Submission to
Senate Standing Committee on
Legal and Constitutional Affairs

in the matter of

Bill C-58 (42-1)
An Act to amend the
Access to Information Act and the Privacy Act
and to make consequential amendments to other Acts

October 2018

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Every effort has been made to ensure the accuracy of the information contained in this report. All information was believed to be correct as of October 2018.

Quotation permitted. Please contact Privacy and Access Council of Canada - Conseil du Canada de l’Accès et la vie Privée – media@pacc-ccap.ca regarding derivatives requests.
The Privacy and Access Council of Canada

The Privacy and Access Council of Canada (PACC) is a national non-profit non-government organization that serves Canada's information access and privacy professionals from all sectors including industry, government, law enforcement, education and academia.

PACC is Canada’s voice for privacy and access.

PACC is Independent • National • Non-profit • Non-partisan • Non-government

PACC is the only organization fully dedicated to the development and promotion of the access-to-information, information privacy, and data governance profession across the private, non-profit and public sectors in Canada

PACC is uniquely positioned to effect change to strengthen the profession and uphold the highest standards of practice

PACC is the certifying body for access and privacy professionals, and engages in outreach efforts to advance awareness about access, privacy, and data protection in Canada

As the voice of privacy and access in Canada, PACC plays a pivotal role in ensuring the independent autonomy of Canada’s access and privacy professionals to administer Canadian privacy legislation, while directly and independently addressing the needs of industry, the public and private sectors.

More information about PACC is available at www.PACC-CCAP.ca
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Executive Summary

The Access to Information Act was drafted and enacted in an era that predates the pervasive use of electronic communications, digital data storage, and artificial intelligence.

At its outset, the ATI Act was considered a gold standard by which other countries measured their access practices. Much has changed in the intervening decades and its usefulness is now limited. Technology has moved forward at lightning speed. Canadians are now under constant surveillance — including by their own government.1 Proprietary artificial intelligence algorithms decide employability and advancement, healthcare treatments, and criminal sentences. Our preferences, opinions, and social interactions are used to influence the elections held in democratic nations.

Experience has shown that the current ATI Act is now more often used as a shield against granting access to information than a mechanism for providing access to requestors.

Federal institutions can hide behind inappropriate interpretations of broadly worded exemptions, or simply deny requests because public officials might be embarrassed, or because errors or failures might be revealed.

Information that ought to see the light of day is hidden behind false claims of legal privilege or obfuscated behind failures to respond to even the simplest of access requests; and the uncertainty wrought of vague language in existing ATI provisions invites further delay and denials of Canadians’ right to gain access to information held by their government — contrary to the core purpose of the federal Access to Information Act, namely, “to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific,”2 subject only to limited and specific exceptions to protect privacy, confidentiality and security.

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In 2011 the Centre for Law and Democracy — which developed a sophisticated Global Right to Information Rating methodology\(^3\) to assess the strength of the legal framework for the right to information — ranked Canada at 40th place overall. In 2018, Afghanistan scored at the very top of the RTI Rating, with an impressive score of 139 points out of a possible 150, or 93%. Canada scored 91 (as did Bulgaria and Uruguay) and slipped from 49th place in 2017 to 56th place in 2018 — well behind Russia (43rd place), Sierra Leone (11th place), and Bangladesh (29th place).

Before and after the 2015 federal general election, the Federal Information Commissioner, the Privacy and Access council of Canada, and countless academics, professional associations, and individual Canadians have urged successive governments to revamp the Access to Information law and regime to finally provide genuine access to information and government (and Crown corporations or those controlled by the Crown) that is truly open by default — and that does not require Canadians to file access requests to obtain government records.

In an effort to appear more responsive to access demands, the Canadian government, like several others, has embraced Open Government. An entire bureaucracy has been put in motion to administer and promote Canada’s Open Government initiative, which its proponents have extolled as the way that the government is meeting its obligation to be open and accountable.

According to the annual Open Government Barometer report\(^4\) issued by the World Wide Web Foundation in September, 2018, Canada has steadily moved toward open government in recent years. While open government is essential, governments have acknowledged that it is administrators who choose what data sets are offered up. In other words, Open Government is cherry picking. Clearly open government must not be conflated with access to information.

While Bill C-58 offers some important improvements to the ATI Act and Canada’s access to information regime in general, it remains lacking in several fundamental aspects that would provide genuine and appropriate accountability, and certainty for the access and privacy professionals working across government and the public sector. The Bill also does

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\(^3\) [https://www.rti-rating.org/country-data/](https://www.rti-rating.org/country-data/)

not contemplate the privacy and access implications of rapidly advancing technologies being put in place by governments and public bodies.

Our nation’s economy, our businesses, and our government services hinge on technology that works reliably and is worthy of Canadians’ trust. Secrecy diminishes that trust. As well, the democratic freedoms Canadians enjoy rely on having genuine privacy and well-functioning access to information.

The broad perspective of PACC members and stakeholders is particularly relevant to amending the Access to Information Act, since PACC members are access and privacy practitioners — as well as citizens, parents, members of military and law enforcement families, and actively involved in their communities. PACC members have an intimate understanding of practical aspects and shortcomings of the legislation because of their daily dealings with the Act and its consequences.

PACC members are representative of the larger Canadian context — yet our members’ awareness of privacy and access laws, and the real-life application and limits of those laws, is perhaps somewhat greater than among the general population.

PACC members understand the complexities of the issues that arise from the current Access to Information regime, and appreciate the good intentions of the Access to Information Act — from both the perspective of access and privacy professional, and that of citizen, consumer, and requestor.

The viewpoints, perspectives, and comments in this submission were gathered from PACC members and other stakeholders, all of whom have experience with the real-life application and impact of the Access to Information Act. The comments expressed in this submission reflect observations and concerns wrought from experienced dealing with the current access regime, the effect of shortcomings in the Act and its application, and recommendations for improvement.

“Man’s capacity for justice makes democracy possible, but his inclination to injustice makes democracy necessary”

Reinhold Niebuhr
American pastor and theologian
Examination of Bill C-58 and Recommendations

This submission examines practical aspects of Bill C-58, An Act to amend the Access to Information Act and the Privacy Act, that warrant amendment to protect Canadians, the democratic freedoms enjoyed by Canadians, and Canada’s place in the global landscape.

Publication of appropriate officer or employee’s title and address

Section 5 provides that “The head of each government institution shall cause to be published the title and address of the appropriate officer or employee for the government institution to which requests for access to records under this Part should be sent.”

“Title and address” is not specific and enables an institution to simply provide a generic title (i.e., FOI Coordinator) and general office address, effectively making it impossible to know whether or by whom an access request is being evaluated. It puts the requestor in the unenviable position of having to await contact or acknowledgement or contact; and if such acknowledgement is not forthcoming, leaves the requestor without any way of contacting a person to be able to obtain clarification about the status of the request.

RECOMMENDATION:
Revise Section 5 to provide that “The head of each government institution shall cause to be published the name, title, email address, direct telephone number and address of the appropriate officer or employee for the government institution to which requests for access to records under this Part should be sent.”

Scope of the Act — Access to Government Record — Artificial Intelligence

As governments and institutions embrace advanced technologies and place their trust in machines with the expectation and promise of beneficial outcomes, decisions about Canadians, including government employees, are being made (with increasing frequency) by machine systems and artificial intelligence including messaging systems used to target messages5 to individuals and identifiable groups.

5 At least two malls are using facial recognition technology to track shoppers’ ages and genders without telling. 26 July 2018.
In the rush to deploy automated decision-making systems, little heed has been paid to the inherent biases or how the technology can be used for malicious purposes and result in individuals being injured by automated decision system determinations that are incorrect, discriminatory or produce discriminatory results.

Similarly, blockchain technology offers a promise of security and privacy, but its effectiveness also causes its own set of problems when it comes to granting access to information or deleting information.

Bill C-58 do not contemplate such advanced technologies, and is therefore obsolete even before it becomes law.

RECOMMENDATION:
Add a provision in Bill C-58 stipulating that
(a) every individual about whom a decision is made by or on behalf of government and which is based or determined, in whole or in part, upon artificial intelligence shall be promptly notified in advance or at the time such automated decision-making is invoked;
(b) every artificial intelligence algorithm and automated decision-making system used by or on behalf of a government entity, public institution, Crown corporation, and any corporate entity, including non-profit and private sector companies, established to conduct business on behalf of government or a public body, shall be subject to examination, study and testing by the Information Commissioner of Canada or any party on his or her behalf.

Scope of the Act — Access to Government record — Duty to Document
The ability to gain access to information is contingent upon a record existing; and is undermined when decisions are not recorded. The increasing reliance on undocumented “oral government” is of sufficient concern that, during a celebration of the 20th anniversary of British Columbia’s Personal Information Protection Act, the country’s Information and Privacy Commissioners and Ombudspersons issued a joint resolution calling for the creation of “a legislated duty requiring all public entities to document


matters related to deliberations, actions and decisions.” In addition, modern technology makes it easier than ever to avoid public examination of government records.

RECOMMENDATIONS:
Introduce a formal duty to document for all government and public institutions, and require them to preserve records that reflect and evidence the full spectre of their decision-making.

Ensure that exceptions and exclusions to the right of access are narrowly defined and subject to both a test of actual harm and a mandatory public interest override.

Request for access to record
Section 6 provides that “A request for access to a record under this Part shall be made in writing to the government institution that has control of the record…."

While it might be easy to know or guess which institution has custody of a document, it is often impossible to know which one has control of a document. In addition, s97 provides that “the records that the head of a government institution provides to the head of another government institution for the purposes of the other institution providing the services referred to in subsection 96(1) are not under the control of that other institution” — further obscuring the identity of the correct institution to which a request for access must be submitted.

As currently written, s6 (on its own or together with s97) allows any institution to reject a request for access to information by claiming it only has custody, not control, of a document.

RECOMMENDATION:
Revise section 6 to provide that “A request for access to a record under this Part shall be made in writing to the government institution that has custody or control of the record…”

Government Institutions — Definitions
The line between state and corporate actors is blurring, as corporations undertake the work that has traditionally been under the purview of government. The implications and unintended consequences of data being collected, stored, processed and used by private sector actors are not yet understood. The enthusiasm for technology and the potential or promised economic benefit is — with the assistance of carefully crafted media campaigns and lobbying by technology and other for-profit companies — taking precedence over
the rule of law; and it is unduly influencing lawmakers to enact provisions intended to, firstly, support the economic interests of the corporate influencers, generally at the peril of individuals. Vendors — that were not elected to represent Canadians’ views and whose motives are biased to favour their own investors’ economic benefit — are being placed in the position of collecting, developing, and controlling information on behalf of governments and public bodies.

In their current form, neither the ATI Act nor Bill C-58 provide Canadians with access to information held by private sector companies created to conduct business on behalf of governments or public bodies. For instance, Waterfront Toronto — one of the partners in the proposed Sidewalk Toronto smart-city development — does not appear on the Access to Information Act Heads of Government Institutions Designation Order, SI/83-113 or on the list of covered institutions in Ontario’s FIPPA regulation O.460 — thereby obfuscating the organization’s activities, despite the reality that it is a creation of the Governments of Canada and Ontario and the City of Toronto. While the organization acknowledges that, “As a tri-government organization, we are fully accountable to the governments and people of Canada, Ontario and the City of Toronto,” and one that is “helping shape the future of data and digital policy in Canada,” Waterfront Toronto is unequivocal in its approach to access to information: “Waterfront Toronto (the Corporation) is not subject to freedom of information (FOI) legislation.”

RECOMMENDATION:
Expand Section 81 to stipulate that a ‘government entity’ includes any corporate entity, including non-profit and private sector companies, established to conduct business

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8 Sidewalk Toronto is a joint effort by Waterfront Toronto and Sidewalk Labs (https://sidewalklabs.com), a New York-based subsidiary of Google’s parent company Alphabet.


10 https://www.ontario.ca/laws/regulation/900460


on behalf of government or a public body, and that such entities do not constitute third parties.

**Reasons for declining to act on request**

Section 6.1 allows that, “With the Information Commissioner’s written approval, the head of a government institution may, before giving a person access to a record or refusing to do so, decline to act on the person’s request if, in the opinion of the head of the institution…(c) the request is vexatious, is made in bad faith or is otherwise an abuse of the right to make a request for access to records.”

In the same way that the ATI Act is used as a shield against granting legitimate access to records, permitting heads of institutions to declare a request is vexatious grants institutions (which might well have reason to try to avoid disclosure) the power to declare a request to be vexatious, even when it is not.

The requirement that a claim of ‘vexatious’ be approved by the Information Commissioner of Canada (OIC) provides a dubious safeguard, given the reality that the OIC endures a perpetual backlog of cases. Compounding the Commissioner’s workload, in the form of vexatious claims to be verified — even with an impending injection of $1.7 Million to help the OIC cover the costs of administering changes wrought on her office by Bill C-58 — will be another avenue to effectively delay responses.

**RECOMMENDATION:**

Specify within the legislation (not regulations) the characteristics of a request that would constitute a ‘vexatious’ request. Defining the test that would have to be met to qualify as a vexatious request would eliminate the potential for improper bias, subjectivity, or opportunity to falsely claim (and therefore delay) a request is vexatious.

**Notice**

Section 6.1(2) requires that, “If the head of a government institution declines to act on the person’s request, they shall give the person written notice of their decision to decline to act on the request and their reasons for doing so.” That provision does not stipulate the time within which such notice must be provided.
RECOMMENDATION:
Revise Section 6.1(2) to add a deadline by which time the institution must provide its reasons for declining to act on a request for access to information, failing which the head of the institution shall be subject to penalty as set out in revised Section s36(1)(b).

Access to Records
Section 15 of Bill C-58 provides that the Information Commission has the authority to compel and view allegedly privileged records in investigating a complaint that a government institution has withheld information on the grounds of privilege; however, the provision allows wide latitude in interpretation and, in practical terms, provides a mechanism to delay access to information. Accordingly, greater clarity is warranted to facilitate genuine and timely access to information.

The Minister of Justice, the Honourable Jody Wilson Raybould, has written to the Canadian Bar Association to affirm that section 15 of Bill C-58 will remain in the Bill. PACC applauds this commendable commitment.

PACC acknowledges that solicitor-client privilege is a substantive right, and a cornerstone of the rule of law that has constitutional dimensions. The public’s right of access to information also has constitutional dimensions, as the Supreme Court of Canada has affirmed.

The public interest in upholding privilege is vitally important, but so is the public interest in neutral, cost-effective, and expert review of privilege claims asserted by the government and public bodies, to ensure that claims of privilege are properly made.

The Commissioner is a neutral, independent arbiter who provides efficient and effective oversight of government institutions’ claims of solicitor-client privilege. Her office has done this work successfully for decades and has developed considerable expertise in doing so.

Her decisions on privilege claims are subject to meaningful judicial oversight, in the form of de novo review by the Federal Court of Canada. Any concerns about protection of privilege are thus fully protected by the judiciary.
The Supreme Court of Canada has affirmed that Parliament may empower statutory tribunals with the authority to decide constitutional matters.\(^{15}\) The Court must be understood to have affirmed this when it ruled, in 2016, that a legislature may authorize a statutory tribunal—which the Commissioner effectively is—to compel product of allegedly privileged records.\(^{16}\) The Court did not suggest that there is any constitutional bar, despite its earlier ruling, against Parliament enacting such a clause (or empowering a tribunal to decide privilege claims). The Court would surely not have let this point pass unmentioned in 2016 had it wished to turn away from its explicit ruling in 2003.

There is no constitutional or public policy reason to prevent the Commissioner from continuing to provide the expert, cost-effective review of government’s privilege claims, a function her office has performed, under the oversight of the Federal Court, for over 30 years. Bill C-58 will not change this decades-old framework and Parliament should support this clarification.

**Scope of the Act — Broader Access**

The current access to information regime enables government and public bodies to hold information unless and until a specific element is requested or must be revealed, subverting transparency and accountability while incurring delays, costs, and frustration.

Bill C-58 in its current form fails to extend the ATI Act to the Offices of the Prime Minister and Ministers, and political parties, despite repeated assurances by successive governments that the federal government is open, transparent and accountable.

**RECOMMENDATION:**

Require that all information that is not explicitly categorized and marked as classified or which is not genuinely a Cabinet confidence or similarly sensitive record, shall be posted in any official language, on multiple Government websites within 24 hours of being produced, with translations to be posted within seven business days thereafter.

Include provisions in the ATI Act (not regulations) that the Act applies to the Offices of the Prime Minister and Ministers, and to political parties.

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\(^{15}\) Paul v. British Columbia (Forest Appeals Commission), [2003] 2 SCR 585, 2003 SCC 55 (CanLII). In that case, the Court held that British Columbia could empower a tribunal to adjudicate questions of aboriginal rights, which—unlike solicitor-client privilege—are explicitly protected under section 35 of the Constitution Act, 1982.

\(^{16}\) University of Calgary v. Alberta (Information and Privacy Commissioner), [2016] 2 SCR 555, 2016 SCC 53 (CanLII).
**Enforcement**

The outright refusal by public bodies — such as the RCMP\(^{17}\) — to respond to access requests is a symptom of the ineffective access legislation and regime.

Section 36.1(1) gives the Information Commissioner order-making power in relation to complaints received by her office, but 36.1(2) precludes the Commissioner from making orders in relation to investigations or complaints initiated by her office. Allowing that language to remain will leave the Commissioner’s office unable to be effective without public complaints as the genesis for investigations.

Bill C-58 also falls short of providing any effective enforcement mechanism to compel compliance with Commissioners’ orders. Bill C-58 stipulates that the Commissioner may refer cases of non-compliance with orders to the courts; but even that offers no assurance that access to information will occur in a timely manner or at all.

As a result, institutions that fail to provide access to information can refuse, forcing requestors to seek assistance from the Commissioner whose orders can be disregarded — and whose recourse is to submit the matter to the Courts. Organizations ordered by the court to produce requested records can continue to refuse, only at the peril of further court action — none of which results in the information being produced.

Equally ineffective is imposing fines on reticent organizations since that does little more than redirect taxpayers’ dollars from one public institution to another; and still without any disclosure of requested records.

Similarly, s36(1)(b) provides that institutions can be ordered to reconsider their initial refusal to provide access to a record or part of the record — permitting the institution to simply assert, without substantiation or justification, that it has reconsidered and not changed its position.

**RECOMMENDATION:**

Rewrite the legislation to impose executive accountability (with ensuing consequences) for overall organizational (not merely ATIP unit) effectiveness in achieving ATIP objectives; to clearly define what constitutes wrongdoing; and to create specific consequences for those actions:

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\(^{17}\) RCMP STOPS RESPONDING TO PEOPLE USING ACCESS TO INFORMATION LAWS: INFORMATION COMMISSIONER. https://globalnews.ca/news/785556/rcmp-stopped-responding-to-information-requests-information-commissioner/
Provide significant penalties within the ATI Act (not regulations), for non-compliance with the ATI Act, stipulating that the Head of a public body is personally liable for production of records, and subject to million-dollar fines, dismissal, and imprisonment for their organization failing to comply with orders issued by the Information Commissioner of Canada or by the Court. Provide similar penalties for any Head whose organization is found to have wilfully misapplied exemptions, refused or neglected to respond to access requests, or that fails in its duty to document its decisions, or fails to provide training sufficient for its access and privacy personnel to competently and effectively carry out their roles and duties.

Revise s36(1)(b) to provide that any organization ordered to reconsider its refusal to provide access to a record or part of the record, but which does not vary its decision shall, within 30 days of such refusal, provide the Commissioner with written reasons for such refusal, failing which the Head of the institution shall be subject to penalties for non-compliance with the ATI Act, including that the Head of a public body is personally liable for production of records, and subject to million-dollar fines, dismissal, and imprisonment for their organization failing to comply with orders issued by the Information Commissioner of Canada.

**Scope of the Act — Commissioner’s Mandate**

The current Access to Information Act and the amendments provided by Bill C-58 fail to provide any requirement that the mandate of the Information Commissioner of Canada be expanded to include education and public outreach, or requisite funding to enable the Commissioner’s office to meet that mandate.

**RECOMMENDATION:**

Include provisions in the ATI Act that expand the Information Commissioner of Canada’s mandate to include public education and outreach, as a way to increase Canadians’ awareness about their access-related rights and responsibilities.

Expand the Information Commissioner’s mandate and funding to include development and dissemination of standard guidelines and ongoing interpretation clarification to the entirety of Canada’s public service with a view to improving the consistency in responding to access requests.
Search Fees
The current access regime enables public bodies to charge fees to recover costs associated with locating responsive records and providing access to information that are, in reality, fees to compensate the organization for its inadequate records management practices.

RECOMMENDATION:
Include a provision in the ATI Act stipulating that their cost to organize, search, or digitize their own records is not recoverable. Without such limitations, public bodies will continue to be able to perpetuate their poor planning or inadequate records management practices, and use that as an effective tool to make the cost of access to information unaffordable.

Include a provision that records provided in digital form must be searchable (i.e., a text document cannot be provided as an image) and shall not be subject to charge.

Scope of the Act — Communications
The question of whether or not employees’ personal emails are in the custody or control of a public body and therefore subject to freedom of information legislation was addressed by the Ontario Superior Court of Justice in City of Ottawa v. Ontario, 2010 ONSC 6835 (CanLII); but the current Access to Information Act and the provisions of Bill C-58 are silent as to production of records created or stored on personal devices. At the federal level, the question remains whether or not personal emails that are completely unrelated to one’s work, but which are sent or received with a workplace email address, are emails subject to disclosure.

RECOMMENDATION:
Include a provision in the ATI Act that all emails and communications sent from the personal email addresses and from work email addresses of employees, directors, officers, and contractors, and which relate directly or indirectly to workplace matters, are subject to freedom of information legislation.

Include a provision in the ATI Act that all emails and communications sent from the personal email addresses and from work email addresses of employees, directors, officers, and contractors, and which do not relate either directly or indirectly to workplace matters, are not subject to freedom of information legislation.
Scope of the Act — First Nations governments

The Access to Information Act (ATI Act) and Bill C-58 in their current form do not provide any requirement or mechanism to put in place for First Nation governments the same protections for their confidential information and intergovernmental communications that are available to other governments under the ATI Act, and that are in place for First Nation governments in most provincial and territorial access to information legislation (See Appendix 1). Bill C-58 does not currently include these crucial amendments — which should be made to Bill C-58 before it is adopted and receives Royal Assent.

The ATI Act does not provide sufficient protection for First Nation governments working with the federal government and its institutions in two ways:

1. The ATI Act does not adequately and fairly protect information provided in confidence by First Nation governments to the federal government and its institutions.

2. The ATI Act does not adequately protect communications between First Nation governments and the federal government and its institutions.

RECOMMENDATIONS:

Two amendments are proposed to address the inadequate protections for First Nation governments in the ATI Act:

1. In order to adequately and fairly protect information provided by in confidence by First Nation governments to the federal government and its institutions, amend section 13(3) of the ATI Act to add the following to the definition of ”aboriginal government”:

(i) the council of a band within the meaning of subsection 2(1) of the Indian Act.

2. In order to adequately protect communications between First Nation governments and the federal government and its institutions, amend the ATI Act to include the following new language:

x. The head of a government institution may refuse to disclose any record requested under this Act that contains information the disclosure of which could reasonably be expected to be injurious to relations between the Government of Canada or a government institution and an aboriginal government.

These two proposed amendments would achieve the following objectives for First Nation governments across Canada:
1. Recognize First Nation governments to be on the same footing as all other governments. First Nation governments are engaged in their own governmental law and policy development under a number of frameworks. The ATI Act provides all other governments with the necessary protection for their law and policy development, while excluding First Nation governments.

2. Protect intergovernmental communications. Canada has committed to a “nation to nation” relationship with First Nation governments and supports First sectoral First Nation governance under a number of legislative frameworks. However, it has omitted the vast majority of First Nation governments from the definition of “aboriginal governments” in the ATI Act and has not recognized the need to protect federal-aboriginal governmental relationships. These omissions put the confidential information and communications of First Nation governments at risk.

3. Support the role of government and its Institutions. Canada and its institutions carry on vital work with First Nation governments. The amendments are needed to support the practical “on the ground” ability of those institutions to carry out their mandates. The ATI Act puts these relationships under the cloud of possible disclosure and constrains the flow of communications and sharing of information relevant to establishing and maximizing benefits for First Nation communities.

4. Align with provincial and territorial legislation. Most provincial and territorial access to information legislation recognizes all First Nation governments and, in many cases, a broader range of aboriginal organizations. As federal legislation, the ATI Act should provide at least the same level of recognition and protection to First Nation governments.

**Notice to third parties**

S36(2) of Bill C-58 provides that the Information Commissioner “may consult the Privacy Commissioner and may, in the course of consultation, disclose to him or her personal information”, but is silent as to whether or not corporate or third-party information may also be disclosed to the Privacy Commissioner.

**RECOMMENDATION:**

Revise s36.2 to provide that the Information Commissioner “may consult the Privacy Commissioner and may, in the course of consultation, disclose to him or her personal information, corporate and institutional information including trade secrets, and third-party information.”
**Information Commissioner’s initial report to government institution**

Section 37(1) of Bill C-58 provides that, if the Information Commissioner “finds a complaint well-founded, the Commissioner shall provide the head of the government institution concerned with a report that sets out...(c) the period within which the head of the government institution shall give notice to the Commissioner of the action taken or proposal to be taken to implement the order or recommendations set out in the report...”

“Implement the order or recommendations” implies that implementing recommendations is mandatory but since that is merely an implication, the uncertainty opens the door to protracted actions to seek clarification. Furthermore, s36(1) does not refer to recommendations, only to orders.

**RECOMMENDATION:**

Revise s37(1) to provide that “the Commissioner shall provide the head of the government institution concerned with a report that sets out...(c) the period within which the head of the government institution shall give notice to the Commissioner of the action taken or proposal to be taken to implement the order or recommendations set out in the report...”

**Scope of the Act — USMC Agreement, Tax Treaties and International Agreements**

The Government of Canada has implemented a variety of mechanisms to improve international trade, strengthen the country’s economy, and reduce tax evasion. In addition to 93 tax treaties in force and 4 signed but not yet in force, trade-related agreements have profound implications for privacy and access to information.

The most recent agreement — the United States-Mexico-Canada trade agreement (USMCA) — have profound implications for data privacy and therefore access to information. In addition, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (which incorporates the Trans-Pacific Agreement) compounds the challenge for Canadian organizations struggling to comply with Canadian access and privacy laws.

The USMC effectively bars financial sector organizations and others from requiring the location of computing facilities be within a party’s territory. Government is exempt from that requirement; however, information collected about Canadians on behalf of public

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bodies is subject to the requirement. Thus, the information relevant to Waterfront Toronto and the tripartite government-created entity, Waterfront Toronto, have significant impacts on urban design, social policy and government — yet will be inaccessible to Canadians.

USMC Article 19 undercuts the operation of British Columbia\(^\text{19}\) and Nova Scotia\(^\text{20}\) laws limiting public sector data from leaving Canada, thereby imperilling Canadians’ ability to gain access to information since existing laws, the provisions of Bill C-58, USMCA and CPTPP do not offer any mechanism to enable Canadians to gain access to information that is stored, processed or transmitted beyond Canada’s borders.\(^\text{21}\)

**RECOMMENDATION:**
Stipulate that the Access to Information Act applies to information originating in Canada, regardless of the jurisdiction in which it is processed, stored, or transmitted.

**Access Given — Refusal of access if information to be published**

S26 of Bill C-58 allows the head of a government institution to refuse to disclose any record “if the head of the institution believes on reasonable grounds that the material in the record or in part of the record will be published” by, inter alia, a government institution “within 90 days after the request is made.”

Bill C-58 offers neither a definition as to what constitutes “reasonable grounds” nor any requirement that the head of the institution substantiate their reason for believing the information will be published within 90 days after the request is made. Accordingly, the language of s26 allows the institution to simply deny access to the information, claiming an unsubstantiated belief of imminent publication and if the information is not published, to simply claim it was an erroneous belief. In other words, s26 gives institutions an effective tool to deny and delay access to information.

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\(^\text{19}\) Freedom of Information and Protection of Privacy Act, RSBC 1996, c 165

\(^\text{20}\) Personal Information International Disclosure Protection Act, SNS 2006, c 3

\(^\text{21}\) Article 19.11(1) of the USMC Agreement stipulates that “No party shall prohibit or restrict the cross-border transfer of information, by electronic means if this activity is for the conduct of the business of a covered person” and “person means a natural person or an enterprise.” (TPP Article 14.11(2)) provides that “Each Party shall allow the cross-border transfer of information by electronic means, including personal information, when this activity is for the conduct of the business of a covered person.”

USMCA Article 19.12 (TPP Article 14.13(2)) provides that “No Party shall require a covered person to use or locate computing facilities in that Party’s territory as a condition for conducting business in that territory.”

USMCA Article 19.14 states that “[r]ecognizing the global nature of digital trade, the Parties shall endeavor to … cooperate and maintain a dialogue on the promotion and development of mechanisms, including the APEC Cross-Border Privacy Rules, that further global interoperability of privacy regimes … [and] shall consider establishing a forum to address any of the issues listed above, or any other matter pertaining to the operation of this chapter.”
RECOMMENDATION:
Eliminate section 26 entirely.
Alternatively, include unambiguous definitions to indicate precisely what elements, factors and circumstances constitute “reasonable grounds” for believing that information will be published within 90 days after the request is made; and include penalties for the head of any organization found to have, on a balance of probabilities, wilfully denied access to information on an unfounded belief that information would be published within 90 days after a request is made.

Information Commissioner’s Report — Publication
Section 37(3.1) provides that the Commissioner “may” publish the report referred to in subsection (2)” but does not require that the report be published.

RECOMMENDATION:
Reword Section 37(3.1) to provide that the Commissioner “shall” publish the report referred to in subsection (2)” to provide transparency and openness.

Designated Minister’s Duties and Functions
Section 33(d) of Bill C-58 provides that statistics shall be collected, and that a report containing a summary of statistics shall be published. The Bill does not specify the granularity of statistics reported, any penalty for failing to comply, or mechanism for compelling compliance.

RECOMMENDATION:
Include provisions in the ATI Act (not regulations) to provide a penalty to be imposed for failing to comply, and mechanisms for compelling compliance; and specify granularity of statistics to be reported.

Access to Records
Section 46 provides that “the Court may…examine any record to which this Part applies that is under the control of a government institution, and no such record may be withheld from the Court on any grounds.” The provision does not address the ability of third parties to withhold records from the Court.
RECOMMENDATION:
Revise Section 46 to provide that “the Court may…examine any record to which this Part applies that is under the control of a government institution or third party, and no such record may be withheld from the Court on any grounds.”

Travel Expenses
Sections 71.02(e), 71.05, 71.09, and 75(e) stipulate that travel expenses “including the costs for any other person such as a spouse or dependent who participated in the travel” shall be reported. The language facilitates only partial disclosure of travel expenses and is therefore inadequate to provide full and appropriate accountability.

RECOMMENDATION:
Revise Sections 71.02(3) to provide that “the total cost for each of the following classes of expenses, including the costs for and identity of any other person who participated in the travel with or on behalf of the Senator and whose direct or indirect travel or associated costs are reimbursed, whether to the Senator or any other party:”

Allowances — judges
Sections 90.07 and 90.19 provide that “within 30 days after the end of the quarter in which any travel or other expenses incurred by a judge of the Supreme Court or his or her spouse or common-law partner are reimbursed” however, that language is inconsistent with the provisions of Sections 71.02(e), 71.05, 71.09, and 75(e) which refer to “the costs for any other person such as a spouse or dependent who participated in the travel”. In any event, the language of s90.07 facilitates only partial disclosure of travel expenses and is therefore inadequate to provide full and appropriate accountability.

In addition, Sections 90.07, 90.19, 90.20, and 90.21 relating to reimbursement of travel and other expenses incurred by a judge of the Supreme Court is inadequate to provide full disclosure and appropriate accountability.

RECOMMENDATION:
Revise Sections 90.07) and 90.19 to provide that the Registrar shall cause to be published in electronic form “the costs for and identity of any other person who participated in the travel with or on behalf of a judge of the Supreme Court and whose direct or indirect travel or associated costs are reimbursed, whether to the Judge or any other party:

NOTE: Numbering of Section 90.20 is noted as “90.2”.

October 2018
Hospitality Expenses

Disclosing the information stipulated in sections 71.03(a) through (g), 71.06, 71.10, 75, 83, 90.04, and 90.16 is important to provide accountability, but neglects a significant category to be reported and is therefore inadequate to provide full and appropriate accountability.

RECOMMENDATION:
Add a subsection to Section 71.03 that requires disclosure of “the name of any individuals, corporations or other parties that contribute to funding (whether directly or indirectly) the hospitality event.”

NOTE: Numbering of s.71.10 is noted as “71.1”.

Contracts

Sections 71.04(2), 71.07(2), 87(3), 90.05(1), 90.13(3), and 90.17(2) improves accountability of government contracts, but lack sufficient detail to provide sufficient and appropriate accountability.

RECOMMENDATION:
Revise sections 71.04(2), 77(3), 90.05(2) and (3), and 90.17(2) to provide that when any contract is “amended so that its value is increased or decreased, or its term extended, shortened or renewed,” the Speaker of the Senate or head of the government entity “shall cause to be published in electronic form the value and term and duration’ of the contract, agreement or arrangement.

Contracts over $10,000

Section 71.11(1), 77(1), 86(1), 90.05(1), 90.13(1) and 90.17(1) provide that details shall be published only about those contracts entered into that have “a value of more than $10,000,” and is therefore inadequate to provide full and appropriate accountability, particularly when multiple contracts (each with a value of less than $10,000) are entered into with the same party in a short period or in series.

RECOMMENDATION:
Revise the language of sections 71.11(1), 77(1), 86(1), 90.05(1), 90.13(1) and 90.17(1) to include the same subsections (a) through (f) as appear in section s86(1).
Revise the language of sections 71.11(1), 77(1), 86(1), 90.05(1), 90.13(1) and 90.17(1) to provide accountability for a greater number of contracts and simultaneously avert obfuscation of contracting expenditures by requiring that all information enumerated in s86(1) (a) through (f) inclusive shall be published “Within 90 days after the end of the quarter in which a contract with a value of more than $10,000 is entered into, or more than one contract or agreement is entered into with the same party within the quarter”.

**Briefing Materials**

The inclusion of mandatory reporting by Ministers and heads of government institutions is an important improvement in accountability; however, the language of is inadequate to provide full and appropriate disclosure and accountability. For instance, s74 does not contemplate disclosure of materials prepared on behalf of ministers or government institutions, such as by parties under contract to the minister or institution.

**RECOMMENDATION:**

Revise s74 to provide that:

(a) within 120 days after the appointment of the minister, the package of briefing materials that is prepared for the minister by or on behalf of a government institution for the purpose of enabling the minister to assume the powers, duties and functions of his or her office;

(b) within 30 days after the end of the month in which any memorandum prepared by or on behalf of a government institution for the minister is received by his or her office, the title and reference number of each memorandum that is received;

(c) within 30 days after the last sitting day of the House of Commons in June and December or, respectively, no later than July 31 or January 31 if the House of commons is not sitting in June or December, the package of question period notes that were prepared by or on behalf of a government institution for the minister and that were used on the last sitting day of the month in question;

(d) within 120 days after the minister’s appearance before a committee of Parliament, the package of briefing material that is prepared by or on behalf of a government institution for the minister for the purpose of that appearance.
RECOMMENDATION:
Revise s88(c) to provide that “within 120 days after an appearance before a committee of Parliament, the package of briefing materials that is prepared for the deputy head or the person for the purpose of that appearance and the notes, speeches and presentations prepared for or used in that appearance or provided in relation to that appearance.

Grants and Contributions over $25,000
Section 87 improves accountability in relation to grants and contributions, but without sufficient detail to provide sufficient and appropriate accountability.

RECOMMENDATION:
Revise 87(1)(b) to provide that “the municipality, province and country where the recipient resides or, in the case of a corporation or organization, where its head office is located and where it carries on business;”

RECOMMENDATION:
Expand Section 87(1) to add a subclause “the term, renewal and extension provisions of the agreement or arrangement”

Reclassification of Positions
The proactive disclosure of information about reclassification of occupied positions is an important improvement in openness and accountability; but it lacks sufficient detail to be able to discern the number of affected positions/individuals.

RECOMMENDATION:
Expand s85 to add “the number of individuals affected by each reclassified position;”

Five Year Review
The requirement to refer reports to committee is important for accountability; however, the language of 92(2) neither specifies a time within which a report must be referred to committee nor requires any action be taken by government in response to any recommendations contained in a report.

RECOMMENDATION:
Amend 92(2) to indicate a time within which a report must be referred to committee for the purpose of section 99, and add language to impose a requirement and timeline for government to act upon recommendations contained in a report.
## APPENDIX 1

<table>
<thead>
<tr>
<th>Province/Territory</th>
<th>Legislation</th>
<th>Applicable Provisions</th>
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<tbody>
<tr>
<td></td>
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<td>21(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to:</td>
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<td>(a) harm relations between the Government of Alberta or its agencies and any of the following or their agencies:</td>
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<td>(iii) an aboriginal organization that exercises government functions, including:</td>
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<td>(A) the council of a band as defined in the Indian Act (Canada), and</td>
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<td>(B) an organization established to negotiate or implement, on behalf of aboriginal people, a treaty or land claim agreement with the Government of Canada,</td>
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<td>(b) reveal information supplied, explicitly or implicitly, in confidence by a government, local government body or an organization listed in clause (a) or its agencies.</td>
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<td>BC</td>
<td>Freedom of Information and Protection of Privacy Act (1996)</td>
<td>Disclosure harmful to intergovernmental relations or negotiations</td>
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<td>16(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to:</td>
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<td>(a) harm the conduct by the government of British Columbia of relations between that government and any of the following or their agencies:</td>
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<td>(iii) an aboriginal government;</td>
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<td>(c) harm the conduct of negotiations relating to aboriginal self government or treaties.</td>
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<td><strong>Schedule 1</strong></td>
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<td>In this Act:</td>
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October 2018
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<tr>
<td></td>
<td><strong>&quot;aboriginal government&quot; means an aboriginal organization exercising governmental functions;</strong></td>
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<tr>
<td>MB</td>
<td>The Freedom of Information and Protection of Privacy Act (1997)</td>
<td><strong>Information provided by another government to department or government agency</strong></td>
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<td>20(1) The head of a department or government agency shall refuse to disclose information to an applicant if disclosure could reasonably be expected to reveal information provided, explicitly or implicitly, in confidence by any of the following or their agencies:</td>
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<td>(c) a local public body;</td>
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<td>(c.1) the council of a band as defined in the Indian Act (Canada), or an organization performing government functions on behalf of one or more bands;</td>
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<td><strong>Disclosure harmful to relations between Manitoba and other governments</strong></td>
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<td>21(1) The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to harm relations between the Government of Manitoba or a government agency and any of the following or their agencies:</td>
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<td>(c) a local public body;</td>
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<td>(c.1) the council of a band as defined in the Indian Act (Canada), or an organization performing government functions on behalf of one or more bands;</td>
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<td>ON</td>
<td>Freedom of Information and Protection of Privacy Act (1990)</td>
<td><strong>Relations with Aboriginal communities</strong></td>
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<td>15.1 (1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,</td>
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<td>(a) prejudice the conduct of relations between an Aboriginal community and the Government of Ontario or an institution; or</td>
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<td>(b) reveal information received in confidence from an Aboriginal community by an institution.</td>
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<td><strong>Definition</strong></td>
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<td>NB</td>
<td>Right to Information and Protection of Privacy Act (2009)</td>
<td>Information provided by a council of the band</td>
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<td>19(1) The head of a public body shall refuse to disclose information to an applicant that could reasonably be expected to reveal information provided, explicitly or implicitly, in confidence by a council of the band as defined in the Indian Act (Canada).</td>
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<td>19(2) Subsection (1) does not apply if the council of the band consents to the disclosure or makes the information public.</td>
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<td>NS</td>
<td>Freedom of Information and Protection of Privacy Act (1993)</td>
<td>Intergovernmental affairs</td>
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<td>12 (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to</td>
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<td>(a) harm the conduct by the Government of Nova Scotia of relations between the Government and any of the following or their agencies:</td>
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<td>(iii) an aboriginal government</td>
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<td>NT</td>
<td>Access to Information and Protection of Privacy Act (1996)</td>
<td>Disclosure prejudicial to intergovernmental relations</td>
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<td>16. (1) The head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to</td>
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<td>(a) impair relations between the Government</td>
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(2) In this section, “Aboriginal community” means,
(a) a band within the meaning of the Indian Act (Canada),
(b) an Aboriginal organization or community that is negotiating or has negotiated with the Government of Canada or the Government of Ontario on matters relating to,
   (i) Aboriginal or treaty rights under section 35 of the Constitution Act, 1982, or
   (ii) a treaty, land claim or self-government agreement, and
(c) any other Aboriginal organization or community prescribed by the regulations.
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<td>of the Northwest Territories and any of the following or their agencies:</td>
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<td>(ii) an aboriginal organization exercising governmental functions, including, but not limited to</td>
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<td>(A) a band council, and</td>
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<td>(B) an organization established to negotiate or implement, on behalf of aboriginal people, a treaty or land claim agreement or treaty with the Government of Canada,</td>
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<td>(b) prejudice the conduct of negotiations relating to aboriginal self-government or to a treaty or land claims agreement; or</td>
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<td>(c) reveal information received, explicitly or implicitly, in confidence from a government, local authority or organization referred to in paragraph (a)</td>
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<td>or its agency.</td>
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<td>Disclosure prejudicial to intergovernmental relations</td>
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<td>16. (1) The head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to result in damage to or interfere with the conservation of</td>
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<td>(b) sites having an anthropological or heritage value or aboriginal cultural</td>
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<td>significance;</td>
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<td>Disclosure harmful to conservation</td>
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<td>19. The head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to result in damage to or interfere with the conservation of</td>
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<td>(ii) an aboriginal organization exercising governmental functions, including, but not limited to (A) a band council, and (B) an organization established to negotiate or implement, on behalf of aboriginal people, a treaty or land claim agreement or treaty with the Government of Canada, (b) prejudice the conduct of negotiations relating to aboriginal self-government or to a treaty or land claims agreement; or (c) reveal information received, explicitly or implicitly, in confidence from a government, local authority or organization referred to in paragraph (a) or its agency.</td>
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<tr>
<td>YT</td>
<td>Access to Information and Protection of Privacy Act (2002)</td>
<td>Disclosure harmful to intergovernmental relations or negotiations 20(1) A public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to: (a) harm the conduct by the Government of the Yukon of relations between that Government and any of the following or their agencies:</td>
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<td>Province/Territory</td>
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<td>(iii) a Yukon First Nation government or similar government established under a land claims settlement, the governing body of a band under the Indian Act (Canada), or other aboriginal authority or organization, (c) harm the conduct of negotiations relating to or arising from aboriginal self government or land claims settlements. (3) Subsection (1) does not apply to information in a record that has been in existence for 15 or more years other than information in a record in respect of unfinished negotiations relating to aboriginal self-government or land claims settlements.</td>
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