Submission to Library and Archives Canada: Procedure for Public Interest Disclosure of Personal Information

Freedom of Information and Privacy Association (FIPA)

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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

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Introduction

BC Freedom of Information and Privacy Association (FIPA) welcomes the opportunity to provide input to Library and Archives Canada (LAC) in the development of the Procedure for Public Interest Disclosure of Personal Information. We understand that the procedure is intended to assist with the application of s. 8(2)(m)(i) of the *Privacy Act* in cases where there is a strong public interest in the disclosure of records containing personal information.[1] FIPA is an advocate for open access systems, transparency and accountability, and protection of privacy. We are grateful to be consulted on this matter.

LAC has initiated consultations with the general objective of developing a strong public interest disclosure process and the specific objective of determining how to handle requests for records containing personal information produced as part of the Deschênes Part II report from the Commission of Inquiry on War Criminals.[2] The report contains the particulars of the Commission's in-camera sittings, including the names of each suspect, detailed opinions, and witness names. We have engaged in our own consultation with stakeholders and experts, and these consultations will inform our submissions. We are attuned to the particularly contentious context in which the development of the procedure has arisen. Disclosure of the Deschênes Part II report has been subject to frequent debate and is a complex issue with many interested parties calling for the release of the report as well as expressing concern about the potential privacy impacts of disclosure. We recommend that LAC consider a partial release of names, primarily consisting of substantiated cases.

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[1] *Privacy Act*, RSC 1985, c P-21, s 8(2)(m)(i).
[2] The report is derived from Canada, Deschênes Commission, *Commission of Inquiry on War Criminals* (1986) online: <https://epe.lac-bac.gc.ca/100/200/301/pco-bcp/commissions-ef/deschenes1986-eng/deschenes1986-eng.htm>.

The draft procedure presented by LAC will "[take] into account the specifics of LAC's records and mandate".[3] This includes the stated objective of the procedure to support the Government of Canada's Open Government commitments to transparency.[4] The following submission addresses our concerns and recommendations and is intended to enhance the ability of the procedure to promote that commitment to transparency. In drafting these recommendations, we considered how they might apply to both the Deschênes Part II report and a more general context in other instances.

[3] LAC Consultation Overview at page 3.
[4] LAC Consultation Overview at page 4.

Summary

LAC has done exceptional work creating this initial procedure and addressing many different considerations for public interest disclosure. FIPA was invited to participate in a formal consultation session and our submission will follow from that engagement. Our analysis is guided by the recognition of transparency as an essential factor for democracy and the recognition of privacy as a human right. However, we believe there are a few gaps and general principles that require clarification or additional consideration. Two critical considerations we identified for the procedure involve addressing a key gap and establishing the necessary criteria for the successful application of the process and the procedure itself.

Firstly, there is an absence of recognition for OCAP® and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) principles relating to information management. In recognizing the principles of OCAP® and UNDRIP, the procedure should consider the collective concepts of privacy and communal harm existing in both First Nations and other cultural communities. The opportunity to embrace the above general principles exists throughout the procedure, both in general and in relation to some of the specific factors that LAC proposes to weigh when considering public interest disclosure cases. Specifically, the principles of OCAP® and UNDRIP can be incorporated into the factors of Public Benefit of Disclosure, Public Benefit of Non-Disclosure, Principles of Fairness, and Probability of Harm. Additionally, given that the public interest is inherently public, Expectation of the Individual should also consider community expectations. This would include a consideration of the risk of harm and potential impacts on privacy regarding the broader ethno-cultural and geographic communities.

Secondly, LAC must provide adequate resources for staff training, compensation, and support to ensure that the procedure is properly administered and that Access to Information and Privacy (ATIP) personnel

have the proper expertise and supports to make access decisions. This is essential to the procedure as the legitimacy of the entire process relies on the expertise of the ATIP personnel handling the procedure's analysis. The ability for LAC to succeed in implementing the procedure hinges on the adequate provision of resources, including commensurate compensation for qualified ATIP personnel.

Over the following pages, we provide detailed responses to the guiding questions posed by LAC and we make a number of recommendations for amendments. Specific to the procedure, we have identified several amendments. LAC should clarify exactly how the procedure is triggered and determine a benchmark score for disclosure. This is relevant to both the initiation of the procedure and the ultimate decision regarding disclosure. We also recommend that LAC reviews the effectiveness of the procedure sooner than the stated 5-year period. It is critical that LAC clearly articulates what success looks like prior to implementing and reviewing the procedure.

To enable success, LAC should increase the documentation regarding the descriptions of the procedure's categories. The procedure should contain a clear outline of what kind of information will be assessed and how it will correlate with the scores in each weighted table. Given the large degree of discretion in the procedure, there is a high potential for the decision to be influenced by implicit biases. To mitigate this, the weighted criteria descriptions should be explicit, and the procedure should be documented and proactively disclosed such that a rationale for the decision is accessible to the information requester. This is most clearly an issue in the factor of Government Transparency and Accountability. LAC stated in our engagement that the requester may not know exactly what is considered in that factor. This is problematic if the procedure's objective is one of transparency. Additionally, LAC has the option to consult third parties to inform their decision. To support the transparency objective when exercising this option, LAC should also develop and proactively disclose

how they will determine what party has the requisite expertise. Accordingly, LAC should amend the procedure to include information about when and how internal and external offices will be consulted.

Our recommendations also address other concerns relating to the fulsomeness of considerations of some factors. In Principles of Fairness, LAC has focused on procedural fairness rather than distributive and interactional fairness. There is a case to be made that interactional fairness is also important as it speaks to the ability of the individual to correct the information that is to be made public. The right of correction is particularly important given that many names on the Deschênes Part II report were unaware of their inclusion. Interactional fairness would afford the individual or community an opportunity to make representations or correct the information collected by the Commission in the first instance. As for consideration of Sensitivity of Personal Information, this factor should account more broadly for the various types of information that could indicate the sensitivity of the records in question. LAC should also broaden the factors for consideration in assessing Probability of Harm and Degree of Consequence, including a clear articulation of when measurable harm is met in Probability of Harm. In the Extent of Disclosure – Depth factor, there should also be consideration of the accuracy of information subject to disclosure to mitigate against potential harms from misinformation, disinformation and malinformation campaigns (MDM Campaigns).

Our recommendations also consider the inflexible nature of certain factors, such as the Passage of Time and Degree of Consequence. Classifying by period or type of harm does not adequately account for the variability of what these considerations may support. Longer periods are not always supportive of disclosure, just as financial harm is not always more significant than reputational harm.

From an administrative perspective, our recommendations consider that while the procedure indicates that inappropriate disclosures are actionable,

there is no process to follow-up on inappropriate decisions of non-disclosure. There should be a clearly identified mechanism to hold LAC accountable in either instance. This requires a clear articulation of a complaint and review process – of which the procedure currently lacks.

To assist both the information requester and the ATIP analyst, LAC should expressly distinguish the general issue and the specific records when determining the subject of public interest. In administering this, LAC should also consider the development of a clear distinction between the public interest and what many legislative frameworks consider "vexatious and repetitious" requests.

Whether LAC decides to release the Deschênes Part II report in whole or in part, they should provide information that will put the work of the Commission in its historical context – including public records related to the formation of the Commission, the mandate of the Commission, and how Parliament responded to the release of the reports. Additionally, LAC should highlight that the Deschênes Commission was alert to the fact that people were included on the report due to unsubstantiated and arbitrary tips, and that they adequately considered the privacy considerations at the time of their decision. If LAC chooses to release the entire report, they should highlight that the release is pursuant to their mandate and is released as a matter of public interest. LAC should also consider a partial release of the report and demonstrate due process at the forefront of the procedure. Due process is defined by the Government of British Columbia as involving a thorough examination of the requested records, with a "recognition of the importance of protecting [...] legal rights".[5] Finally, LAC should consider emphasizing the importance of making the correct

[5] British Columbia, *Basic Principles of Canadian Criminal Law* (2021) online: <https://www2.gov.bc.ca/gov/content/justice/criminal-justice/bcs-criminal-justice-system/understanding-criminal-justice/principles-and-sources-of-criminal-law/basic-principles>.

decision in the first instance due to the inherent difficulty of retracting publicly disclosed information.

More generally, LAC should consider implementing a systematic method for proactively reviewing, publishing and declassifying records. By developing a proactive information management system, LAC can ease the pressure on application of the procedure – especially when considering the time and resources it could require.

LAC Question Review

Question 1.1

Has LAC considered all potential factors that would be of importance to undertake this analysis?

Recommendation 1

Greater clarity is required to understand what triggers application of the procedure.

Background

LAC should clarify when and how the procedure will be initiated. In BC, under s. 25 of the *Freedom of Information and Protection of Privacy Act* (FIPPA), the public interest is supposed to be a factor that public bodies proactively consider when handling records.[6] However, in practice, s. 25 is often cited by requesters.[7] This is done either at the outset or by following a public body's response.

Some examples of how the process could be triggered include: (1) a requester proactively makes a public interest argument when making a request; (2) LAC ATIP personnel initiate the public interest assessment process when dealing with requests that meet 'first glance' definitions of public interest; or (3) LAC ATIP personnel refuse to release certain records per privacy requirements and the requester initiates an appeal or review while citing public interest. The first example poses some issues due to the uncertainty of whether LAC has a duty to consider the requester's argument for use of the public interest disclosure clause, but the examples all highlight various means of initiating the procedure.

Recommendation 2

LAC should establish what success looks like in the application of the procedure and this process.

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[6] *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, s 25.
[7] *ibid.*

Background

Currently, the procedure provides no indication of what a successful application looks like. LAC should establish key performance indicators from the outset and be prepared to adjust the criteria as needed.

FIPA is an advocate for strong public interest overrides and for the protection of privacy. Balancing these sometimes-contradictory elements require simultaneously considering them in a manner that enables both to establish the conditions of success. Neither privacy nor public interest are a zero-sum framework creating a loss for the other; both add value in consideration. In the application of the procedure, privacy should neither be a scapegoat for non-disclosure nor fail to enable public interest disclosure. Similarly, public interest is served by non-disclosure or disclosure considering privacy rights appropriately.

These definitions of success are important considerations in the evolution of the procedure. We deal with this more in Recommendation 16.

Question 1.2

Have the factors been clearly described? Are there elements that are missing that should be added/considered?

Recommendation 3

The procedure requires consideration of Indigenous or First Nations information management principles such as those in OCAP® and UNDRIP.

Background

LAC's *Indigenous Heritage Action Plan* (the "Action Plan") notes that LAC must acknowledge and reconcile both existing and historical structural discrimination.[8] Consequently, LAC and its procedures should consult, partner with, and incorporate the perspectives of First Nations in accordance with the *Library and Archives of Canada Act*.[9] FIPA is not a First Nations organization and we do not intend to speak on behalf of First Nations. However, we feel that it is important to utilize our platform to raise prominent issues that may otherwise be overlooked.

It is currently unclear how the Action Plan is being realized within the procedures. Indigenous data sovereignty is a key aspect of the right to self-determination, as unequivocally affirmed in UNDRIP.[10] Further, the Action Plan states that the Government of Canada is fully committed to UNDRIP. In considering UNDRIP, it is the responsibility of all parts of Canadian society to work towards reconciliation. Thus, reconciliation is in the public interest and the self-determination rights of Indigenous peoples must be considered as part of an assessment of public interest disclosure under s. 8 of the *Privacy Act*.[11]

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[8] Library and Archives Canada, "Indigenous Heritage Action Plan" (2019), online: <library-archives.canada.ca/eng/corporate/about-us/strategies-initiatives/indigenous-documentary-heritage-initiatives/Pages/actionplan.aspx>.
[9] *Library and Archives of Canada Act*, SC 2004, c 11.
[10] United Nations, "United Nations Declaration on the Rights of Indigenous Peoples", 2007.
[11] *Privacy Act*, RSC 1985, c P-21, s 8.

Canadian public institutions should utilize frameworks such as The First Nations Information Governance Centre's principles of OCAP® (Ownership, Control, Access, and Possession) in order to respect UNDRIP, truth and reconciliation, and ultimately the sovereignty of Indigenous peoples over their information.[12] In practice, implementing OCAP® into the procedures may at the very least take the form of considering whether data is about or from a First Nation, as well as who should have access or what the limitations or conditions may be to access.

Another example of a specific consideration from the OCAP® framework that could be implemented into the procedure is the concept of community harm. Community harm is the idea of using a holistic lens to consider harm beyond just an individual or a small group of people. A community harm perspective can include considering a spiritual, cultural, or Nation-level harm.

Institutions and laws tend to adopt an individualistic notion of privacy rights, which stands in contrast to more collectivist approaches. Yao Li notes in *Cross-Cultural Privacy Differences*, similarly to the aforementioned community harm approach, that individuals from collectivistic cultures contextualize themselves as part of a group and are therefore concerned with privacy protection of the group.[13] The concept of collectivism could be better incorporated either directly or at least considered when developing the relevant procedures. Importantly, a collectivist approach may overlap with a First Nations perspective, but a collectivist approach can also be distinct to other cultural or minority groups.

The collective concepts evident in OCAP® and UNDRIP should be incorporated into the procedures. This is an especially important

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[12] First Nations Information Governance Centre, OCAP, 1998. OCAP® is a registered trademark of the First Nations Information Governance Centre (FNIGC), online: <fnigc.ca/ocap-training>.

[13] Yao Li, "Cross-Cultural Privacy Differences" in Bart P. Knijnenburg et al, eds, *Modern Socio-Technical Perspectives* (Cham, Switzerland: Springer, 2022) 267 and 278-79.

consideration for decolonizing Canadian law. For example, when considering the issue of whether to maintain the testimonies collected during trial for the determination of compensation for residential school survivors, the Supreme Court of Canada determined that thousands of survivor testimonies should be destroyed in order to protect the claimants' and alleged perpetrators' confidentiality.[14] While the records will be retained for 15 years, they will be subsequently destroyed if the individual to whom the information relates does not indicate they would like to preserve their records. This example highlights the importance of considering both individual and collective frameworks in the creation of a procedure regarding information management and privacy at both an individual and collective level.

FIPA notes that LAC acknowledges in the procedure documents that the *Privacy Act* does not itself recognize collective privacy rights[15]. We are not requesting a revision or reinterpretation of the *Privacy Act*; rather, we are highlighting that an assessment of the public interest is necessarily one that extends beyond the individual level.[16] The ability of the Canadian access and privacy system to operate equitably and protect all Canadians is dependent on the ability of public institutions to consider the needs of diverse populations. Public institutions should also take into account the distinct interests and the information and privacy rights of Indigenous peoples. These considerations should be assessed in the procedure itself, specifically in the factors of Public Benefit of Disclosure, Public Benefit of Non-Disclosure, Principles of Fairness, Expectations of the Individual, and Probability of Harm.

[14] *Canada (Attorney General) v Fontaine*, 2017 SCC 47.
[15] Privacy Act, RSC 1985, c P-21; LAC Consultation Overview at page 3.
[16] Privacy Act, RSC 1985, c P-21.

Recommendation 4

LAC should broaden the factors for consideration when assessing Sensitivity of Personal Information, Probability of Harm, and Degree of Consequence.

Background

Sensitivity of Personal Information currently considers sexual history, religious beliefs, health data, and ethnic or racial origins, among others. However, the factor lacks in terms of the breadth of its considerations. For example, the Office of the Privacy Commissioner of Canada (OPC) issued an Interpretation Bulletin that included political opinions in the definition for sensitive information.[17] This is just one example of the broader considerations LAC should include in their analysis of sensitive information.

There are numerous examples of the grave impact that lists of personal information can have. In *Privacy is Power*, Veliz states that the Netherlands used to require religious status on their identification cards.[18] This effectively led to the administration of death certificates when Nazi Germany invaded. Another example is the practice of redlining in both the US and Canada where individuals with home addresses in primarily Black and ethnic minority communities faced discrimination and increased costs when attempting to access financial services.[19] These examples highlight that the procedure should account for the broader considerations of what information could be sensitive.

Probability of Harm requires a broader analysis of factors for assessing both the types of harm and the probability that harm will occur. It should also have a clear threshold for when measurable harm is satisfied. The

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[17] Canada, Office of the Privacy Commissioner of Canada, *Interpretation Bulletin: Sensitive Information* (2022) online: <https://www.priv.gc.ca/en/privacy-topics/privacy-laws-in-canada/the-personal-information-protection-and-electronic-documents-act-pipeda/pipeda-compliance-help/pipeda-interpretation-bulletins/interpretations_10_sensible/>.

[18] Carissa Véliz, *Privacy is Power: Why and How You Should Take Back Control of Your Data* (London, UK: Bantam Press, 2021).

[19] Richard S Harris & Doris Forrester, "The Suburban Origins of Redlining: A Canadian Case Study, 1935-54" (2003) 40:13 J Urban Studies 2661.

factor accounts for negative effects on an individual, including to their career, reputation, safety, health, or well-being. However, harm extends beyond the categories enumerated in the factor and the lack of clear guidelines allows the procedure to be swayed by implicit biases.

Finally, Degree of Consequence does not adequately represent modern potential and categories of harm. In certain occasions reputational harm may be more impactful than financial harm. Additionally, well-being should be a separate consideration from physical harm, such as a sense of security.

More generally, the procedure should explicitly account for collective harms and vulnerable populations in both the factors' descriptions and their correlation to the individual weights. LAC stated in our discussions that they plan to account for vulnerable populations in the analysis, but it is not included in the descriptions themselves. Disclosure decisions can have a significant impact on vulnerable demographics and populations, and the scoring should adequately reflect this.

Recommendation 5

Extent of Disclosure – Depth should consider the accuracy of the information subject to disclosure to mitigate harm from MDM campaigns.

Background

Public bodies create records that may be inaccurate, partial, or otherwise flawed, but are linked as personal information to an individual. Some of these records are transferred to LAC due to their historical significance and may be subject to release via the public interest disclosure clause. We are concerned that the release of partial or incorrect information could exacerbate the potential for negative effects. Partial and or incorrect personal information can allow the spread of false narratives through MDM campaigns. Even where information is anonymized, modern Artificial Intelligence (AI) environments create the increasing ability for

reidentification. This highlights the importance of releasing accurate and complete information.

For example, Chrystia Freeland, the current Deputy Prime Minister and Minister of Finance for Canada, was targeted by Russian malinformation campaigns in 2017 and 2018. The record of her grandfather's history was vague and allowed Russia to propel a false narrative. The Globe and Mail showed there was no evidence of her grandfather supporting Nazi philosophies – he never signed anything nor made policy.[20] Additionally, Global News shared a report by the Communications Security Establishment Canada that MDM campaigns are increasingly targeting Canadians and challenge the transparency and independence of decision-making processes.[21] Given the increasing threats from MDM campaigns and the impact they can have on our democratic institution, LAC should consider the accuracy of information when assessing the factor Extent of Disclosure – Depth.

Recommendation 6

Concepts of identified impacted communities require consideration.

Background

In the procedure, multiple criteria and scores consider defined individuals and the public writ large. Absent are defined impacted communities' expectations, benefit, and harm regarding privacy and disclosure. Addressing this could include a consideration of the impact from disclosure or non-disclosure on defined and impacted ethno-cultural and geographic

[20] Robert Fife, "Freeland knew her grandfather was editor of Nazi newspaper", *The Globe and Mail* (7 March 2017), online: <https://www.theglobeandmail.com/news/politics/freeland-knew-her-grandfather-was-editor-of-nazi-newspaper/article34236881/>.
[21] "'Canadian eyes only' intelligence reports say Canadian leaders attacked in cyber campaigns", *Global News* (10 December 2019), online: <https://globalnews.ca/news/6258755/intelligence-reports-canadian-leaders-attacked-cyber-campaigns/>.

communities. This consideration has also been highlighted in Recommendation 3.

Question 1.3

Do the weighting tables adequately describe the different levels of potential benefit or harm associated with potential disclosure?

Recommendation 7

Generally, the procedure requires less ambiguity in scoring.

Background

Ultimately, the ATIP analyst, information requester and public must be able to understand how the values are determined. This requires a high degree of supporting information, with consistency and transparency in application.

Currently the procedure identifies that:

> Each criteria will be given a score which will then be weighted in accordance with the circumstances to arrive at a recommendation. The scale of weighting may be variable from one file to the next, as required.

This is problematic for a procedure that is meant to increase transparency. It raises subsequent questions that include:

> *What is the rationale for scoring and weighting on a case-by-case basis?*
>
> *Will the scoring be made public and accordingly subject to scrutiny?*
>
> *How much of the process will be transparent in the decision?*

The procedure's descriptions for some factors are lacking in terms of what information will be used and how that information correlates with a particular score. For example, the procedure describes a generic process in Government Transparency and Accountability where the information

requester may not understand what is analyzed and how it leads to a particular score.

The current procedure lends itself to inconsistency in application and a corresponding lack of supporting information. It creates a near ad hoc procedure that may necessitate recreation every time it is applied. That flexibility in application and decision-making can lead to corresponding issues of interpretation and understanding of criteria. This can negatively impact the development of trust through transparency. The procedure will necessarily require a degree of case-by-case analysis and to provide for nuance and discretion while also supporting fairness and consistency. However, for any procedure to be optimized, it must move beyond the ad hoc and into the repeatable, defined, and managed process. While FIPA acknowledges the limits of the procedure itself, LAC should strive for a procedure that is repeatable and defined.

In our discussions, LAC stated this factor will consider whether the information has already been made public through other means, the possibility of the information becoming more widely available without disclosure from LAC, the nature and extent of the release, as well as what personal information will be disclosed. These considerations should be clearly stated in the definition and correlated in a quantifiable way to the elements scoring. There are many procedures and risk assessments that can be used for comparison. One example is the US Guide for Conducting Risk Assessments.[22]

The procedure also lacks in terms of its ability to translate the collection of individual scores to a disclosure decision. LAC should determine an appropriate benchmark score that indicates disclosure or not. The Project Complexity and Risk Assessment Tool, developed by the Government of

[22] US, National Institute of Standards and Technology, *Guide for Conducting Risk Assessments* (2012).

Canada to aid the Treasury Board's management of projects, is another example for comparison.[23] Without an explanation of how the target or benchmark score will be determined, the purpose of using scores and weights when assessing criteria is unclear.

Recommendation 8

In some instances, scores require more flexibility or score inversion.

Background

The assessment of Passage of Time and Degree of Consequence should be determined on a case-by-case basis, considering the potential impact.

The current scoring in Passage of Time does not adequately express the complexity of the issue surrounding public interest disclosure. Current records do not always support non-disclosure, just as old records do not always support disclosure. To better account for the variability of what this factor supports, it should be assessed from the impact rather than the period of time. This would involve an analysis of how the passage of time has impacted the sensitivity of information, instead of blankly stating that a 20-year passage of time is always strongly in support of disclosure.

The same can be said for Degree of Consequence. The factor does not adequately account for the varying degrees of harm. Currently, the procedure grades the degree of consequence by the type of harm. While difficult to rank on a hierarchal scale, LAC could develop a means to quantify the degree of harm outside of classifying by the type of harm.

Recommendation 9

Principles of Fairness should more wholesomely consider interactional fairness.

Background

The procedure mentions three forms of fairness: distributive, procedural and interactional. However, the draft is primarily focused on procedural

[23] Canada, Government of Canada, *Project Complexity and Risk Assessment Tool* (2015).

fairness. We recommend that LAC consider interactional fairness more wholesomely in the procedure itself. This would primarily focus on whether the individual is able to exercise a right of correction.

Our interest here is to encourage LAC to consider how the information rights of individuals were treated by the original collectors of their personal information. LAC is a distinct institution due to being an archival organization that receives and curates records from other organizations. LAC is not the originator of the collected information, so it is pertinent to the procedure that they assess the circumstances that led to the initial collection of information. In the context of the Deschênes Part II report, 96% of the members on the list were unaware of their inclusion.[24] Assessing the interactional fairness at the time of the Commission would involve a consideration of whether they could refute their inclusion on the report, or to clarify and correct any information provided on the report.

Question 1.4

Is there anything else you feel that LAC should be aware of or consider as it refines its analysis by applying this procedure?

Recommendation 10

Application of the procedure should be adequately documented and proactively disclosed as a category of records to accompany any decision.

Background

Both the consultation process and the rationale for the final decision should be documented to promote the transparency objective. LAC should note that there will be criticism and requests for transparency whenever the procedure is applied. To address this, LAC should highlight the importance of transparency before conducting any analysis. A process report should accompany the release or refusal to release any records and the rationale should incorporate the historical context and past discussion

[24] LAC Consultation Overview at page 2.

around the material in question. It should also reference how comparable information has been dealt with by international parties.

Additionally, LAC should disclose the practices and procedures they choose to follow when consulting third parties. LAC has the option to consult third parties to inform their decision; however, there is no procedure they must follow in doing so. LAC should clearly state when and how they will engage public bodies, external stakeholders, and experts to inform their decision. LAC's consultations should be guided by a systematic approach and the rationale for their decision should be accessible to the information requester. If the specific circumstances do not allow for consultation with the original decision-maker, LAC will consider if currently functioning government departments have the requisite subject matter expertise to inform their decision, but the choice of who to consult is ultimately a matter of LAC's discretion.

Recommendation 11

LAC should clearly articulate any complaint and review procedures that apply.

Background

Currently, the procedure does not explain when and how a requester can initiate a review of the disclosure or non-disclosure decision. A clear complaint and review process is essential to the stated objective of transparency and promotes the public's trust in the proper application of the procedure. Accordingly, LAC should clearly state if a review is possible and to whom it is to be made.

Recommendation 12

LAC should clearly define public interest and when it applies.

Background

The procedure requires a clear definition of the public interest. Canadian information and privacy laws, as interpreted by Commissioners and courts, tend to distinguish between the public interest in an issue and the public interest served by the disclosure of records. In this context, would the

public interest be gauged in reference to the Deschênes Part II records or more generally in reference to Holocaust-related documents?

In BC, the disclosure of COVID-19 data was found to be in the public interest, but the release of specific data about cases proximate to those First Nations was not. The request was for BC government data in areas proximate to the First Nations' locations to better allow them to make informed decisions about public health as sovereign nations. BC's Privacy Commissioner held that there was sufficient COVID-19 data in the public realm to protect communities and that the specific release of COVID-19 data pertaining to Indigenous communities was not required under the public interest disclosure clause in FIPPA.[25] This highlights that LAC should clearly distinguish between the public interest in a topic or issue and the public interest in certain records related to that issue to ensure the procedure considers the public interest from the correct perspective.

A clear distinction should also be provided between public interest and media attention. While this is particularly relevant to Urgency of Public Interest, it also pertains to the Public Benefit of Disclosure and Non-Disclosure. LAC should develop a clear distinction to ensure the factors are not unduly influenced by the current context in which the procedure emerges and the availability of resources an interested party has at its disposal to mobilize support. This is a complex matter. It is easy to conflate public interest with the volume of reports surrounding a topic. Addressing this will require careful analysis by the LAC ATIP personnel to ensure the two are distinguished. This is especially important when there is a public interest in certain records, but no mass media attention. Conversely, if volume is a proxy for public interest, then there is no public interest

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[25] *British Columbia (Health) (Re)*, 2020 BCIPC 66 (CanLII), online: OIPC <https://canlii.ca/t/jcbrw>;
Freedom of Information and Protection of Privacy Act, RSBC 1996, c 165.

without media attention. Accordingly, the two should be sufficiently distinguished.

Question 2

If the Deschênes Part II Report were to disclose the names of individuals following LAC's analysis in accordance with its Procedure, and if the DP2 Report were to be publicly disclosed on LAC's website, what would be important context or information that LAC should include?

Recommendation 13

LAC should publish public records related to the formation of the Commission, the mandate of the Commission, and how Parliament responded to the release of the reports.

Background

It is essential for LAC to elaborate on the context at the time of the Deschênes Commission's report. The Commission's decision was guided by privacy considerations engaged at the time by the listed individuals under the *Privacy Act.*[26] Since LAC is contemplating departing from and potentially overturning an independent commissioners' decisions and direction, they should provide links to the relevant LAC materials regarding the original Deschênes Commission and links to the Hansard records pertaining to the Commission's inquiry. This would include records outlining the Commission's decision regarding whether to proceed with prosecution or not, or the release of records themselves. LAC should source the records pertaining to the context in which the Commission was formed and the decision was made, the terms of reference provided in the formation of the Commission itself, and the records from Parliament's debates surrounding the Commission and the report's findings. LAC is a government repository, so they are not responsible for literature review; however, given LAC's mandate, they have a responsibility to source the relevant Hansard material.

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[26] *Privacy Act*, RSC 1985, c P-21;
Canada, Deschênes Commission, *Commission of Inquiry on War Criminals* (1986) at 53 online: <https://epe.lac-bac.gc.ca/100/200/301/pco-bcp/commissions-ef/deschenes1986-eng/deschenes1986-part1-eng.pdf>.

LAC should also highlight how the records were created. At the time of the Commission, newspapers were accepting anonymous tips to help build the report's list of names. *War Criminals in Canada?* shows that individuals could be included for as little as owning a shop and "[behaving] curiously regarding the sources of the store's goods".[27] Other context could include the growing concern at the time of the Commission about the importation of Nazis into Canada. This led to many unsubstantiated tips and inclusions in the report. Additionally, LAC should highlight that there is no supporting documentation or ability to correct the record in the Deschênes Part II report. This is especially problematic when considering that many of the listed individuals do not know they were included on the report. There is a strong potential for the release to unintentionally harm these individuals through guilt by association and these effects can further spread through international circles, exacerbating the harm. The release can also fuel Russian propaganda campaigns to create false equivalencies and erode trust in Western Democracies.

Finally, LAC should consider including in the context how both Parliament and LAC have responded to previous requests for the release of certain records. The procedure currently accounts for the volume or frequency of requests in its analysis under Urgency of Public Interest. However, we would like to highlight that volume and frequency of requests can be manipulated by individual requesters to indicate a higher degree of urgency – especially where there may only be one party interested in the release of records. Accordingly, LAC should emphasize the context surrounding previous requests for the release of certain documents, such as providing Parliament and LAC's rationales for their previous disclosure decisions.

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[27] Canada, Deschênes Commission, *Commission of Inquiry on War Criminals* (1986) at 386 online: <https://epe.lac-bac.gc.ca/100/200/301/pco-bcp/commissions-ef/deschenes1986-eng/deschenes1986-eng.htm>.

Question 3

If another disclosure of personal information – from other documents related to other subject matter – were to be publicly made using LAC's public interest procedure, what might be important for the public to understand?

Recommendation 14

LAC should highlight the importance of due process and that exceptional circumstances may call for exceptional action.

Background

LAC should consider emphasizing at the forefront of the process the importance of due process and making the correct disclosure decision in the first instance. The procedure does not currently emphasize the importance of due process, nor the inherent difficulty of retracting publicly disclosed information. There are numerous examples where the release of innocuous information has led to severe harm on both individuals and communities. For example, Google released imagery of old Burakumin maps in Japan leading to prejudice against individuals with Burakumin ancestry.[28] Burakumin already face prejudice in Japan and the identification of these villages increased the instances of discrimination they face. The example highlights that it is difficult to predict all outcomes when disclosing information and that it is even more difficult to retract it. This creates a strong incentive to make the correct decision in the first instance.

LAC could also consider the preconditions that would give rise to exercising due process should conditions require them or other public bodies to seek judicial authorization for a take down order. As the Burakumin situation highlights, publicly disclosed information is inherently difficult to retract. However, situations can and do arise where the risk of harm requires public agencies to restrict access to records in the public

[28] Jay Alabaster, "Google maps inadvertently open old wounds", *SF Gate* (3 May 2009), online: <https://www.sfgate.com/news/article/google-maps-inadvertently-open-old-wounds-3243229.php>.

interest. The difficulty of applying such a remedy highlights that LAC should emphasize making the correct decision in the first instance and demonstrate due process in the release of sensitive information.

Question 4

Is there anything else you feel LAC should be aware of or consider related to the possible release of personal information and/or the release of the Deschênes Part II Report?

Recommendation 15

LAC should consider a partial release of names with context.

Background

Based on the material at hand, if LAC decides to disclose the report, they should consider a partial release of names. This would mitigate the potentially negative repercussions that could follow disclosure of the entire list – especially for individuals included on the list despite "no prima facie evidence of war crimes".[29] Examples of potential harm include subsequent doxing and corresponding reputational, financial, and physical harm with potential impacts to communities and individuals.

Recommendation 16

The initial review of the procedure should take place sooner than the stated 5-year period.

Background

A 5-year review process is adequate once a process is being managed; however, there should be an initial period of review and refinement as soon as possible. This could be implemented after the initial use in the current matter of the Deschênes Part II report. Depending on the anticipated frequency of application, it might be initially applicable to review the procedure after each use. By reviewing the process earlier, LAC can assess

[29] Canada, Deschênes Commission, *Commission of Inquiry on War Criminals* (1986) at 268-70 online: <https://epe.lac-bac.gc.ca/100/200/301/pco-bcp/commissions-ef/deschenes1986-eng/deschenes1986-part1-eng.pdf>.

the effectiveness of the procedure and highlight any areas of difficulty in carrying out the analysis before subsequent application.

Recommendation 17

LAC should implement a systematic way to proactively declassify, review and publish records.

Background

FIPA is a strong advocate for a proactive form of information management. LAC should implement a broader declassification and publication system to take pressure off the use of the public interest disclosure procedure. We have previously suggested this in the 2022 ETHI Committee Study and again at the 2023 ETHI Committee Meeting.[30] Currently, the procedure itself is reactive. The goal is to develop trust in government institutions through transparency, which requires a systematic method to handle requests for undisclosed records – especially where a considerable amount of time has passed. Accordingly, LAC should develop a detailed procedure for the proactive declassification, review, and publication of archived records.

Recommendation 18

LAC must adequately resource the process with staff training, support and renumeration.

Background

ATIP personnel need the proper expertise to handle the specific subject matter of public interest disclosure requests. The legitimacy of the entire process relies on experts handling the procedure's analysis. Public interest disclosure requires an in-depth understanding of the context, both historical and current, of the records in question. Accordingly, LAC must

[30] House of Commons, *The State of Canada's Access to Information System*, (2022) online: <https://www.ourcommons.ca/documentviewer/en/44-1/ETHI/report-9/page-93#19>; House of Commons, *Standing Committee on Access to Information, Privacy and Ethics*, 44-1, No 064 (18 April 2023) online: <https://www.ourcommons.ca/DocumentViewer/en/44-1/ETHI/meeting-64/evidence>.

provide adequate compensation to retain and recruit ATIP personnel with the necessary expertise. LAC will also need to provide ATIP personnel the requisite supports to ensure the proper application of the procedure.

Conclusion

FIPA supports that the procedure will put into practice the consideration of harm and privacy and is committed to improved transparency through documentation. FIPA is encouraged by the deliberation taking place in the development of the procedure. FIPA has thoroughly contemplated the issue at hand and are grateful for the opportunity to provide input. We hope to have provided enough constructive recommendations to improve the procedure's ability to obtain the stated objective of increased transparency in the application of a public interest disclosure considering privacy implications. While all our recommendations require consideration, FIPA would like to highlight three main themes.

Firstly, the procedure requires considerations of Indigenous and First Nations principles relating to information management, such as those in OCAP® and UNDRIP. This includes collective concepts of communal privacy and harm, which could be considered in a similar fashion to the individual. The inclusion of OCAP® and UNDRIP principles are essential to forwarding Canada's current commitment to reconciliation.

Secondly, adequate resources must be provided for ATIP personnel. No number of considerations will protect the procedure from inappropriate decisions if LAC's ATIP personnel are under resourced. This includes appropriate compensation for recruitment and retention purposes, as well as the adequate provision of resources for staff supports and training. ATIP personnel must have the requisite experience and supports to ensure proper administration of the procedure. The successful application of the procedure hinges on LAC's implementation of this recommendation.

Thirdly, the procedure requires more documentation and less ambiguity in its scoring. LAC should develop a more comprehensive description of what information will be used when assessing the factors and how it will correlate with individual scores. Both the ATIP personnel and requester

need to be able to understand how scores are arrived at and how those scores result in a final decision to disclose or not disclose that information.

In conclusion, FIPA would like to thank LAC for the opportunity to provide our input regarding the Procedure for Public Interest Disclosure of Personal Information. LAC has thoughtfully considered several factors that are pertinent to the use of s. 8(2)(m)(i) under the *Privacy Act* and FIPA is appreciative of their efforts.[31] If requested, FIPA can provide further clarification on our recommendations. FIPA humbly provides our submissions for consideration and looks forward to the final release of the procedure.

[31] *Privacy Act*, RSC 1985, c P-21, s 8(2)(m)(i).

Recommendations List

These recommendations have been organized considering the submissions provided above.

Question 1.1 Has LAC considered all potential factors that would be of importance to undertake this analysis?

1. **Greater clarity is required to understand what triggers application of the procedure.**
2. **LAC should establish what success looks like in the application of the procedure and this process.**

Question 1.2 Have the factors been clearly described? Are there elements that are missing that should be added/considered?

3. **The procedure requires consideration of Indigenous or First Nations information management principles such as those in OCAP® and UNDRIP.**
4. **LAC should broaden the factors for consideration when assessing Sensitivity of Personal Information, Probability of Harm, and Degree of Consequence.**
5. **Extent of Disclosure – Depth should consider the accuracy of the information subject to disclosure to mitigate harm from MDM campaigns.**
6. **Concepts of identified impacted communities require consideration.**

Question 1.3 Do the weighting tables adequately describe the different levels of potential benefit or harm associated with potential disclosure?

7. **Generally, the procedure requires less ambiguity in scoring.**
8. **In some instances, scores require more flexibility or score inversion.**
9. **Principles of Fairness should more wholesomely consider interactional fairness.**

Question 1.4 Is there anything else you feel that LAC should be aware of or consider as it refines its analysis by applying this procedure?

10. **Application of the procedure should be adequately documented and proactively disclosed as a category of records to accompany any decision.**
11. **LAC should clearly articulate any complaint and review procedures that apply.**
12. **LAC should clearly define public interest and when it applies.**

Question 2 If the Deschênes Part II Report were to disclose the names of individuals following LAC's analysis in accordance with its Procedure, and if the DP2 Report were to be publicly disclosed on LAC's website, what would be important context or information that LAC should include?

13. **LAC should publish public records related to the formation of the Commission, the mandate of the Commission, and how Parliament responded to the release of the reports.**

Question 3 If another disclosure of personal information – from other documents related to other subject matter – were to be publicly made using LAC's public interest procedure, what might be important for the public to understand?

14. **LAC should highlight the importance of due process and that exceptional circumstances may call for exceptional action.**

Question 4 Is there anything else you feel LAC should be aware of or consider related to the possible release of personal information and/or the release of the Deschênes Part II Report?

15. **LAC should consider a partial release of names with context.**
16. **The initial review of the procedure should take place sooner than the stated 5-year period.**
17. **LAC should implement a systematic way to proactively declassify, review and public records.**
18. **LAC must adequately resource the process with staff training, support and renumeration.**