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First Nations Information Governance Centre
Le Centre de gouvernance de l'information des Premières Nations

A FIRST NATIONS GUIDE TO THE ACCESS TO INFORMATION ACT

About the Artist

The cover and interior art for this publication was done by Tsista Kennedy (aka Hotdog Water Art), an Anishinaabe Onyota'a:aka artist from Southern Ontario. Born in 2001, Kennedy is a self-taught artist who works primarily in digital, but also creates work with ink on watercolour and sketchbook paper.

Kennedy's love of art began in his early childhood, when his teachers would often find more doodles on his classwork than answers and equations. At 14-years-old he created his first Woodland Art piece, a style which his art had followed ever since.

Kennedy's unique variation of the Woodland style is marked by semi-bold black lines, intricate patterns, and vibrant colors, all of which combine to make the artwork flow elegantly across the canvas. Because of his ability to convey stories and messages through his artwork, Kennedy has been commissioned by many organizations, universities, and businesses.

Kennedy's artwork isn't solely rooted in Indigenous traditionalism or Indigenous modernism, rather, it's a merging of the two. With his personal experiences and stories thrown into the mix, combining these two perspectives provides the inspiration behind some of his artwork today. Being a frequent daydreamer however, many of his best art pieces simply begin as an image popping up in his head.

About the Art

Kennedy's cover art for the FNIGC series of First Nations guides to federal legislation are meant to illustrate First Nations knowledge and information, and data sovereignty. These ideas have been conceptualized through flowers and strawberries which emerge from the hands of the First Nations people signifying the essential connection between the two.

The illustrations found within these guides are meant to represent the collection, storage, and access to First Nations data and how these legislations impact First Nations Data Sovereignty.

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About FNIGC

The First Nations Information Governance Centre (FNIGC) is an incorporated, non-profit organization committed to producing evidence-based research and information that will contribute to First Nations in Canada achieving data sovereignty in alignment with their distinct world views. FNIGC is strictly technical, apolitical, is not a rights-holding organization, and does not speak directly for First Nations. Mandated by the Assembly of First Nations' Chiefs-in-Assembly (AFN Resolution #48, December 2009), FNIGC's Mission is to assert data sovereignty and support the development of information governance and management at the community level through regional and national partnerships. We adhere to free, prior, and informed consent, respect Nation-to-Nation relationships, and recognize the distinct customs of First Nations, to achieve transformative change. Our work includes research and analysis of the technical elements of First Nations data sovereignty.

This Guide is not intended to be legal advice and should not be relied upon as such.

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INTRODUCTION

This guide to the *Access to Information Act* provides the basic details of the legislation and is intended to help First Nations understand and navigate the federal information management regime. It also reflects on the impact of the *Access to Information Act* on First Nations data sovereignty.

What is First Nations data and data sovereignty?

First Nations data sovereignty is an inherent, Treaty, and Constitutional right essential to the exercise of rights to self-determination and self-government. First Nations data sovereignty means First Nations data is governed by First Nations laws no matter where in Canada the data is located. It incorporates the First Nations principles of OCAP® - ownership, control, access, and possession of data. 'Data' is defined in this paper to mean information in any form:

1. *About First Nations people like health, jobs, and housing;*
2. *From First Nations like languages, patterns, songs, or dances; and*
3. *About First Nations reserve and traditional lands, waters, resources, and the environment*

WHAT IS THE ACCESS TO INFORMATION ACT?

Canada's *Access to Information Act* deals with accessing data and information held by the federal government, other than "personal information" as defined in the *Privacy Act*. The purpose of the legislation is "to enhance the accountability and transparency of federal institutions in order to promote an open and democratic society and to enable public debate on the conduct of those institutions" (s.2).

HOW DOES THE LAW WORK?

Rights of Access

Part 1 of the Act grants any Canadian citizen or permanent resident the right to request and be given access to any data or information under the control of a government institution (s. 4). A request for information must be in writing, and there are forms available for this purpose.[1] It costs five dollars to submit an access to information request, though as of 2024 "heads of institutions are strongly encouraged to waive the $5 application fee for the purposes of

[1] Government of Canada, 2021, *Access to Information and Privacy (ATIP) Online Request,* https://atip-aiprp.apps.gc.ca/atip/welcome.do?lang=en

advancing reconciliation." [2] The federal government has specific time limits for responding to a request for information (sections 7-10). The federal government is obliged to provide the information within 30 days of the request.

A request for information can be denied if the federal government deems it to be "vexatious, made in bad faith, or otherwise an abuse of the right of access" (s. 6 and 6.1). There are no definitions of these terms in the legislation, but the Information Commissioner has issued guidance to the federal government on how to interpret these terms.

Vexatiousness is usually understood to mean with intent to annoy, harass, embarrass, or cause discomfort. However, in the context of an application to decline to act on an access request, vexatiousness must rise above annoyance or inconvenience.

Bad faith is usually understood to be the opposite of good faith. Bad faith generally implies a design to mislead or deceive another, not prompted by an honest mistake as to one's rights, but by some interested or sinister motive. Bad faith is not simply bad judgement or negligence, but rather implies the conscious doing of a wrong because of a dishonest purpose.

Abuse is usually understood to mean a misuse or improper use. [3]

The nature, scope, purpose, wording, and timing of the request, along with the volume of similar requests by the same individual or individuals working in concert, will be taken into consideration in deciding if the request is vexatious, in bad faith, or otherwise an abuse of the process.

Information that Must Be Made Public

Some information must be made public. All federal government institutions are required to publish information on, among other things, a description of all classes of records under its control and a description of all manuals used to administer programs and activities (s.5). Additional information that must be made public includes ministerial mandate letters from the Prime Minster (s.73), travel expenses of a minister, ministerial adviser, or staff (s.75), grants and contributions over $25,000 (s.87), briefing materials to deputy ministers (s.88), and others identified in the Act.

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[2] Government of Canada, 2024, *2024-01: Advancing Indigenous Reconciliation: Waiver of $5 Application Fee,* https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information-privacy-notices/2024-01-advancing-indigenous-reconciliation.html

[3] Information Commissioner of Canada, 2021, *Investigation Guidance,* available at: https://www.oic-ci.gc.ca/en/information-commissioners-guidance/seeking-information-commissioners-approval-decline-act-access

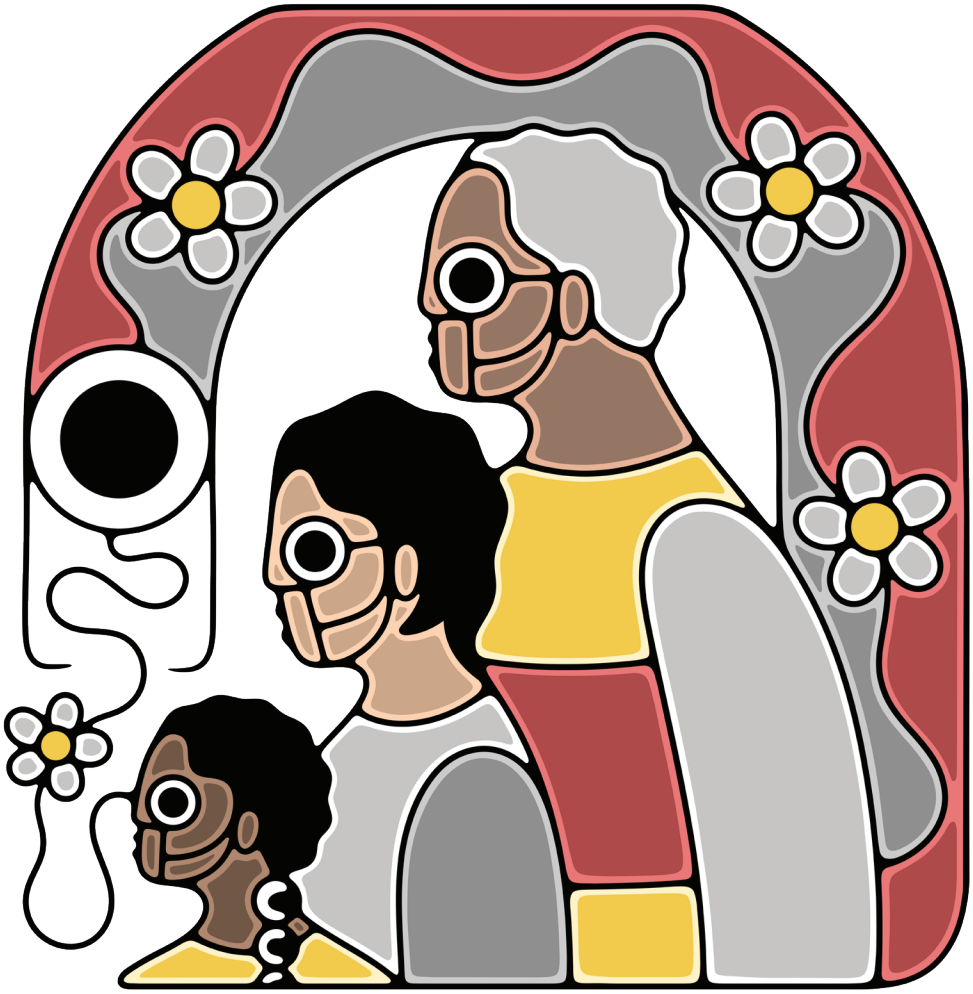
When an Access to Information Request is Not Required

Information that is already public or materials placed with public libraries, galleries, and archives do not require access to information requests (s.68). These materials are already accessible to the public through other means.

When Access is Not Permitted

There are exceptions to accessing information. No public access is permitted to information obtained in confidence from the government of a foreign state, an international organization of states, the government of a province, municipal or regional government, or an Aboriginal government (s.13(1)(e)). The term Aboriginal government is defined in the Act to refer only to the following First Nations:

- Nisga'a Government, as defined in the Nisga'a Final Agreement given effect by the *Nisga'a Final Agreement Act*;
- the council, as defined in the Westbank First Nation Self-Government Agreement given effect by the *Westbank First Nation Self-Government Act*;
- the Tlicho Government, as defined in section 2 of the *Tlicho Land Claims and Self-Government Act*;
- the council of a participating First Nation as defined in subsection 2(1) of the *First Nations Jurisdiction over Education in British Columbia Act*;
- the Tla'amin Government, as defined in subsection 2(2) of the *Tla'amin Final Agreement Act*;
- the Tsawwassen Government, as defined in subsection 2(2) of the *Tsawwassen First Nation Final Agreement Act*;
- the *Cree Nation Government*, as defined in subsection 2(1) of the *Cree Nation of Eeyou Istchee Governance Agreement Act* or a *Cree First Nation*, as defined in subsection 2(2) of that Act;
- a Maanulth Government, within the meaning of subsection 2(2) of the *Maanulth First Nations Final Agreement Act*;
- Sioux Valley Dakota Oyate Government, within the meaning of subsection 2(2) of the *Sioux Valley Dakota Nation Governance Act*; or
- the council of a *participating First Nation*, as defined in section 2 of the *Anishinabek Nation Education Agreement Act*.



This is a particular failing of the federal government. Most provinces including British Columbia, Alberta, Manitoba, Ontario, New Brunswick, Nova Scotia, and all the Territories have access to information legislation which acknowledges the legitimate collective privacy interests of all First Nations governments. For example, the Ontario *Freedom of Information and Protection of Privacy Act* allows the head of an institution to refuse to disclose information if it could:

> a) prejudice the conduct of relations between an Aboriginal community and the Government of Ontario or an institution, or
>
> b) reveal information received in confidence from an Aboriginal community by an institution.[4]

All *Indian Act* bands, all Indigenous organizations or communities negotiating Section 35 rights, and any other Indigenous organization listed in the regulations are an "Aboriginal community" for the purpose of the Ontario legislation.

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[4] Ontario *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31. s.15.1.

In addition, the public may not have access to certain types of information as noted below:

- federal-provincial consultations or deliberations, or strategies and tactics of Canada, regarding federal-provincial affairs (s.14),
- information affecting international affairs and defense (s.15),
- information about law enforcement and investigations (s.16),
- information with respect to the *Public Servants Disclosure Protection Act* (i.e., whistleblower protection) (16.1),
- information necessary to protect the safety of individuals (s. 17),
- information about the economic interests of Canada (s.18),
- personal information unless the disclosure has been consented to, the information is publicly available or disclosure is in accordance with Section 8 of the *Privacy Act*, which includes the exemptions to the *Privacy Act* for research, archiving, etc. (s.19),
- third party information under certain conditions (s.20),
- operations of government including advice or recommendations to the institution or minister, positions or plans for the purpose of negotiation,
- plans relating to the management of personnel, etc. (s.21),
- testing procedures, tests and audits that would affect the use or results of the tests or audits (s.22),
- protected information, for example solicitor-client privilege (s.23) or patents and trademarks (s.23.1), or
- many additional statutory restrictions to access particular information (s.24 and Schedule 2).

Other information is entirely exempt from access to information requests. It is not possible, for example, to ask for access to information about a journalist's source for a story if the source is kept anonymous, or information from Atomic Energy of Canada Ltd on how to develop nuclear material (s.68.1).

Schedule 2 contains a list of specific restrictions provided in other legislation on access to information. This covers a wide range of topics, including for example, access to Traditional Knowledge provided to the Minister in confidence under section 26.2 of the *Canadian Navigable Waters Act*, the identify of someone

involved in covert activities (s.18, *Canadian Security Intelligence Service Act*), or the prohibition on divulging personal information obtained for the purpose of the *Statistics Act*, s.17.

Third Party Information

Third party information is information provided to the federal government that is requested by someone other than the party that submitted it in the first place. For example, Party A gives some information to the federal government. Party B wants access to that information. Party A is the "third party" and their information is the "third party information.' If the federal government intends to release Party A's information to Party B, it must make reasonable efforts to notify Party A, and Party A has the right to make written submissions arguing against the release of the requested information, but only if the information falls within one of these exceptions:

- trade secrets,
- confidential information that is consistently treated as confidential,
- information prepared for the purpose of emergency response about vulnerabilities of buildings or systems
- information that could reasonably be expected to result in material financial loss, gain or could affect a competitive edge, or
- information that could interfere with contractual or other negotiations of the third party. (s. 20).

It is important to note that the federal government does not require the consent of the third party (Party A) to release the information. The right to make submissions is only a procedural right.

Complaints and Offenses

The federal Information Commissioner, a position created under this legislation, may investigate complaints related to the implementation of the Act (s.54) and may also initiate investigations (s.30). Those who feel they have been wrongfully denied access to information may make a complaint to the Information Commissioner for investigation (s.30). The complaint generally must be in writing and must be submitted within 60 days of being refused access to the information sought (s.31). The Information Commissioner may also refuse to investigate if the complaint is frivolous or in bad faith, or unnecessary regarding the circumstances (s.30(4)).

Section 36 sets out the powers of the Information Commissioner in carrying out investigations, including the capacity to compel evidence, administer oaths, enter premises, consult with the Privacy Commissioner, and disclose personal information, in addition to other powers. The decisions of the Information Commissioner can be reviewed by the federal court. Sections 41 – 53 set out the rules of procedure for hearings by the federal court about the implementation of the Act.

It is an offense to obstruct the Information Commissioner and is subject to summary conviction (less than 2 years in jail) (s. 67). Further, it is a summary or indictable offense (more than two years in jail) "to obstruct with intention to deny a right of access by destroying, mutilating, altering a record, falsifying a record or making a false record, concealing a record, or directly propose, counsel, or cause any person" to do one of these things (67.1).

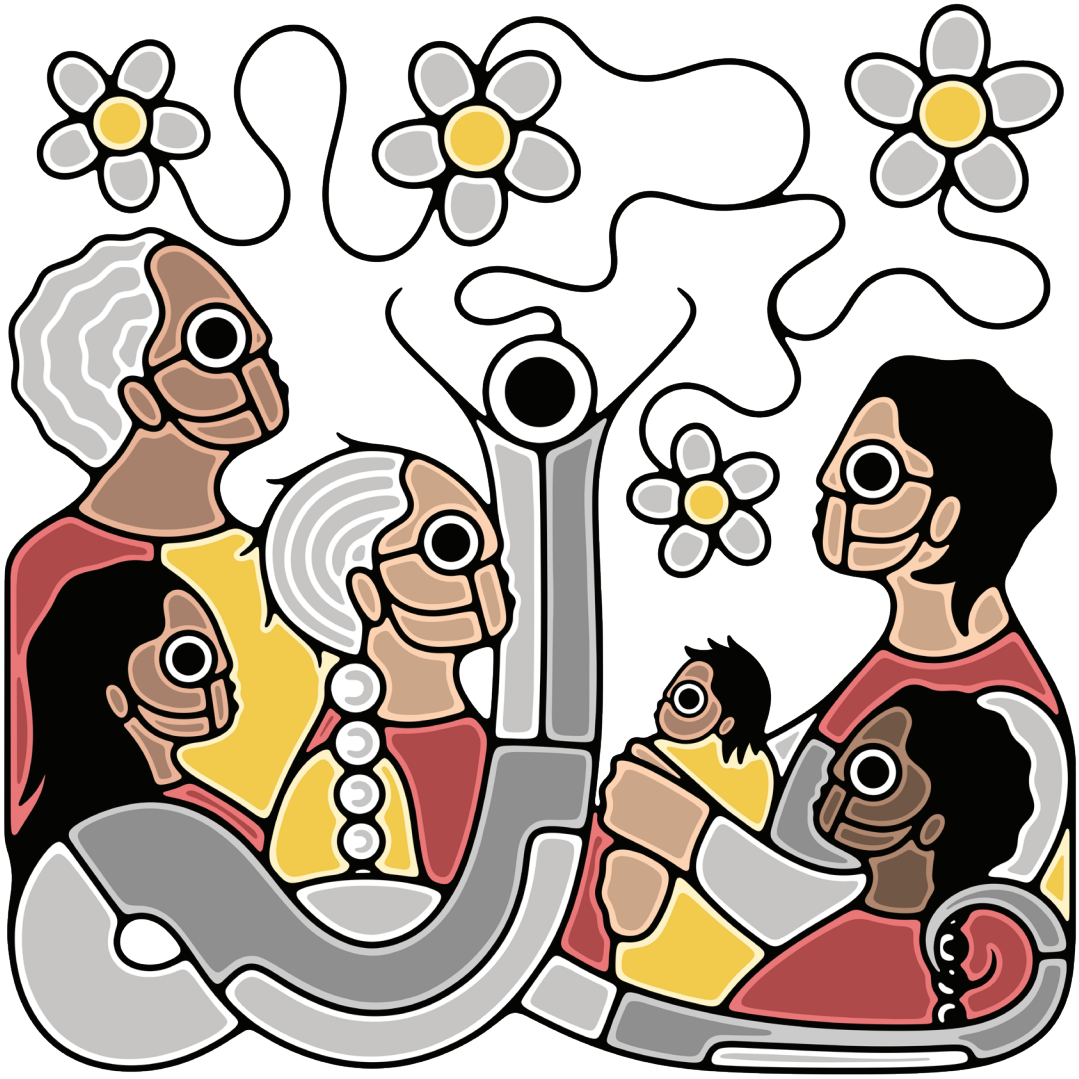
Civil servants are protected from civil and criminal proceedings if they acted in good faith in releasing information, no matter what harm was caused by the release of the information (s.98).

List of Institutions Responsible

Schedule 1 provides a list of government institutions responsible for implementing the legislation. This includes the same First Nation organizations included in the *Privacy Act*, specifically the First Nation Financial Management Board, First Nation Tax Commission, Gwich'in Land and Water Board and Land Use Planning Board, and the Sahtu Land Use Planning Board and Land and Water Board.

Review of the Act

The Act must be reviewed every five years (s.93). This is a new provision in the legislation adopted in 2019. The first five year review commenced in June 2020.



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WHAT DOES THE ACCESS TO INFORMATION ACT MEAN TO FIRST NATIONS DATA SOVEREIGNTY?

This legislation has multiple impacts on First Nations data sovereignty. First, this legislation provides access by the public to First Nations data and information held by the federal government. First Nations should note that the *Access to Information Act* generally does not block the release of First Nations data and information.

Once in the hands of the federal government, information provided by First Nations or information taken from First Nations is deemed to be information controlled by the federal government. It is therefore subject to public release. All this information is available to anyone who requests access to it. First Nations' consent is not required.

Second, the *Access to Information Act* is the primary means by which First Nations can access their data and information held by the federal government. It can also assist First Nations accessing information submitted by others. There are exceptions to this, for example, access to personal information. There are advantages to First Nations being able to access their information or information supplied by others, but the Act can also operate to frustrate First Nations access to information they need to make informed decisions.

First Nations should be alert to the fact that Canada is moving to make even more data publicly available to enhance decision making, facilitate the easy flow of information, breakdown government silos, and become more transparent about the functions of government. Open data means making it easier to access information, including information shared by First Nations.[5] This may make it easier in some ways for First Nations to access critical data and information they need for decision-making. It also means that even more First Nations data held by the federal government is available to the public.

You can learn more about First Nations data sovereignty at: www.FNIGC.ca

[5] Government of Canada, 2020, Canada's 2018-2020 National Action Plan on Open Government, available at https://open.canada.ca/en/content/canadas-2018-2020-national-action-plan-open-government