

June 6, 2016

Information and Privacy Policy Division
Treasury Board of Canada Secretariat
Flaherty Building, Floor 04
90 Elgin Street
Ottawa ON K1A 0R5

Email: ATIconsultationAI@tbs-sct.gc.ca

Dear Sirs:

Re: Proposed amendment to the *Access to Information Act*

Pursuant to the Interim Directive¹ on the Administration of the *Access to Information Act*² (“the Act”) issued on May 5, 2016 and the invitation to participate in the consultation process³, the First Nations Financial Management Board would like to put forward the following propose amendment to the Act:

That subsection 13(3) of the *Access to Information Act* be repealed so that all information obtained in confidence from all aboriginal governments be protected on a mandatory basis.

Justification

The present wording of section 13 of the Act and, more specifically, the limitation to the protection that it offers by virtue of the listing of those First Nation governments whose information can benefit from that protection, leaves the information provided to federal government institutions by all First Nation governments other than those listed in subsection 13(3) without protection.

There is adequate protection accorded by subsection 20(1) of the Act for information of First Nation governments that falls within the terms of subsection 20(1) of the Act – i.e., trade secret, commercial, financial, technical, scientific, competitive as well as information pertaining to negotiations – but the following categories of information are without protection: social, political, cultural, spiritual, environmental, traditional as well as all information pertaining to land and other claims of First Nation governments. In the absence of solid protection for these categories of information federal government institutions cannot accommodate the wish of First Nation governments to have it kept confidential.

¹ <http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=18310>

² <http://laws-lois.justice.gc.ca/eng/acts/a-1/>

³ http://open.canada.ca/en/consultation/revitalizing-ati?utm_source=referral&utm_medium=email&utm_term=ogs&utm_content=aticonsult&utm_campaign=revitalizeati



This absence of protection impedes the ability of federal government institutions to adequately interact with First Nation governments who fear that the information that they provide be disclosed in response to access requests submitted under the Act and, in the case of the First Nations Financial Management Board more specifically, it impedes our ability to collect and preserve information that falls outside the categories protected by section 20 of the Act for certification and other purposes mandated under the *First Nations Fiscal Management Act*. The elimination of subsection 13(3) would encourage the free exchange of information between First Nation governments and federal government institutions, and would eliminate a significant and costly barrier that First Nations face when working towards being certified by the First Nations Financial Management Board.

Sincerely,

Kenneth Bateman, Chief Operating Officer
First Nations Financial Management Board

Enclosure: Background on the Need to Amend the *Access to Information Act*

cc: Carolyn Bennett, Minister, Indigenous and Northern Affairs Canada
(carolyn.bennett@parl.gc.ca)

Harold Calla, Executive Chair, First Nations Financial Management Board
(harold_calla@fnfmb.com)

Background on the Need to Amend the *Access to Information Act*

The First Nations Financial Management Board (“the FMB”) has been given the legislative mandate under section 49 of the *First Nations Fiscal Management Act*⁴ to:

- (a) assist first nations in developing the capacity to meet their financial management requirements;
- (b) assist first nations in their dealings with other governments respecting financial management, including matters of accountability and shared fiscal responsibility;
- ...
- (f) provide assessment and certification services respecting first nation financial management and financial performance;
- ...

In fulfilling these purposes it is essential that the FMB obtain and analyse a wide variety of operational and financial records from its First Nation clients on a day-to-day basis. These records often contain sensitive and otherwise confidential information. This working relationship is only made possible once the necessary level of trust is established between both parties. A significant barrier to establishing this trust on many occasions has been the fact that by providing information to the FMB in the ordinary course of the activities listed above (e.g. certification) makes the information received immediately subject to the *Access to Information Act*.

It is important to recognise that First Nations themselves are not subject to the *Access to Information Act*. It is only by working with the FMB that a First Nation must contend with this legislation. For a First Nation to demonstrate to the FMB that it has designed and implemented a financial management system that meets or exceeds the standards established by the FMB in connection with certification, a variety of sensitive information needs to be shared with and retained by the FMB (e.g. minutes of finance and audit committee meetings, strategic plans, risk assessments, etc.). In this way a First Nation’s information is exposed to the provisions of the *Access to Information Act* in a manner that was not contemplated under this legislation. While a limited number of aboriginal governments have been named and therefore exempted by virtue of subsection 13(3) of the *Access to Information Act*, this list excludes any and all First Nations who have chosen to have their names added to the Schedule to the *First Nations Fiscal Management Act* or who are

⁴ <http://laws-lois.justice.gc.ca/eng/acts/F-11.67/FullText.html>



eligible to do so. The FMB at present can only provide services to those First Nations who are listed on this Schedule. Subsection 13(3) of the *Access to Information Act* is presented as follows:

(3) The expression ***aboriginal government*** in paragraph (1)(e) means

(a) Nisga'a Government, as defined in the Nisga'a Final Agreement given effect by the *Nisga'a Final Agreement Act*;

(b) the council, as defined in the Westbank First Nation Self-Government Agreement given effect by the *Westbank First Nation Self-Government Act*;

(c) the Tlicho Government, as defined in section 2 of the *Tlicho Land Claims and Self-Government Act*;

(d) the Nunatsiavut Government, as defined in section 2 of the *Labrador Inuit Land Claims Agreement Act*;

(e) the council of a participating First Nation as defined in subsection 2(1) of the *First Nations Jurisdiction over Education in British Columbia Act*;

(e.1) the Tla'amin Government, as defined in subsection 2(2) of the *Tla'amin Final Agreement Act*;

(f) the Tsawwassen Government, as defined in subsection 2(2) of the *Tsawwassen First Nation Final Agreement Act*;

(g) a Maanulth Government, within the meaning of subsection 2(2) of the *Maanulth First Nations Final Agreement Act*; or

(h) Sioux Valley Dakota Oyate Government, within the meaning of subsection 2(2) of the *Sioux Valley Dakota Nation Governance Act*.

Lastly, it is important to also recognise that First Nations that choose to enact a Financial Administration Law under the *First Nations Fiscal Management Act* commit to minimum levels of accountability and transparency to their members.