

Submission to the BC Ministry of Citizens' Services Freedom of Information and Privacy Review

**Submitted by the Union of BC Indian Chiefs
April 9, 2018**

About the Union of BC Indian Chiefs

The Union of BC Indian Chiefs (UBCIC) is a not-for-profit organization that supports Indigenous Nations in asserting and implementing their Aboriginal title, rights, treaty rights, and right of self-determination as peoples. The UBCIC is also an NGO in Special Consultative Status with the Economic and Social Council of the United Nations. Since its inception in 1969, the UBCIC has worked with Indigenous Nations in BC to ensure that they are supported in their efforts to have their title and rights recognized, respected, and addressed by governments and industry so that our connection to our lands is sustained. We are directed by the resolutions from our Chiefs Council Meetings and Annual General Assemblies, at which representatives of our over 100-member Nations gather.

Among the core principles of the UBCIC is the right to knowledge and a steadfast commitment to information sharing to strengthen the abilities of Indigenous peoples to implement, exercise, and secure our rights, title, and treaty rights, and in so doing safeguard our lands and resources for future generations.

The UBCIC's policy advisors, analysts, and research staff regularly rely upon British Columbia's Freedom of Information process to obtain necessary records from BC public bodies in the course of their work on behalf of Indigenous Nations and communities in BC. The UBCIC advocates at the federal and provincial levels to ensure government transparency and accountability and to remove existing barriers to Indigenous peoples' access to information.

The Unique Impacts of Freedom of Information on Indigenous Peoples

The right to knowledge via access to information is integral to Indigenous peoples' pursuit of justice – to seeking justice for Indigenous women, children, and families; securing safe drinking water and housing in our communities; and exercising our jurisdiction over our lands and natural resources.

The right to know and to access information are also fundamental components of Indigenous peoples' efforts to resolve historical land rights grievances, such as specific claims. Because Indigenous Nations are required to produce a wide range of government records to substantiate their land claims and historical land-related grievances against the Crown, Freedom of Information has direct impacts on the ability of these Nations to seek justice through government mechanisms for redress for the dispossession of lands and resources. The importance of disclosing records to Indigenous Nations for legitimating these grievances is underscored in section 22(2)(d) of the FOIPPA which states that public bodies must consider whether disclosure of personal information will “assist in researching or validating the claims, disputes or grievances of aboriginal people.”¹

Barriers to provincial government records significantly inhibit Indigenous peoples' ability to achieve justice for past wrongs through the state mechanisms established for this purpose. Indigenous people's

¹ *Freedom of Information and Protection of Privacy Act* [RSBC 1996] accessed at http://www.bclaws.ca/Recon/document/ID/freeside/96165_02#section22.

right to redress for historical wrongs is articulated in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).² When the BC NDP Government assumed power in July 2017, it committed to working in partnership with Indigenous peoples to fully adopt and implement the UNDRIP as a step towards reconciliation.³ Your government has also agreed that BC's Freedom of Information policy and procedures and the current Freedom of Information and Protection of Privacy Act (FOIPPA) have proven insufficient in overcoming barriers and safeguarding rights to information, as well as ensuring government transparency and accountability. The barriers faced by Indigenous Nations seeking information access must be specifically and systematically targeted, such that rights to redress are advanced and protected.

Current Barriers to Freedom of Information Faced by Indigenous Nations

Indigenous Nations routinely experience the following barriers when attempting to obtain provincial government records through Freedom of Information:

1. Prolonged, unacceptable delays in obtaining information. Our researchers are regularly asked to waive legislated timelines – often multiple times for a single request for records – resulting in serious delays meeting our own deadlines, jeopardizing relationships with funders and the communities on whose behalf we carry out our work.
2. Unreasonably broad applications by public bodies of the exceptions to disclosure under the Act, resulting in excessive redactions or failures to release information. Sections 14, 16, 21, and 22 are routinely invoked, even in cases where disclosure would not prejudice a third party or constitute an unreasonable invasion of privacy under the Act. We note that the discretion given to public bodies under section 22(2)(d) of the Act, which implicitly recognizes the resolution of Indigenous claims and grievances as a matter of justice, is extremely broad and in practice often fails to yield the necessary disclosure of records. Since Nations are compelled to produce a wide range of provincial government records to substantiate their land claims and grievances against the Crown, challenges obtaining these records are a substantial barrier to achieving justice for land-related grievances.
3. Public bodies using extra-legislative rationales, such as “out of scope” or “not responsive” as a basis for withholding information. Redactions are routinely made, and disclosure is regularly refused without statutory justification, even if records are publicly available elsewhere.
4. Public bodies failing to create and retain records as required under the Act⁴ resulting in gaps in the public record. In addition to withholding information vital to matters of justice, health, dignity, and safety, these bodies make frequent, deliberate attempts to keep government dealings from public scrutiny; the result is further erosion of trust in government and the undermining of efforts to bring about reconciliation.

² United Nations General Assembly, Article 8.2(b), *United Nations Declaration on the Rights of Indigenous Peoples*, September 13, 2007.

³ <https://www.bcndp.ca/reconciliation>

⁴ Revealed by BC's Information and Privacy Commissioner, Elizabeth Denham, in Investigation Report F15-03 *Access Denied: Record Retention and Disposal Practices of the Government of British Columbia*, October 22, 2015.

5. Public bodies failing to transfer records to government archives,⁵ resulting in decades' worth of missing information. This is resulting in inexplicable gaps in the historical record upon which Indigenous Nations depend to substantiate their claims and grievances.
6. Prohibitive fees required for documents and the denial of requests for fee waivers. With document requests for the purposes of substantiating claims and grievances, costs can amount to thousands of dollars, beyond the resource capacity of many Indigenous Nations and organizations.
7. Information produced by public bodies or their subsidiaries is often required to substantiate Indigenous Nations' grievances, yet this information is currently excluded from either mandatory or discretionary disclosure under the existing legislation.

Recommendation:

That the BC NDP Government work in full partnership with Indigenous Nations and their representative organizations to develop and enact mutually agreed-upon changes to policy and legislation regarding Freedom of Information and privacy, such that transparency, openness, and fairness are enhanced and Indigenous Nations' rights (especially the rights to joint oversight and redress for past wrongs) are implemented, as per the UNDRIP and the BC NDP Government's commitments to reconciliation.

Any attempt to modify Freedom of Information and privacy policies or legislation will have a unique impact on Indigenous Nations. Our membership insists that your government act upon the concrete recommendations of Indigenous Nations and organizations on matters of fundamental concern to our communities. The BC NDP Government has a standing promise to "review policies, programs and legislation to determine how to bring the principles of the Declaration to action in British Columbia" so that Indigenous rights are upheld without discrimination.⁶ The UNDRIP requires governments to consult and cooperate in good faith with Indigenous peoples to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.⁷

A Freedom of Information review must make meaningful, direct dialogue with Indigenous Nations a priority and reject cursory actions that only create the illusion of meaningful change. This work must be guided by transparency, due process, and full enactment of the government-to-government approaches articulated within the UNDRIP. These guiding principles are not just future outcomes of some consultative process but must be built into these processes from the start.

⁵ Documented in IPC's Special Report *A Failure to Archive-Recommendations to Modernize Government Records Management*, July 22, 2014.

⁶ Ibid.

⁷ United Nations General Assembly, Article 19, *United Nations Declaration on the Rights of Indigenous Peoples*, September 13, 2007.