personal information controlled by federal government institutions to 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 any of the aboriginal peoples of Canada".

In 2016, to address First Nations' mounting concerns with the informal access to information process (delay, non-disclosure of records, and poor communication), First Nations claims researchers reconvened a joint working group on access to information. After a year of adversarial meetings, information management staff at CIRNAC revised the informal access policy to meet Canada's obligations under the *Privacy Act*, such that all requests for informal access must include a completed 8(2)(k) form and BCR for approval by CIRNAC's Director of Access to Information and Privacy (ATIP) at the outset, prior to receiving a file list from regional or head offices. First Nations claims researchers were assured that the ATIP approval process would result in a more expeditious turnaround of records.

However, since January, claims researchers applying for ATIP approval to access records informally are being asked to submit, in addition to a BCR and an 8(2)(k) form, details about the nature and scope of their research. Canada's request for these details is wholly inappropriate and compliance may adversely affect First Nations and compromise their access to justice for the redress of their historical claims. First Nations claims researchers are being asked to provide CIRNAC-ISC information analysts with the following:

1) a description of the claim, dispute, or grievance against Canada, including the proposed use, nature, and planned parties to the claim;
2) a description of the information being requested, including the type of records and associated date ranges, as well as a statement about why the records are required;
3) verification that the records being requested will not be shared with the First Nation on whose behalf the research is being conducted and that the records being requested will not be used for additional purposes, including other claims by the same First Nation (separate claims will require additional 8(2)(k) applications); and
4) verification that the records will not be shared with other members of the organization authorized by the First Nation to conduct the research. Claims researchers are being told they have 30 days to comply, or their requests will be abandoned by the department.

These requirements, we are told, are being put in place to safeguard the privacy of individuals and to ensure that the request and disclosure of records through the informal process aligns with obligations under the federal

Privacy Act. However, the First Nation on whose behalf the records are being sought has already provided authority to the researcher and/or research organization via BCR to access its records for the purposes of conducting claims research. The new requirements effectively set this legal instrument aside in a gesture that denies First Nations data sovereignty and undermines the governing authority of the First Nation.

Further, there is nothing in the 8(2)(k) provision of the Act which necessitates that claims researchers disclose any of the above information to Canada. Since Canada is the defendant in First Nations' historical claims, it may harm a First Nation's interests if a researcher complies. Additionally, if Canada insists that the former protocols regarding informal access were insufficient to meet its obligations under the *Privacy Act*, First Nations may legitimately be alarmed about whether previous access requests and the claims which rested on the disclosure of documents under the old process will be placed in jeopardy and disallowed on the basis of unlawful disclosure. An internal draft policy document forwarded to First Nations representatives on the working group after they called an emergency meeting with the Director of ATIP last Thursday further rationalizes the new requirements as necessary to ensure informal requests and disclosure of information align with an internal "Directive on Privacy". First Nations claims researchers have not been provided with this directive or any of its details to assess its implications for claims research. Canada's unconscionable and legally unjustifiable overreach and lack of any consultation with First Nations claims researchers highlights Canada's conflict of interest in controlling access to records First Nations require to substantiate their historical claims.

It also underscores the continuing barriers that undermine First Nations' access to justice. First Nations are already disadvantaged by an unfair process in which Canada assesses claims against itself, and the new requirements exploit Canada's conflict of interest even further by refusing First Nations access to their own records unless they divulge details of their claims to the federal government. It is particularly unscrupulous given that the NCRD has repeatedly drawn Canada's attention to the conflict of interest inherent in Canada's control over First Nations' historical information, and the need for independent oversight regarding access.

Under the UN Declaration, First Nations have the right to redress for historical losses (Article 28) through fair, independent, impartial, open, and transparent processes that incorporate Indigenous laws and worldviews (Article 27), as well as the right to timely and effective remedies (Article 40). Canada must also consult and obtain First Nations' free, prior, and informed consent regarding all administrative and legislative processes that affect them, prior to implementation (Article 19). The Prime Minister's December 16, 2021 mandate letters to Ministers directs each of them to implement the UN Declaration and work in partnership with Indigenous peoples to advance their rights. Canada's access to information and privacy staff, regardless of rank or position, must ensure that their conduct, policies and processes align with Canada's explicit public reconciliatory objectives and comply with the UN Declaration. They must also uphold the honour of the Crown which, according to the Department of Justice's own set of principles governing Canada's conduct, "requires the federal government and its departments, agencies, and officials to act with honour, integrity, good faith, and fairness in all of its dealings with Indigenous peoples." Concrete changes to legislation, policy, and procedures can only occur in full partnership with First Nations, as per Article 19 of the UN Declaration.

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. As such they must be withdrawn immediately so that claims research may proceed according to timelines upon which the provision of claims research and development funding depends. A substantive discussion about First Nations access to their own information held by Canada must also take place immediately at the joint working group established to address these crucial issues.

Sincerely,

National Claims Research Directors

CC/
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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
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First Nations Summit