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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 PRIVACY 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.



## 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 *Privacy 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 *Privacy 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 PRIVACY ACT?

Canada's *Privacy Act* deals with protecting and accessing personal information. The purpose of the *Privacy Act* is:

1. to protect the privacy of individuals by keeping personal information held by the federal government private, and
2. to provide individuals with a right of access to personal information about themselves (s.2).

The Act defines personal information as any information about you that could identify you, including:

-  your age, gender, ethnicity, religion, etc.;
-  your education, medical, criminal, or employment history;
-  your financial information;

- your social insurance number, bank account number, or any number or symbol assigned to you;
- your address, fingerprints, or blood type;
- your personal opinions with some exceptions; and
- correspondence sent to you by the government that is private or confidential (s.3).

Personal information does not include:

- titles, salaries, business addresses, and personal views expressed in the context of work of individuals that work for the federal government; and
- names and titles of advisors to a federal minister or member of the minister's staff; among other things (s.3).











Personal information about an individual who has been dead for more than 20 years is no longer subject to privacy protection (s.3). It can be shared publicly.

## HOW DOES THE LAW WORK?

The Act applies to federal government institutions defined as:

1. any department or ministry of state of the Government of Canada, or a body or office, listed in the schedule to the Act, and
2. any parent Crown corporation, and any wholly-owned subsidiary of such a corporation, within the meaning of section 83 of the [Financial Administration Act](#) (s.3).

This includes the following First Nations organizations listed in the schedule of the *Privacy Act*:

-  First Nations Financial Management Board
-  First Nations Tax Commission
-  Gwich'in Land and Water Board
-  Gwich'in Land Use Planning Board
-  Sahtu Land and Water Board
-  Sahtu Land Use Planning Board

You have a general right of protection for your personal information recorded in any form by any of these federal government institutions, including the listed First Nations organizations.

## Federal Responsibilities

Sections 4 and 5 of the Act spell out the primary obligations of the federal government regarding its collection and use of personal information.

Personal information may only be used by a government institution for the reason it was collected for or a use that is consistent with that reason. The use must relate “directly to an operating program or activity of the government institution” that collected the information in the first place (s.4). This includes sharing the information with other government institutions.

No information may be shared with another government institution unless it relates directly to the purpose for which it was collected. For example, the





federal government collects information every time someone uses their passport to cross the border. The Canadian Border Service can use that information for the purpose of border control. It cannot be used by a different federal department for a different purpose.

## Consent

You have a right to be informed of the reason why your personal information is being collected and the Crown must seek your consent before collecting it. Usually, your information is required to receive a service, product, or benefit, or to fulfill an obligation owed to the Crown, like paying taxes. The Crown must fulfil the standard of care described in the *Privacy Act* to protect the information it demands.

Every effort must be made to collect the information directly from you or from someone authorized by you to share the information, like an accountant (s.5). There are exceptions, including where incorrect information would be obtained, like someone lying to avoid criminal charges, or if the information needs to be collected in secret, for example in undercover operations.

## Retention and Disposal of Personal Information

Government institutions are obliged to keep your personal information after it has fulfilled its administrative use for as long as required by regulation to allow you a reasonable opportunity to access it if you wish. The government institutions are obliged to make their best efforts to keep the information up to date and accurate. It is standard for the government department to hold the information for at least two years. After such time, your personal information will be disposed of as required by regulations (s.6).

That said, there are no such regulations at the time of writing this review. Therefore, when the *Privacy Act* is read together with the *Library and Archives of Canada Act*, it prohibits **any** record within government control from being disposed of or destroyed. It must **all** go to Library and Archives Canada (LAC) unless the National Archivist allows it to be destroyed and issues a Records Disposition Order (RDO). There are not many RDO's that permit the destruction of records. In other words, rather than holding your personal information for only two years, the federal government retains your personal information indefinitely.










Furthermore, the *Privacy Act* only protects personal information for 20 years following the death of the individual, after which time it can be made public. Thus, all First Nations personal information shared with the federal government will be kept indefinitely and can be shared publicly 20 years after death no matter the impact of disclosure on surviving family or the community. Recall too that the federal government collects more information on First Nations individuals than other Canadians, thus much more personal information on First Nation people is available to the public than on other Canadians.

## Exceptions to Privacy of Personal Information

The privacy of personal information offered by the *Privacy Act* is not absolute. There are exceptions to when, what, and how personal information can be shared.

First, there is a general exception to share personal information if the individual involved consents (s.7). For example, you could consent to share your personal information for health research or at an official inquiry.

Other exceptions for sharing personal information set out in Section 8 of the Act include:

-  for obtaining a subpoena or warrant,
-  under request by the Attorney General,
-  to enforce a law of Canada, province, or territory or to carry out a lawful investigation,
-  under an agreement or arrangement between the Government of Canada or any of its institutions and the government of a province,
-  to any foreign government or organization of states to enforce the law or a lawful investigation,
-  to an MP to help the person,
-  for the purpose of an internal audit,
-  to locate someone to collect a debt, and
-  for any other purpose that would benefit the individual.

The Crown also has an obligation to share information:

under an agreement or arrangement between the Government of Canada and the council of the Westbank First Nation, the council of a participating First Nation as defined in subsection 2(1) of the *First Nations Jurisdiction over Education in British Columbia Act*, and the council of a participating First Nation as defined in section 2 of the *Anishinabek Nation Education Agreement Act* (s.8(2)(f)).



These are the only First Nations recognized as governments in this legislation. They are included along with exceptions for provincial governments, foreign governments, or organizations of states, like the United Nations.

First Nations may also access personal information held by the federal government. An “aboriginal government, association of aboriginal people, Indian band, government institution” or anyone acting on their behalf may access personal information “for the purpose of researching or validating the claims, disputes or grievances of any of the aboriginal peoples of Canada” (s.8(2)(k)). The terms Indian Bands, Aboriginal governments, and the Council of Westbank First Nation are defined in the *Privacy Act* Sections 8(6), (7), and (8) respectively.



## Additional Provisions Permitting Disclosure of First Nations Data

There are four additional provisions of a general nature that do not specifically reference First Nations but have implications for First Nations' data sovereignty.

First, any federal law may authorize disclosure of First Nations' data (s.8(2)(b)). If the federal government wants the data, it need only pass a law allowing itself to dip in when, where, and how it may feel entitled to do so.

Second, federal institutions may provide any individual or organization access to and use of personal information for research or statistical purposes. The head of the government institution has to be satisfied the research would fail except for the information being provided in a form that would identify the individual. The government institution must obtain a written commitment from the researchers to not share the personal information further in any way that would identify the individual (s.8(2)(j)). The federal government has established additional regulations, guidelines, and protocols for accessing personal information for research.<sup>1</sup>

The third exception is with respect to personal information that is of historic or archival value. "Documentary heritage" is defined in the *Library and Archives of Canada Act* as "publications and records of interest to Canada" (s.2). Anything of interest to Canada is required to be sent to LAC for archiving (s.8(2)(i)). Anyone may access personal information stored at LAC for any research or statistical purpose, whether personal information will be revealed or not (s.8(3)).

The fourth and final exception for sharing personal information is when the head of a government institution feels that "the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure" (s. 8(2)(m)(i)). This provision allows the disclosure of personal information if it would not be possible to do so legally under any of the other exceptions. FNIGC has learned that this clause is little used because of the potential to breach the *Canadian Charter of Rights and Freedoms*.

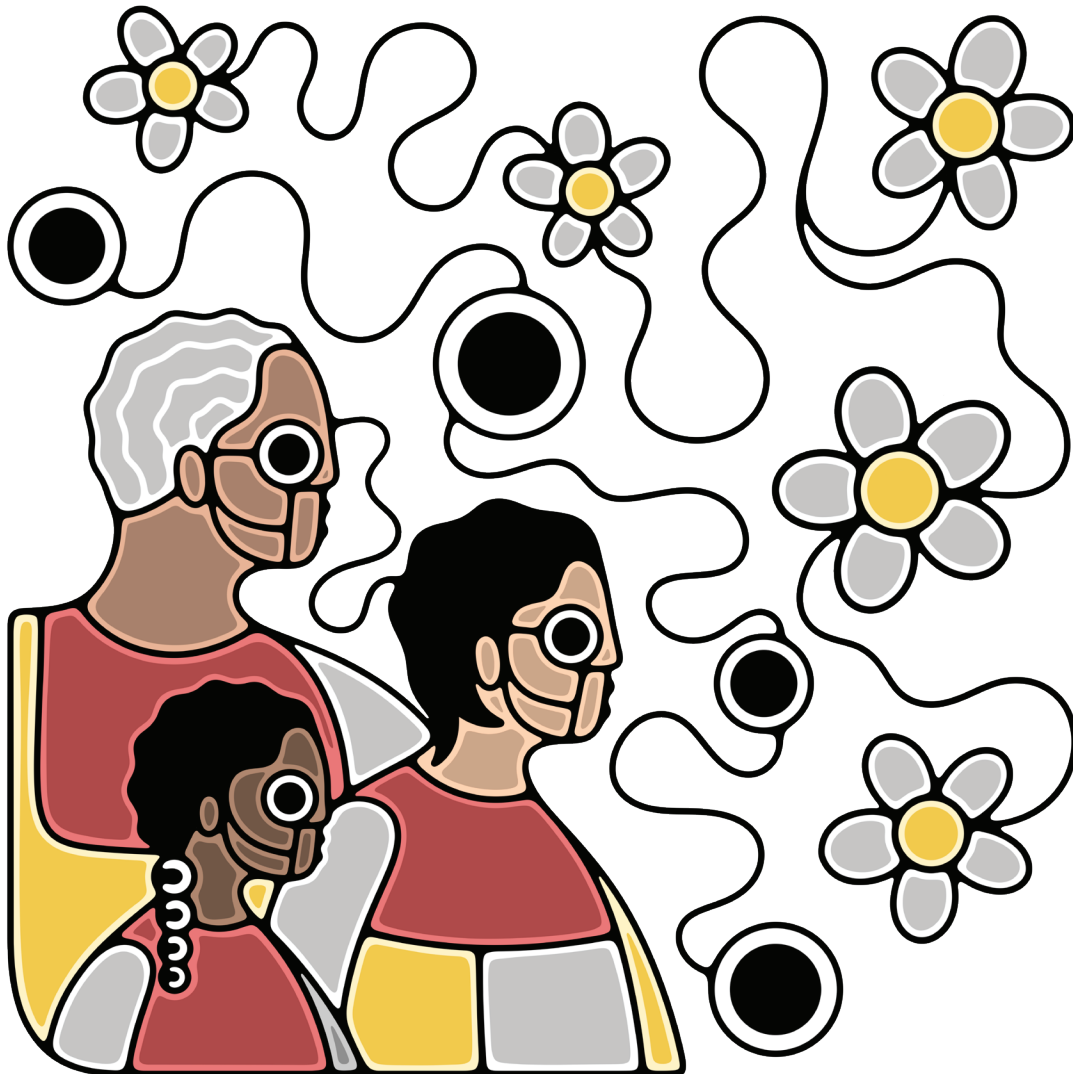
## Access to Personal Information

The next part of the Act deals with rights of access to personal information. As noted above, this is the second major purpose of the legislation. It begins with the requirement that government institutions must keep records of personal information in their possession (s.9) and keep Personal Information Banks (libraries) and an Index of Personal Information to facilitate access for individuals to their personal information (s.10).

<sup>1</sup> See for example, Statistics Canada, 2015, Statistics Canada Policy on the Use of Administrative Data Obtained under the Statistics Act, retrieved from: [https://www.statcan.gc.ca/eng/about/policy/admin\\_data](https://www.statcan.gc.ca/eng/about/policy/admin_data) or Statistics Canada, 2018, Statistics Canada's Privacy Framework, retrieved from: <https://www.statcan.gc.ca/eng/reference/privacy/framework>

Section 12 of the Act gives individuals the right to access your personal information. This section also provides for an opportunity to correct personal information. Sections 13 through 17 establishes the process for getting access to information, including the format of the request, time limits, and the format of the information accessed, including provisions for those with disabilities or requesting documents in the other official language. Note that additional detail about accessing information from federal government institutions is contained in the *Access to Information Act*.

Just as there are exemptions to privacy of personal information, there are limits on accessing personal information. Sections 18 through 28 set out the exemptions for access. First, certain Personal Information Banks are off limits (s. 18), including those related to foreign affairs and defense (s.20), and law enforcement (s.21).



Second, any personal information shared with the federal government in confidence by the council of Westbank First Nation or the council of a participating First Nation as defined in subsection 2(1) of the *First Nations Jurisdiction over Education in British Columbia Act* is also exempt from disclosure (s.19(1)(e) & (f)).

Third, any personal information collected while conducting business with various federal government institutions is also generally not available. For example, information received by the Privacy Commissioner while investigating a privacy breach (s.22.1). Sections 23 through 28 include additional exemptions like security clearances, parole or medical records, or solicitor client privilege.

## Complaints

There are provisions to lodge complaints about the operation of the *Privacy Act*, including for example personal information improperly collected or accessed, refusing access, breach of time limits, etc. (s.29 & 30). The Privacy Commissioner is responsible for investigating complaints. This includes the powers to compel evidence and enter any government institution (s.34(1), or to conduct audits to confirm the compliance of government institutions in meeting their *Privacy Act* obligations (s.37). Any appeals to decisions of the Privacy Commissioner are heard by the Federal Court (s.41–52). Sections 53 through 67 set out the officers, staff, mandate, compensation, etc. of the Office of the Privacy Commissioner. Section 68 makes it an offense to obstruct the Privacy Commissioner in the performance of his/her/their duties. Finally, certain personal information is exempt from the application of the *Privacy Act*. This includes public information shared for reference or public display in a library or museum and information already publicly available (s.69), information supplied to the Canadian Broadcast Corporation to protect journalistic integrity (69.1), and Cabinet confidences (s.70).

The remaining provisions of the Act address general matters including tabling with Parliament reports on the effect of the legislation, making regulations, duties of the designated minister, etc. The final section of the Act, the schedule, lists the various government institutions to which the Act applies.

## WHAT DOES THE PRIVACY ACT MEAN TO FIRST NATIONS DATA SOVEREIGNTY?

As with many pieces of federal legislation, the *Privacy Act* has implications for First Nations data sovereignty. First, like all other Canadians, First Nations can expect their personal information will be protected by the Crown when in its possession and they can access their personal information for the purpose of correcting it as necessary. There are also restrictions on the reasons for which



the federal government can collect or share First Nation citizens' personal information, which helps to limit the amount of data collected.

There are also negative impacts of the legislation on First Nations data sovereignty. For example, the Crown obtains access to all data and information submitted by First Nations for administrative purposes and all the exceptions outlined in Section 8 (2) and (3). The Auditor General has estimated that each First Nation submits approximately 168 reports annually to the federal government and Indigenous and Services Canada alone collects 60,000 reports annually from First Nations.<sup>2</sup> Only some of this information is protected under the *Privacy Act*, specifically, personal information.

Much of the First Nation data and information held by the Crown is not personal information as defined in the *Privacy Act*, and thus much of it is open to the public via the *Access to Information Act*. Additionally, the *Privacy Act* only protects the privacy of personal information of individuals. It does not recognize or accommodate First Nations collective rights to privacy. It denies most First Nations similar respect it gives to other governments, including foreign governments, provinces, and municipalities.

Further, the Crown makes unilateral decisions about who can access the data, under what conditions, and for what purposes. There is no obligation on the Crown to consult or seek First Nations approval to share their data. There are even examples of when the Crown has profited from the sale of First Nations data to the private sector.<sup>3</sup>

Finally, the federal government regularly uses the provisions of the *Privacy Act* to deny First Nations access to personal information held by the federal government. For example, First Nations are required to file an access to information request to access their own band membership list. The First Nations are considered by the Crown to be a third party, not a government with responsibilities for their citizens.

You can learn more about First Nations data sovereignty at: [www.FNIGC.ca](http://www.FNIGC.ca)

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<sup>2</sup> Office of the Auditor General, 2011, *June 2011 Status Report* "Chapter 4: Programs for First Nations on Reserve", Retrieved from: [https://www.oag-bvg.gc.ca/internet/English/parl\\_oag-201106\\_04\\_e\\_35372.html#hd5j](https://www.oag-bvg.gc.ca/internet/English/parl_oag-201106_04_e_35372.html#hd5j)

<sup>3</sup> FNIGC, 2014 *Ownership, Control, Access and Possession (OCAP™): The Path to First Nations Information Governance* [https://fnigc.ca/wp-content/uploads/2020/09/5776c4ee9387f966e6771aa93a04f389\\_ocap\\_path\\_to\\_fn\\_information\\_governance\\_en\\_final.pdf](https://fnigc.ca/wp-content/uploads/2020/09/5776c4ee9387f966e6771aa93a04f389_ocap_path_to_fn_information_governance_en_final.pdf)



