# Resources



# Letter to the Chair of the Standing Senate Committee on Indigenous Peoples (APPA)

March 7, 2024

Senator Brian Francis
Chair of the Standing Senate Committee on Indigenous Peoples (APPA)
The Senate of Canada

Ottawa, Ontario
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Dear Mr. Chair:

I am writing to follow up on a number of items mentioned during my appearance at APPA on February 26, 2024. I am grateful to the committee for inviting me to appear and I commend their interest in exploring how the access to information system can further contribute to reconciliation.

During my appearance, members asked me what changes would be needed to remove systemic barriers to access to information, in particular for Indigenous Peoples. In January 2021, in the context of the government's review of the access to information regime, I submitted recommendations to enhance government institutions' transparency. Among these recommendations is the need to include in the *Access to Information Act* a general public interest provision, which, I believe, could greatly benefit Indigenous communities.

The inclusion of an obligation to disclose in access to information legislation recognizes the importance of public access to critical, urgent information held by the government, and the latter's obligation to provide this information without delay. Six provincial jurisdictions have provisions requiring institutions, whether or not an access request is made, to disclose without delay information about a risk of significant harm to the health or safety of the public or to the environment.

In addition, and as mentioned in my opening remarks, Part II of the *Act* requires the proactive publication of specific information of public interest, without requiring that an access request be made. In my submission to the government's review, I recommended that the *Act* should contain an independent review mechanism to ensure that institutions comply with the requirements with respect to the publication of information listed in Part II of the Act. While appearing in front of your committee, I also touched on the importance of voluntary disclosure of information, which goes beyond what is legally required. I have been vocal about the need for institutions to disclose more information voluntarily and independently of the legal obligation of proactive publication, and I will continue to do so.

Throughout my appearance, the use of discretion by institutions to disclose more information was also raised. The Act contains exemptions that are discretionary, such as section 23, which protects information that is subject to solicitor client

privilege or to litigation privilege. In Ontario (Public Safety and Security) v. Criminal Lawyers' Association, 20[illegible] SCC 23, the Supreme Court of Canada explained that "a

discretion conferred by statute must be exercised consistently with the purposes underlying its grant" and that "to properly exercise this discretion, the head must weigh the considerations for and against disclosure, including the public interest in disclosure." Although the Court in that case went on to conclude that because of the near absolute nature of legal advice privilege, presumptively the protection of the privilege will outweigh other factors favouring disclosure, it recognized that there may be exceptional circumstances where that privilege must yield.

Furthering reconciliation may well be one of those exceptional circumstances. At a minimum, it is a factor weighing in favour of disclosure that must be considered by institutions when exercising their discretion.

Furthermore, I have found that the age of the records is also a relevant factor that must be taken into account in the exercise of discretion. Institutions must consider the purpose underlying the exemption and whether the interest underlying this privilege would in fact be harmed by the disclosure of the record at issue; the public interest in the records' release; the likelihood of any prospect of injury, or lack thereof, from disclosure; and the extent to which disclosure will further Canada's commitment to reconciliation and acknowledgement of the Rights of Indigenous People.

In addition, the *United Nations Declaration on the Rights of Indigenous People Act* requires the federal government to take all measures necessary to ensure that the laws of Canada are consistent with the United Nations Declaration on the Rights of Indigenous Peoples (the UN Declaration) and to prepare and implement an action plan to achieve the objectives of the UN Declaration. The UN Declaration speaks to the need for access to government information, while the federal government's Action Plan 2023-2028 outlines the ongoing work to achieve greater access to information. The government has an obligation to consider the disclosure of information in this context.

Finally, you may also be aware that the Standing Committee on Access to Information, Privacy and Ethics completed a study on the access to information system last June. The Committee recommended that the government work with Indigenous Peoples to remove barriers to access to information as well as to develop a mechanism of independent oversight that ensures their full and timely access to records held by government institutions for purposes of substantiating historical claims. I believe that recommendations found in this report could have a

positive impact on enhancing access to information and translate into actual results if the Government commits to their implementation.

Should you and the other members of the Standing Senate Committee on Indigenous Peoples have any questions following this letter, please have the committee staff contact Manon Côté, my Manager of Parliamentary and Stakeholders Relations, by email (parl@oic-ci.gc.ca).

Sincerely,

Caroline Maynard
Information Commissioner of Canada

c.c.: Mr. David M. Arnot, Deputy Chair
Standing Senate Committee on Indigenous Peoples

Ms. Andrea Mugny, Clerk
Standing Senate Committee on Indigenous Peoples

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