# Submission to the Office of the Independent Special Interlocutor

2023.11.01

Freedom of Information and Privacy Association

## Territorial Acknowledgement

FIPA acknowledges with respect the Indigenous Peoples on whose traditional territory we conduct activities. We acknowledge the insight and knowledge of Elders past, present, and emergent and their relationship to this land and these issues. While striving to increase privacy protection and access to information for everyone, we recognize that colonization and associated attitudes, policies and institutions have significantly changed Indigenous Peoples' relationship with this land. For many years, those same things served to exclude Indigenous Peoples from the privacy protection and access to information afforded to others. FIPA is committed to redressing those historic and continued barriers.

## About FIPA

The BC Freedom of Information and Privacy Association (FIPA) is a non-partisan, non-profit society that was established in 1991 to promote and defend freedom of information and privacy rights in Canada. While we are based in BC, our membership extends across Canada and we regularly partner with organizations throughout the country.

Our goal is to empower citizens by increasing their access to information and their control over their own personal information. We serve a wide variety of individuals and organizations through programs of public education, public assistance, research, and law reform. We are one of very few public interest groups in Canada devoted solely to the advancement of freedom of information and privacy rights.

## Institutional Funders

The BC Freedom of Information and Privacy Association thanks the Law Foundation of BC and all our contributors including donors, funders, and volunteers for their ongoing support of our advocacy, programs, projects, and activities. We also acknowledge the financial support of the Province of British Columbia (Gaming Policy and Enforcement Branch).


## Preface and Positionality

My name is Gage Smith (he/him). I am Red River Métis and a citizen of the Métis Nation of Alberta. My family has ancestral roots in the Red River Settlement in Manitoba and Willow Bunch and Qu'Appelle in Saskatchewan. I am studying law in the Juris Doctor/Juris Indigenarum Doctor (JD/JID) program at the University of Victoria, where we have the opportunity to learn about both Canadian common law and Indigenous legal orders.

The reason I am in law school and working at FIPA is to contribute to the work of people like Kimberly Murray, who advocate for Indigenous-led processes that improve the legal system for future generations of Indigenous families. FIPA's focus on progressive advocacy and law reform drew me to the organization. My friends, family, and the JD/JID community ground me in my purpose as a legal advocate for Indigenous people.

I was working on FIPA's "Leading Language" project when I was informed that we had the opportunity to draft a submission to the Office of the Special Interlocutor for Missing Children and Unmarked Graves and Burial Sites associated with Indian Residential Schools (OSI). It is deeply meaningful to me that our research may be useful for such an important purpose.

Access to information and protection of privacy legislation has unjustly obstructed the efforts of Indigenous families to uncover the truth about their history and heal from the impacts of the residential school system. My main hope is that this submission contributes to at least one family's healing process, even in a small way.

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## Introduction

The BC Freedom of Information and Privacy Association (FIPA) is a non-partisan, non-profit society that was established in 1991 to promote and defend freedom of information and privacy rights in Canada. Our goal is to empower citizens by increasing their access to information and their control over their own personal information. We serve a wide variety of individuals and organizations through programs of public education, public assistance, research, and law reform. We are one of very few public interest groups in Canada devoted solely to the advancement of freedom of information (FOI) and privacy rights.[1]

Our most recent public education project is called Canadian Access, Privacy, and Enforcement: Leading Language. Canadians' trust in the federal government respecting their privacy rights has decreased from 63% of Canadians surveyed in 2020 to 58% in 2022[2], so we drew attention to clearly written and substantive legislation in the field of access to information and protection of privacy. Our research focused on the public sector, as will this submission.

This submission focuses on questions 2 and 3 from your call for submissions:

*2. Are there any promising practices that you have developed or are aware of in the context of search and recovery work including those relating to:*

- *Gathering Survivor truths and testimonies?*
- *Collaborative agreements on sharing information?*
- *Commemoration and memorialization processes and projects?*
- *Engagement and inclusive decision-making processes across affected Indigenous communities?*

*3. What broad structural changes to the current legal framework would produce more just outcomes for Survivors, families and communities in the context of missing children and unmarked burials?*

We answer question 2 in part with a "leading language" analysis: we determine which statutes are the most effective at achieving the stated purposes in the question. This submission focuses on the "gathering survivor truths and testimonies" purpose with an incidental focus on the "engagement and decision-making" purpose. We will focus on two statutes that are leading the Canadian access and privacy landscape: Québec's *Act to authorize the communication of personal information to the families of*

[1] https://fipa.bc.ca/

[2] https://www.priv.gc.ca/en/opc-actions-and-decisions/research/explore-privacy-research/2023/por_ca_2022-23/#:~:text=Nearly%20six%20in%2010%20Canadians,general%20respects%20my%20privacy%20rights%E2%80%9D.

*Indigenous children who went missing or died after being admitted to an institution*[3], and Newfoundland and Labrador's *Access to Information and Protection of Privacy Act*[4].

We answer question 3 with a gap analysis: we identify barriers, shortcomings, and oversights in the current access and privacy frameworks across Canada and make policy recommendations that we argue would help rectify these gaps. We focus on two specific statutes while answering question 2, but for question 3, the gaps identified exist, in large part, due to the structure of the general access and privacy framework administered by all jurisdictions. So, the focus will be on access and privacy legislation in a more general sense.

[3] https://www.legisquebec.gouv.qc.ca/fr/document/lc/C-37.4?langCont=en
[4] https://assembly.nl.ca/legislation/sr/statutes/a01-2.htm

## Promising Practices

The leading legislation for search and recovery work will create the most effective and accessible legal mechanisms for that work. In our leading language project, we identified some of the following characteristics of effective language in access and privacy:

- Limits to the following barriers to successful Freedom of Information ("FOI") requests:
    - Cost
    - Unreasonable delays
    - Overcomplication
    - Arbitrary or unnecessary restrictions
- Broad protections for individuals' right to access their personal information held by public bodies
- Access request mechanisms that are practical and accessible

In the context of this submission, some other factors may need to be considered for some Indigenous applicants, including:

- Linguistic barriers
- Cultural protocols
- Community and family obligations
- Indigenous legal orders
- Bearing the burden of proof:
    - It is FIPA's position that Indigenous applicants who have already suffered from the impacts of the residential school system brought by the Canadian state should not be required or expected to bear the burden of proof, cost, or labour when using access and privacy legislation to facilitate search and recovery work. It is justified for the Canadian state to bear these burdens, as policies implemented by the historical Canadian state have caused the harm that necessitates the search and recovery work being undertaken by Indigenous peoples today. (UNDRIP Article 21(2), Article 28, Article 38, Article 39).

### The Québec Act

In this submission, we evaluate Québec's *Act to authorize the communication of personal information to the families of Indigenous children who went missing or died after being admitted to an institution* as opposed to its public sector access and privacy legislation. The statute, which will now be referred to as "*The Québec Act*" for the remainder of this submission, is unique in that it is the first of its kind, with a purpose specifically to facilitate, support, and encourage search and recovery work.

The scheme and language of *The Québec Act* centre the applicant of a request in a way other access to information legislation fails to. For example, take note of sections 3 and 4 of *The Québec Act*:

> *3. The minister responsible for Indigenous affairs must inform Indigenous families on a regular basis, taking into account such aspects as their linguistic and cultural characteristics, of the various measures put in place to support them in their search for information, in particular as regards the procedure to follow in accordance with this Act.*
>
> *4. The minister responsible for Indigenous affairs provides assistance to any person who requires it, in accordance with the person's needs, in making a request for the communication of personal information held by an institution, body or religious congregation about a person who could be a missing or deceased Indigenous child, as well as in following up on such a request, including by planning a meeting if the person making the request considers it necessary.*
>
> [...]

While it is common for access and privacy legislation to include provisions that make it the responsibility of the government institution to assist the applicant in making their request, it is not common for these provisions to also require the institution to consider the special circumstances of Indigenous families who will be using the request mechanism the legislation establishes. The Québec Act stipulates that the minister actively informs Indigenous families about the measures taken in the Act to support them with search and recovery work. It also specifies that when the minister aids a requestor, that the minister plans a meeting if the requestor considers it necessary.

This language stipulating consideration of the specific circumstances of Indigenous families and individual applicants is absent from other access and privacy legislation, but it is essential to an effective framework for search and recovery work. Other access and privacy legislation grants considerable discretion to public bodies in how they will respond to FOI requests. Public bodies have discretion over whether applicants must pay fees, the costs of the fees, whether they will give themselves extensions of time to respond to requests, and more. This discretion is often used to create barriers to Indigenous people trying to carry out search and recovery work (*Vancouver Interim Report,* p. 30).

These barriers impede upon progress towards Indigenous data sovereignty. For example, the principles of OCAP©[5], which were specifically developed by the First Nations Information Governance Centre to work towards First

[5] https://fnigc.ca/ocap-training/

Nations data sovereignty, are that First Nations must have ownership, control, access, and possession of First Nations' data. The Québec Act affords Indigenous families and requestors, including First Nations families and requestors, a higher degree of control over their data than other access and privacy legislation. It places the discretionary authority on the requestor to determine the degree of assistance required to make a request.

The Act includes other provisions that lead other access and privacy legislation in being effective mechanisms for facilitating search and recovery work. Section 18 gives the Minister of Indigenous Affairs the right to assist families engaging in search and recovery work under the Act "with completing the formalities surrounding an application to the Superior Court for an order of disinterment." This provision further places the burden of labour on the state as opposed to Indigenous applicants. Section 19 of the Act ensures that complaints filed under the Act are reviewed by the Indigenous Affairs minister; under general access and privacy legislation, an access and privacy commissioner or the jurisdiction's ombudsperson would be responsible for reviewing appeals on unsuccessful requests. Having complaints reviewed by the Indigenous Affairs office implies that requests for information that would advance search and recovery work is properly characterized as an issue of Indigenous rights as opposed to a generic access to information issue. And review by the minister of Indigenous Affairs may lead to more just outcomes because this minister is expected to be more familiar with effective methods for resolving issues of Indigenous rights.

The Québec Act does have gaps; it fails to expressly mention Indigenous legal orders or Indigenous protocols and still, to a degree, operates on the assumption that Indigenous data is rightfully owned by the Canadian state and Canadian organizations. However, with its stated purposes of supporting Indigenous families in search and search and recovery work and doing so in a way that respects Indigenous linguistic and cultural characteristics, the Act far surpasses any generic access to information and protection of privacy legislation as a mechanism for facilitating search and search and recovery work in a good way.

### Accommodation and Accessibility: Newfoundland and Labrador

We identified the Newfoundland and Labrador *Access to Information and Protection of Privacy Act* (AIPPA) as having the leading language in Canada regarding the accessibility of its FOI request mechanism. This means that the statute is worded in a way that makes it more accessible to all Canadians than other FOI mechanisms in other jurisdictions, with special consideration to people in Canada who may experience socioeconomic or systemic barriers to the mechanism.

Subsection 11(3) of the AIPPA permits applicants to make oral requests where they have difficulty understanding an official language of Canada or has a disability impacting their ability to make a request. In cases of Indigenous applicants engaging in search and search and recovery work who primarily speak their Indigenous language or who may prefer to submit an oral request as opposed to writing a request in English, this provision avoids a major barrier that is present in other jurisdictions. Subsection 26(3) stipulates that public bodies only charge applicants fees that are a "modest cost" after ten to fifteen hours spent by the public body on locating the record. This is distinct from British Columbia, for example, which exempts only the first three hours spent on a request, or Alberta, where there is an initial fee of $25 for a non-continuing request or $50 for a continuing request.[6]

Newfoundland and Labrador's legislation creates barriers to search and recovery work that are inherent to the structure of the Canadian access and privacy framework. But in the aspect of accessibility, which is relevant to search and recovery work, it is leading other provinces and territories.

## Implementing *UNDRIP*: The Federal Government and British Columbia

Québec is the first jurisdiction to have enacted specialized legislation for facilitating search and recovery work, so in other jurisdictions, Indigenous families engaging in search and recovery work will more than likely encounter Canada's general legal framework that governs access to information rights. As mentioned in the OSI's Vancouver Interim Report, the general access to information framework presents numerous barriers to Indigenous families engaged in search and recovery work: overcomplication, cost, timeliness, and more. One way some governments have pledged to mitigate these barriers is through the implementation of *United Nations Declaration on the Rights of Indigenous Peoples* ('UNDRIP").

The language of the Canadian and British Columbian access and privacy statutes does not lend itself to the establishment of particularly effective mechanisms for facilitating search and recovery work. Institutions still have the discretion to deny FOI requests, and review is handled by a commissioner or ombudsperson who may or may not be especially aware of the measures that should be taken to resolve issues related to the rights of Indigenous peoples in a good way. These generic frameworks may not themselves be promising practices. But these jurisdictions have made enactments that commit them to implementing UNDRIP[7] [8], which is a

[6] Jerika Caduhada, *Canadian Access, Privacy and Enforcement: Leading Language*
[7] https://www.justice.gc.ca/eng/declaration/ap-pa/ah/index.html
[8] https://www2.gov.bc.ca/gov/content/governments/indigenous-people/new-relationship/united-nations-declaration-on-the-rights-of-indigenous-

promising practice if the jurisdictions follow through on their commitments. Here are some ways the federal and British Columbian UNDRIP enactments may assist in search and recovery work if implemented:

- Advancement of the principle of Indigenous data sovereignty (federal action plan page 32, BC action plan page 20)
- Exercise of Indigenous laws and jurisdiction, which allow for communities to exercise data sovereignty should they wish to do so (federal action plan page 33, BC action plan page 10)
- Advancement of Indigenous language rights and language revitalization, which may support the mitigation of linguistic barriers for some Indigenous people engaging in search and recovery work (Federal Action plan page 45, BC action plan pages 10, 20).

These are broad, overarching concepts. But if implemented, they will likely lead to amendments in access and privacy frameworks. This is speculative, but could include:

- Shifting burdens of proof from Indigenous applicants to public bodies, in accordance with the principle of Indigenous data sovereignty
- The implementation of Indigenous legal orders which impact how certain pieces of information are handled
- The allowance of FOI requests in Indigenous languages and through oral requests

peoples/implementation#:~:text=The%20Declaration%20Act%20Action%20Plan,over%20the%20next%20five%20years.

## Brief Gap Analysis and Recommendations

This submission refers to gaps and barriers inherent to the current framework governing access to information and protection of privacy in Canada. This section is a broad and general overview of these gaps, as well as recommendations for legislative bodies to consider when addressing these gaps.

- Current access and privacy frameworks are too general and fail to adequately address the needs of search and recovery work
    - Recommendations:
        - Implement alternative legal frameworks or provisions if the records requested are relevant to search and search and recovery work
        - An example of an alternative framework could be the Québec Act
        - Ideas for alternative provisions could include automatic fee waivers and shortened minimum response time for Indigenous applicants engaging in search and recover work

- Current frameworks remain overcomplicated and confusing for many applicants. Complex bureaucracies are difficult to navigate, and that difficulty increases when they obscure the types of records they hold. This can create serious issues and continued erosion of trust when a requestor without the ability to navigate the information holding, reasonably expects a document, requests it, yet receives no responsive records. It is incumbent upon a public body to maintain a transparent information inventory that enables requestors to more rapidly understand what information the public body holds, and for bureaucrats to know what they are reasonably expected to create use and retain.
    - Recommendations:
        - Mandatory release of guidance documents specifically for access requests relating to search and search and recovery work
        - Mandatory assistance to Indigenous applicants engaging in search and recovery work upon the request of the applicant without delay or unreasonable procedural requirements
        - Mandatory training for bureaucrats within public bodies that ensures they know what records the institution holds and retains, and mandatory communication of this knowledge to Indigenous applicants engaging in search and recovery work upon request

- Current frameworks mandate complaint and review processes by officials who may be unaware of how complaints should be evaluated in the context of search and recovery work
    - Recommendation: Specialized review, appeal, and investigation processes for requests relevant to search and search and recovery work

- Lack of consultation with Indigenous communities by lawmakers when developing legislation that impacts access and privacy rights of Indigenous peoples and which affects search and recovery work
    - Example: Bill C-27, if passed, would govern consumer privacy rights, data protection tribunals, and artificial intelligence data. However, second reading of the bill has been completed by the House of Commons, but the Standing Committee on Industry and Technology has engaged in minimal consultation with Indigenous communities or governing bodies in the deliberation of this bill.
    - Recommendation: Pursuant to the principle of Indigenous data sovereignty, the drafting of any legislation that impacts the data rights of Indigenous peoples should only be carried out after consulting with Indigenous representation

## Conclusion

Canadian access and privacy frameworks have a lot of work ahead of them in order to adequately support search and recovery work. The Québec and Newfoundland and Labrador legislation lead the way as strong examples for other jurisdictions to follow, while the federal government and British Columbia will likely improve their frameworks in the process of implementing UNDRIP. However, serious systemic gaps and barriers remain that can only be resolved through Indigenous-led processes. By identifying these positive examples and areas that need work, we look to support the parties who are putting in the work to address these longstanding issues. Thank you for considering our submission.