

# THE ANTI-RACISM DATA ACT

Posted on June 15, 2022

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On June 2, 2022, the BC Government passed the *Anti-Racism Data Act* (the “**Act**”).<sup>[1]</sup> The Act is intended to support the collection, use and disclosure of demographic information within BC for the purposes of identifying and dismantling systemic racism and advancing racial equity, particularly in policing, health care, and education.<sup>[2]</sup>

Co-developed with Indigenous partners, and with engagement from representatives of BIPOC communities, the Act sets out requirements for collaboration and consultation with Indigenous peoples and racialized communities regarding data initiatives.<sup>[3]</sup> However, the Act also raises questions as to how privacy considerations will be preserved and human rights considerations will be protected while advancing these goals. This bulletin summarizes what the Act permits and how it addresses these privacy and human rights concerns.

## What are the objectives of the Act?

The provincial government aims to utilize the Act to work with Indigenous peoples and racialized communities to find ways to safely collect demographic information such as ethnic origin, ancestry, race, age and gender identity, in order to address gaps and provide better programs and services to all British Columbians.<sup>[4]</sup> To this end, the Act allows for collection, storage, and disclosure of a broader scope of data than currently exists under the current public sector privacy legislation, the *Freedom of Information and Protection of Privacy Act* (“**FIPPA**”).

## What are the key privacy considerations?

As noted, the Act permits a broader scope of collection, use and disclosure of personal information. Because this scope is connected to particularly sensitive information such as race, privacy is of greater importance. As a result, the Act seeks to address privacy concerns by:

- Stating that disclosure of personal information to a public body is voluntary;
- Ensuring that proper notice is published prior to collection and use of personal information; and
- Setting limits for disclosure of the collected personal information.

### Voluntary Disclosure

Disclosure of personal information to the relevant public body for the purposes of this legislation is voluntary, and therefore public bodies that collect such personal information must not withhold or limit any benefits or services to those individuals who do not wish to provide their information.<sup>[5]</sup> For example, if one chooses not to provide information about their race to a health care provider, they will not be denied health care services. Under the Act, personal information collected can only be used for the purposes of identifying and eliminating systemic racism and advancing racial equity.

### Notice

The public body must ensure that an individual is notified of the purpose for which their personal information is being collected and used, and the types of information that may be collected and used.<sup>[6]</sup> This notice must also set out the legal authority for collecting and using such personal information and contact information for a person who may be asked to provide such information. Similar to the requirements under FIPPA, when personal information is collected, notifications must be written on the form or the document that is used to collect the information itself.

### Limits for Disclosure

In addition, the Act sets out limitations for disclosure of the information collected under the Act. It only permits primary demographic data and program data to be shared with another public body if it is for the purpose of identifying and eliminating systemic racism and advancing racial equity.<sup>[7]</sup> Information collected under the Act can be shared with an Indigenous governing entity for the purposes identified above, and to the benefit of the services provided for their respective community.<sup>[8]</sup> For example, when a nation is providing services to their members, such as education or health care, they may access the information needed to improve the delivery of their services. Further, Indigenous governing entities are able to access the information of other racialized groups in certain situations, for example, to compare outcomes of services or participation in programs.

### **What are the key human rights considerations?**

The Act is aligned with article 19 of the *United Nations Declaration on the Rights of Indigenous Peoples*, which sets out the requirement for states to consult with Indigenous peoples in good faith before adopting and implementing legislative or other administrative measures that may affect them.<sup>[9]</sup> Additionally, the distinctions-based approach to data collection supports Indigenous peoples' rights to self-governance and is therefore aligned with the goals in BC's *Declaration on the Rights of Indigenous Peoples Act*.<sup>[10]</sup>

In the Act, certain key terms were intentionally left undefined, such as systemic racism and intersectionality.

The BC legislature chose not to define systemic racism because systemic racism can look different depending on the communities and it may change over time – meaning that systemic racism must be flexible enough to take its meaning within the context of a particular group.<sup>[11]</sup> Similarly, because there are so many intersectional variables that may affect individuals, racialized groups are able to take an active role in designing the variables that make up the intersectional analysis.<sup>[12]</sup> In both cases, the hope is that the lack of definition allows the legislation to keep up with the current understandings of racism and intersectionality, and avoids prematurely excluding groups that the BC government intended to be included.

However, leaving these terms without a clear definition introduces an element of risk that the application of the legislation may not firmly align with its purposes. To address this risk, the Act permits the establishment of data directives and data standards respecting variables and values for personal information collected, used and disclosed, allowing the BC government to dictate how and what kinds of data should be collected, used and disclosed.<sup>[13]</sup> This is done in consultation and engagement with Indigenous peoples and racialized groups so that the needs of those communities are responded to appropriately.

For example, data standards and data directives must be developed in collaboration with a committee that is composed of racialized people, in consultation with Indigenous peoples whose rights or interest could be affected, and in a manner that supports cultural safety and mitigates and minimizes community harm.<sup>[14]</sup> Additionally, when developing data standards, the director must consult with both the BC Information and Privacy Commissioner and the BC Human Rights Commissioner.

These built-in protections are intended to ensure that the data collected, including any personal information, will not be used in ways that further marginalize and harm Indigenous peoples and BIPOC communities by leaving some flexibility for each community to have a say in how and what kinds of information will be collected.<sup>[15]</sup>

## Conclusions

The Act aims to collect and provide access to key demographic data that would assist in the provincial government's understanding of systemic barriers. Ideally, this information will pave the way to identifying and eliminating forms of systemic racism across the public sector. It remains to be seen whether this race-based data collection and the requirements proposed under the Act will actually lead to substantial and meaningful change that will eventually improve racial equity when accessing public services and programs.

Nevertheless, the efforts undertaken to collaborate with Indigenous partners and BIPOC community members in drafting this legislation, along with the stated intention to continue meaningful engagement with these groups as required under the Act, indicates that the government is cautious about doing this work with care, sensitivity and collaboration. This is further seen in the voluntary nature of data collection and the limits on use

and disclosure, consistent with the purpose-based approach in existing Canadian privacy legislation.

[1] Bill 24, *Anti-Racism Data Act*, 3rd Sess, 42nd Parl, British Columbia, 2022 (first reading) [Bill 24].

[2] British Columbia, Legislative Assembly, [Hansard](#), 42nd Parl, 3rd Sess (2 May 2022) (draft transcript).

[3] *Ibid.*

[4] British Columbia, Legislative Assembly, [Hansard](#), 42nd Parl, 3rd Sess (4 May 2022) (draft transcript).

[5] Bill 24, *supra* note 1, ss 3, 5.

[6] *Ibid*, ss 3(4), 4(2).

[7] *Ibid*, s 4(1)(a).

[8] *Ibid*, s 6.

[9] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, UN Doc A/RES/61/295 (2007) 68, art 19.

[10] *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44.

[11] British Columbia, Legislative Assembly, [Hansard](#), 42nd Parl, 3rd Sess (9 May 2022) (draft transcript) [Committee Debate].

[12] *Ibid.*

[13] Bill 24, *supra* note 1, ss 7, 12.

[14] *Ibid*, ss 9-11 and 14-16.

[15] Committee Debate, *supra* note 11.

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### **A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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