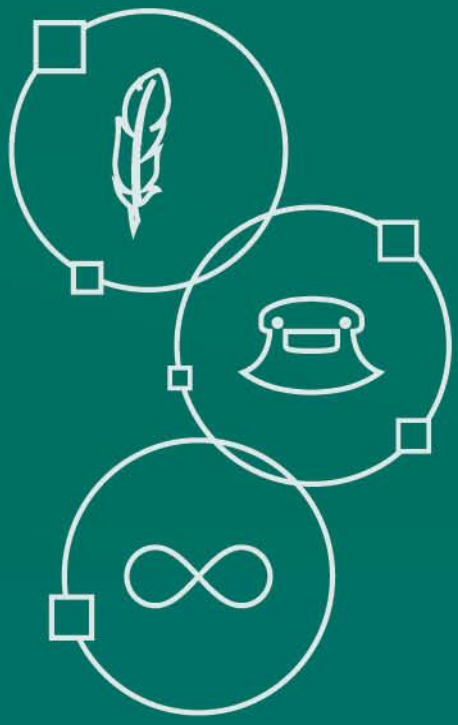
Department of Justice Canada | Ministère de la Justice Canada



Privacy Act Modernization:

Report on 2022 Engagement with Indigenous Partners

Summary of Responses to the *What We Have Learned (so far) and Next Steps Report*

Canada

Privacy Act Modernization: Report on 2022 Engagement with Indigenous Partners

Summary of Responses to the *What We Have Learned (so far) and Next Steps* Report

Introduction

This document reports on Justice Canada's 2022 engagement with First Nations, Inuit and Métis partners on the modernization of the *Privacy Act*, which continued work begun in an initial engagement during 2020-2021.[1]

This report summarizes what we have learned from this current engagement with First Nations, Inuit and Métis partners on *Privacy Act* modernization and provides a bit of context for the engagement.

It also briefly describes our path forward for further engagement with First Nations, Inuit and Métis partners on *Privacy Act* modernization.

[1] We note that the *United Nations Declaration on the Rights of Indigenous Peoples Act* (UNDA), which came into force on June 21, 2021, includes a requirement in section 5 that "The Government of Canada must, in consultation and cooperation with Indigenous peoples, take all measures necessary to ensure that the laws of Canada are consistent with the Declaration." While the UNDA refers to "consultation and cooperation", we use here the general term "engagement" to be consistent in describing our involvement with First Nations, Inuit and Métis partners both before and after the UNDA came into force, given that our report reflects a continuation of work commenced before the UNDA came into force.

Executive Summary

The Department of Justice Canada has been leading efforts to modernize the federal *Privacy Act*, which is a key piece of Canada's legal framework for protecting privacy interests. As part of this work, Justice Canada undertook an initial engagement with Indigenous governments and organizations from spring 2020 to spring 2021 to learn how a modernized *Privacy Act* could better reflect the needs, expectations and perspectives of First Nations, Inuit and Métis. Our discussions were summarized in our initial *What We Have Learned (so far) and Next Steps* report ("Initial Report"), published in March 2022.

Justice Canada's 2022 engagement with First Nations, Inuit and Métis partners built on several themes and questions identified in the Initial Report that relate to the *Privacy Act*'s foundational principles and rules that play a significant role in governing information sharing between federal public bodies and Indigenous peoples.

This report summarizes the feedback received from 16 First Nations, Inuit and Métis partners in response to the questions identified in the Initial Report as well as feedback on other issues raised by partners. Overall, several consistent messages emerged on how to modernize the *Privacy Act*'s foundational principles and rules on information sharing between federal public bodies and bodies that represent the interests of Indigenous peoples. These messages included support from most partners to incorporate into a modernized Act:

- a purpose clause that recognizes advancing reconciliation as a purpose of the Act;
- updated terminology that appropriately recognizes the diversity of First Nations, Inuit, and Métis governments, with many preferring the phrase "Indigenous governing body" as already used and defined in various federal laws;
- broader disclosures of personal information for Indigenous governments or governing bodies; and
- privacy mechanisms to support expanded disclosures or transfers of personal information.

Partners also shared a number of observations with respect to the overarching *Privacy Act* modernization initiative, including the importance of aligning it with the United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration). Moreover, they further emphasized that any decisions about Indigenous peoples' personal information should be made in partnership between the Government of Canada and those representing the interests of Indigenous peoples.

The report concludes with a description of our path forward for further engagement with First Nations, Inuit and Métis partners on *Privacy Act* modernization, which could include engagement on more detailed rules and complex questions that may need to be addressed to support any potential initial changes made to the *Privacy Act*, as well as other relevant policy ideas.

Context and Summary

Context

The Department of Justice Canada is leading the effort to modernize the *Privacy Act* and establish an updated framework to govern how federal public bodies manage personal information. The need for *Privacy Act* modernization is well recognized; after almost 40 years of technological advances and societal change since the Act became law in 1983, expectations regarding the use and protection of personal information have evolved significantly.

Recognizing that the *Privacy Act* has specific impacts on Indigenous peoples in Canada, Justice Canada undertook an initial engagement with Indigenous governments and organizations from spring 2020 to spring 2021 to learn how a modernized *Privacy Act* could better reflect the distinct needs, expectations and perspectives of First Nations, Inuit and Métis.[2]

In the context of that initial engagement, we invited 32 First Nations, Inuit and Métis governments and organizations to discuss *Privacy Act* modernization, 14 of whom met with us to share their perspectives and experiences.[3] These discussions were summarized in the report, *What We Have Learned (so far) and Next Steps* (the "Initial Report"), published in March 2022. In the Initial Report, Justice Canada committed to continuing the dialogue with First Nations, Inuit and Métis partners to ensure that questions related to *Privacy Act* modernization and its impacts on Indigenous peoples are given appropriate consideration as it develops policy proposals for potential changes to the *Privacy Act*.

The Initial Report proposed a multi-stage approach to modernizing the provisions in the *Privacy Act* pertaining to Indigenous peoples and identified the first two stages of this work. Stage 1 would focus on the Act's foundational principles and rules that play a significant role in governing information sharing between federal public bodies and Indigenous peoples. Stage 2 – which could occur after the enactment of a new Act – would engage First Nations, Inuit and Métis partners to discuss more detailed rules and complex questions that could support any initial changes made to modernize the Act.

To help inform the first stage of Justice Canada's multi-phase approach, the Initial Report set out questions for input, which were developed based on the feedback received from partners that participated during the initial engagement.[4] We shared the report with 64 partners representing First Nations, Inuit and Métis governments and organizations. Partners were invited to provide feedback in response to these questions through a virtual sharing and discussion session, in writing, or both, by April 30, 2022.[5]

---

[2] More information about Justice Canada's engagements and work to modernize the *Privacy Act* may be found on the Modernizing Canada's *Privacy Act* – Engaging with Canadians webpage on the Justice Canada website.
[3] These 14 partners included representation from national Indigenous organizations (4), Modern Treaty governments (5), a Métis Nation government, an advisory circle and organizations with expertise in privacy, claims research, or information management.
[4] See Annex A to this report for the set of questions asked in the Initial Report. These questions are also reproduced in this report at the outset of each section summarizing the input received from partners on that particular question.
[5] The due date to provide feedback was subsequently extended to December 16, 2022.

What we have learned from the 2022 Indigenous Engagement

Justice Canada would like to thank the many First Nations, Inuit and Métis governments and organizations who provided input in response to the questions presented in our Initial Report, either in writing, through bilateral engagement sessions, or both. Of the 64 partners that were invited to provide feedback, we heard from 16 representing the views of First Nations, Inuit and Métis.

More specifically, we heard from eight First Nations Modern Treaty organizations and governments, one Inuit land claims organization, two Métis Nation governments, three National Indigenous Organizations (NIOs), and two Indigenous organizations with particular expertise in privacy, claims research and information management.

When partners provided their feedback at a discussion session, Justice Canada officials prepared notes to document the points raised. These were shared after each session with the representatives of the participating partner for their review and comment to ensure that they accurately captured the conversation. This report draws from these notes as well.

This stage of the engagement began in February 2022 and closed in December 2022. Funding was made available to First Nations, Inuit and Métis partners to support their participation.

In addition to the input Justice Canada received during this stage of the engagement, this report also summarizes input received from Indigenous partners in the course of the Treasury Board of Canada Secretariat's Indigenous engagement on the review of the federal access-to-information regime, which occurred from the spring to the fall of 2022, where there was overlap with *Privacy Act* modernization.[6]

The following subsections summarize in detail the feedback from First Nations, Inuit and Métis partners in response to the ideas and questions for potential changes to modernize the *Privacy Act* set out in the Initial Report.[7]

I. General comments from First Nations, Inuit and Métis partners

At the start of an engagement session or written submission, Indigenous partners often provided introductory remarks to help orient their responses to our questions for input. Most partners specified whose interests they were representing as well as the limitations of their authority to speak on behalf of other Indigenous peoples.

We also found that these remarks reflected some common themes. The majority of partners spoke to the importance of aligning a modernized *Privacy Act* with the United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration). In particular, partners noted that section 5 of the *United Nations*

[6] The Treasury Board Secretariat's *Access to Information Review Indigenous-specific What We Heard Report* is available online.

[7] This report does not attribute the views shared by First Nations, Inuit and Métis partners to any particular government, organization, or entity and is not intended to capture all comments provided in submissions or bilateral engagement sessions.

Declaration on the Rights of Indigenous Peoples Act (UNDA) requires measures be taken to ensure the consistency of federal laws with the UN Declaration. According to some First Nations partners, alignment with the UN Declaration would require the Government of Canada to obtain the free, prior and informed consent of First Nations for any new governance regime that impacted their personal information, both before its enactment and thereafter, and to involve them in decisions regarding the collection and maintenance of information about their members.

Similarly, many partners stated at the outset that any decisions about Indigenous peoples' personal information should be made in partnership between the Government of Canada and those representing the interests of Indigenous peoples; some stated this was required by certain modern treaties, self-government agreements, and the UNDA. Most partners indicated they would welcome continued engagement with Justice Canada on its initiative to modernize the *Privacy Act* in a manner that is participatory, ensures the diverse views of Indigenous peoples across Canada are incorporated, and aligns with Indigenous peoples' engagement protocols, including providing sufficient time for meaningful contributions.

Finally, some partners commented on the limitations of the *Privacy Act* modernization initiative, signalling that while it is essential and sorely needed, it only deals with one piece of the framework governing Indigenous data and thus could only partially address the privacy and data-governance issues affecting First Nations, Inuit and Métis.

II. Including a purpose clause that recognizes the advancement of reconciliation with Indigenous peoples in Canada

Q1. In what circumstances would you support the inclusion of a purpose clause which recognizes that one purpose of a modernized *Privacy Act* is advancing reconciliation with Indigenous peoples in Canada by promoting improved sharing of Indigenous individuals' personal information with First Nations, Inuit and Métis?

Most partners that responded to this question expressed support for including in the *Privacy Act* a purpose clause recognizing reconciliation with Indigenous peoples without framing it around the promotion of improved sharing of information with those representing Indigenous peoples. One partner further explained that a purpose clause framed more broadly would not limit the ends by which reconciliation may be advanced to the "sharing of Indigenous individuals' personal information." Another partner suggested that a broader framing would be consistent with the preamble of the UNDA.

An NIO partner commented on the importance of ensuring the purpose clause is precise, since it would serve as a strong interpretative guide in the potential future application of the *Privacy Act*. As such, they cautioned against adopting terms not currently used in the *Privacy Act*, like "sharing", which could lead to interpretive ambiguity. This partner also expressed concerns with the grouping of "First Nations, Inuit, and Métis" because "First Nations" is not a defined legal term and it could be misinterpreted as applying only to *Indian Act* bands. In their view, a purpose clause designed to advance reconciliation must also take into account the rights and

needs of “off-reserve Status” and “non-Status Indians” who have little or no connection to a First Nation, *Indian Act* Band, or other “aboriginal government” as presently defined in the *Privacy Act*. Given these considerations, the partner recommended that the purpose clause should instead adopt the language of “aboriginal peoples of Canada” under section 35 of the *Constitution Act, 1982* to ensure that all peoples to whom the Crown owes its duties are included.

Some partners also suggested that in addition to recognizing reconciliation, a purpose clause should:

- Explicitly mention complying with the UNDA and UN Declaration.
- Include a distinctions-based approach acknowledging that Indigenous peoples are not a homogenous group.
- Recognize First Nations data sovereignty as a necessary precondition to rights of self-determination and self-government. On this point, one partner explained that, in their view, inclusion of such language would mean that where a modernized *Privacy Act* impinged on data sovereignty, the offending provisions could be struck from the Act and replaced with provisions co-developed with First Nations.
- Recognize both individual and collective privacy rights. On this point, one partner noted that collective Indigenous rights were already recognized in the UN Declaration and various court decisions in Canada. Others pointed out that recognition in the *Privacy Act* would help further reconciliation by, for example, permitting Indigenous peoples to access information about collectives to establish Indigenous membership or to access information regarding past cultural traditions. Finally, others were also supportive of including collective privacy rights in a modernized Act and not necessarily placing them only in the purpose clause.
- Recognize Canada’s colonial history and discriminatory treatment of Indigenous peoples, including through use of information from and about Indigenous peoples; this, if acknowledged, would advance reconciliation, permit Canada to confront its history, and help it move forward.
- Promote the health, well-being and prosperity of First Nations, Inuit and Métis.

Finally, one partner suggested adopting the *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples* in a purpose section to guide federal public bodies’ determinations as to how to exercise authorities or comply with requirements in a modernized *Privacy Act*.

III. Adding a principle that could broaden the scope of disclosure to those representing interests of Indigenous peoples

---

Q2. In what circumstances would you support the addition of a principle recognizing that a federal public body may disclose Indigenous individuals’ personal information under its control to an Indigenous government, organization or entity?

In response to this question, a few partners supported inclusion of such a principle, with one First Nations partner proposing that, in their context, the principle be framed to permit the Crown to disclose personal information to First Nations governments and duly authorized organizations and entities at the request of First Nations. In this partner's view, such an addition would be an important element of recognizing First Nations data sovereignty and OCAP® principles[8] and ensuring effective operations of First Nations governments.

Some partners offered cautionary remarks, suggesting a disclosure principle would need to be:

- Framed to permit only Indigenous governments to be entitled to receive full access to personal information.
- Established only after the law resolves ongoing, complex and multiple membership issues. On this point, the partner explained that existing colonial legal frameworks complicate membership concepts and entitlements. For example, an individual assigned *Indian Act* membership in a particular band may identify as being a member of a different First Nation or a different Indigenous group or may even not identify as Indigenous.
- The subject of further engagement to define its scope and clearly specify at the outset who would be entitled to receive the information. On this point, we heard from one partner that disclosures should apply to Indigenous governments only and the scope of the principle should not be too broad or be too vague on which Indigenous entities would be entitled to receive the information. An NIO partner highlighted that First Nations have long had to deal with certain Indigenous and non-Indigenous researchers using their information and data in a manner that does not respect First Nations data sovereignty.

IV. Identifying purposes for which personal information can be disclosed without an individual's consent

---

Q3. For which purposes, in addition to those already included in the *Privacy Act*[9], should disclosure of Indigenous individuals' personal information to Indigenous government, organizations or entities be authorized?

Q4. Which approaches would you support to expand the purposes for which Indigenous individuals' personal information could be disclosed without consent?

---

[8] OCAP® is a registered trademark of the First Nations Information Governance Centre and refers to First Nations principles of ownership, control, access, and possession. For more information, see https://fnigc.ca/ocap-training/.

[9] Subsection 8(2) of the *Privacy Act* sets out a list of circumstances where government institutions can disclose personal information without the consent of the person to whom the information relates. Two of those circumstances are specific to certain Indigenous recipients. Paragraph 8(2)(k) of the *Privacy Act* authorizes federal public bodies to disclose personal information to Indigenous governments, associations and Indian bands (as defined in subsections 8(6), 8(7), and 8(8)), or to any person acting on their behalf, "for the purpose of researching or validating the claims, disputes or grievances of any of the aboriginal peoples of Canada." Paragraph 8(2)(f) of the *Privacy Act* permits disclosures "for the purpose of administering or enforcing any law or carrying out a lawful investigation" under an agreement or arrangement with certain First Nations recipients.

A) Would you support (a) listing all the purposes for which disclosure is permitted, (b) allowing disclosure regardless of the purpose, or (c) an alternative approach?

In response to these questions, one NIO partner favoured listing the purposes for which information could be disclosed and suggested that those purposes be set out in a regulation to the Act so they remain flexible and responsive to change over time. This partner clarified that definitions of purposes should not be generic, such as "to contribute to the development or well-being of the community" or "for the purpose of advancing the interests of Indigenous peoples in Canada." In their view, the federal government should not be charged with the power to determine when something advances the interests of Indigenous peoples in order to obtain access to personal information that is the rightful property of Indigenous peoples.

Others, however, opposed listing purposes in the Act. In their view, it might be impractical, would require the co-development of agreed purposes, and could result in a narrow interpretation and be inflexible over time. However, these partners made suggestions of purposes that could be included in a modernized Act should the Act continue listing them. These included permitting disclosure of Indigenous individuals' personal information to:

- Indigenous entities for fulfilling sectoral self-government activities or projects aimed at reconciliation; advancing benefits to individuals; responding to emergency situations; locating or re-establishing contact with those taken or removed from their homes; and advancing best interests, cultural continuity and equality of Indigenous peoples, as well as for any other purpose in accordance with Indigenous laws.
- Indigenous governments, organizations or entities in order to permit First Nations to operate governments, programs and projects effectively. Such a purpose, in the view of one partner, would embrace the possibility of First Nations right to self-government in their internal and local affairs.

Some First Nations partners favoured broad disclosure of Indigenous individuals' personal information regardless of purpose because it would provide the widest latitude to First Nations, limit opportunities for the federal government to deny access to personal information by First Nations rights holders, and support self-governing nations in effectively operating and delivering their programs and services for the benefit of their members. One proponent of this approach stated that if disclosure of First Nations personal information to a First Nations government, organization, or entity were authorized regardless of purpose, it could become an exception provided for in subsection 8(2) of the *Privacy Act*, replacing paragraphs 8(2)(f) and (k), as well as others with respect to First Nations information.

Others, however, cautioned that permitting disclosure for any purpose might be too broad and vague, resulting in over-collection by recipients and thus increasing risk of privacy violations. Furthermore, one partner explained it may be the wish of some Indigenous individuals that their personal information not be accessible to all Indigenous groups or organizations, even those they may ostensibly be members of.

Another set of partners offered alternatives to these approaches. For example, one partner suggested that the federal government should be authorized to disclose Indigenous individuals' personal information if the

personal information relates directly to an operating program or activity of an Indigenous entity, which would need to be subject to a clear and transparent process. In their view, such an approach would provide the most flexibility to Indigenous entities, whose needs for personal information may vary significantly, with some requiring more information than others, such as those with governing roles.

Similarly, another partner suggested that disclosures would need to be both broad and specific if dealing with Indigenous governments, organizations and entities. They explained that Indigenous governments require broad access to effectively govern and have sovereignty over their affairs, so they should not have to justify access to information every time. For Indigenous organizations and entities that are not recognized under section 35 of the *Constitution Act, 1982*, disclosures would need to be more restricted, with purposes of disclosure tailored to the practical realities of the requester's mandate.

An NIO partner took the view that the *Privacy Act* should provide an opt-in framework wherein Indigenous governing bodies elect to receive their members' personal information without consent through Information-Sharing Agreements (ISAs). According to this partner, the category of purposes under which such information can be disclosed should be specific to the relevant body, determined according to the opt-in processes and set out in each ISA. The partner also suggested considering including provincial governments in ISAs because these governments also possess personal information relevant to Indigenous governing bodies (e.g., birth and marriage certificates). The partner stated that these measures could be incorporated into a modernized Act and modeled on the section 20 Coordination Agreements under the *Act respecting First Nations, Inuit and Métis children, youth and families*.

One partner representing First Nations interests emphasized the need to proceed cautiously in expanding existing disclosure authorities and suggested undertaking further engagement with First Nations and their legal experts. Additionally, this partner called for more insight into the entirety of proposed changes to section 8 of the *Privacy Act* to ascertain whether any of these changes might adversely affect First Nations and result in further interdepartmental disclosure of their information without consent. This partner explained that First Nations are concerned about their personal information being disclosed between federal public bodies to investigate or survey First Nations individuals who participate in protests and who seek to uphold their Aboriginal and Treaty rights.

Finally, while certain partners abstained from suggesting approaches for expanding the current list of permissible disclosures of personal information under section 8, they instead drew attention to the challenges that claims researchers face when seeking to obtain personal information. In particular, these partners stated that researchers encounter several administrative barriers when seeking to obtain disclosures of personal information in accordance with paragraphs 8(2)(k) and 8(2)(j). These partners recommended that the Government of Canada work in partnership with Indigenous peoples to develop a mechanism of independent oversight that would ensure full and timely access to records held by federal government institutions for purposes of substantiating historical claims.

V. Recognizing the diversity of Indigenous governments

Q5. Which concepts and definitions would you support to ensure that the *Privacy Act* appropriately recognizes the diversity of First Nations, Inuit, and Métis Nation governments?

Of those that provided input on this question, most favoured the concept of "Indigenous governing body", with a minority expressing some concern.

Some partners explicitly supported the concept as used in several federal laws[10] and defined as "a council, government or other entity that is authorized to act on behalf of an Indigenous group, community or people that holds rights recognized and affirmed by section 35 of the *Constitution Act, 1982.*"[11]

One NIO partner suggested that the concept appropriately authorizes disclosure to Indigenous organizations and should replace the existing restrictive definition of "aboriginal government" under section 8(2)(k) of the *Privacy Act*. In their view, the concept was not a perfect solution because it is still contested among some and there is currently no consistent set of criteria defining an Indigenous governing body. Nonetheless, they added that its adoption would still be an improvement, and urged the Government of Canada to recognize the diversity of representation that exists among Indigenous peoples in a modernized Act, regardless of the terminology chosen.

Another partner commented that the concept was well-established and recognized a broad range of organizations requiring personal information to serve Indigenous individuals; but even so, they noted that other Indigenous groups may feel otherwise. This partner thus supported inclusion of additional concepts for organizations who may not be considered Indigenous governing bodies but who should be authorized to receive personal information without consent, such as certain land claims entities, advocacy groups, health care organizations, and law enforcement organizations.

Another partner stated that federal laws using the concept of "Indigenous governing body" were co-developed with First Nations and supported First Nations rights to choose their representatives as stated in the UN Declaration. Finally, another NIO partner suggested that the process for determining whether the Indigenous governing body legitimately represents section 35 rights holders as per the *Constitution Act, 1982* should proceed on a case-by-case basis.

Other partners shared concerns about adopting the concept of "Indigenous governing body". One such partner stated that the concept had its own challenges given its broad scope and that the concept does not provide a clear way to determine which bodies it includes. They noted that Indigenous governments representing collective rights holders under section 35 of the *Constitution Act, 1982* would need to be further engaged on this concept. This partner added that establishing a definition of Indigenous government in this context would

[10] Partners pointed to the following federal laws: the *Indigenous Languages Act*, the *Department of Indigenous Services Act*, *An Act respecting First Nations, Inuit and Métis children, youth and families*, and the *Department of Crown-Indigenous Relations Act*.

[11] *Department of Crown-Indigenous Relations Act*, S.C. 2019, c. 29, s. 337, s. 2.

require an understanding of the governance structure involving local and regional governments and the information needs and differing roles of each of these groups, and would require further engagement with its citizens.

One partner referred generally to a need to pursue a distinctions-based approach to every project or piece of legislation affecting First Nations, Inuit and Métis peoples' rights, interests and claims. They further argued that the term "Indigenous" as a blanket statement is not acceptable as it does not clearly distinguish or recognize the full rights that these groups hold.

VI. Disclosing personal information to Indigenous governments, organizations and entities

---

Q6. If a modernized *Privacy Act* were to authorize disclosure of Indigenous individuals' personal information regardless of the purpose, should this broad disclosure authority be for Indigenous governments only or for all Indigenous governments, organizations and entities?

Q7. If a modernized *Privacy Act* were to authorize disclosure of Indigenous individuals' personal information for a new list of specific purposes, which types of Indigenous entities (governments, organizations and/or other entities) should be identified as authorized recipients for each of these purposes?

Q8. What measures should be used to assist a federal public body in ensuring that an Indigenous government, organization, or entity is authorized to receive the personal information of its citizens or members?

There was general unanimity that First Nations, Inuit and Métis governments should be able to receive Indigenous individuals' information given that these governments need access to this information to:

- Effectively govern and provide services and programs for their citizens.
- Assist in informed decision making.
- Help advance their ability to continue to pursue their full inherent right to self-determination and economic sustainability.

Specifically, most First Nations partners were generally supportive of disclosing personal information to their democratically elected governments, but were more cautious or silent on whether to extend the same disclosures to other organizations and entities. They provided further details in support of their positions:

- One partner recommended that First Nations governments should advise the federal government where to direct what information and for what purposes, determined through First Nations governments' own internal processes. In their view, this would recognize the authority of First Nations governments as sole decision makers and would respect their delegation of authority to non-rights-holding organizations and entities to steward or otherwise engage with First Nations information on behalf of

First Nations rights holders. They further clarified that non-rights-holding organizations and entities needed access to Indigenous information to fulfill their governance functions for the benefit of First Nations rights holders, and could be provided such access through First Nations governments.

- Other partners explained that the enumerated list of “aboriginal governments” provided in subsection 8(7) of the *Privacy Act* fails to expressly recognize many self-governing nations and therefore should be removed or expanded significantly to support disclosure to more First Nations governments.
- Some Modern Treaty partners noted that, unlike their governments, many Indigenous entities and organizations do not have legislation that recognize their authority to receive personal information, nor formal systems in place to protect the personal information that they receive; as such, processes for information sharing should reflect this difference. Furthermore, they maintained that the purposes for which information is disclosed to Indigenous entities and organizations should be more limited and correspond to the nature and role of the specific organization or entity. One partner drew attention to the complexities and challenges of discerning which non-governmental Indigenous groups have the endorsement and trust of First Nations, and thus only favoured allowing third parties to obtain personal information through the consent of First Nations’ citizens or their First Nations government.
- Another partner suggested that disclosing personal information to Indigenous organizations and entities would require more study, as many do not require access to First Nations personal information and some could falsely claim they are Indigenous. Nonetheless, they noted there might be limited circumstances where, for example, a Tribal Council provides post-secondary services to individuals on behalf of First Nations, and such narrow and confined purposes may require access to personal information, but only to the extent that specific information is needed for the service.

Métis partners supported disclosing their citizen and community-related personal information to Métis Nation governments, with one partner emphasizing that such disclosures should be broad and not onerous and not require justification each time. These partners held differing concerns around permitting such disclosures to Indigenous organizations and entities. For example,

- One partner said that disclosures would need to be more restricted for Indigenous organizations and entities that are not recognized under section 35 of the *Constitution Act, 1982*.
- Another partner found it unacceptable to disclose the personal information of a Métis person to other Indigenous groups without Métis government or citizen approval, as it could place their citizens’ identities at risk and compromise Métis history through inaccurate, erroneous or adverse revisions of the information by those with competing interests. They were also concerned that improper disclosure to organizations could negatively affect Métis collective claims and cause Métis government oversight over their affairs to be overlooked or ignored. To this end, they took issue with the existing definition under paragraph 8(2)(k) of the *Privacy Act* that permits broad disclosure of an individuals’ personal information to several parties “for the purpose of researching or validating the claims, disputes or grievances of any of the aboriginal peoples of Canada.”

Another partner suggested that not every Indigenous entity in Canada needs to receive personal information from the federal government and supported a “layered” approach, in which larger, recognized regional

Indigenous organizations or governing bodies could receive and distribute personal information to smaller organizations. In their view, regional organizations and governing bodies have broader needs than smaller entities that serve a single purpose and are also better suited to receive and manage personal information and to determine what information should be made available to smaller organizations under the group umbrella.

We heard from NIO partners who recommended that disclosures be available to Indigenous governing bodies and organizations, given the latter may undertake work vital to advancing reconciliation, addressing inequities, and delivering services related to health, healing, justice, and socioeconomic development. Partners elaborated on their views, highlighting that:

- The term “Indigenous organizations” would need to be appropriately defined in law and could mean an Indigenous governing body or any other entity that represents the interests of the Indigenous peoples of Canada.
- Indigenous non-governmental organizations (INGOs) at the local, regional and national levels often engage in research and advocacy work that can be significantly advanced by access to Indigenous personal information. They noted that existing provisions in the *Privacy Act* allowing for the disclosure of personal information in certain circumstances continue to remain relevant to work undertaken by INGOs – for example, where consent is provided or disclosure is permitted under various section 8(2) categories for research and statistics purposes, researching or validating Indigenous claims, public interest and the interest of the individual concerned.

Partners recommended establishing various measures that could assist federal public bodies in ensuring that Indigenous governments, organizations, or entities that receive Indigenous individuals’ personal information are authorized to do so. For example:

- One NIO partner suggested that a modernized Act could permit disclosure of personal information to INGOs through an opt-in framework, with requirements set out in ISAs and as determined on a case-by-case basis. In each case, specific criteria could be set out for INGOs, such as consideration of their organizational structure (Indigenous-owned, Indigenous board etc.), its purposes or mandates (whether it has a primarily profit-seeking purpose or not), and recognition by Indigenous peoples as an Indigenous organization. Similarly, this partner suggested that any disclosures of personal information to Indigenous governments or governing bodies be guided by a legislated process to help determine whether the body was legitimate, which could be determined at the time of establishing an ISA if they are chosen to be the legal mechanism for such information disclosures.
- Another partner suggested creating a single process for determining which Indigenous entities and governing bodies are authorized to receive personal information and for what purposes, with one central point of contact for making these determinations. They explained that these entities and governing bodies should not be required to go through a lengthy process to verify that they are authorized to receive personal information each time they request it. Likewise, if ISAs or other mechanisms are used, they should not be required to negotiate separate agreements with each federal department they deal with. Rather, there should be a single agreement with the federal government that would apply to all departments and agencies, with a single point of contact to provide for such things as

verifying that the entity is authorized to receive personal information (as validated by a land claims agreement, legislative status, entity legislation, and/or corporate documents), and verifying that privacy-related requirements are met.

- Several First Nations partners held the view that modern treaties and self-governing agreements on their own would be sufficient to establish that First Nation governments are entitled to personal information. They noted that disclosing personal information to Indigenous entities and organizations other than governments should be subject to appropriate restrictions, such as a requirement to demonstrate a connection to any individual whose personal information is being disclosed. They added that the *Privacy Act* should include a requirement that an Indigenous government must agree before any federal public body could share information relating to that government's citizens with Indigenous entities and organizations. They further noted that by establishing an agreement, a Modern Treaty government could require that information relating to that government's citizens be shared with Indigenous entities and organizations.

Some partners remarked that more study and engagement would be needed for defining which Indigenous entities should be authorized recipients of Indigenous individuals' personal information. For example, one First Nations partner noted that First Nations governments have an important part in defining those who are eligible to receive personal information without an individual's consent, which would involve a careful balancing of individual rights and freedom to information. Another partner suggested that a better understanding would be needed of how Indigenous peoples organize themselves and that these should be dealt with on a case-by-case basis.

VII. Transferring personal information

Q9. In what circumstances would you support expanding the *Privacy Act*'s disclosure provisions to authorize federal public bodies to transfer personal information?[12]

A) Should the transfer of personal information be authorized in general or limited to specific situations, such as where there is also a transfer of a program or activity?

B) Should federal public bodies be authorized to transfer personal information to all or some Indigenous governments, organizations or entities?

[12] As noted in the Initial Report: for the purposes of the discussion on this point, a transfer is different from the usual situation where a copy of the personal information is provided to the requestor. Instead, with a transfer, a federal public body would provide the personal information and then cease to have control over it or even hold a copy of the information transferred, subject to its own obligations pursuant to the *Library and Archives of Canada Act*. This would mean that the federal public body would be unable to use or disclose the personal information once a transfer occurs, including giving access to the individual to whom it relates.

Most of the partners that responded supported information transfers to Indigenous governments, with some emphasizing that it would be a step towards recognizing data sovereignty of Indigenous governments and would ensure their ownership, control, access, and stewardship of the information. However, the extent of partners' support for such transfers rested on several conditions.

For example, one partner suggested that when a government has the capacity and a need for the information, it would be appropriate to transfer the information in a manner that is not onerous or limited to specific situations; otherwise, it could undermine the process and its objective.

Some Modern Treaty partners suggested transfers should be limited to recipient Indigenous governments with adequate privacy and access-to-information legislation in place to ensure both that privacy interests in the data are protected and that the individual to whom the information relates can have access to it from the recipient body. They also suggested that personal information transfers should be permitted if they were associated with a federal program or activity of a Modern Treaty government; upon the request of a First Nations government; and possibly in some more general circumstances related to the needs of Modern Treaty governments and their citizens. However, others cautioned that limiting a transfer to a "program or activity" might create unintended barriers for transference purposes where Indigenous groups do not share the same structures.

Others generally spoke to the need for a privacy framework or comprehensive information protection mechanisms to be in place for Indigenous governments or governing bodies to receive such information. One partner suggested that transfers should also be permitted to INGOs if they met privacy protective conditions. However, on this point, a partner suggested that Indigenous governments should decide whether transfers should be authorized to a non-rights-holding organization or entity versus another noting that the bar would have to be very high to authorize the transfer of personal information to Indigenous organizations or entities.

Partners shared further considerations, noting that transfers:

- Would need to be supported by corresponding resources and funding to Indigenous governments (for example, to help cover the costs of responding to access-to-information requests).
- Would require engagement with Indigenous groups on the types of information that could be transferred, how they wish to receive the information, and the safeguards needed.
- Should not result in the information being no longer accessible to other Indigenous organizations, as many Indigenous peoples count themselves as members of more than one Indigenous organization.

Finally, we heard from one partner who did not see a significant need for transfers and was concerned about the potential for information to be permanently lost if transferred and then deleted by the federal government. They further noted that certain entities might not have the resources to remain the sole custodian of that personal information over time and argued that personal information should therefore only be transferred in very specific circumstances and based on clear written instruction from the receiving entity and possibly from affected individuals.

VIII. Mitigating impacts on Indigenous individuals' privacy interests

---

Q10. What mechanisms should the *Privacy Act* recognize to support expanded information sharing and to ensure the protection of personal information disclosed or transferred to First Nations, Inuit and Métis governments and organizations in line with federal public bodies' responsibilities and accountability obligations?

A) Should a new Act explicitly recognize information-sharing agreements (ISAs) and Indigenous peoples' own legislation and privacy codes as mechanisms to support personal information sharing and protection?

Q11. In what circumstances would you support the development of legislative or regulatory requirements to establish the baseline privacy protections that any chosen mechanism (whether ISAs, Indigenous privacy legislation or code) should include to mitigate the impacts of disclosure and transfer on Indigenous individuals' privacy interests?

Q12. What baseline privacy requirements should be discussed after engagement on the potential changes identified in Part 2 has concluded?

Overall, partners favoured privacy mechanisms to support expanded disclosures or transfers of Indigenous individuals' personal information to First Nations, Inuit and Métis governments or organizations. Partners suggested a variety of privacy mechanisms for differing reasons. For example, partners generally supported ISAs as legally binding agreements that could facilitate and create baseline privacy requirements for disclosures of personal information to Indigenous governments and organizations. Partners elaborated on their views in support of ISAs, indicating that such agreements should be:

- Simple to execute and/or negotiated on a case-by-case basis, given that drafting ISAs can be labour-intensive and introduce various challenges (e.g. reliance on the courts for interpretation).
- Used to support information sharing for recipients without their own privacy legislation in place but not be required for Indigenous governments with their own privacy legislation that adequately protects personal information.
- Used also as a mechanism for Indigenous governments and organizations to govern from afar their information that is in the custody of the federal government by asserting adequate control over its collection, use, disclosure, access, and destruction.

One partner supported Indigenous governments establishing privacy legislation to support expanded disclosures or transfers, but held that it should not be required as a condition of receiving personal information. As an alternative to privacy legislation, some partners suggested:

- Creating a privacy code that would provide minimum standards to be met for disclosing information.

- Requiring Indigenous governments to have in place policies, frameworks and regulations to define baseline protections for individuals' personal information. These partners noted that such requirements should not be defined in the Act, since legislation is too inflexible and difficult to amend.

- Establishing a comprehensive regulatory framework at the outset for organizations to choose to opt-into before permitting any disclosures or transfers, which would require appropriate data-tracking mechanisms, accountability measures for privacy breaches, and processes for complaints or appeals. In the view of this partner, such a framework would protect against particular harms for Indigenous women and gender-diverse people, especially those in vulnerable circumstances.

- Improving existing provisions in the *Privacy Act*, such as updating paragraph 8(2)(k), which does not require the recipient to protect the individual's personal information upon receipt. This partner also suggested incorporating new provisions into the Act to prevent disclosure of personal information that might cause harm to Indigenous peoples and their governments and to provide for redress and mandatory reporting of harm to Indigenous governments and citizens. Section 18.1 of BC's *Freedom of Information and Protection of Privacy Act* was highlighted as a law that partly addresses this gap and could be used as a starting point for modernizing disclosures under the *Privacy Act*, subject to further engagement to define harms that might arise through disclosure of sensitive or personal information to other parties.

Some partners cautioned that any changes to laws or regulations imposing certain privacy protections and mechanisms on a First Nations, Inuit or Métis government, organization or entity in order to receive Indigenous individuals' personal information must:

- Be developed in consultation and cooperation with Indigenous governments in a manner that is distinctions-based and meets the expectations of their citizens (for example, recognizing culturally appropriate mechanisms that Indigenous groups have implemented for sharing and transferring data), the details of which could be subject to further engagement.

- Ensure that self-governing First Nations have the authority to pass their own legislation to address internal and local affairs on matters such as data sovereignty, thus making them accountable to their citizens for the proper privacy protections related to personal information.

- Not impose a restrictive equivalency requirement that an Indigenous government's privacy legislation or code must provide a "similar", "equivalent", or "adequate" level of protection to federal privacy laws.

- Include financial and other supports to Indigenous governments, organizations and entities to meet any new requirements. For example, one partner suggested establishing an organization (or relying on an existing one) to help Indigenous governments, organizations and entities in negotiating and developing ISAs; implementing or developing privacy codes or frameworks; to obtain any required information from

federal public bodies; and to receive and investigate complaints from Indigenous individuals about federal public bodies' disclosure of their personal information.

Finally, we heard a few suggestions for baseline privacy requirements that could be discussed at a future engagement to support and complement any initial changes made to modernize the Act, including further dialogue on technical matters (e.g. information technology and information management strategies); the establishment of privacy management programs; and the conduct of privacy impact assessments.

IX. Additional input from First Nations and Métis partners

We heard additional feedback, mainly from First Nations partners, but also from some Métis partners, on amendments they would like included in a modernized *Privacy Act* to address issues beyond the questions Justice Canada officials posed in the *What We Have Learned (so far) and Next Steps* report. We summarize this feedback below.

- Recognition of First Nations agreements, treaties and privacy laws: We heard concerns from certain partners about the impact of changes that a modernized *Privacy Act* might have on existing self-governing agreements, Modern Treaties, and First Nations freedom of information and protection of privacy laws. They indicated that a new federal privacy law would prevail in the event of a conflict with existing agreements, treaties and laws; thus, they requested that a modernized *Privacy Act* recognize their agreements, treaties and privacy laws as substantially similar and as an appropriate mechanism to support sharing of information.

- Timely and comprehensive disclosure of personal information: Certain partners noted that the process for a Modern Treaty government to obtain personal information held by the federal government should be straightforward, timely and comprehensive to support the recipient government in making well-informed governance decisions. These partners urged the Government of Canada to provide appropriate time limits on sharing personal information with self-governing First Nations and to restrict the extent to which federal bodies can exclude information.

- Personal information obtained in confidence: Some First Nations partners noted that personal information obtained in confidence from certain First Nations governments and councils is not currently protected from disclosure under section 19 of the *Privacy Act*[13], in contrast to information obtained from a province, a municipal government, or various listed First Nations governments and councils. They suggested that personal information shared in confidence by Modern Treaty governments should also be protected under s.19.

- Adoption of the OCAP® principles: In the view of some First Nations partners, adopting the OCAP® principles would ensure First Nations control and ownership over data collection processes and how

[13] Subsection 19(1) of the *Privacy Act* requires a government institution to refuse to disclose personal information that was obtained in confidence from certain governments, organizations or institutions, including the specified First Nations governments and council, where an individual makes a request for access to that personal information under subsection 12(1) of the Act. Subsection 19(2) provides two exceptions: where the government, organization or institution consents to the disclosure or makes the information public.

information can be stored, interpreted, or shared about Indigenous individuals and their communities. Adopting these principles into a modernized Act would, according to these partners, support recognition of Indigenous collective privacy rights in addition to individual privacy rights.

- Adoption of best practices from other jurisdictions: Some partners recommended that a modernized *Privacy Act* should reflect best practices from other jurisdictions, notably in Europe as well as certain jurisdictions within Canada. These partners cited numerous examples, including requiring federal public bodies to create and maintain a privacy management program and to complete and publish privacy impact assessments; to introduce the concept of demonstrable accountability, making federal institutions responsible for regularly demonstrating to the public and the Privacy Commissioner of Canada that they are acting in compliance with the law; to require breach notification and information security requirements, and regular vulnerability assessments and audits.

Moving forward with *Privacy Act* modernization

Conclusion and next steps

This stage of the engagement has provided Justice Canada with a greater understanding of First Nations, Inuit and Métis partners' perspectives on ideas for potential changes to the *Privacy Act*'s foundational principles and rules that play a significant role in governing information sharing between federal public bodies and Indigenous governments and organizations. We will rely on the invaluable input received so far to inform policy proposals and help identify the best way for a modernized *Privacy Act* to better reflects the needs and expectations of First Nations, Inuit and Métis.

We are committed to further engaging First Nations, Inuit and Métis partners on the modernization of the *Privacy Act*. In particular, we will be considering appropriate next steps for additional engagement with partners, which could include discussions on more detailed rules and complex questions to support any potential initial changes made to modernize the Act, as well as other relevant policy ideas that could come before or after the tabling of a bill. We will keep partners apprised of the next stage of the engagement.

We have shared this report with First Nations, Inuit and Métis partners that were invited to participate in the engagement and are making it available to all to be transparent, to continue building a common ground for further discussion, and to be an open invitation to other Indigenous partners who would like to participate in this engagement going forward.

We welcome any new First Nations, Inuit and Métis partners who want to participate in our next engagement to write us directly at the following email address: privacyactmodernization-modernisationdelaLPRP@justice.gc.ca. You may also contact us by postal mail at:

Privacy Act Modernization Initiative
Department of Justice Canada
284 Wellington Street
Ottawa, ON., K1A 0H8

Annex A. Questions for input from the *What We Have Learned (so far) and Next Steps* report

Q1. In what circumstances would you support the inclusion of a purpose clause which recognizes that one purpose of a modernized *Privacy Act* is advancing reconciliation with Indigenous peoples in Canada by promoting improved sharing of Indigenous individuals' personal information with First Nations, Inuit and Métis?

Q2. In what circumstances would you support the addition of a principle recognizing that a federal public body may disclose Indigenous individuals' personal information under its control to an Indigenous government, organization or entity?

Q3. For which purposes, in addition to those already included in the *Privacy Act*, should disclosure of Indigenous individuals' personal information to Indigenous governments, organizations or entities be authorized?

Q4. Which approaches would you support to expand the purposes for which Indigenous individuals' personal information could be disclosed without consent?

> **A)** Would you support (a) listing all the purposes for which disclosure is permitted, (b) allowing disclosure regardless of the purpose, or (c) an alternative approach?

Q5. Which concepts and definitions would you support to ensure that the *Privacy Act* appropriately recognizes the diversity of First Nations, Inuit, and Métis Nation governments?

Q6. If a modernized *Privacy Act* were to authorize disclosure of Indigenous individuals' personal information regardless of the purpose, should this broad disclosure authority be for Indigenous governments only or for all Indigenous governments, organizations and entities?

Q7. If a modernized *Privacy Act* were to authorize disclosure of Indigenous individuals' personal information for a new list of specific purposes, which types of Indigenous entities (governments, organizations and/or other entities) should be identified as authorized recipients for each of these purposes?

Q8. What measures should be used to assist a federal public body in ensuring that an Indigenous government, organization, or entity is authorized to receive the personal information of its citizens or members?

Q9. In what circumstances would you support expanding the *Privacy Act*'s disclosure provisions to authorize federal public bodies to transfer personal information?

> **A)** Should the transfer of personal information be authorized in general or limited to specific situations, such as where there is also a transfer of a program or activity?

B) Should federal public bodies be authorized to transfer personal information to all or some Indigenous governments, organizations or entities?

Q10. What mechanisms should the *Privacy Act* recognize to support expanded information sharing and to ensure the protection of personal information disclosed or transferred to First Nations, Inuit and Métis governments and organizations in line with federal public bodies' responsibilities and accountability obligations?

A) Should a new Act explicitly recognize information-sharing agreements (ISAs) and Indigenous peoples' own legislation and privacy codes as mechanisms to support personal information sharing and protection?

Q11. In what circumstances would you support the development of legislative or regulatory requirements to establish the baseline privacy protections that any chosen mechanism (whether ISAs, Indigenous privacy legislation or code) should include to mitigate the impacts of disclosure and transfer on Indigenous individuals' privacy interests?

Q12. What baseline privacy requirements should be discussed after engagement on the potential changes identified in Part 2 has concluded?