ACCESS TO PUBLIC RECORDS LEGISLATION IN NORTH AMERICA: A CONTENT ANALYSIS

by

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ABSTRACT

This thesis examines federal, state and provincial legislation concerning access to public records in the United States and Canada using content analysis as a method for gathering data. The analysis focuses on the following specific statutory elements: the legislative intent or purpose, eligibility, the definition of records or public records, the duration of exemptions, severability, responsiveness to requests, and publication of information about records. The elements are discussed from the perspective of archival theory and practice.

With regard to legislative intent or purpose, the most appropriately expressed clearly confer a right of access to records. If the overall purpose is accountability, right of access is best conferred on citizens. If general openness is the aim, eligibility for all persons is more fitting. When legislative definitions of public records and a model definition are compared, the model definition covers a broader concept of public agencies than is normal within the scope of existing access legislation. A more consistent application of the definition would also have legislators define records instead of public records, and provide a means of identifying more specifically those public agencies which fall within the purview of the legislation. Because the passage-of-time principle has

rarely formed part of legislation, it is possible that, contrary to the spirit of access legislation, exemptions may apply in perpetuity. Although provisions for severability of information result in the release of more records, they may also affect the probative value of records. With regard to responsiveness to requests and provision of information about records, government agencies might take advantage of the expertise and experience of archivists in providing reference services and producing finding aids.

The overall results point to the appropriateness of adopting a unified view of public records administration with the archivist and the record administrator each moving beyond traditional bounds of responsibility for historical records and active records, respectively. For archivists, the introduction of access to public records legislation represents an opportunity to make their expertise more widely available to administer access to records at all stages.

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INTRODUCTION

Over the last three decades in North America as governments at the federal, provincial and state level have implemented access to public records legislation, records administrators have wrestled with the new and changing regulations that govern access to the records in their custody. Where once government agents decided whether or not records would be released to the public, citizens now assert their legal right to inspect records produced by agents who are obliged to provide access as well as sustain the mechanisms of access. Even government archives institutions that had a long history of providing access to public records experienced the impact of access legislation. Where once access to public records depended on the passage of predetermined periods of closure, archivists now utilize the same regimen of regulations that apply to the current-day records in government offices to determine whether or not public records can be released.

In order to appreciate the changes represented by the introduction of these new regulations, this thesis will analyze access to public records statutes and discuss the outcome of the analysis from the perspective of archival theory and practice. The method of inquiry used to examine the statutes is content analysis. The approach to the analysis is fully described in

Chapter 2. The detailed results of the analysis are reported in the twelve appendices. The legislative components described in Chapter 2 and outlined below were selected because they are most relevant for a general thesis on access legislation in the area of archival studies.

The opening chapter introduces the subject of access to public records legislation by describing the basic components of a typical statute, by discussing the broader context of access rights in democratic states and by presenting a brief history of federal access legislation in Canada and the United States. The first chapter closes by discussing some of the reasons why access legislation is relevant to archival work and why the legislation applies to records in archives institutions as well as records in government offices.

The results of the analysis are discussed in three chapters following the chapter on methodology. Chapter three discusses the intent or purpose of access legislation as well as provisions which define who is eligible to exercise rights under access legislation. In order to understand the overall change that the legislative approach to access brings, these two topics are discussed in the context of access to public records prior to legislation. This discussion draws heavily on the experiences of the archives profession because it was mainly through archives institutions that the public previously accessed the records of public bodies.

Chapter four focuses on the definition of records and public records in access legislation in relation to concepts developed in archival theory. Specifically, the definitions found in the

legislation are compared to a model definition and discussed in terms of their suitability. Problems resulting from the implementation of inappropriate and ill-conceived definitions are also discussed. The scope of the legislation is also addressed by analysing what the meaning of "record(s)" includes as well as what the meaning of "public" excludes.

Chapter five addresses a few common practical concerns which arise out of access legislation. Only the most fundamental and common concerns are addressed here because access legislation can and does manifest itself in many forms, some of which include very detailed provisions while others provide little or no detail as to how the statute is to be implemented or administered. Unfortunately, the parameters of this study do not allow the inclusion of data gathered from real-life experience of administering access legislation. The first issue is the application of exemptions and the effect that the duration of exemptions can have on the administration of access in an archives setting. The chapter also discusses the ramifications of severability, the importance of requiring a degree of responsiveness on the part of government agents, and the necessity of publicizing the existence and nature of records coming under the terms of the legislation.

The intent of this study is to raise an awareness in the archival community and otherwise of some of the issues arising from access legislation. Many of these issues are related to questions and concerns that have long been associated with archival work. Thus, the major aim of the content analysis is to provide a clear understanding of why and how the wording of

access legislation is important to archival administration of public records. The study also aims to dispel the misperception that access legislation is something beyond an archivists realm of concern, when in fact, archivists are, because of their experience with records, uniquely qualified to participate in the debate on access to public records and to act as mediators between the public and its records, as is their proper responsibility.

CHAPTER 1

ESTABLISHING A CONTEXT FOR ACCESS TO PUBLIC RECORDS

During the 1991 provincial election campaign in British Columbia, the New Democratic Party (NDP) gathered public support for an election platform based largely on promises of open, honest government. Against the tarnished reputation of the government of the day[1], the NDP presented itself as an accountable, trustworthy, or at least unblemished alternative. In addition to new conflict-of-interest guidelines, the NDP promised that it would introduce freedom of information legislation to regain the trust of the electorate. Speaking on behalf of the new NDP government, the Lieutenant-Governor, the Honourable David C. Lam, highlighted this pledge when he delivered the March 1992 Speech from the Throne:

> When the cabinet was sworn in last November, I reminded its members that they must begin by restoring the confidence of the people of British Columbia in their government. Steps have already been taken to earn that trust. There will be new initiatives during this session to ensure that government is open and honest.
>
> For the first time in British Columbia, public access to many previously restricted government documents will be clearly defined through a new freedom-of-information-and-privacy-act. This legislation will ensure new openness and greater accountability by government to the people of British Columbia while protecting individual privacy.[2]

The B.C. legislature passed Bill 50, the Freedom of Information and Protection of Privacy Act, on June 23, 1992, marking a new

era of public record regulation in B.C.

Information Rights on the International Stage

By adopting the Freedom of Information and Protection of Privacy Act, the B.C. government joined a growing movement that has already swept across North America and has made significant inroads into other western democracies. In North America, access to public records legislation exists at the federal level in Canada and the United States, at the state level in all 50 U.S. States, and at the provincial and territorial level in all but Alberta, the Northwest Territories, and Prince Edward Island.[3] Elsewhere, Sweden has had a constitutionally entrenched right of access to public records since 1766, and Norway, Denmark, France and Australia have also established in recent years the means by which citizens can obtain access to government records. Although similar rights are far from being established in the emerging democracies of Europe and Asia, the idea that openness and access to government records are fundamental to democracy and freedom of opinion and expression is becoming increasingly recognized. In the 1991 world report Information Freedom and Censorship, Frances D'Souza of the human rights organization Article 19[4], suggested that:

> Perhaps one of the most urgent areas for concern will be the right of access to information and the need for international glasnost. If it is truly the goal of all nations to achieve international security, then states will have to explicitly acknowledge the right to know ....[5]

D'Souza's words acknowledge that the struggle for information rights in general is only beginning to be fought on the international stage.

It is also clear that the political arena is not the only front where access to public records issues and other information rights have been advanced. Academics, jurists, professional associations in the social sciences, and rights advocacy groups have worked hard to promote and debate information rights issues. As a result, a proliferation of related literature has emerged in the fields of law, political science, public administration, history, journalism, librarianship and media studies. A decade ago, Harold C. Relyea and Tom Riley, two prominent freedom of information advocates, commented on the significant strides made in the promotion of access to public records. They wrote:

> The international dimensions of freedom of information policy and practice should be evident from this symposium in at least three ways. First, by content: recent freedom of information developments in selected countries are described and discussed by individual experts. Second, by medium: the symposium appears in an international journal which, in recognition of the spread and growing importance of freedom of information programs, seeks to acquaint its world-wide readership with all aspects of this subject. And, third, by contributors: as author profiles indicate, a clearinghouse--the International Freedom of Information Institute--has been established in London to serve as a communication center and research exchange and to provide education and expertise on freedom of information matters everywhere.[6]

In the ten years since that assessment, access to public records legislation and information law generally have remained a topic of great interest and consideration.

Clearing Up the Terminology

Before proceeding, it is worthwhile to establish a label or term to cover the question of access to the records of government bodies. The most common terms used in this connection are "access to information" or "freedom of information." Part of the problem comes from the use of the word information. Over the

last forty years, the word information has become a multi-faceted concept that has captured the imaginations of scientists and philosophers alike. In The Cult of Information, Theodore Roszak traces the "rags-to-riches" ascent of information since World War II to the "exalted status of a godword" it occupies today. He cautions against the misuse and obfuscation of words generally, and, with regard to information, insists:

> The word has received ambitious, global definitions that make it all good things to all people. Words that come to mean everything may finally mean nothing; yet their very emptiness may allow them to be filled with a mesmerizing glamour. The loose but exuberant talk we hear on all sides these days about "the information economy," "the information society," is coming to have exactly that function. These often-repeated catchphrases and cliches are the mumbo jumbo of a widespread public cult...[enlisting] [p]eople who have no clear idea what they mean by information or why they should want so much of it [but] are nonetheless prepared to believe that we live in an Information Age.[7]

So as not to proceed like followers of Roszak's information cult, we need to clarify what is meant by "access to information" for the purposes of this thesis.

In some Canadian and most American jurisdictions, access to the records produced by government bodies is referred to as "Freedom of Information," "Access to Information" or sometimes "Open Records Law." The concept is often confused with related concepts such as freedom of the press, freedom of expression, censorship, access to published sources of information, intellectual freedom, and government secrecy.[8] To avoid any confusion hereafter, the term "access legislation" or the more literal and suitable term "access to public records" will be used. In the context of this term, access refers to the "right, opportunity, or means of finding, using, or approaching documents

and/or information;"[9] and public records refers to "documents made or received and preserved in the legitimate conduct of governance by the sovereign or its agents."[10]

The right to access public records is a legal defeasible right. This means that the right is furnished within a juridical system by virtue of a legal instrument (a statute) which provides an entitlement to examine public records and imposes an obligation on public bodies to sustain the mechanisms of access. Some access rights are established generally as part of a preamble to a statute while others are specifically and succinctly established in a separate section in a given Act. Manitoba's Freedom of Information Act presents its right of access in a clear, concise statement:

> Subject to this Act, every person has, upon application, a right of access to any record in the custody or under the control of a department ...[11]

The declaration of policy found in Texas' Open Records law is stated more passionately in the statute's preamble, but essentially accomplishes the same end as Manitoba's:

> Pursuant to the fundamental philosophy of the American constitutional form of representative government which holds to the principle that government is the servant of the people, and not the master of them, it is hereby declared to be the public policy of the State of Texas that all persons are, unless otherwise expressly provided by law, at all times entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created. To that end, the provisions of this Act shall be liberally construed with the view to carrying out the above declaration of public policy.[12]

These two approaches are typical of the broad range of

legislative statements establishing a right of access to public records. Manitoba's, taken in the context of a range of accompanying definitions and additional provisions, provides a straightforward simple statement to establish a right of access. Texas' approach, on the other hand, establishes the same right of access, but emphasizes the broader context of democratic government in which the people are sovereign and citizens expect that acts of government are transparent and evident to all.

As is the case with all legal rights, they require a corresponding obligation to be imposed on another party in order to have any substance. The right to access public records is usually accompanied by a clearly articulated set of policies and procedures designed to allow the public to exercise their rights effectively. When such policies and procedures are not prescribed legislatively, the effectiveness of the right is certainly compromised, but it does not absolve the public body or its bureaucratic agents of the duty to support the mechanisms of access.

In addition to outlining the procedures that applicants must follow to request access to public records, public bodies are typically obliged to render timely and fair service, to provide access to original records or copies, to provide access to a facility where they can examine records during reasonable hours, to provide notice of any delays, to furnish reasons when access is denied, and to publish directories and guides that contain enough information about government bodies and their records so that applicants may know what kinds of records exist and how to locate the records they want. Other general provisions address

fees for copies or services, penalties and offenses, and the administration of the statute. These obligations are clearly outlined in most access to public records statutes.

As noted above, the right to access public records is a defeasible right since it is possible for it to be defeated in certain circumstances. These circumstances are usually outlined in the same legal instrument which establishes the right of access in the form of limited and specific exemptions to a general access rule. Once records are deemed to be records of an agency within the provided definitions and therefore subject to general disclosure under the law, the public body must determine whether or not the records in question will be withheld according to the exemptions provided. Exemptions can be either mandatory or permissive, that is, the government agency is either required, on the one hand, to withhold, or may be permitted, on the other, to disclose the records under its custodial control. Exemptions, whether mandatory or permissive are sometimes accompanied by time restrictions after the expiry of which the records by definition no longer fall under the exemption.

The most common exemptions are for records which are specifically restricted in accordance with other statutes; records relating to law enforcement and investigations; records containing information obtained in confidence; records containing trade secrets and sensitive commercial information provided confidentially by third parties; records relating to inter-governmental affairs; records relating to current negotiations; records relating to the security of a jurisdiction; records containing policy advice; records documenting executive

deliberations; records that are subject to solicitor-client privilege or other types of privilege; records which might violate the privacy of individuals (privacy is often addressed in a separate statute); and records which may jeopardize the financial or economic interests of a public body. The foregoing list is not exhaustive, but does represent the most typical exemptions found in access legislation.

Although definitions are not unique to access legislation, they are a significant ingredient, as they are in most statutes. Access statutes typically define who can use the law, which agencies come under it, which materials it refers to, and a broad range of concepts relating to interpretations necessary to the administration of access. Careful examination of the definitions of public records in the legislation will be a major part of this thesis.

The last major component of access to public records legislation is the establishment of a review mechanism. The review mechanism allows applicants to appeal the decisions of government agencies if they are not satisfied that they have been fairly treated. The appeal mechanism can take many different forms. Applicants may be allowed to appeal through an appropriate court, through an Information Commissioner, through an Ombudsman, or to a specified review board. The form of the review mechanism usually depends on the existing political structures. Canadian appeals usually go through an Information Commissioner or Ombudsman in the first instance and only then to a court, if at all, whereas most American statutes provide for appeals through the courts.

Selected aspects of access to public records legislation will be examined in more depth from an archival perspective later in this thesis. Before turning to that analysis, it will be useful to look at the broad place of legislation in democratic systems of government and then trace its historical development.

The Place of Access Legislation in Democracy

In a democracy, where the enfranchised citizens are constituted as sovereign, organs of government are established to carry out the will of the people. These organs are usually comprised of a legislative branch charged with the creation of law, an executive branch charged with the administration of law, and a judicial branch charged with the adjudication of law. Various legislative and constitutional controls are usually established to ensure that the operation of government is carried out according to the will of the people.[13]

The right to access public records can be categorized with other democratic characteristics relating to popular consultation, a principle that is central to the notion of a balanced and democratic system of government. Popular consultation in a representative democracy "prescribes that citizens have a right to be consulted by their representatives and that representatives must be responsive and accountable to their constituents."[14] The oft-quoted passage by James Madison to the effect that "a popular government without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy; or, perhaps both"[15] indicates the importance of the principle of popular consultation in modern democratic

thinking and also lends considerable credence to contemporary appeals for enhanced rights and obligations regarding popular consultation.

The most basic right of popular consultation is, of course, the right to vote in regular elections. Between elections, citizens can exercise their rights of popular consultation through the right of free speech and assembly, the right to pressure government officials, and the right to protest peacefully. With the growth of government and the ever-increasing complexity of society, new mechanisms of popular consultation become necessary to aid citizens to scrutinize the actions of government. Echoing Madison's position, information rights advocates use the principle of accountability as a basis for the establishment of legislated rights to access public records. In defining the global impact of such rights, Tom Riley explained

> that the citizen will then be in a position, if he so chooses, to know what his government is doing and why. It means that the citizen who pays the taxes which finance the gathering of that information will have the right to scrutinize the information. It means, in other words, that there shall exist the opportunity for an electorate to be informed. Such a law, then, implies that the government of the day shall be accountable for what it is doing and for the policies it implements in the name of the people it is governing.[16]

Several years earlier, in a Canadian government green paper on information legislation, the Honourable John Roberts, Secretary of State for Canada offered a similar argument:

> Democratic government must be acceptable to the collectivity of citizens. To ensure that it is acceptable, there must be a political system to establish that government is accountable. Effective accountability--the public's judgement of the choices taken by government--depends on knowing the information and options available to the

> decision-makers. Assessment of government depends upon a full understanding of the context within which decisions are made.[17]

In addition to enhanced accountability, access to public records advocates argue that improved administrative efficiency would flow from the legislation. Situations in which two or more parties would deplete scarce resources gathering similar information would no longer occur if existing government records were generally available. By sharing information, governments would be able to test public response to policies that are still in the developmental stage, and thus have an opportunity to make changes before more resources are spent on unpopular or unworkable policies. The improved consultative process would help to maintain and perpetuate public confidence, and, ultimately, public perception of the administration of government in a fair and open manner would be enhanced.

The Emergence of Access Legislation in North America

The movement for legislation governing access to public records emerged during the late 1950s and early 1960s in the United States.[18] Some American states had enacted open-records laws before the passage of the federal Freedom of Information Act in 1966.[19] These laws provided models for discussion for the federal Act[20], but most were amended after 1966 to emulate the new federal Act.[21] The movement that led to the passage of the federal Act was, in the broadest sense:

> a struggle between the executive and legislative branches over executive agency information policies. It led not only to the passage of the FOIA and subsequent amendments, but also to the passage of the Federal Advisory Committee Act, the Sunshine Act and the Privacy Act, as well as to battles

> in Congress and the courts over executive privilege and the proper scope of the national security classification system. While the FOIA was perhaps the most visible and most important of the legislative attempts to exert control over executive agency information management practices, it was only one part of a much larger movement.[22]

The structure of American government was devised to provide a system of checks and balances between the legislative, executive and judicial branches. The federal republican system provides that each branch of government oversees and monitors the operations of the other branches. The struggle that ensued between Congress and the Executive agencies in the late 1950s was an attempt to re-adjust the balance by examining the changing nature of government in society, and addressing certain information management policies and government procedures with regard to the needs of the public and the good of the constitutional system. In other words, the system no longer provided an adequate mechanism for accountability.

Between the end of World War II and the late 1950s, the federal government actively pursued policies to enhance its powers to keep information and records secret. Fuelled by Cold War attitudes, the Executive expanded the scope of the national security classification system and enhanced the power of executive privilege in order to maintain a tighter grip over information and the activities of executive agencies. This trend toward secrecy collided head-on with the growing media and public demand for popular consultation as is customary in a democratic society. To exacerbate the situation, the growing federal bureaucracy and the increasing intrusiveness of government in the lives of individuals began to breed suspicion and distrust of

government. The resulting pressure combined with the growing dissatisfaction in Congress with its own ability to get information from the executive agencies provided the impetus for passage of the Freedom of Information Act.[23]

The targets of congressional efforts for change were the Housekeeping Statute, which gave agency heads complete control over the disposition and use of records, and the Administrative Procedures Act, which gave agencies broad discretionary powers to withhold records, even though the original intention of section three was to provide a general right of access to government records and despite the fact that it was very successful in improving the accessibility of certain specified types of public records.[24] The revision of the Housekeeping Statute was easily accomplished by adding a provision which prohibited the use of the statute to withhold records from the public. Revision of the Administrative Procedures Act - the statute of choice for agencies wishing to deny access to records - proved to be far more difficult. Besides agency resistance to the potent amendments tabled by House and Senate subcommittees, efforts to amend the Act were hampered by a seemingly endless stream of technical difficulties, bureaucratic setbacks and political interference.[25] However, on June 20, 1966, after nearly ten years of dedicated work, the Freedom of Information Act was passed. It came into effect on the fourth of July, 1967.

Over the next three years, the implementation of the new Freedom of Information Act met with great resistance. Some Executive agencies chose to ignore it completely. Ironically, the Department of Justice, which strongly resisted passage of the

Act, took the lead in promoting its proper implementation, mainly to avoid the legal suits that might otherwise have been brought against the government which the Department of Justice would be required to defend.[26] However, by 1970, it was obvious that a major revision of the Act was required before agency bureaucrats would administer its provisions in the spirit intended by its congressional sponsors. Following four years of intense investigation by congressional subcommittees charged with overseeing the Act, and a last minute hurdle over a Presidential veto, amendments to the Act were passed which allowed the disclosure of segregable information, tightened up agency response times, standardized fee schedules, expanded the number of agencies required to follow the Act, narrowed certain exemptions, and required the government to provide guides and indexes for the use of applicants.[27] The new and improved Freedom of Information Act came into effect on February 19, 1975.

In Canada, rumblings for greater access to government records began in the 1960s around the time that the United States was passing its Freedom of Information Act. While some commentators see Canada's enthusiasm for access legislation as "enduring evidence of the profound influence of American political fashion on Canadian political life,"[28] others simply recognize that:

> ... in the British parliamentary tradition we have been engaged over the centuries in grafting liberal and egalitarian elements onto a system whose roots are aristocratic and hierarchical. Freedom of Information is simply part of this process.[29]

The adoption of the Canadian Charter of Rights in 1982, which established certain entrenched rights for Canadians, is the

strongest testimony to the liberalization of the Canadian brand of parliamentary government. Although other democracies had implemented some form of access legislation prior to 1966, the U.S. Freedom of Information Act, being the first modern comprehensive law on access to public records, naturally provided a model for other governments. As Donald Smiley observes,

> as the access debate advanced, the influence of Swedish ideas was superseded by those of the United States. As with so many policy issues, Canada's close proximity to the United States, the shared values, and the free exchange of social, economic, and political ideas between the two countries, served to encourage the absorption of American ideas and perspectives.[30]

While the concept of free access to governmental records met no fundamental philosophical hindrances in a country which constitutionally vests political authority in the citizenry, this concept did have some philosophical impediments in a system based upon the Westminster model of government. Having its roots in a system which evolved from an autocracy to a democracy, the Canadian political system has developed certain traditions and parliamentary customs contrary to the terms of the U.S. Freedom of Information Act. Of particular concern were the impact of access legislation on the principles of ministerial responsibility and public service neutrality.

Collective ministerial responsibility, or Cabinet solidarity, has not been compromised by access legislation. This facet of ministerial responsibility provides that cabinet ministers must publicly support all cabinet decisions regardless of whether or not they support them inside of cabinet. This means that "the legislature and the people can hold the entire government accountable for its actions: the administration must

stand or fall together."[31] Framers of access legislation in Canada have accommodated this principle by including an exemption for cabinet records.

The other aspect of ministerial responsibility, individual ministerial responsibility, provides that a minister is accountable to the legislature for the actions of his department, and must take responsibility for any serious difficulties by resigning. This allows the bureaucracy to remain anonymous and politically neutral since they are responsible only to the minister of the day. It would seem that access legislation could compromise individual ministerial responsibility since it provides a mechanism whereby the public or the opposition can bypass the minister and obtain information directly from the bureaucracy. The minister's ability to be responsible could be compromised and the bureaucracy would be drawn into the political arena. However, "many commentators have observed that the traditional theory of individual ministerial responsibility bears less and less resemblance to modern political practice."[32] With the incredible growth of the bureaucracy in the post-war period, it has become virtually impossible for ministers to be involved in every aspect of administration of their departments. This represents a breakdown in the traditional mechanism of accountability since ministers have become reluctant to take ultimate responsibility through resignation because they are so far removed and detached from the inappropriate conduct in question. But this breakdown has occurred completely despite access legislation which leads some observers to argue that:

> 'ministerial responsibility' is a shopworn constitutional myth and that one of the very compelling arguments in favour of freedom of information laws in parliamentary jurisdictions is that it would restore a measure of that very kind of accountability that was originally secured by the convention of ministerial responsibility.[33]

Thus the arguments for and against access legislation in a Parliamentary system are polarized between those that want to preserve a particular constitutional heritage and those that believe the provisions of that constitutional tradition are anachronistic and inappropriate for today's society.

Canada's legislative debate on access to public records began in 1965 when a New Democratic Party private member's bill was introduced into the federal Parliament. The 1968 Trudeau government extended the debate by launching the Task Force on Government Information (1969) and the Royal Commission on Security (1969). Both of these studies explored the relationships between the executive branch, Parliament and the public with the question of greater access to governmental records at the centre. While the reports endorsed traditional conventions and governmental secrecy, they recognized the need to clarify the government's position on access to public records.

Recognizing the mounting pressure to implement some sort of policy on access, the government adopted sixteen access guidelines in 1973 which applied to holdings of the Public Archives of Canada, leaving access to active public records up to the discretion of ministers. However, these rules were considered extremely restrictive and inadequate. In 1974, a much revised set of guidelines appeared in a Progressive Conservative private member's bill. Bill C-225 passed a second reading in the

House of Commons and was directed to the Standing Joint Committee on Regulations and Other Statutory Instruments. The ensuing report endorsed the notion of greater access to information.[34] Although Bill C-225 was not passed, the concern with access legislation continued.

In 1977, the Liberal government released a position paper on access which outlined a somewhat restrictive system. The reaction from the opposition and lobby groups such as the Canadian Bar Association, especially in light of the progress Nova Scotia and New Brunswick were making in implementing their own legislation, was strongly in favour of legislation based upon the American model. When the former opposition Progressive Conservative Party formed a minority government in 1979, it introduced such a bill. Bill C-15 was similar to the American legislation in spirit and form, but did not pass the House due to the government's defeat in early 1980. The Liberals introduced a stricter variation of Bill C-15 which was criticized by both sides of the debate for being both too strong and too weak.[35] In June of 1982, amendments to Bill C-43 tightened the restrictions on cabinet documents and the bill was passed with reluctance on both sides.

Bill C-43 received Royal Assent on 7 July 1982 as the Access to Information Act. An accompanying piece of legislation, the Privacy Act, based on Part IV of the Canadian Human Rights Act, was enacted at the same time to prevent the misuse of information about members of the public held by the government. Together, these Acts form the basic mechanism of regulation on the use of personal information and the dispensation of

governmental records in Canada.

Since the enactment of the federal Access to Information Act following the enactment of similar legislation in New Brunswick and Nova Scotia, six other provinces--Quebec, Manitoba, Ontario, Newfoundland, Saskatchewan, British Columbia--as well as Yukon have enacted access legislation. Given the fact that Canadian governments have successfully enacted access legislation, it would seem clear that with certain adjustments, such an instrument is workable within a Parliamentary system. As mentioned above, Canadian governments have included exemptions for cabinet records in order to preserve the principle of cabinet solidarity. In addition, appeal mechanisms have been structured so as to avoid the courts, thus preventing a compromise of Parliamentary supremacy. Certain aspects of ministerial responsibility, bureaucratic anonymity and political neutrality in particular, have been somewhat compromised, but it would seem that a right of access to public records might be the solution to rather than the cause of this failing.

Why Archivists Are Interested in Access Legislation

In his RAMP study on access to archives, Michel Duchein describes access to public records legislation as an administrative law without a direct aim to affect the administration of archives. He states that:

> Nowhere in [the U.S. Freedom of Information] law is the word archives used. The scope of this law is thus quite clearly different from the traditional scope of laws on archives, which essentially consider documents as sources for research into the past. The Freedom of Information Act is concerned with documents from the moment they come into being. It is an administrative law and not a law on archives. Its

> consequences for archives depositories are a side effect, not a direct aim.[36]

Although his assessment is correct, Duchein understates the importance of access legislation for archives by emphasizing that it is not targeted at archives, that it addresses current records in administrative settings, and that it falls outside the traditional scope of laws on archives. Furthermore, Duchein's characterization of the impact of access to public records legislation on archives depositories as side effects, leaves the reader with the impression that the consequences for archives depositories are less significant than they actually are. Indeed, the changes that have occurred in regulating access to public records have arguably had a very significant effect on the whole administration of records, including those records deposited in archives institutions.

If one accepts a definition of archives which presupposes archival quality in records from the moment of their creation, then Duchein's statement must seem somewhat confusing. If the Freedom of Information Act is concerned with documents from the moment of creation, then it is, in fact, concerned with archives. There is no doubt that the Freedom of Information Act is clearly different from the traditional scope of laws on archives and that it is indeed a law that applies to records in an administrative setting and is therefore an administrative law. But given that Duchein establishes on page one of his study that he follows the usual 'European' meaning of the word archives[37], and that this definition encompasses the American definitions of records and archives, then it is reasonable to infer that in the context of

these definitions, a law that applies to records in an administrative setting can be both an administrative law and a law on archives. And as such, archivists must be concerned with access legislation, as well as all other access regulations and their application in whatever setting.

Archivists are also interested in access legislation for the simple reason that it applies to records in the custody of any government body, including an archival repository. Access legislation therefore has an obvious direct consequence for archives because the law regulates an activity that has always been central to the role of archivists in society, that is, administering access to government records. This change in access policy does not only address the mechanics of how access is administered, but also has the potential to effect profound changes to the role of the archivist vis-à-vis government and society in general.

Because of their long-standing role in the administration of access, archivists have much to offer in the access to public records debate. The change in access policy that this legislation represents is part of a broader policy change that affects all government agencies by placing them under the same rule with regard to access. Prior to the advent of access legislation, archival institutions were practically the only agencies of government dedicated to facilitate public access to government records. For all other segments of government, access legislation usually introduces the concept of public accessibility for the first time. Because archivists have had a long history providing access to government records in their own

institutions, it can be said that the general concept of accessibility of government records, was pioneered in an archives setting. Drawing on the experience and principles of archives can help to clarify some of the issues that have surfaced as to the operation of access legislation.

NOTES TO CHAPTER 1

1. In addition to Premier Vander Zalm's own resignation following the conflict-of-interest scandal involving the sale of his theme park, ten of his ministers also faced various conflict-of-interest allegations. Seven of the ten ministers were eventually forced to resign. "B.C. Conflict Allegations Brought Ministers Down," Globe and Mail, 30 March 1991, p. A5.

2. British Columbia Debates, "Speech from the Throne," 17 March 1992, vol. 1 (1992): 4.

3. See the bibliography of this thesis for full citations to access to public records statutes in the U.S. and Canada.

4. Article 19 is an independent and impartial human rights organization established in 1986 to promote freedom of expression and to combat censorship worldwide. Taking its name and mandate from the nineteenth article of the Universal Declaration of Human Rights, the organization promotes freedom of opinion and expression as universal human rights guaranteed by international law and fosters and defends these rights across national, cultural, religious, racial, ideological and language boundaries. Article 19 of the Universal Declaration of Human Rights asserts that "Everyone has the right to freedom of opinion and expression; this includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." Article 19, Information Freedom and Censorship World Report 1991 (Chicago: American Library Association, 1991), iii.

5. Ibid., xv.

6. Harold C. Relyea and Tom Riley, introduction to "Freedom of Information Developments Around the World: A Symposium," Government Publications Review 10 (January/February 1983): 1.

7. Theodore Roszak, The Cult of Information (New York: Pantheon Books, 1986), x.

8. It is difficult, if not impossible, to explain why the right to access public records is often confused with other information related concepts. However, given the ambiguity of the term freedom of information or the multiplicity of the word information as discussed above, the confusion is certainly not

surprising.

This confusion was clearly demonstrated on the CBC Radio afternoon talkshow "Almanac" on December 7, 1993 during an open-line discussion of the court ban on press coverage of information relating to the Paul Bernardo murder trial in Ontario. The Court's ban was based on the argument that an impartial jury could not be selected if the circumstances of the crime or the details surrounding the trial of his estranged wife were released to the public prior to his trial later in 1994. The studio guest argued the virtues of a free press and attacked the ban on grounds of censorship. Throughout the discussion, the host, guest and callers argued both sides of the issue often using phrases like "the public has a right to know"; "when there is freedom of information ..."; "the press wants to provide access to information." At one point in the discussion, the host spoke to a librarian from the Vancouver Public Library who had been forced to clip articles out of American newspapers that had published information about the Bernardo case in contravention of the ban. The librarian expressed deep regret about her actions because, she said, "as a profession, librarians are concerned with access to information."

All of these phrases are commonly used in literature on access to public records as well as literature on freedom of the press, freedom of speech and expression, censorship, access to published sources, government secrecy, privacy, and intellectual freedom. Because of this situation, as noted above, the phrase "right of access to public records" is the most literal and accurate that can be used in the context of this thesis. But before leaving this topic, a quick look at the definitions of these related topics may help to further clarify the situation.

Black's Law Dictionary defines Freedom of expression as the "right guaranteed by First Amendment of U.S. Constitution [that] includes freedom of religion, speech and press." Freedom of press is defined as the "right to publish and distribute one's thoughts and views without governmental restriction as guaranteed by First Amendment of U.S. Constitution." The definition goes on to explain that "there is little difference between freedom of speech and freedom of press." The principles embodied by freedom of expression are enjoyed by many democracies worldwide, not only in the United States. Access to public records is sometimes discussed in the context of a free press since journalists often desire access to information in public records for their writing. However, the phrases access to information or freedom of information are often used in the context of a public right of access to a free uncensored press. In this context, information refers to the product produced by the press rather than public records.

"The systematic control of the content of any communications media, by means of constitutional, judicial, administrative, financial or purely physical measures imposed directly by, or with the connivance of, the ruling power or a ruling elite" is the definition given to censorship by Michael Scammell in Information, Freedom and Censorship: The Article 19 World Report

1988 (Burnt Mill, U.K.: Longman Group UK, 1988), 10. When writers in this field use the term freedom of information, they often use it as an antonym of censorship and define it liberally to encompass access to public records, published material and information in general, whatever the source or media of transmission. This concept of freedom of information casts much further than the strict notion of access to public records as put forward in this thesis.

The terms access to information or right to know are commonly used to refer to physical and intellectual accessibility of all sources of information, without distinguishing published sources from archival sources. Intellectual freedom goes further. It refers to the liberty of thought and expression.

9. Society of American Archivists, A Glossary for Archivists, Manuscript Curators, and Records Managers, compiled by Lewis J. Bellardo and Lynn Lady Bellardo (Chicago: Society of American Archivists, 1992), s.v. "access."

10. Trevor Livelton, "Public Records: A Study in Archival Theory" (M.A.S. thesis, University of British Columbia, 1991), 157.

11. Manitoba, sec. 3.

12. Texas, art. 6252-17a, sec. 1.

13. In Democracy and Rights in Canada, the authors argue that the democratic nature of any association can be gauged by examining four general defining characteristics, namely, popular sovereignty, political equality, majority rule and popular consultation. Popular sovereignty requires that, with reasonable exceptions, everyone have a right to participate in government. Political equality requires that everyone has the same rights of political participation, such as the right to vote or run for office. Majority rule, qualified by anti-majoritarian devices to protect the rights of minorities and individuals, ensures that rule by the people reflects the views of the majority and not that of an elite minority. Popular consultation prescribes that citizens have a right to be consulted by their representatives and that representatives must be responsive and accountable to their constituents. Summarized from: Don Carmichael, Tom Pocklington and Greg Pyrcz, Democracy and Rights in Canada (Toronto: Harcourt Brace Jovanovich, 1991), 11-15.

14. Carmichael, Pocklington and Pyrcz, Democracy and Rights in Canada, 13.

15. Letter from James Madison to W.T. Barry, 4 August 1882, in The Complete Madison, ed. Saul K. Padover (New York: Harper and Brothers, 1953), 337; quoted in William L. Casey, Jr., John E. Marthinsen, and Laurence S. Moss, Entrepreneurship, Productivity, and the Freedom of Information Act (Lexington, Mass.: D.C. Heath, 1983), 12.

16. Relyea and Riley, "Freedom of Information Developments," 1.

17. Canada. Secretary of State, Legislation on Public Access to Government Documents (Ottawa: Minister of Supply and Services, 1977), 1.

18. For a detailed legislative history of the American federal Freedom of Information Act, see Burt A. Braverman and Frances J. Chetwynd, Information Law (New York: Practising Law Institute, 1985), 1:5-63; and Ontario Commission on Freedom of Information and Individual Privacy, Access to Information and Policy Making: A Comparative Study by Heather Mitchell (Toronto: Ministry of Government Services, 1980), 91-141.

19. For a list of state level Access to Public Records laws with dates of enactment and amendment, see David M. O'Brien, "State Open-Records and Open-Meetings Laws," Appendix B in The Public's Right to Know: The Supreme Court and the First Amendment (New York: Praeger Publishers, 1981), 179-182. For a synopsis of each state level Access to Public Records law, see Wallis McClain, ed., A Summary of Freedom of Information and Privacy Laws of the 50 States (Washington, D.C.: Plus Publications, 1977).

20. Braverman and Chetwynd, Information Law, 2:895, n. 3.

21. McClain, "Summary of Freedom of Information and Privacy Laws," 1.

22. Braverman and Chetwynd, Information Law, 1:9.

23. Ibid., 1:12.

24. Ibid., 1:7.

25. For a detailed account of the legislative process involved in amending Section 3 of the Administrative Procedures Act, see Braverman and Chetwynd, Information Law, 1:19-29.

26. Ibid., 1:34.

27. For a summary of the 1974 amendments to the Freedom of Information Act, see figure 2-1 in William L. Case, Jr. et al., Entrepreneurship, Productivity and the FOIA, 24.

28. John D. McCamus, "Freedom of Information in Canada," Government Publications Review 10 (January/February 1983): 59.

29. Attributed to Donald V. Smiley in the preface to Donald C. Rowat, ed., The Making of the Federal Access Act: A Case Study of Policy-Making in Canada (Ottawa: Carleton University Department of Political Science, 1985): iv. Original source is not named.

30. Patrick Gibson, "The Role of Ideas," in The Making of the Federal Access Act: A Case Study of Policy-Making in Canada, ed. Donald C. Rowat (Ottawa: Carleton University Department of Political Science, 1985), 20.

31. Ontario. Commission on Freedom of Information and Individual Privacy, Public Government for Private People (Toronto: Ministry of Government Services, 1980), 2:84.

32. Ibid., 86.

33. McCamus, "Freedom of Information in Canada," 53.

34. Gibson, "Role of Ideas," 10.

35. Ibid., 11.

36. Michel Duchein, Obstacles to the Access, Use and Transfer of Information from Archives: A RAMP Study (Paris: Unesco, 1983), 11.

37. Duchein uses the following translated definition of archives from the ICA Dictionnaire internationale de terminologie archivistique: "all documents, whatever their age, format or material composition, that are produced or received by any physical or moral person or by any public or private service or organization in the performance of their activities." Ibid., 1.

CHAPTER 2

METHODOLOGY

This thesis utilizes content analysis, "a multipurpose research method developed specifically for investigating any problem in which the content of communication serves as the basis of inference."[1] The idea for undertaking a content analysis of access to public records legislation came from Victoria Bryans' study of Canadian provincial and territorial archives legislation.[2] In her thesis, Bryans drew on the words of F. Geny to emphasize the importance of language in drafting and interpreting legislation.

> As with human language, legal discourse is only a tool to express the thought of the speaker, in order that the listener may adequately comprehend the contents of his message. Since law is the result of the conscious and premeditated activity of its author, he will be deemed not only to have carefully formulated in his own mind the exact rule he wishes to establish, but also to have chosen, with reflection and premeditation, the words that best serve to express his ideas and intention. Thus in construing an enactment we must first look at its wording.[3]

The emphasis on language in a study of legislation makes this methodology particularly suitable since "some form of content analysis is often necessary when ... the subject's own language is crucial to the investigation."[4]

The content analysis employed in this thesis is used to describe the attributes of similar legislation originating from multiple sources. The processes used are identification and

evaluation. As Krippendorff observes, "while evaluations assess the degree to which something conforms or deviates from a standard, identifications have a more either/or quality."[5]

The goal of the analysis is not to evaluate or rank legislation on a scale ranging from best to worst but rather to characterize and discuss specific components of access legislation from the perspective of archival theory, method, and practice. To achieve this goal, significant components of the legislation will be considered one by one in preestablished terms. At no point will the overall character of statutes be compared. It is important to understand that the elements chosen for this analysis are those that have the greatest interest for the purposes of this thesis. Not all elements of access legislation are analyzed, nor is the design presented herein the only way in which access legislation might be examined. Indeed, access legislation could be analyzed for a number of purposes, utilizing any number of research techniques. What follows is an explanation of the methodology used for the purposes of this thesis.

The object of the analysis is statutes governing access to records of federal, state and provincial governments in Canada and the United States. References to the statutes were obtained in the spring of 1990 by searching through the available statutes in the UBC Law library. Letters were sent to state and provincial archives in each jurisdiction to obtain confirmation of the references as well as to obtain copies of the legislation. All but three institutions responded to confirm or correct the references. In the spring of 1994, a further investigation

identified new statutes and any amendments that had been enacted in the interim. References to these 61 statutes appear in the bibliography. This chapter explains the method of analysis. First, the important elements of the statutes from an archival perspective are identified, and then the terms in which these elements are to be analyzed are explained. Chapters 3, 4 and 5 report the results of the analysis.

From an archival perspective, several elements of these statutes are particularly significant. In general terms, two groups of elements are of overarching importance. All these statutes are intended to create a legislated right of access to public records and/or the information contained in those records. It is therefore essential to examine statements, wherever they appear in the statutes, which declare the right of access or indicate the purpose or objectives of the legislation. The intent of the legislation has a pervasive influence on how any given statute is constructed, interpreted, and administered; accordingly, it is important to understand and compare the terms in which intent is expressed. The second general element is the statement in the legislation which indicates who has the right of access. In a well written law, this second element is logically connected to the first, since intent will imply who ought to have the right. The terms of analysis for these two elements are detailed in separate sections of this chapter. The results of the analysis are reported in Appendices 1 and 3 and discussed in Chapter 3. Appendix 2 provides a compilation of statements of legislative intent and purpose for each jurisdiction.

The third group of elements deserves special attention

because together it is critical to the interpretation of the legislation and is particularly pertinent to archival work. This group of elements makes up the definition of public records. As has already been observed, the purpose of access legislation is to create a right of access to public records, but what are public records and how have they been defined in the legislation? This question may be divided into two parts. The first part of the question is what are records, and how does the legislation define records? The second part of the question is what makes a record a public record, and how does the legislation support this distinction? In most cases, sometimes elaborately, access to public records statutes define what records are, and either directly or indirectly define or determine which records are public records. All persons must understand what qualifies as a public record in order to exercise rights they hold or obligations they must fulfil under the legislation. Therefore, it is important to examine all definitions of public records that appear in access legislation. The terms of analysis are set out in a separate section of this chapter. The results of the analysis are reported in Appendices 4, 5, 6 and 7 and discussed in Chapter 4. Appendix 8 provides a compilation of definitions of records/public records for each jurisdiction.

A number of significant elements may be gathered together because they are relevant to traditional methods of administering archives and because they are applicable to current policies of implementing access legislation. As is widely recognized, the terms in which exemptions to the right of access are construed is critical in the administration of the legislation. Because it is

generally recognized that archives institutions exist to make records available for research, the duration of exemptions has a vital bearing on administration of archival repositories. Access legislation frequently provides for the severance of exempt portions of records so that remaining information may be released. Since the content of a record and, more importantly, the context of its creation can be fully appreciated only when the record is in an unabridged form, it is important to recognize the possible consequences of severing the intrinsic elements from a record. Finally, access legislation frequently obliges agencies to respond to requests and publicize records in certain terms. These elements are examined because of their affinity to the traditional practice of reference work and the preparation of finding aids in archives institutions. The terms of analysis for these elements are set out in a separate section of this chapter. The results of the analysis are reported in Appendices 9, 10, 11 and 12 and discussed in Chapter 5.

Analysis of Legislative Intent

This portion of the analysis examines the precise wording of declarations of the right of access and statements of legislative intent. Each statement was examined and categorized depending on whether it

1) establishes a right of access to records/public records (see column labelled "Rec" in Appendix 1);
2) establishes a right of access to information (see column labelled "Inf" in Appendix 1);
3) declares that records are open (see column labelled "Opn" in

Appendix 1); or

4) obliges agencies to provide access to records (see column labelled "Obl" in Appendix 1).

Statutes which are attributed to the first category indicate that records or public records are what eligible persons have a right to access. Phrases such as "every person has a right of access to a record or a part of a record" and "every person has a right to inspect or copy any public record" are used to express the idea behind the first category. Statutes which are attributed to the second category indicate that information is what eligible persons have a right to access. Typical phrases used in this construction include "every person shall have access to information," "all persons are entitled to complete information," or "every person shall be permitted access to information." Statutes which are attributed to the third category are those which provide their right of access in the form of a general policy statement which declares records to be open. Statutes falling into this category declare that "the public records of all public agencies are open to inspection by the public" or that "all records shall be open to inspection by the general public." Statutes which are attributed to the fourth category couch their right of access in the form of an obligation placed on agencies. To enact the right of access, these statutes use phrases such as "every person having custody of public records shall permit them to be inspected" or "a custodian shall permit a person or governmental unit to inspect any public record."

Only one category can be identified for each statement of

intent. If two categories are present, then only the highest category is identified (the highest being the first category, the lowest being the fourth category). Conceptually, these four categories are arranged so that the lower categories are not significant if a higher category is present. For example, a statute might characterize the right as applying both to records and to information using a phrase such as "the purpose of this act is to provide a right of access to information in records." Because access to records is the highest of the two categories, then it is so indicated. The second category, access to information, is not indicated.

After categorizing statutes according to what type of right they establish, the same statutes are analyzed to determine the nature of various direct statements of the legislative intent. These statements are sometimes found in the same declarations that are analyzed above or in legislative preambles. The statutes are categorized as to whether they aim at

1) endorsing the general principle that openness and access to information or records are proper in a free democracy or an open society (see column labelled "Dem" in Appendix 1);
2) enhancing political participation and discourse (see column labelled "Pol" in Appendix 1);
3) enhancing knowledge of the conduct of government through access to evidence of its actions (see column labelled "Evd" in Appendix 1); or
4) enhancing government accountability (see column labelled "Acc" in Appendix 1).

Statutes which are attributed to the first category support

the general principle that openness in the operation of government and access to information and records are important to maintaining a free and democratic society. A link is usually made between the legislation and the basic principles of a free democratic society. At the very least, the statute might state that access should be available as a matter of principle over and above the simple fact that access is available. For example, these statutes might assert that "it is vital in a democracy that public business be performed in an open and public manner," "openness in the conduct of public business is essential to a democratic society," or that "the people's right to know the process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society."

Statutes which are attributed to the second category contend that the purpose of access legislation is to enhance political participation and discourse. The basic notion is that citizens must be informed of government actions and decisions if they are to take part in the political process and contribute fully as members of a democratic system. Legislators have framed this concept by maintaining that "the people shall be informed so that they may fully participate in the democratic process," that "the more open a government is with its citizenry, the greater the understanding and participation of the public in government," or that "access is necessary to enable the people to fulfil their duties of discussing public issues fully and freely, making informed political judgements and monitoring government."

Statutes which are attributed to the third category maintain

that the purpose of access legislation is to make the public aware of government decisions and actions by providing access to the evidence found in public records. This category goes further than the first category because the first category embraces openness for the general greater good of society whereas this category more specifically suggests that the openness embodied in access legislation allows citizens to witness government actions and decisions. This concept can be suggested in a legislative preamble using phrases such as "persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them" or "citizens shall have the opportunity to observe the performance of public officials and to monitor the decisions that are made" or "the purpose of this statute is to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government."

Statutes which are attributed to the fourth category maintain that the purpose of access legislation is to enhance government accountability. This category goes one step further than the category just discussed in that an increased awareness of government actions and decisions is a desirable preliminary step if accountability is to be enforced. Accountability requires elected officials and bureaucratic agencies to provide the sovereign citizens with an account of how public business has been conducted. This idea has been expressed in access legislation either by stating directly that the purpose of the statute is to make government "accountable" or "more accountable"

or by characterizing the citizenry as sovereign and asserting that the delegated authority exercised by government must be controlled by the sovereign citizens.

Unlike the first four categories which identify the types of declarations, these four categories are not mutually exclusive. Any given statute may aim at one or more objectives. A direct statement of intent may also be absent, meaning that the particular statute does not register under any category.

Analysis of Eligibility

The terms in which this element are cast in the legislation are quite clear. A statute will either indicate that

1) eligibility is granted to persons (see column labelled "Per" in Appendix 3); or
2) eligibility is granted to citizens (or citizens and permanent residents) of the jurisdiction (see column labelled "Cit" in Appendix 3).

On its own, this category is straightforward, but it is also useful to compare the statements about eligibility with statements of intent. Where accountability is the object, logically the act should refer to the eligibility of citizens to whom accountability is owed. Where general openness is the object, persons would more likely be the eligible group. The two choices in this Appendix are mutually exclusive, that is, either persons or citizens is selected.

Analysis of the Definition of Public Records

The terms of this analysis are drawn from Trevor Livelton's theoretical study of public records.[6] He begins by establishing

that records are a species of document. A document is composed of information having the quality of being recorded. Information is simply "intelligence given." In short, all documents are recorded information. Records are differentiated from other species of documents by having the quality of being made or received in the course of the conduct of affairs and preserved. Thus, an adequate or sufficient definition of records is documents made or received in the course of the conduct of affairs and preserved. Public records are a species of records determined by their provenance. In democratic states like Canada and the United States, public agencies are usually assigned functional responsibility to conduct the affairs of the sovereign in some defined sphere established in law. The citizens of such democratic states are sovereign, and govern themselves through the agents which they establish for that purpose. In the modern world, these agents are numerous, but all derive their authority legitimately from the sovereign legislature. They may collectively be called public agencies in the sense that they carry out in some respect the will of the sovereign, or as it is commonly called, public business.

Therefore, Livelton's definition of public records is documents made or received and preserved in the legitimate conduct of governance by the sovereign or its agents. This definition will be used as the standard to evaluate the definitions of public records in the statutes. Because this definition consists of a number of complex concepts, which were only briefly sketched above, it is necessary to break it down into its component element groups and give certain guidelines for

interpretation of whether the elements exist in any given case.

For the purpose of the analysis, only definitions found in access legislation are considered. Definitions of records or public records that are part of archives legislation or public records legislation are not substituted. It would not be consistent to bring in other definitions since those would necessarily have been developed under different circumstances and for different purposes. Furthermore, in at least two of the nine states which do not provide definitions of records or public records, court precedent has established that definitions from related statutes cannot be substituted for the purposes of access legislation.[7]

Analysis of Documents

The public records definitions are examined to determine whether

1) the definition adequately indicates that records are documents or have documentary nature, that is, are a species of recorded information. This category is for definitions which do not break a document down into its components (see column labelled "Adq" in Appendix 4).

Where an adequate definition is not evident, the definition is examined to see if elements of the definition of a document are evident. The two elements required to adequately define a document are:

2) they are composed of information (see column labelled "Inf" in Appendix 4) which is
3) recorded (see column labelled "Rcd" in Appendix 4).

Thus, an "X" in the column labelled "Adq" or in both the column labelled "Inf" and "Rcd" indicate an adequate definition of the documentary nature of records. It is important to keep in mind that the absence of an adequate definition ("Adq") does not necessarily mean that both information and the quality of being recorded ("Inf" and "Rcd") are present. It is possible that none of these elements are present in the definition.

Because the definitions often become tied in several conceptual knots on the matter of documentary nature, and are sometimes rather incoherent, it is useful to categorize other ways in which the matter is conceptualized. The public records definitions are examined to determine whether

1) definitions provide an <u>open-ended list of physical forms</u> or carriers in which records are manifested (see column labelled "PfOpn" in Appendix 5).

A list is open-ended when it contains a statement to the effect that the physical forms of records are unlimited. Definitions which contain such a statement but not in conjunction with a list of forms are also shown in this column since the author of the law obviously thought it important to indicate that records are records regardless of the physical form they take. The corollary to definitions in this category are

2) definitions which provide a <u>restricted list of physical forms</u> or carriers (see column labelled PfRes" in Appendix 5).

In addition to the conceptual confusion with physical forms, some definitions also mistake the documentary nature of records for the documentary form of records. These definitions were categorized according to whether they

3) provide an open-ended list of documentary forms (see column labelled "DfOpn" in Appendix 5); or

4) provide a restricted list of documentary forms (see column labelled "DfRes" in Appendix 5).

Because of the common confusion between these concepts, a fifth category is added for

5) definitions which make no apparent distinction between physical and documentary forms in any listing (see column labelled "Mix" in Appendix 5).

Two more elements are included in this appendix because they commonly occur along with physical and documentary form listings. They are

6) definitions which indicate that copies of records are also records (see column labelled "Cop" in Appendix 5); and

7) definitions which specifically cite electronic or machine readable documents as legitimate records forms (see column labelled "Elc" in Appendix 5).

Analysis of Archival Quality

According to the model definition, records are distinguished from documents because they are

1) made (see column labelled "Mad" in Appendix 6); or

2) received (see column labelled "Rec" in Appendix 6); and

3) preserved (see column labelled "Prs" in Appendix 6);

4) in the course of the conduct of business (see column labelled "ConBus" in Appendix 6)

A definition includes the element of being made when it indicates that a document is made, written, produced, prepared,

compiled, drafted or created by the agency in question. The element of being received is usually indicated simply by using the word received or some other synonym. The element of being preserved is expressed in many different ways, including the following: retained; kept on file; in the possession of; under the control of; owned; maintained; of or belonging to; or in the custody of the agency in question. The fourth archival element--in the course of the conduct of business--is expressed in any phrase which makes a connection between the creation or receipt of documents and the actions of government. Typical phrases include "records relating to the conduct of the public's business," "made in connection with the transaction of public business," or "received in the course of the operation of a public office or agency."

According to the model definition, public records are a species of records determined by their public provenance. The citizens of democratic states are sovereign, and govern themselves through the agents which they establish for that purpose. They may collectively be called public agencies in the sense that they carry out in some respect the will of the sovereign, or as it is commonly called public business. The public records definitions are examined to see whether they

1) convey the idea that the records have public provenance (See column labelled "PubPrv" in Appendix 7); or
2) indicate that public records are records that are open to the public (See column labelled "NotRes" in Appendix 7).

Because some statutes offer definitions of records instead of public records, the statements of legislative intent and purpose

in Appendix 2 are also examined for the presence of this element. If other elements of the model definition appear in conjunction with the provenance element in the legislative intent of statutes, it is permitted to register those accompanying elements as well. Statutes which convey the notion that the "public" element in "public records" means records that are open to public inspection, are registered in the latter category.

Analysis of Exemptions

The analysis of exemptions is designed to assess to what degree access legislation adheres to "the passage of time principle." "This principle assumes that the reasons for and appropriateness of denying access diminish over time."[8] Almost all access statutes include specific exemptions to the right of access that apply to records at all stages of their existence. These are usually designed to permit governments to carry out activities that are necessarily confidential or to protect information in records which must not be disclosed for a specific reason. While the passage of time principle does not prescribe exactly how long exemptions should persist, it does presume that all exemptions have a limited duration.

The figures in Appendix 9 represent the number of exemptions with a limited duration over the total number of exemptions in a given statute. The first column represents the number of permissive exemptions with a limited duration over the total number of permissive exemptions in a given statute. Permissive exemptions are those which allow the agency to use some discretion in disclosing records under an exemption. Phrases

such as "an agency may disclose records relating to..." or "the agency may withhold records if the information could reasonably be expected to harm..." are often used to introduce this type of exemption. The second column represents the number of mandatory exemptions with a limited duration over the total number of mandatory exemptions in a given statute. Mandatory exemptions are those which require non-disclosure and are often introduced using phrases such as "an agency must not disclose records relating to...." The figures for both types of exemptions are added together in the third column. The fourth column converts this total to a percentage for the purpose of comparison between statutes.

Because each statute enacts a particular combination of exemptions and structures and expresses them differently, it is difficult to form a basis of comparison between statutes. For this reason, each statute is considered individually. If a statute includes ten exemptions outlined in ten sections, then that number forms the basis for the total number of exemptions. An exemption has a limited duration if it specifically establishes a time period or a set of circumstances after which the exemption is no longer in effect. These provisions can be established for a specific exemption or they can apply to all exemptions in a statute. A basis of comparison is formed by expressing the totals in the form of a percentage. Whether five out of 10 exemptions in one statute or 10 out of 20 exemptions in another have a limited duration, they both indicate in column four that 50% of exemptions are limited.

Analysis of Administrative Provisions

This section groups together three categories which have had a great practical impact on the administration of archives and records. The first category seeks to determine whether or not a statute allows exempt information to be severed from records in order to allow disclosure of the remaining record. Severability is usually provided explicitly in a section describing the procedure or by granting a right of access to records as well as parts of records. If a statute includes provisions for severability, it is indicated under the column labelled "Sev" in Appendix 10.

The second category seeks to determine whether or not a statute makes provisions which require the government agency to respond efficiently and in a specific manner to access requests. These provisions can refer to any number of requirements including time periods for response, rules governing the transfer of requests, or the requirement that the denial of access be accompanied by specific written reasons. If a statute includes provisions requiring a degree of responsiveness on the part of an agency, it is indicated under the column labelled "Res" in Appendix 11.

The third category seeks to determine whether or not a statute makes provisions which require an agency to provide finding aids which will help researchers to understand their rights and help them to access the records of government. Finding aids may be described as guides, indices or lists in the legislation. If a statute includes provisions requiring the production of finding aids, it is indicated under the column

labelled "Pubs" in Appendix 12.

Validation

To ensure that the data presented in the appendices is as reliable as possible, all statutes were coded twice by the author. In addition, six randomly chosen statutes (a ten percent sample) were coded by two other individuals, neither of whom has archival training. Except for two instances, a high degree of agreement was registered among all three individuals. The first discrepancy appeared in Appendix 1 where one individual identified one category and the other individual and the author identified another category. The second discrepancy appeared in Appendix 9 where one individual identified one exemption as a permissive exemption where the other individual and the author identified the exemption as a mandatory exemption. In this case, the total number of exemptions and the percentage were unaffected by the discrepancy. Nevertheless, where there is room for interpretation in any given category, there will always be a certain level of uncertainty as to the results. Given the outcome of the validation, one hopes that such uncertainty will be eased.

NOTES TO CHAPTER 2

1. Ole R. Holsti, Content Analysis for the Social Sciences and Humanities (Reading, Mass.: Addison-Wesley Publishing, 1969), 2.

2. Victoria Bryans, "Canadian Provincial and Territorial Legislation: A Case Study of the Disjunction Between Theory and Law" (M.A.S. thesis, University of British Columbia, 1990).

3. Victoria Bryans, "Canadian Provincial and Territorial Legislation" (M.A.S. thesis, University of British Columbia, 1990), 3, quoting F. Geny, Methode d'interpretation et sources en droit prive positif, Vol. I (Paris: L.G.D.J., 1954), 194.

4. Holsti, Content Analysis, 17.

5. Klaus Krippendorff, Content Analysis: An Introduction to its Methodology (Beverly Hills: Sage Publications, 1980), 39.

6. Trevor Livelton, "Public Records: A Study in Archival Theory" (M.A.S. thesis, University of British Columbia, 1991).

7. It was established in Tennessee in Creative Restaurants, Inc. v. City of Memphis, 795 S.W..2d 672 (Tenn. Ct. App. 1990) that "'Records,' as defined in § 10-7-101, does not govern what is to be considered a record under this section" quoted in Tenn. Code Ann., s. 10-7-503. Notes to Decisions, Note 1. In addition, it was established in a New Mexico court in Newsome v. Alarid, 90 N.M. 790, 568 P.2d 1236 (1977), that the "definition of 'public records' in Public Records Act does not apply to [this] section, the 'right-to-know law.' Such definition is so broad that no reasonable interpretation of this section could possibly include all of the records that would be subject to inspection by public under that definition," quoted in N.M. Stat. Ann., s. 14-2-1. I. General Consideration.

8. Robert Craig Brown, "Government and Historian: A Perspective on Bill C43," Archivaria 13 (winter 1981-82): 121.

CHAPTER 3

INTENT AND ELIGIBILITY UNDER ACCESS LEGISLATION

The adoption of access legislation by a democratic government is usually described in terms that suggest a new beginning in the administration of public records. This attitude was evident, for example, in Lieutenant Governor David C. Lam's announcement of B.C.'s forthcoming access legislation quoted at the beginning of chapter one. As governments cross this important threshold and embrace the principles of access legislation, they are compelled to address certain fundamental issues regarding the purpose and extent of these new rights. This chapter will focus on the purpose or legislative intent of access legislation and the issue of eligibility.

At the end of chapter one, this writer stated that the general concept of accessibility of government records was pioneered in an archives setting. This idea is restated to emphasize that the appearance of access legislation does not, in fact, signal the beginning of the access to government records issue. While it is true that the adoption of a democratic right of access is an important threshold to be crossed in the evolution of access policies, it is important to recognize that prior to the arrival of access legislation, governments dispensed an abundance of information to the general public and provided

liberal access to their records primarily through archival institutions. The veritable significance of the establishment of rights of access can best be seen in relation to access practices and policies prior to their legislative manifestation.

Access to Public Records Prior to Legislation

From ancient times up until the French Revolution, "archives have served rulers of nations as the spiritual part of their treasury, as their 'arsenal of law'."[1] Posner describes in his study of ancient archives types of records that establish law, sanction control over land and people, and protect rights and privileges - records which he calls constants in ancient records creation, whatever the nature of governmental, religious, or economic institution.[2] The clay tablets, wooden boards, and papyrus records were primarily created for administrative purposes necessary to oversee the empires of the ancient world. However,

> As far as is known, access to the archive repositories constituted by kings and priests in ancient times was limited strictly to the officials responsible for their preservation or to those who had received specific permission from the supreme authority.[3]

An ideologically absolute political system, that is, a government possessing unconditional power and responsible only to itself, had no need to provide knowledge of actions to anyone. Access to records was simply a non-issue. This situation continued almost without exception, through the ancient period, the Middle Ages, and up to the era marked by the emergence of the modern territorial states in Europe. Secret archives, housing the active and inactive records of the power elite, formed the basis

of a solid legal arsenal that remained beyond the reach of the rank and file members of society.

Despite the pervasiveness of absolutism during this time, a notable exception to the inaccessibility of government and its records can be found in the ancient Greek city-state democracies of the fourth century B.C. As a democratic society, the Athenians were conscious of the need to publicize the decisions and policies of the government so that individuals understood the rights and obligations of citizenship. Official documents were transcribed onto wooden boards or stele (inscribed stone or bronze) and displayed in a central public space. These publicly accessible copies "were used to bring official issuances to the attention of the citizens and were roughly equivalent to the official gazette of modern times."[4] Although the ancient Greeks stopped short of utilizing the accessibility of public records for the purpose of accountability, they were cognizant of the need to promote knowledge of government decisions and to encourage the free exchange of ideas and opinions in order to maintain an open and democratic society.

This outlook was not entirely unique before the modern period. "The Italian city states had democratic governments which, by the thirteenth century, had enunciated the principles of freedom of information and publicity of records."[5] All records activity was directed at serving the administration and providing efficient access for citizens. "Of course, the needs of scholarly research were not considered at the time because such a thing did not exist."[6]

It was not until the fifteenth and sixteenth centuries, with

the development of historical criticism accompanied by an interest in the exploitation of original documents, that scholars began to pressure officials to permit access to archives. Generally speaking, however, records were characteristically inaccessible during this period owing to the fact that the European monarchies were not subject to control or influence by citizens.[7] Like earlier absolute governments, European rulers were accountable only to themselves and had no need to provide knowledge of actions to anyone. Although persistence sometimes brought success for individual scholars, it was the great political and intellectual changes that swept Europe in the eighteenth century and the period following the French Revolution that eventually led to the opening of archives and the liberalization of access policies. As Wagner puts it,

> archives were developing their modern function, while keeping much of their classical one: the old function of the spiritual treasury, the arsenal of law, serving the ruler, his government and administration, was supplemented by the new one of the arsenal of history.[8]

As Europe passed from the feudal age and the archives of feudal institutions were transferred to national repositories, the trend towards greater openness continued. More and more countries began to provide access to their archives, although only under carefully controlled conditions and initially only to older materials of previous centuries. Ecclesiastic archives, diplomatic, and military archives were generally inaccessible, except to privileged researchers.[9] Although closure periods shortened and broader categories of researchers were admitted as time went on, the notion that access to archives, and in particular to public records, was a privilege granted by

governments survived until well after the Second World War.

This is not to say that a legal right of access to public records does not pre-date World War II. As early as 1766, Sweden's government responded to a period of severe censorship by enacting access to public records provisions as part of its constitutionally entrenched free press law.[10] Echoing the rationale implicit in the policies of the ancient Greek city-state democracies, the Constitution of the Kingdom of Sweden states that "[t]o further free interchange of opinions and enlightenment of the public, every Swedish national shall have free access to official documents."[11] As part of a free press law, Sweden's approach to access legislation aims to promote intellectual freedom and a general right to know rather than to emphasize the accountability of public officials.

The concept of accountability was introduced 23 years later in the Declaration of the Rights of Man and the Citizen of 1789, Article 15, which maintains that "every public agent is under the obligation to give an account of his administration."[12] Although the French revolutionaries did not base their archives legislation on this concept, it remained as a fundamental tenet of modern democratic philosophy and an impetus for later access legislation. The French Revolution is also important for archives generally because it resulted in the first modern archives institution and the first archives legislation. "[F]or the first time an organic administration of archives covering the whole extent of existent depositories of older materials and of record-producing public agencies was established."[13]

The French archives act of June 25, 1794, which included

provisions entitling every citizen to access historical records in archival repositories proclaimed that:

> documents from the 'national archives' - which means, according to the terminology of the times, the archives belonging to the Nation, including governmental, administrative, judiciary and ecclesiastical archives - were to be accessible freely and without cost to all 'citizens' requesting such services.[14]

The interests of scholarly research were not meant to be furthered by this action. In fact,

> [a]ccessibility for use in learned studies was at the beginning a secondary aspect, and the vast imperial archives that Napoleon accumulated in Paris were by no means intended for the general use of the public.[15]

The State simply meant to "provide for the needs of persons who had acquired part of the national property."[16] However, France's bold move to provide a legal right to access archives was ironically coupled with regulations which allowed the Director of the National Archives to refuse arbitrarily access to records if the request caused 'administrative difficulties.'[17] This important but cautious step forward signalled the beginning of a new era of access to government records regulation and foreshadowed some of the difficulties that were to hinder administration of access.

Since the establishment of the first centralized archives institution in France, archivists have struggled with access. Not only did archivists have to determine what part of the holdings would be accessible, but also to whom access would be granted. Today, the answers are clear, in particular with regard to the latter question. The principle of free access prescribes that a broad range of records will be available, but more significantly, that every person that requests access will be

treated in a fair and equal manner. This principle is widely accepted among archivists today as witnessed in various professional codes of ethics. However, theory and practice are not always in perfect harmony, to say the least. Archivists still grapple with the ethics and practice of non-discriminatory treatment of researchers in real-life situations, despite the clear and explicit declarations in professional codes of ethics.[18] Nevertheless, the general expectation is that the principle of equal access ensures that non-discriminatory practices are observed.

But of course, today's liberal policies relating to eligibility have only slowly evolved. Even the French archives act of 1794 which declared the national archives officially open to all citizens was still interpreted in a very subjective manner, allowing access primarily to those who had a legal need to consult records. Eventually,

> As a result of the struggle against the levelling tendencies of the Revolution and against the foreign domination of Napoleon, the beginnings of nationalism developed. The peoples of Europe gradually became conscious of their national individuality and began to use national history as a source of encouragement....[19]

The increasing number of scholars demanding access to archives began to slowly pressure institutions into admitting greater numbers of people. Later, the diversification of the academic use of archives encouraged a broader spectrum of scholars to seek out even broader categories of archival material. Many new and developing disciplines such as contemporary history, social history, historical geography, political science, and the social sciences, but to name a few, capitalized on the availability of

archival sources and contributed to the growing demand for admittance.[20] Ultimately, the popularization of history and other areas of study that draw on archival sources fostered an interest in archives among the general public, which in turn has led to more populist uses of archives and more liberal policies regarding eligibility.[21]

More recently, in an effort to eliminate all remaining discriminatory practices, critics attacked policies which distinguished national and foreign researchers. Prior to the Extraordinary Congress on Archives held in Washington, D.C. in May 1966, many archives had adopted liberal policies which allowed access to any scholar, whether foreign or not. However, some countries continued to grant access only to native scholars while others allowed access to foreigners only if reciprocal privileges were granted to their scholars.

> The historical importance of the [1966 Washington] congress lies in the fact that, through its unanimously adopted resolutions, the principle of free access to archives was solemnly proclaimed for the first time on a world-wide level. ... From 1966, the moral obligation to fulfil the resolutions caused a competitive progress which advanced slowly but surely; as soon as one country relaxed its access restrictions, others followed suit.[22]

Two years later, at the 1968 International Congress on Archives in Madrid, the General Assembly ratified this position when it unanimously passed resolutions supporting the liberalization of access, including a clear endorsement of the principle of equality of treatment for national and foreign researchers.[23]

Of course, by this time the United States had enacted the federal Freedom of Information Act, thereby introducing the legal concept of a right to access public records. Despite the fact

that this right of access applied only to public records, the effect was to re-orient the long-standing arguments for non-privileged access and openness in favour of arguments of democratic principle. The Freedom of Information Act had the same effect on the other half of the access question, that is, the matter of what material would be accessible. For the first time, rules governing access were codified and rationalized. Archivists, and bureaucrats in the parent government body, had legislation to guide their decisions. As with the debate over eligibility, access legislation also derailed the liberalization process that had been evolving in archives institutions with regard to what would be available in favour of a more democratic argument. From an archivist's point of view, the important outcome was not what was made available by access legislation, but rather that the existence of rules to determine what was made available took the guesswork out of access administration and eliminated the inconsistent and idiosyncratic practices of the past.

In the two hundred years since the Enlightenment, policies governing what material would be accessible also underwent many revisions. Although often guided by arbitrary and impulsive decisions, there were some established general rules which applied to public records. One rule equated the accessibility of records with their transfer to an archives institution. Unfortunately, if creating bodies neglected or refused to transfer records to a designated repository, they remained inaccessible. The success of this system strongly depended on a strict scheduling process.

Another standard rule linked accessibility with a system of closed periods. Accessibility was not dependent on transfer to an archives repository because public records were made accessible after the end of the closed period regardless of where they were physically located. The important difference between this system and that established by access legislation is that the former does not allow citizens to have access to information and records concerning current, present-day government as is the case under access legislation. Instead, the system of closed periods prevents access to government records except for historical sources.[24] This was pre-determined through the application of 30, 50, 60 or another minimum number of closed years. Usually, the general closed period rule was supplemented by longer or shorter closed periods for particular classes of records. Sometimes certain privileged researchers were permitted access before the designated closure period had expired. Another variation on this rule established the closure period at a specific significant date meaning that the closed period became longer with the passage of time. More recently, closed periods were substantially reduced due to increased interest in more current sources.[25] Even though the system of closed periods operated on a simple premise, its application seems to have been less than straightforward.

In this brief treatment of the history of access to public records prior to access legislation, three separate rationales for access emerged. The first rationale for access is to allow persons to establish and maintain rights and obligations. Examples were drawn from the ancient and modern period and

featured the absolute rulers who used records to support their control over subjects. The second rationale for access is to promote openness and the free exchange of ideas to support an open and often democratic society. Examples of this type were found in the ancient Greek city-states, the Italian city-states of the thirteenth century and the Swedish state of the late eighteenth century. The third rationale for access is to promote a more direct understanding of government actions in order to compel the accountability of the agents of the people in a democratic state. No direct examples of this third rationale were discussed since it is only in the post World War II period that any such legislation emerged, although the concept of accountability was discussed in relation to the French Revolution.

As the discussion turns to the specifics of access legislation in North America, there are two general points to bear in mind. First, access legislation applies to all public records regardless of whether they are in administrative or archival settings. Access schemes of the past applied mainly to historical sources in archives settings, leaving current-day public records inaccessible. Second, access legislation provides a basis for a uniform approach to access administration. Previous access schemes were riddled with inconsistent and subjective policies and practices. Of course, this does not mean that all access to public records statutes are consistent and alike. Having unfolded in different social, economic and political situations, access legislation varies from jurisdiction to jurisdiction. While it is not the aim of this thesis to

speculate on or trace the root causes of such differences, it is appropriate to review how legislators have framed statutory elements in order to consider their implications for archives institutions.

Purpose of Access Legislation

By establishing a legal right of access to public records, North American legislators have given persons a new tool with which they can hold their elected officials and their agents accountable. Their actions, once protected behind a cloak of government secrecy, are now exposed in the records brought to light through the use of access legislation. The majority of these statutes provide a declaration which establishes the right of access followed by the specific and limited exemptions to the right as well as the various procedural requirements. Some statutes, in addition to an explicitly stated right of access, include a preamble or statement of policy to elaborate on the meaning and significance of the right or to place the right of access in the broader constellation of democratic rights. Other statutes are not so well formulated. At best, poorly drafted statutes leave eligible persons with a confused notion of the purpose or worth of access legislation; at worst, they result in ineffective legislative tools. (See Appendix 1 for a statute-by-statute enumeration of the characteristics attributed to the legislative purposes of access legislation. See Appendix 2 for a compilation of the legislative purposes of access legislation).

Manitoba's Freedom of Information Act is typical of statutes which express the right of access in a straightforward, concise

statement. It holds that "Subject to this Act, every person has, upon application, a right of access to any record in the custody or under the control of a department, ..."[26] Oregon's Public Records Law and Mississippi's Public Records Act also fall into this category, the apposite sections respectively read as follows:

> Every person has a right to inspect any public record of a public body in this state, except as otherwise expressly provided ....[27]

> Except as otherwise provided by sections 25-61-9 and 25-61-11, all public records are hereby declared to be public property, and any person shall have the right to inspect, copy or mechanically reproduce or obtain a reproduction of any public record of a public body ....[28]

Each of these statements, taken in the context of their accompanying definitions and provisions, simply establishes a democratic right of access to records for all persons. This category of access right is the most common, and accounts for 34 of 61 statutes in North America (See column labelled "Rec" in Appendix 1).

Other statutes go much further in that they establish a right of access and provide a policy statement that outlines the importance and significance of the new right. The intent of these policy declarations is to influence those who administer access to be as open and liberal as possible in their interpretation of the act and to convey to the public the broader purposes that are served by the legislation. One of the most impressive examples of this sort of declaration is found in New York's Freedom of Information Law which reads as follows:

> The legislature hereby finds that a free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental

> actions. The more open a government is with its citizenry, the greater the understanding and participation of the public in government. As state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible. The people's right to know the process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality. The legislature therefore declares that government is the public's business and that the public, individually and collectively and represented by a free press, should have access to the records of government in accordance with the provisions of this article.[29]

This declaration does a lot more than simply establish a right of access to public records. In fact, it is the only statute which includes all four concepts identified in the content analysis of direct statements of legislative purpose. First, the declaration links the purpose of access legislation to the most basic principles of a free and democratic society, without going into a great deal of background on this link. It is simply stated that openness of government through access is in the public interest and generally good for society. This viewpoint is expressed above in the passages which assert that the "people's right to know ... is basic to our society" and that "a free and open society is maintained..." by the legislation. Of 61 statutes, 14 link the basic purpose of access legislation to fundamental principles of an open democratic society (See column labelled "Dem" in Appendix 1).

Second, the declaration maintains that an improved sense of public participation in the political process will flow from a less secretive government. To that end, access legislation helps to provide persons with sufficient information from government

records to allow greater understanding and insight into the issues of the day. New York's declaration clearly states that "[t]he more open a government is with its citizenry, the greater the understanding and participation of the public in government." Out of a total of 61 statutes, only four specifically cite enhanced public participation in the political process as the intent of access to public records legislation (See column labelled "Pol" in Appendix 1).

Third, the New York declaration suggests that the purpose of access legislation is to provide a means for citizens or persons to know the decisions and to witness the actions of government. From an archivist's point of view, this concept is important because it makes a significant connection between the actions of government and the records they create. In the opening sentence, the New York legislature finds that the greater good is maintained "when the public is aware of governmental actions" and later adds that the people have a "right to know the process of governmental decision-making and to review the documents and statistics leading to determinations...." By linking access to records with governmental actions, legislators in New York state have established an access policy consistent with an archival understanding of the nature of records. This allows us to move beyond the notion that government records simply yield information about government and that the relationship between a government body and the records in their custody is merely proprietary. Indeed, this view supports records as sources of information, but more importantly, as evidences of governmental actions. Out of a total of 61 statutes, only 15 state that

access legislation allows persons or citizens to witness government decisions and actions and thereby view public records as evidence of government actions (See column labelled "Evd" in Appendix 1).

Fourth, the New York statement maintains that access to public records legislation helps to promote government accountability. Accountability is the obligation of an agent to render an account of actions to the source of delegated authority. In a democratic society, the agents of the sovereign citizens, that is, the elected officials and the bureaucratic agencies, must provide an account of how public business has been conducted. This category builds on the idea of records as evidence of government actions. Without the evidence inherent in public records, accountability cannot be fully realized. Public records become the factual basis upon which the court of public opinion and any court of law measure and judge how well an agent has fulfilled its delegated responsibility. Armed with evidence of government decisions and actions, the public is in a much stronger position to compel their elected officials and their agents to be responsive and responsible, that is, accountable. Of 61 statutes, only seven specifically cite improved accountability as the intent of access legislation (See column labelled "Acc" in Appendix 1).

The legislative intent expressed in New York's access legislation is exceptional in that it embraces all four characteristics of the analysis in addition to clearly establishing a right of access to records. However, most statutes fail to articulate a clear purpose, especially those

that provide a poor definition for records in addition to a poorly enacted right of access. For example, New Brunswick's Right to Information Act provides no declaration of policy and offers the following as its right of access: "[s]ubject to this Act, every person is entitled to request and receive information relating to the public business of the Province."[30] The phrase "information relating to the public business" does not suggest that records are evidence of actions, or even that the information sought after need come from public records. New Brunswick's Right to Information Act is representative of a small category of statutes which neither clearly articulate the purpose of access legislation nor clearly establish the right of access to records as such. Out of a total of 61 statutes, only six maintain that information is what the statute aims to provide (See column labelled "Inf" in Appendix 1). (Eleven other statutes include information as an object of access in conjunction with records, but these are counted only under the access to records category). Given that laws are interpreted on the basis of how they are worded, it becomes very important to articulate precisely the purpose and meaning of access legislation if persons are to take full advantage of their new rights and if the judicial system is going to uphold these rights when they are abrogated.

The third category of access declarations fall somewhere between the two already discussed: they fall short of the New York example since they only indirectly bestow a right of access on eligible persons, but they improve somewhat on the likes of New Brunswick's declaration since the access policy clearly

applies to records. For example, Hawaii's Freedom of Information Law establishes that "all government records are open to public inspection unless access is restricted or closed by law."[31] A second example is Wyoming's Public Records Act which establishes that "all public records shall be open for inspection by any person at reasonable times, except as provided in this act ...."[32] These two examples are indicative of the 17 statutes which simply declare public records open to inspection, rather than granting all persons or citizens a right to access public records (See column labelled "Opn" in Appendix 1). With this category of statutes, one is not left with the understanding that persons now have a new democratic right. One is simply left with the impression that the State has declared a new public policy regarding access to its records without going so far as to declare what purposes the act serves or that the new policy is in the form of a right now possessed by the public.

The fourth category of access declarations removes the right of access one step further from the public by establishing an open records policy in the form of an obligation on records custodians to make the records available for inspection. Massachusetts' Public Records Law provides that:

> Every person having custody of any public record, as defined in clause Twenty-sixth of section seven of chapter four, shall, at reasonable times and without unreasonable delay, permit it, or any segregable portion of a record which is an independent public record, to be inspected and examined by any person ....[33]

Washington State requires that "each agency, in accordance with published rules, shall make available for public inspection and copying all public records, unless the record falls within the

specific exemptions ....[34] Washington, along with Massachusetts and two other jurisdictions, brings the total to four statutes which establish the right of access in the form of an obligation on the records custodian (See column labelled "Obl" in Appendix 1). While the possession of a right by one party implies the existence of an obligation on another, and vice versa, it is wholly unsatisfying to express a right of access only in terms of its reciprocal obligations on the State. Instead of allowing persons to assert their right of access, this style of enactment would leave them merely demanding that agencies fulfil their duties. The latter does not carry nearly the same weight and tends to cloud the basic purpose of access to public records legislation.

An analysis of the nature of legislative declarations of a democratically-based right of access in North American statutes has shown that they fall into four distinct categories. The first category consists of statutes which clearly confer on persons a right of access to public records. The second category consists of statutes which establish a right of access to information, instead of public records. The third category consists of statutes which declare records to be open for inspection without specifically conferring a right of access to them. The fourth category consists of statutes which impose an obligation on agencies to open their records to inspection rather than conferring a right of access on persons.

The New York state example was used to illustrate four elements which sometimes appear in conjunction with the legislative intent of access to public records statutes. The

first two characteristics correspond to the second rationale for access outlined earlier in the section on access to public records prior to the introduction of legislation. These characteristics--the general notion of accessibility as a basic ingredient of an open democratic society and the enhancement of public participation in the political process--support openness in a very general sense. The other two characteristics correspond to the third rationale for access, that is, the evidence of government actions found in records give sovereign citizens the means to ensure government accountability. The next section will focus on how eligibility is expressed in access legislation and its impact on the right of access to public records in an archives setting.

Eligibility Under Access Legislation

The statement or section which acknowledges a general right of access is usually where the range of individuals to whom the right extends is defined. Legislators have defined the persons eligible under access legislation in essentially two ways: broadly, by extending access rights to "a person" or "the general public", and narrowly, by extending the right only to "citizens" of the given jurisdiction. Of the 61 jurisdictions in Canada and the United States with access legislation, 50 confer the right of access upon persons and 11 confer the right of access upon citizens of a given jurisdiction. (See columns labelled "Per" and "Cit" in Appendix 3 for a statute-by-statute enumeration of eligibility provisions).

South Carolina's Freedom of Information Act presents a

typical example of the broad user definition. It states that "any person has a right to inspect or copy any public record of a public body..."[35] and then goes on to define "person" to include "any individual, corporation, partnership, firm, organization or association."[36] An example of the narrow user definition can be found in Canada's federal Access to Information Act which states that "every person who is (a) a Canadian citizen, or (b) a permanent resident ... has a right to and shall, on request, be given access to any record under the control of a government institution."[37]

Governments can rationalize a limitation to the right of access on the grounds that accountability is an obligation that extends only as far as their electorate. Moreover, when examined from the point of view of the "public" as both sovereign and the aggregate of the sovereign's subjects, and "government" as the vehicle through which the sovereign public governs itself, an argument can be made that the pure formulation of a right of access would apply only to the citizens of a jurisdiction since they are the ones that demand accountability and that require information and evidence found in public records in order to ensure their own good governance.[38] However, as compelling an argument as this is, it has been rarely embraced by legislators. Appendix 1 shows that only 18 jurisdictions include at least one of the two characteristics that correspond to the accountability rationale. Of those 18 jurisdictions, only four--Arkansas, Delaware, New Hampshire, Virginia--have adopted the point of view that eligibility granted to citizens is more appropriate to a statute which embraces accountability as its purpose.

In practice, the citizen-limitation is easily circumvented through the use of qualified agents that are residents or citizens of the jurisdiction in question. Furthermore, it is debatable whether this situation is altogether fair since it is quite possible that foreigners or corporate bodies will find themselves subject to the laws of a jurisdiction and possibly in a situation where they require government information. In the interest of fairness and equity, those that are subject to administrative proceedings in a jurisdiction should be able to avail themselves of all resources normally available, regardless of citizenship. Additionally, in extending the right of access to foreigners, the right is not eroded in any way. While it may not be in its purest form, it would allow foreigners to help the sovereign citizens perform their ruling function by supplementing the free flow of ideas and information in the political arena.[39] Rather than supporting accountability, this indiscriminate approach to eligibility supports the type of access statute which embraces openness in government as its purpose.

Once legislation has been enacted, it is unlikely that provisions such as those which define eligibility would be amended. However, the rising costs associated with the administration of the U.S. Freedom of Information Act have led some officials to argue that eligibility for foreign requesters is a cost that may no longer be afforded. During a Senate Judiciary Committee hearing, Stephen J. Markham, Assistant Attorney General, was asked whether

> it might be appropriate to modify FOIA to provide that agency records ... not be disclosed to a person who is neither a citizen or a permanent resident alien of the United States,

> unless he is a national of a foreign country which provides reasonably reciprocal access to government information for its own national and non-nationals.[40]

He responded that the Department of Justice was not proposing a legislative change at the time, but remarked that he was

> concerned that the Freedom of Information Act can be used by foreign requesters, including requesters from countries that provide no reciprocal information access to United States citizens, and that the American taxpayer bears an inappropriate financial burden in this regard.[41]

In his brief to the Committee, Markham specifically cited an example involving a Canadian newspaper which requested information, a fee-waiver and subsequently litigated a case in an American court. Despite the fact that this service was provided at great expense to the American taxpayer, he noted that the Canadian government does not extend its right of access to Americans or other non-citizens.[42] Given the sentiment expressed in this 1988 hearing, it appears that governments which currently extend access to any person, may at least be tempted to revoke the provision in favour of the narrower citizen-based right.

In the early days of access legislation, government officials could disqualify otherwise eligible persons by judging their interest in a given request as inadequate to warrant disclosure. This arbitrary power to weigh the requester's interest in making a request disappeared at the federal level in the United States when the provision in the Administrative Procedure Act providing for disclosure to interested parties was superseded by the provision in the Freedom of Information Act providing for disclosure to any person. The Supreme Court sustained this principle in NLRB v. Sears, Roebuck & Co., when it concluded that

a person's rights under the Freedom of Information Act are neither increased nor decreased because the requester claims an interest in a document greater than the interest shared by the general public.[43] However, some arbitrary discretion remains with government officials in the area of exemptions. In cases of discretionary disclosure, that is, where the exemption is permissive, officials are not prevented from considering the interests of the applicant in their decision to disclose.[44]

At the state/provincial level, only three states--Washington, Rhode Island, Arizona--allow the requester's purpose to enter into a Freedom of Information application. In these instances, the limitation is specifically directed at preventing the use or abuse of information for commercial purposes. Generally at the state level, the courts have been hostile to non-disclosure based on the requester's interest, and have strongly upheld the principle of non-discrimination.[45] However, state courts have considered the applicant's interest in a record

> in determining whether information falls within an exemption and, if so, whether it should be released anyway pursuant to agency discretion. The requester's purpose is also considered in the few states that allow public-interest nondisclosure.[46]

Possibly the most serious threat to the right of access to public records comes from the reappearance of provisions allowing agencies to ignore requests for information if they are deemed by the head of the agency concerned to compromise the conduct of public business. British Columbia's recently enacted Freedom of Information and Protection of Privacy Act allows the Information Commissioner to

> authorize the public body to disregard requests ... that,

> because of their repetitious or systematic nature, would unreasonably interfere with the operations of the public body.[47]

This provision most likely stems from the bureaucratic anxiety caused by recent well-publicized cases involving what may be considered abuses of the access to public records system. In one case, a Montreal lawyer-accountant obtained 400,000 Revenue Canada documents in order to compile a tax newsletter for his subscribers. He filed approximately 4,500 applications and had as many as 15 government employees working full-time to process his requests.[48] In another case, a convicted arsonist serving time in an Ontario penitentiary managed to file approximately 2,300 requests with provincial authorities--roughly ten percent of all requests filed in Ontario since the Freedom of Information Act came into effect in 1988. His requests cost the tax-payers of Ontario hundreds of thousands of dollars and he freely admits that the exercise was "a form of therapy ... a way of sublimating his anger, of getting even - legally - [with] 'the Establishment'."[49] In the United States, a study of the effect of the Freedom of Information Act on Drug Enforcement Administration investigations showed that 60 percent of the requests for DEA records came from prison inmates and half of the remaining 40 percent were made by others under current investigation.[50]

It is easy to understand why citizens and frustrated government officials would support provisions to stop such abuses. After all, the examples cited above hardly represent the type of request that legislators had in mind when they introduced access legislation in an effort to foster openness, improve

accountability or bring the government decision-making process closer to the people. However, any limitation placed on eligibility, especially those which give government officials discretion to judge the eligibility of requests truly represent 'the thin edge of the wedge' and could foreshadow a serious breach of the intent of access legislation. Before the end of her term as Canada's Information Commissioner, Inger Hansen accused the federal government of undermining the Access to Information Act when it recommended that such a provision be introduced. When questioned about the controversial recommendation on CBC's "Ideas," Hansen responded:

> That is the most dangerous concept I have seen in terms of freedom of information because that leaves the one who has to give this service with the option of saying "We don't think what you want is important, and at the same time, we reserve the right to charge you for it." And once you accept this kind of subjective reasoning, you may as well tear up the act.[51]

Under access legislation, eligibility has been defined either in terms of citizenship or in terms of an inclusive grouping of persons. It has been suggested herein that the use of citizenship as the criteria for eligibility would be more appropriate for statutes which embrace accountability as their purpose, and likewise, that the statutes which embrace general openness as their purpose would most likely designate all persons as eligible under the legislation. However, the analysis has shown that this assumption is not so. In fact, the question of eligibility is not a straightforward matter at all. On the one hand, eligible individuals are clearly defined in legislation and the practice of applying arbitrary discretion to determine eligibility has disappeared, while on the other hand, subjective

judgement can still be used to interpret some exemptions and provisions which allow government officials to use discretionary powers to ignore requests are reemerging in more recent statutes. Furthermore, the anxiety caused by soaring administrative costs of access legislation combined with the public and bureaucratic outrage effected by perceived abuses of the legislation is causing some governments to reexamine the question of eligibility.

As discussed earlier in this chapter, archives institutions have recently adopted after long centuries of development, non-discriminatory access policies which do not distinguish between researchers on the basis of nationality or privilege. These liberal policies evolved in the context of the cultural role played by archives institutions in supporting scholarly work based on historical sources. The new policies surrounding eligibility have evolved in a completely different context. Instead, eligibility is now based on a democratic right of access to current-day public records. This right is possessed by the sovereign citizens of a given jurisdiction rather than scholars; with archivists, along with all bureaucrats in the parent organization (government), essentially playing an administrative role. Archivists can draw some comfort from the fact that only 11 jurisdictions out of the 61 studied impose the citizen-limitation on eligibility (See column labelled "Cit" in Appendix 3), meaning that only archivists in those few jurisdictions need worry about an obvious immediate conflict between the policies of access legislation and archival philosophies. But ultimately archivists will have to acknowledge the new policies and

reconcile those with the philosophies and traditions of the archival profession.

NOTES TO CHAPTER 3

1. A. Wagner, "The Policy of Access to Archives: From Restriction to Liberalization," in Modern Archives Administration and Records Management: A RAMP Reader, comp. Peter Walne (Paris: Unesco, 1985), 375.

2. Ernst Posner, Archives in the Ancient World (Cambridge: Harvard University Press, 1972), 3.

3. Michel Duchein, Obstacles to the Access, Use and Transfer of Information from Archives: RAMP Study (Paris: Unesco, 1983), 2.

4. Posner, Archives in the Ancient World, 97.

5. Luciana Duranti, "The Odyssey of Records Managers, Part II: From the Middle Ages to Modern Times," Records Management Quarterly 23(4) (October 1989): 5.

6. Ibid., 5.

7. Ibid., 6.

8. Wagner, "The Policy of Access to Archives," 376.

9. Duchein, Obstacles to Access, 4.

10. Ontario. Commission on Freedom of Information and Individual Privacy, Access to Information and Policy Making: A Comparative Study by Heather Mitchell (Toronto: Ministry of Government Services, 1980), 3.

11. Duchein, Obstacles to Access, 10.

12. Ibid.

13. Ernst Posner, "Some Aspects of Archival Development Since the French Revolution," American Archivist 3 (July 1940): 161.

14. Ontario. Commission on Freedom of Information and Individual Privacy, Access to Information and Policy Making, 3.

15. Posner, "Aspects of Archival Development," 165-166.

16. Posner, Archives in the Ancient World, 162.

17. Duchein, Obstacles to Access, 3.

18. For a discussion of the practical application of the principle of equal access, see Elena S. Danielson, "The Ethics of Access", American Archivist 52(1) (winter 1989): 52-62.

19. Posner, "Aspects of Archival Development," 166.

20. Michael Roper, "The Academic Use of Archives," in Modern Archives Administration and Records Management: A RAMP Reader, comp. Peter Walne (Paris: Unesco, 1985), 361-362.

21. Duchein, Obstacles to Access, 7-9.

22. Wagner, "The Policy of Access to Archives," 377-378.

23. The first two recommendations of the congress read as follows:
"1. The Extraordinary Congress reaffirms that one of the principal objectives of the International Council on Archives is "to facilitate more frequent use of archives and the effective and impartial study of the documents they contain by making their content more widely known and by encouraging greater freedom of access", as stated in Article 2 of the ICA Constitution.
2. The Congress expresses the wish that researchers, irrespective of nationality, should everywhere be accorded equal and easy facilities for access to archives, and that every means should be employed to make this principle effective. ..."
"Resolutions, Recommendations and Wishes of the Extraordinary International Archives Congress," Archivum 16 (1966): 233.

24. Duchein, Obstacles to Access, 15.

25. Wagner, "The Policy of Access to Archives," 376. and Duchein, Obstacles to Access, 14-15.

26. Manitoba, s. 3.

27. Oregon, s. 192.420.

28. Mississippi, s. 25-61-5.(1).

29. New York, s. 84.

30. New Brunswick, s. 2.

31. Hawaii, s. 92F-11(a).

32. Wyoming, s. 16-4-202.(a).

33. Massachusetts, s. 10.(a).

34. Washington, s. 42.17.260.(1).

35. South Carolina, 30-4-30 (a)

36. South Carolina, 30-4-20 (b)

37. Canada, sec. 4.

38. Trevor Livelton, "Public Records: A Study in Archival Theory" (M.A.S. thesis, University of British Columbia, 1991), 176-181.

39. Ibid., 180.

40. Senate Committee on the Judiciary, Subcommittee on Technology and the Law, The Freedom of Information Act: Hearing before the Subcommittee on Technology and the Law of the Committee on the Judiciary, 100th Cong., 2nd sess., 2 August 1988, 128.

41. Ibid.

42. Ibid., 39.

43. Burt A. Braverman and Frances J. Chetwynd, Information Law (New York: Practising Law Institute, 1985), 1:139-140.

44. Ibid., 1:140-141.

45. Ibid., 2:906.

46. Ibid., 2:905.

47. British Columbia, s. 43.

48. Stephen Bindman, "King of Federal Access Laws," The Vancouver Sun, 5 January 1993, A7.

49. Ian MacLeod, "Arsonist Drives Bureaucrats Buggy," The Vancouver Sun, 28 January 1993, A4.

50. Senate Committee on the Judiciary, Subcommittee on Technology and the Law, The Freedom of Information Act, 38.

51. Transcript of program entitled "Access to Information," in the Ideas series, broadcast on CBC Radio, 15 February 1989, p.9.

CHAPTER 4

DEFINITION OF RECORDS AND SCOPE OF LEGISLATION

Most statutes provide definitions of key terms in order to give meaning and substance to the provisions they establish. With few exceptions, access legislation provides explicit definitions of the object of access, that is "records," "public records," "documents," "writings," "information," or "data."[1] Even though these statutes are commonly labelled "Freedom of Information" or "Access to Information," "information" is not actually the object of access. Records, or more specifically public records, are what users of this legislation are in fact granted a right to see. But do the statutes define public records well?

This question should in fact be broken down into two distinct questions. First, are records adequately defined? To answer this question one must consider what records are in an abstract sense and compare this model with the definitions offered in the legislation. In so doing, an understanding can be gained as to how records might best be defined for the purposes of this law. Second, are public records adequately defined? To answer this question one must again consider what public records are in an abstract sense and compare this model with the definitions offered in the legislation. In so doing, we will discover

whether or not the law covers the full scope of records and the full scope of agencies of the jurisdiction concerned.

A proper definition of public record is important to clarify exactly what is the object of access. If this is not clear, any number of problems may arise in the applicability of the law and its interpretation by administrators and courts of law resulting in the ineffective conduct of public business and the accrual of needless expense. A proper definition is also important for those who administer access in an archives setting. A consistent understanding of what constitutes a public record is needed so that persons with rights under an act understand the scope of records which come under its provisions.

Definitions of "record(s)" and "public record(s)" abound in archival literature. Many basic works have undertaken analyses of fundamental concepts and definitions and thus added to an understanding of the nature of public records that archivists use in practice and in academic work. The following analysis of definitions found in access to public records legislation is based on ideas that have been developed in archival studies. While it is obvious that definitions found in statutes are products of particular social, political and legislative situations, and there is no reason to expect that such definitions will correspond to ideas formulated by archivists, it is useful to draw on these fundamental archival concepts in order to compare and scrutinize the formulation of definitions of public records as well as to discuss some of the problems arising from the application of those definitions.

The starting point for an analysis of "record(s)" and "public

record(s)" as defined in access legislation, is with a clear model definition against which these definitions can be compared and discussed. As mentioned earlier in Chapter 2, Livelton's study will be followed as the most authoritative text on public records.[2] A definition of "record(s)" begins with information defined as intelligence given, followed by "document(s)" defined as information having the quality of being recorded. "Record(s)" follow as a species of documents, which are differentiated from all other species of documents by having the quality of being made or received in the course of the conduct of affairs and preserved; that is, by being archival in the traditional sense. "Public record(s)" are a class of records determined by their provenance. Public bodies, or public agencies make and receive documents in the course of conducting their affairs. In a democratic society, public agencies are established by the sovereign legislature to conduct specified functions on behalf of the sovereign, or in other words, the will of the sovereign is carried out by agencies charged with the responsibility of governance. Thus, following Livelton, who makes the most thorough analysis of the subject, public records are documents made or received and preserved in the legitimate conduct of governance by the sovereign or its agents.[3] This definition provides the standard against which legislative definitions of the object of access--public records--are measured.

Although there are 61 jurisdictions in North America with access legislation, only 52 define "records" or "public records." Therefore, all figures presented in this chapter should be viewed in terms of 52 rather than 61 statutes.

The Documentary Nature of Records

Firstly, an analysis of the term "document(s)" in access to public records statutes shows that it is not used in the same sense as in the model definition. (See Appendix 4 for a statute-by-statute enumeration of the characterization of "documents" and Appendix 7 for the text of all 52 public records definitions). Of the 22 statutes which use the term "document(s)," 18 confuse the term with physical carriers and documentary forms as evidenced in Virginia's definition of "official records" which reads: "Official records" means all written or printed books, papers, letters, documents, maps and tapes, photographs, films, sound recordings, reports or other material....[4] The usage of the term documents in this and the other 17 statutes does not define the fundamental nature of documents as information with the quality of being recorded, nor does it present an alternative term with a similar meaning. Of the remaining four statutes which use the term documents, Oklahoma's provides the finest example with records defined as "all documents, including, but not limited to,...[list of physical forms]..., created by, received by,...."[5] Nebraska uses the term documents in nearly the same fashion, while the usages made by Quebec and New Brunswick are adequate but somewhat lacking. It is unclear in Quebec's case whether they are trying to define record when they define document, while in New Brunswick's case, the definition of document is adequate, but it is dissatisfying to see that the definition is not carried any further (See column labelled "Adq" in Appendix 4).

However, this does not mean that the majority of definitions

are without foundation. At the root of most definitions is the notion that records consist of information that is recorded. In effect, the idea behind the model definition of "document(s)" is conveyed, using alternate language. Take for example, Connecticut's definition of public records which begins with "any recorded data or information ...;"[6] Manitoba's definition of record which begins with "any kind of recorded information ...;"[7] or Wisconsin's definition of records which begins with "any material on which written, drawn, printed, spoken, visual or electro-magnetic information is recorded ... ."[8] This characterization is completely consistent with the model definition cited above (See columns labelled "Inf" and "Rcd" in Appendix 4).

Some statutes do not provide as clearly expressed a statement as those just cited, but do, nevertheless, convey the idea that a document or recorded information is central to the definition of record(s) and public record(s). Such is the case with Maine's definition of public records which states that:

> the term "public records" shall mean any written, printed or graphic matter or any mechanical or electronic data compilation from which information can be obtained, directly or after translation into a form susceptible of visual or aural comprehension ... .[9]

A "data compilation from which information can be obtained" implies the presence of information that was compiled or recorded, as does the use of words such as "written" and "printed" imply recording. Although convoluted, this definition also provides the necessary elements in the definition of document(s).

Some definitions provide alternate means to arrive at

adequate definitions of document(s) by explicitly providing one element and implying the other through example or explanation. An example of this is found in Michigan's definition of "public record" and "writing" which state that:

> "Public record" means a writing ... [and a] "[w]riting" means handwriting, typewriting, printing, photostating, photographing, photocopying, and every other means of recording, and includes letters, words, pictures, sounds, or symbols, or combinations thereof, and papers, maps, magnetic or paper tapes, photographic films or prints, microfilm, microfiche, magnetic or punched cards, discs, drums, or other means of recording or retaining meaningful content.[10]

This definition provides a clear indication of many modes of recording--handwriting, typewriting, printing, photostating photographing, photocopying--but the object of recording, information, is not explicitly indicated, although meaningful content could substitute for information. That aside, the definition goes on to include different ways of representing information--letters, words, pictures, sounds, symbols--and different physical carriers of information--paper, tapes, films, discs. If the best definitions must include information with the quality of being recorded, then this definition is not too far off the mark. It indicates that something intelligible has been recorded on a physical carrier. Inferring that the something is information is not too difficult to accept, especially given the presence of the phrase meaningful content at the end of the definition.

Similarly, it is also possible that documents can still be adequately characterized without the explicitly stated element of recording, given an appropriately phrased definition that includes the element of information coupled with an indication of

exemplary forms. An example of this is found in New York's definition of record which states that:

> "Record" means any information kept, held, filed, produced or reproduced by, with or for any agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes.[11]

Putting aside the other elements of the definition for the moment, we find a clear indication of information, but there is no explicit mention of recording that information. However, the definition goes on to indicate that the information can be in any physical form whatsoever including, but not limited to a number of record forms, and is furthermore capable of being kept, held, filed, produced or reproduced. Since information in itself has no physicality, it must be recorded in order for it to be objectified "in any physical form" or "filed, held or reproduced" for that matter.

Physical and Documentary Forms as Documents

Up to this point, the first steps toward a solid definition of record(s) and public record(s), that is, an appropriate characterization of document(s) as information having the quality of being recorded, have been met, either directly or indirectly, in most statutes. However, many definitions do not start off so well. (See Appendix 5 for a statute-by-statute enumeration of how physical and documentary forms have appeared in definitions and Appendix 7 for the text of all 52 public records definitions).

Approximately 18 statutes proceed with a confused or vague

notion of the nature of documents and records in exactly the same manner as many similar definitions Victoria Lemieux found in her analysis of archives legislation.

> Instead of defining a record in terms of its essential nature as, for example, the expression of ideas in a form which is both objectified (documentary) and syntactic (governed by rules of arrangement), and which constitutes evidence of an official transaction, as Luciana Duranti does in her series on diplomatics in *Archivaria*, current definitions elucidate the term by cataloguing the [documentary or physical forms] which may constitute record material.[12]

For example, Kentucky defines "public record" as "all books, papers, maps, photographs, cards, tapes, discs, diskettes, recordings or other documentary materials regardless of physical form or characteristics, ..."[13] Similarly, Louisiana defines "public record(s)" as:

> all books, records, writings, accounts, letters and letter books, maps, drawings, photographs, cards, tapes, recordings, memoranda, and papers, and all copies, duplicates, photographs, including microfilm, or other reproductions thereof, or any other documentary materials, regardless of physical form or characteristics, ...[14]

No differentiation is made between letters and memoranda, (the documentary forms) and paper, cards, and microfilm (the physical forms). Document(s) are simply equated with documentary and/or physical forms in these definitions (See columns labelled "PfOpn," "DfOpn," and "Mix" in Appendix 5).

There are several dangers in this kind of oversight. The first arises when new physical carriers are introduced that fall outside of what is specifically cited in a form-based definition. In such cases, statutes would require amendments as new forms appeared. Unlike some in archives legislation[15], form-based definitions found in access to public records statutes have at least included an open-ended statement indicating that in

addition to specifically named forms, records can be in any other unnamed or yet-to-be-invented physical form. This at least avoids the complications of a legislative amendment when new physical carriers are introduced.

However, the distinction between records and mere physical carriers becomes more relevant when considering the increasingly ambiguous physicality of records, especially in electronic form. Even archivists do not yet have a consistently clear notion of what constitutes an electronic record as evidenced by the fact that the recently formed ICA Electronic Records Committee included foremost among its list of work items the "[d]evelopment of a consistent view of the term 'electronic record.'"[16] While it is true that legal precedent has firmly established that records may appear in machine-readable or electronic form,[17] and that many statutes specifically mention machine-readable and electronic records (See column labelled "Elc" in Appendix 5), it is not altogether clear what other factors are necessary to constitute a machine-readable or electronic record as opposed to a non-record in that form. For example, a record that is saved on a diskette could be erased or transferred to another medium, leaving the original physical carrier perfectly intact, but eliminating all evidence of the recorded transaction. Given this scenario and a form-based definition, the diskette (read "record") would still exist,[18] or at least it might not have been compromised in the eyes of a judge.

As alluded to above, 18 definitions of record(s) and public record(s) specifically cite machine-readable or electronic records as acceptable physical forms, and many others leave the

range of possible forms completely open to the inclusion of electronic records by formulating the definitions in such a way as to allow records to take "any physical form whatsoever." Eight definitions of record(s) and public record(s) indicate that copies of records are also records. Of these eight definitions, five are among those which specifically cite machine-readable or electronic records as acceptable record forms. Again, given the scenario where an electronic record is transferred to another medium, the definitions which declare a copy of a record to be a record provide a basis to consider the record separately from the physical carrier. Since a hard-copy print-out or an electronic copy of a record is also a record, the correlation between the record and a particular physical carrier is broken. As long as the record has any given physical form, which includes an altered or transformed physical form, the record exists. The overly literal interpretation would be avoided and a record that was transferred from a diskette would simply be seen as existing in another form. Consequently, a judge would not likely maintain that a blank disk is a record. (This scenario, of course, is based on the assumption that the statute does not define record(s) appropriately in the first place and has fallen back on the form-based approach to record definitions).

Another problem stemming from the reliance on form-based definitions has been the tendency to use them to try to broaden the definition of record(s) to include materials that are truly not record(s), at least according to the model definition provided above. The phrase "any physical form whatsoever" has been used in U.S. courts to argue that NASA's moon rocks and the

Kennedy assassination bullets are government records. In a 1967 memorandum, the U.S. Attorney General tried to exclude three-dimensional objects from the scope of the federal Freedom of Information Act by emphasizing that the intention of Congress was to provide a right to copy a record, and since the three-dimensional nature of objects would preclude copying by conventional means, they were not accessible under the Act. The counter-argument to this line of reasoning has been that the right to copy a record is provided as a corollary to the right to inspect a record, and if a record cannot be copied, for whatever reason, this does not mean that it cannot be inspected.[19]

However, neither of these arguments addresses the reason why, from an archival perspective, the NASA moon rocks and the Kennedy assassination bullets may or may not be records. The three-dimensional nature of an item does not automatically disqualify it as a record. On the contrary, it is quite possible that a record can take three-dimensional form, and interestingly enough, one definition of public records includes "artifacts" in its list of acceptable physical forms.[20] Three-dimensional objects which are attached to documents are, if preserved, part of the transaction of business and thereby qualify as documents. Jenkinson observes that

> The line between what is and what is not, by a little writing added or attached to it, converted into a document is one so difficult to draw, and the question of separating enclosed objects from the document to which they belong raises so many difficulties and objections, that probably our best course is to be dogmatic; including under 'Document' for the purposes of our definition ... [all objects] ... reasonably assumed to have formed part of or been annexed to specific documents thus defined.[21]

However, the case of the moon rocks and the sought after bullets

as outlined above is not one concerning attachments to documents. To be sure, these two items yielded evidence which led to the creation of numerous records. But these items are not records, not because they are three-dimensional, but because they are not archival.

Archival Quality Expressed in Public Records Definitions

As the model definition moves from document(s) to record(s), it includes 4 elements which give record(s) the quality of being archival; that is, record(s), as a species of documents, are differentiated from all other species of documents by having the quality of being (a) made or (b) received (c) in the conduct of affairs and (d) preserved. An analysis of definitions found in access to public records statutes reveals that 45 definitions include a combination of some or all of these four aspects. (See Appendix 6 for a statute-by-statute enumeration of the characteristics of archival quality in public records definitions and Appendix 7 for the text of all 52 public records definitions).

For statutes which define records rather than public records, both the given definition and the legislative intent are examined. A statute which defines records must include the element of public provenance elsewhere in the legislation, usually in the legislative intent. This is mentioned here since the element of being preserved often occurs along with the element of public provenance. For the purposes of the analysis, the statement of legislative intent is a legitimate source for the element of public provenance and the element of being

preserved. This allows a comparison between statutes which define records and statutes which define public records, rather than excluding statutes from the discussion simply because they do not attempt to define public records. Saskatchewan's legislation is typical of this situation. It provides a definition of record (which actually corresponds to document(s) as defined in the model definition) and then includes the quality of being preserved and the element of public provenance when it subsequently establishes that every person has a right of "access to records that are in the possession or under the control of a government institution."[22]

Among the 45 definitions that do include some combination of the four archival elements, only five include all four elements.[23] Oklahoma's definition stands out as the most well formulated of the group. After defining record(s), albeit using a form-based definition of document(s), the definition includes the four archival elements of the model definition as follows:

> ... created by, received by, under the authority of, or coming into the custody, control or possession of public officials, public bodies, or their representatives in connection with the transaction of public business ....[24]

The remaining definitions include various combinations of the four elements. Overall, 33 definitions include the element of being made (See column labelled "Mad" in Appendix 6), 16 include the element of being received (See column labelled "Rec" in Appendix 6), 26 include the element alluding to the conduct of business (See column labelled "ConBus" in Appendix 6), and 37 include the element of being preserved (See column labelled "Prs" in Appendix 6).

The four archival elements, however, are interrelated and must be considered as a single package. For example, a document is obviously made, but without the quality of being made in the conduct of affairs and preserved, the document cannot be a record. Definitions which lack one or all four archival elements are apt to result in a rather problematic body of jurisprudence as courts struggle to determine whether documents are, in fact, records. U.S. courts have set legal precedents maintaining that

> ... some relationship between the record and the agency must exist for there to be an "agency record" covered by the FOIA. The courts have described this relationship through the concepts of "possession," "use," and "control."[25]

The significance of being received in the course of the conduct of affairs and preserved, for example, has been a difficult concept for U.S. courts to embrace. Lacking a clear definition of what constitutes a record, judges presiding over cases involving the U.S. federal Freedom of Information Act have looked to other elements of the legislation to guide their decisions. In one case, in an effort to control the distribution of records, an appeal court held that a presentence report created by a court and subsequently received by the Department of Justice in the conduct of its legitimate mandated activity and preserved could not become an agency record of the Department of Justice and was therefore beyond the scope of the Act. The decision was based on the fact that the report in question was authored by a government agency which was an exempt body under the Freedom of Information Act. In another case, a court held that a congressional committee hearing transcript that had been in the possession of the CIA for 30 years was not an agency

record of the CIA because Congress, being an exempt government institution, was required to maintain "control" over the record.[26]

In these two cases, the courts, lacking the guidance of a clear definition, applied the concept of authorship rather than the concept of archival provenance in order to determine which agency had "control" over the record. The Congress, the Courts, the Office of the President, among other government institutions, are all exempt as agencies under the Freedom of Information Act. However, this exemption should apply to the fonds generated by those particular institutions. It should not allow those agencies to reach into the fonds of other agencies and impose blanket restrictions on documents which it has authored and invoke an ill-conceived notion of "control" as justification. If such records are too sensitive to be released, then the exemptions should prevent disclosure. Establishing precedents which re-shape the definition of record(s) ill-serves the very objectives of the legislation, whether construed as openness or accountability.

Similar reasoning has also been used to the opposite effect. Agencies have not only used the legal notion of control or authorship to exclude records, but also employed the concept of "use" to include records from another fonds within the scope of the legislation. In some cases, records which have been produced in the private sector with agency funding have come under the control of an agency for access purposes. Courts have tried to determine whether there was significant government involvement in the production of records. The reasoning has been that

> since the Act seeks to reveal the nature and quality of agency decision-making, agency reliance on data [or records] created with government funds should trigger application of the Act to the [private sector] data.[27]

Again, lacking the guidance of a clear definition, the courts have fallen back on the intent of the legislation to set a precedent which defies the definition of archival quality. Instead of determining whether the records in question were received in the ordinary conduct of business and preserved, the court has tried to judge the degree to which information was "used" by an agency in its decision-making process. Definitions which skirt the issue of archival quality or leave it out altogether risk the application of inappropriate concepts which would serve to dismember the fonds and make the remaining parts unintelligible. The element of "use" which has become important for judicial interpretation figures prominently in 15 definitions of public record(s).[28]

The relationship between records and agencies that the courts have tried to establish through the application of legal concepts of possession, use and control, might be better established through the application of concepts of archival quality. The fact of being made and received in the conduct of affairs and preserved, connects records to the agencies generating them through the conduit of actions. Actions are carried out under the authority of legitimate mandates and recorded in objectified and syntactic forms in records. While "possession" and "control" do connote "preserved" in the archival definition, and "use" hints at the underlying actions implicit in the phrase "in the conduct of business," the lack of precision and consistency in

the manner in which these terms are applied has lead to many unconventional conclusions in the courts. Lacking the critical element of "in the conduct of business" can mean that the link between actions and the production of records is non-exist, thereby bringing all documents, instead of records, into the scope of the legislation. With legal precedent being established on the basis of stringently literal interpretations, legislators must draft legislation and definitions with extreme care.

The Public Provenance of Records

The final element that is addressed in the analysis of definitions is the difference between a record and a public record. In the model definition the difference between "record(s)" and "public record(s)" is that the latter are a provenance-based subspecies or type of record. In the model definition, the sovereign refers to the public--the democratic source of legitimate authority. Recognized authority allows the sovereign public to be governor and simultaneously governed by the political and legal structure that is established. Thus, in the model, the more generic definition of "record(s)" is augmented by recognizing a particular provenance, the sovereign public, as well as the particular function of that records creator, governance.[29]

Of the 52 statutes which provide a definition of records or public records, all 52 include a reference to the public provenance of records in that definition, or in some cases, in the legislative intent (See column labelled "PubPrv" in Appendix 7). The requirement of demonstrating public provenance is met if

there is a clear indication that the records that are defined are those of public institutions. For example, the Canadian federal Access to Information Act defines "record" in the definitions and then introduces the element of public provenance in the declaration of the right of access: "The purpose of this Act is to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution...."[30] Almost all statutes recognize the provenance of records in this manner. Montana's statute is an exception which goes somewhat further in demonstrating an understanding of the concept by stating in its definition that public records are "the written acts or records of the sovereign authority."[31]

There are, however, six jurisdictions which present a slightly confused notion of public provenance. In addition to acknowledging the public provenance of records, these definitions also give the impression that the word "public" in public records means "not restricted" or "available for inspection" (See column labelled "NotRes" in Appendix 7). Utah defines records as "documentary materials ... which are prepared, owned, received, or retained by a government entity or political subdivision,"[32] but then goes on to define public record as "a record that is not private, controlled or protected and that is not exempt from disclosure."[33] Similarly, Massachussets suggests that public records are those which are "made or received by any officer or employee of any agency ... unless such materials or data fall within the following exemptions ...."[34] Maine, Ohio, Rhode Island and Vermont also structure their definitions in this manner. These definitions start adequately by including records

of agencies within the scope of the definitions, but then contradict the idea by suggesting that exempt records, by virtue of their inaccessibility, are not public records.

The fact that all statutes analyzed generally recognize that public records means the records of public agencies addresses the scope of the legislation on only the broadest level. Livelton's definition of public records in fact leads to the broadest possible view of public records, that is, records of all agents of the sovereign, which would include the executive, legislative and judicial branches of government. However, the scope of access legislation is not cast that far. Typically, access legislation applies only to the bureaucratic arm of the executive. Sometimes the scope of an act will also encompass local governmental bodies such as municipalities and school boards, as well as regulatory boards, self-governing professional bodies and institutions of higher learning.

There are several ways in which legislators have delimited the scope of an act. For example, British Columbia's Freedom of Information and Protection of Privacy Act recognizes that the application of the act extends to "any record in the custody or under the control of a public body,"[35] thereby acknowledging that public records are records of public provenance. But the scope of what is meant by public body is set out in Schedule 1 of the Act as the bureaucratic arm of government or any other body listed in Schedule 2 of the Act. Schedule 2 includes a list of advisory bodies, regulatory boards, crown corporations, and other bodies which exist under the auspices of government departments and agencies. The definition of public body also excludes

specific public agencies from the scope of the Act, namely, officers and members of the Legislative Assembly and the Courts. These exceptions are reiterated in the legislation along with the exception for "material placed in the archives of a public body by or for a person other than a public body."[36]

Many statutes define the scope of public bodies by referring to the degree to which the body is funded by public monies. Arkansas establishes that public records are records of "a public official or employee, a governmental agency, or any other agency wholly or partially supported by public funds or expending public funds."[37] Similarly, North Dakota maintains that public records are

> all records of public or governmental bodies, boards, bureaus, commissions, or agencies of the state, or any political subdivision of the state, or organizations or agencies supported in whole or in part by public funds, or expending public funds, shall be public records,....[38]

Other statutes define public bodies in terms of the delegated authority of law. Louisiana, for example, defines public records as records created "under the authority of the constitution or laws of this state, or by or under the authority of any ordinance, regulation, mandate, or order of any public body...."[39] New Jersey establishes that public records are "all records which are required by law to be made, maintained or kept on file by any board, body, agency, department, commission or official of the State or any of its political subdivisions...."[40] This latter formulation, however, has been interpreted in the courts very literally, effectively excluding records from the scope of the access law unless they are explicitly required by law to be made or maintained on file.[41]

Given that the model definition takes the broad view of public records and that access legislation is not designed to fully encompass all the agencies implicit in that definition, it might be more appropriate to adopt the approach taken by British Columbia and define records as the object of access and then define the scope of the Act by delineating exactly which public bodies fall under its terms. This might be simpler and more consistent than trying to define public records which recognizes the public provenance of records but tries to narrow the range of applicable public bodies using a problematic or inconsistent formula. This approach can leave the impression that some public records, that is, public records according to the model definition, are not public records according to access law. It is certain, however, that all access legislation applies (or should apply) to records (as defined in the model definition). But the scope of the law has always applied only to a subset of public records (as defined in the model definition).

As has been discussed throughout this chapter, definitions of public records in access legislation are less than clear and often stray from the concepts embodied in the model definition provided. While some of these infractions are subtle, others are conspicuous and can lead to serious misinterpretations. With regard to the scope of an act, a poor definition has the potential to include documents that ought to be excluded or exclude records that ought to be included. Furthermore, the lack of clarity that is characteristic of some definitions can leave judges grasping for anything, however inappropriate, on which to base an interpretation. Unfortunately, this has led to judicial

precedents which run counter to our fundamental understanding of the nature of records and public records. It is only through recognizing these problems and inconsistencies that legislation can be improved and that the rights and obligations established under access law will be fully understood and exercised.

NOTES TO CHAPTER 4

1. Out of a total of 61 jurisdictions in the United States and Canada, 11 statutes define "record(s)," two statutes define "document(s)," 36 statutes define "public record(s)," one statute defines "government data," one statute defines "government record," one statute defines "information," one statute defines "official record(s)," and nine statutes do not explicitly define the object of access.

Eight of the 36 statutes which define "public record(s)" as the object of access do so in conjunction with secondary or supporting definitions. Of these eight statutes, six define "writing(s)" in conjunction with "public record(s)," one defines "files" in conjunction with "public record(s)," and one defines "public information" in conjunction with "public record(s)."

Interestingly, seven of the 11 statutes which define "record(s)" are from Canadian jurisdictions. Two of the remaining three Canadian statutes define "document(s)," and the other defines "information." Canadian statutes conspicuously avoid the term "public record(s)." American statutes, on the other hand, define "public record(s)" 36 times out of 51 statutes. Of the remaining 15 statutes, nine do not provide definitions, three define "record(s)," and the remaining three statutes define "government record(s)," "government data," and "official record(s)" respectively. Clearly, "public record(s)" is the term of choice in American statutes.

One explanation for this observation might relate to the fact that Canadian archives traditionally follow the "total archives" approach and acquire both public and private archives while American archives acquire public and private archives into different institutions following a "historical manuscripts tradition" and a "public records tradition." Therefore, when Americans deal with public records in access legislation, they use the more specific term "public record(s)," whereas Canadians, being accustomed to addressing both private and public records, favour the more generic term "record(s)," even though this particular kind of legislation addresses public records exclusively.

2. Trevor Livelton, "Public Records: A Study in Archival Theory" (M.A.S. thesis, University of British Columbia, 1991).

3. Ibid., 73, 159-160.

4. Virginia, s. 2.1-341.

5. Oklahoma, s. 24A.3.1.

6. Connecticut, s. 1-18a(d)

7. Manitoba, s. 1.

8. Wisconsin, 19.32(2).

9. Maine, s. 402.3.

10. Michigan, 15.232(c), 15.232(e).

11. New York, s. 86.4.

12. Victoria Lemieux, "Archival Solitudes: The Impact on Appraisal and Acquisition of Legislative Concepts of Records and Archives" Archivaria 35 (spring 1993): 157.

13. Kentucky, 61.870.(2).

14. Louisiana, s. 1.(2).

15. Lemieux, "Archival Solitudes," 158.

16. John McDonald, "The ICA Electronic Records Committee," Archivaria 36 (autumn 1993): 300.

17. Burt A. Braverman and Frances J. Chetwynd, Information Law: Freedom of Information, Privacy, Open Meetings, Other Access Laws. (New York: Practising Law Institute, 1985), 2:129.

18. Lemieux, "Archival Solitudes," 158.

19. Ann H. Wion, "The Definition of 'Agency Records' Under the Freedom of Information Act," Stanford Law Review 31 (July 1979): 1097.

20. North Carolina, s.132-1.

21. Hilary Jenkinson, A Manual of Archive Administration (London, 1965), 6.

22. Saskatchewan, s. 5.

23. The five statutes that include all 4 archival elements of the model definition are Connecticut, Delaware, Georgia, Maine, and Oklahoma.

24. Oklahoma, s. 24A.3.1.

25. Wion, "Agency Records," 1106.

26. Ibid., 1109-1110.

27. Ibid., 1113.

28. Mississippi's definition of "public record(s)" includes documentary materials "having been used, being in use, or prepared, possessed or retained for use... ." The other 14 jurisdictions which include "use" as a key element are California, Colorado, Connecticut, Delaware, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maine, Michigan, Oregon, South Carolina and Washington.

29. Livelton, "Public Records," 136-139.

30. Canada, s. 2.(1).

31. Montana, s. 2-6-101.

32. Utah, s. 63-2-103 (17).

33. Utah, s. 63-2-103 (18).

34. Massachussets, ch.4, ss. 7, cl. 26.

35. British Columbia, s. 4.(1).

36. British Columbia, s. 3.(1).

37. Arkansas, s. 25-19-103(1).

38. North Dakota, s. 6.

39. Louisiana, s. 1.(2).

40. New Jersey, s. 47:1A-2.

41. Any document not required by law to be made, maintained or kept on file is outside purview of the right to know law. Collins v. Camden County Dept. of Health, 200 N.J.Super. 281, 491 A.2d 66 (L.1984). quoted in New Jersey, s. 47:1A-2, Notes of Decisions, Note 2.

CHAPTER 5

PRACTICAL CONCERNS OF ACCESS ADMINISTRATION

Every access to public records statute worthy of its name includes provisions for the administration of the Act. Without these practical considerations to guide agencies, the intent of access legislation, whether the intent is greater accountability in government or greater openness of government, would not likely be fulfilled. The provisions referred to are those which outline how the legislation is to be administered, what powers do those administrators exercise, and what sort of review process will be implemented. In this chapter, the focus will be on provisions which have a more direct relationship to archival concepts and practice. The elements discussed are exemptions, severability of information, responsiveness to requests and publicity of records.

Duration of Exemptions

The right to access public records is a defeasible right by virtue of the fact that the right can be defeated in certain circumstances. Access to public records statutes usually outline these circumstances in the form of exemptions to a general right of access. These exemptions can pertain to any number of subjects or categories of records that the legislative body feels it must protect from disclosure. (See "Clearing Up the Terminology" in Chapter 1 for a brief description of the most

common exemptions). Exemptions are either permissive or mandatory. With the mandatory exemptions, the government agency has no choice but to withhold records, whereas with the permissive exemptions, the government agency has discretionary powers to decide whether or not to withhold records.

However, not all statutes approach the issue by providing a general right of access accompanied by specific exemptions to the rule. At the end of Chapter 4, we saw that some legislators have provided exemptions in the form of exceptions to the definition of public records. According to Vermont's legal definition of public record, for example, records relating to trade secrets, law enforcement investigations, ongoing negotiations and 17 other categories of public records, are not public records.[1] Vermont, in providing exemptions in this manner, has provided a right of access to all public records, without exception, since all exempt records are placed outside the scope of the Act. One possible explanation for this unorthodox approach points to a lack of understanding of key terms and definitions. If Vermont's legislators understood "public records" to mean "records that are publicly accessible," then one can see why they defined public records in a general sense and exempt records as exceptions to the definition of public record. But if they understood "public record" to mean "records of a public agency," then their approach does not make sense since the records that the legislation defines as non-public records are certainly public records as defined in archival theory. However, despite the peculiar construction of exemptions in Vermont, they are still counted as exemptions for the purpose of this chapter.

Five out of 61 statutes - Alabama, Missouri, Montana, Nevada, North Dakota - do not include any specific exemptions and have relied entirely on judicial precedent to determine what records are exempt from disclosure. New Jersey's access to public records statute, which has only one vaguely defined exemption for records specifically excluded by other statutes, includes a precedent in the annotations which declares that the

> Right to know law...does not contain specific substantive standards that define exclusions from its coverage, but, rather, leaves it to [the] executive to delineate by executive order those materials that are not subject to disclosure, and, absent such determination, it remains for [the] Supreme Court to develop, on [a] case-by-case basis, articulated principles that guide courts in making such decisions.[2]

For the purpose of this discussion, only exemptions enacted in law will be considered.

The number and nature of exemptions vary from jurisdiction to jurisdiction. While some statutes make only vague references to exemptions, like New Jersey's, others include long lists of exemptions, sometimes citing specific record series as exempt from disclosure. However, the exact nature of exemptions across the 61 jurisdictions is not of central importance to this discussion. It is true that as administrators of access, archivists are certainly interested in understanding access regulations so that the implementation of the law is conducted well. And, of course, archivists may hold strong personal convictions about exemptions from political or philosophical points of view. However, the one central question stemming from our role as archivists revolves around the duration of exemptions rather than the specific nature of exemptions.

This section assesses to what degree access legislation adheres to the "passage of time principle."[3] This concept was first articulated by Robert Craig Brown in a historian's perspective on Canada's proposed federal access legislation. In his article, Brown explained that from a historical perspective, researchers expect that all records, no matter how sensitive or confidential at the time of their creation, must eventually be disclosed. With the passage of time, he observed, the reasons for and appropriateness of secrecy diminish until records are finally released. With regard to what he saw as an obvious violation of this principle in the Canadian federal bill on access to information, Brown declared that "[w]e do not accept the notion that some of these classes of records will, and others may, depending on the whim of a head of a government department, be closed forever."[4]

In a brief to the B.C. provincial government on Bill 12 (the proposed Access to Information and Protection of Privacy Act), the Ad Hoc Committee on Freedom of Information and Privacy of the Archives Association of British Columbia supported this concept. The brief argued that all exemptions, regardless of their nature, should be limited in time. The rationale set forth was based on the premise that records form a part of activities and transactions, and that activities and transactions are limited in time. In the brief, the Committee maintained that

> the public's right to information about its government's activities never ends. In fact, in many cases it is only with the passage of time that the nature and context of government activities can be fully and justly understood. In acknowledgement of this need for democratic accountability, as well as to promote cultural knowledge and social continuity, governments have mandated archival agencies to

> maintain the records of their activity. Still, the full potential of archival repositories as agents of democratic government cannot be fulfilled unless the public has access to all classes of records created in its name at some point in time.[5]

However, 30 of 61 access to public records statutes leave at least some records closed to access in perpetuity. (See Appendix 9 for a statute-by-statute enumeration focusing on exemptions with limited duration). If the number of exemptions with limited duration is related to the total number of exemptions in a given statute, and if this relation is expressed as a percentage for the sake of comparison across the range of statutes, 30 statutes indicate that 0% of their exemptions have a limited duration. As shown in the table below, five statutes do not apply to this analysis since they provide no exemptions at all. Nine statutes indicate that between one and 10% of their exemptions have a limited duration. Eleven statutes indicate that between 11 and 40% of their exemptions have a limited duration. Of the remaining 6 statutes, 3 indicate that 100% of their exemptions have a limited duration, and the rest indicate that 82% (or 9/11), 96% (or 26/27), and 97% (or 37/38) of their exemptions have a limited duration.

Some jurisdictions have limited the duration of exemptions through archives legislation instead of through access legislation. Quebec, for example, establishes in its Archives Act that

> Inactive documents scheduled for permanent preservation and to which restrictions to the right of access apply under the Act respecting Access to documents held by public bodies and the Protection of personal information (chapter A-2.1) may, notwithstanding that Act, be disclosed not later than 150 years after their date.[6]

Hawaii makes a similar provision outside of its access legislation. It declares that

> All restrictions on access to government records which have been deposited in the state archives, whether confidential, classified, or private, shall be lifted and removed eighty years after the creation of the record.[7]

Percentage per Statute of Exemptions With Limited Duration	Number of Statutes
Not Applicable (no exemptions)	5
0 %	30
1-10 %	9
11-20 %	6
21-30 %	3
31-40 %	2
41-50 %	0
51-60 %	0
61-70 %	0
71-80 %	0
81-90 %	1
91-100 %	5

If governments are to limit the duration of exemptions, it would be better to do so within the framework of access legislation rather than in another statute such as an archives act. Not only would the limitation be more apparent to those exercising their rights under access legislation, but there would also be no mistaking the fact that the limitation to the duration of exemptions applied to all exempt public records. The approach used by Quebec and Hawaii certainly make all exemptions

immaterial after a certain point in time, but only for records which have been transferred to an archives. This type of limitation does not apply to all public records wherever they are located.

The approach to limiting the duration of exemptions can be either specific or general. British Columbia's Freedom of Information and Protection of Privacy Act provides several examples of the specific approach. The exemption for records of Cabinet confidences does not apply to records that have been in existence for 15 or more years.[8] Likewise, records which disclose policy advice are exempt for only 10 years;[9] records which disclose information harmful to intergovernmental relations or negotiations are exempt for only 15 years;[10] and records which disclose personal information are exempt for 100 years after their creation or for 20 years after the death of the person.[11] The specific approach creates a cut-off period that applies to a single exemption.

When a statute takes a general approach to limiting the duration of exemptions, it usually outlines all the exemptions and then establishes a cut-off period after which all or most exemptions become immaterial. Utah's Government Records Access and Management Act states that

> A record shall be presumed to be public 75 years after its creation, except that a record that contains information about an individual...shall be presumed to be public 100 years after its creation.[12]

Similarly, Oregon's Public Records Law establishes that "except as otherwise provided in ORS 192.496, public records that are more than 25 years old shall be available for inspection."[13]

The exception provided in ORS 192.496 goes on to establish a 75 year period for certain categories of personal information. A few statutes provide a general limitation to the duration of exemptions, but intentionally exclude one or two exemptions. Indiana's Access to Public Records Statute, for example, provides that

> Notwithstanding any other law, a public record that is classified as confidential other than a record concerning an adoption, shall be made available for inspection and copying seventy-five (75) years after the creation of that record.[14]

The practice of establishing general cut-off periods after which exemptions fall away is somewhat reminiscent of the former access system under which all records remained inaccessible until transferred to an archives or, inaccessible until after the passage of a predetermined closure period. However, there is an important difference. Under the former system, blanket closure periods applied to all records, whether confidential or not, and set some future date as the earliest time when the material would become accessible. Under a system of legislated access, where specific exemptions are made to a general policy of openness and where the legislation establishes a general cut-off period after which all exemptions become immaterial, exemptions apply only to specific records, or specific portions of records, and the cut-off period applies to the earliest date when formerly exempt records, or exempt portions of records, would become accessible.

As seen earlier, the majority of statutes do not establish cut-off periods after which all exemptions become immaterial. This means that when records are withheld because of the application of a mandatory exemption, they might be withheld

permanently, which runs counter to the principle that all records should be accessible at some point in time. In a similar situation, permissive exemptions would at least allow the option of disclosure, and with the passage of time, access administrators would be more likely to invoke that option. While it is obvious that the new system of access legislation and exemptions results in the earlier release of most records, it does not necessarily result in the ultimate release of all records. Under the old system of blanket closure periods, researchers at least knew that after the passage of 30, 50 or 100 years, all records became accessible. What is needed in addition to exemptions, therefore, is a clear indication of when exemptions become immaterial.

Before leaving the issue of exemptions, it would be fitting to raise a few questions relating to the application of exemptions. Under the old system of access, records that were transferred to an archives were usually transferred for the purpose of accessibility. If blanket closure periods remained in effect after transfer to an archives, it was due to the broader access policies of the sponsoring parent government and beyond the control of archivists. Under this system, archivists were advocates for openness and were seen as allies of the researcher operating from within the government structure. The new legislative approach to access, particularly the application of exemptions, has led to a change in the role of the archivist. While applying exemptions under access legislation, archivists and government bureaucrats alike have been put in the position of withholding records. For government bureaucrats, this does not

represent a substantive change in their role in the administration of access to records since it was their broader policies which traditionally prevented access and established blanket closure periods. The archivist was always somewhat removed from this mechanism. But as archivists apply exemptions, they must espouse the role of those who would deny access to records, a role that archivists are less than comfortable with and a role that is at least unfamiliar to researchers.

In addition to causing changes to the role of the archivist, access legislation can also have an effect on the operations of archives institutions. Under access to public records legislation, all records are open from the moment of creation, except for specifically exempt classes of records. Records, whether in the original offices of business or in an archives must undergo the same analysis to determine whether or not they are to be released. One possible ramification of this situation is that the creators of records, not wanting to become heavily involved with the administration of access, might transfer records to archives much sooner than under the previous system. This could also encourage records creators to develop better records management practices to ensure that the administration of access is carried out efficiently and with as little disruption as possible. Once records have fulfilled their immediate purposes in the offices of creation, a quickly scheduled transfer can shift the burden of access administration onto another body, namely, an archives. However, the parameters of this thesis do not allow us to measure these effects. Whether or not access legislation has encouraged the improvement of records management

practices resulting in the hastened transfer of records to archives; or whether archives institutions have a greater or disproportionate burden of responsibility with regard to access administration are questions deserving of a separate study.

Severability of Information

Severability, or redaction, refers to the provision in access legislation which allows the exempt portion of a record to be withheld so that the remaining non-exempt portion may be released. Newfoundland's Freedom of Information Act provides a typical example in the following:

> Where a portion of a document contains some information that is information to which a person is refused access and that portion is severable, that portion shall be deleted and the request with respect to the remaining portion of the document shall be granted.[15]

When severability is not specifically provided in legislation, entire records can be withheld because of the presence of one piece of exempt information. It is easy to envision how the spirit of access legislation can be defeated by taking advantage of such an omission, and yet a significant number of statutes do not provide for severability. Out of a total of 61 statutes, 35 permit exempt portions of records to be severed (See column labelled "Sev" in Appendix 10).

It is difficult to deny the benefits of severability in access legislation since it assures the release of many records that would otherwise be withheld. However, one possible negative effect of severing portions of records and presenting partial records for access is that the probative value of records might be indirectly compromised. Because a record is evidence of an

action or transaction, a partial record can only provide incomplete evidence. By focusing exclusively on informational content, the evidential context of records can become obscured. While the scope of this thesis does not allow us to measure this effect, it is important to raise an awareness of this potentially negative ramification.

Responsiveness to Requests and Publicity of Records

In requiring government agencies to respond to access inquiries in a specific manner and to provide information to assist researchers in their search for records, legislators have delegated new responsibilities to government agencies that have been part of the archives experience for centuries. Ever since records have been in existence, archivists have worked to provide access to them, whether access was restricted to kings and rulers or open to a sovereign public. It hardly needs to be said that much of the thought and energy that has been poured into the body of knowledge that makes up archival theory has focused on the experience and understanding gained by archivists in arranging, describing, servicing and providing access to records. Government agents, on the other hand, know how to access their own records, but have little or no experience in making those records available to the public. Perhaps in recognition of this inexperience, coupled with the desire to provide fair and efficient service, many access statutes include provisions for responsiveness and publicity.

Requirements for an appropriate response can include time limits on processing access requests, providing written notice of

delays, providing specific reasons when access is denied, and furnishing an appropriate research environment when access is granted. Forty-two statutes make specific provisions to compel government agents to respond thusly to access inquiries (See column labelled "Res" in Appendix 11). Regardless of whether or not such requirements are rigorously applied, they at least convey the notion that where a right is granted to one party, an obligation is imposed on another. In this case, a right of access for the public requires an obligation on the part of government to sustain the mechanisms of access. Government agencies could benefit in this area from the experience and knowledge of those that have traditionally responded to requests for access to records, namely, archivists.

A parallel situation exists with regard to publicity. Archivists have experience in analysing the context and nature of records and providing information regarding the creation, arrangement and character of records. However, only seventeen legislatures have highlighted the importance of this information by mandating government agencies to provide the public with the necessary information and tools to take full advantage of their rights (See column labelled "Pubs" in Appendix 12). Michel Duchein rightly notes in his study of accessibility that "access to archives depends on the number and quality of finding aids just as much as on legislation and regulation."[16]

It is unfortunate that the majority of access to public records statutes have not encouraged or directed government agents to develop and improve finding aids, since most governments have ready access to experts in this field.

Manitoba's Access Guide[17], for example, was produced by the Government Records section of the Provincial Archives of Manitoba as mandated under the Freedom of Information Act. It identifies and describes government records systems, outlines the structures of government departments, provides a glossary of key terms, provides copies of the statute, regulations and forms, and describes how rights can be exercised under the Act. In every respect, the guide addresses the concern expressed by Michel Duchein above. In addition to strong legislation, Manitoba has ensured the success of its statute by distributing an excellent finding aid.

This chapter has only touched lightly on a few practical considerations raised in access legislation. In each case, further study would be desirable. With regard to exemptions, it would be interesting to conduct a study in an archives to determine whether more current records are indeed being transferred to archives as a result of access legislation. And just because legislation mandates responsiveness to requests and publicity of records, it is up to individual agencies to implement these mandates. The success of these programs and the role that archivists play also would be a worthwhile topic, yet beyond the scope of this type of analysis. These practical concerns have been identified in the legislation and discussed in order to raise an awareness of these issues and perhaps to define a course of future inquiry. Given that access legislation has existed in North America for close to thirty years, it might be appropriate to conduct studies of this type. The results will serve to improve access administration and thus promote a greater

awareness of access legislation amongst the public.

NOTES TO CHAPTER 5

1. Vermont, s. 317.(b).

2. McClain v. College Hospital, 99 N.J. 346, 492 A.2d 991 (1985). quoted in Notes of Decisions, N.J. Stat. Ann. (West 1989), s. 47:1A-1.

3. Robert Craig Brown, "Government and Historian: A Perspective on Bill C43," Archivaria 13 (winter 1981-82): 121.

4. Ibid.

5. Archives Association of British Columbia, Ad Hoc Committee on Freedom of Information and Privacy, "Discussion Paper on Bill 12: Access to Information and Protection of Privacy Act," (Vancouver: AABC, 1992, photocopy).

6. R.S.Q., chapter A-21.1, s. 19.

7. Haw. Rev. Stat. § 94-7 (Supp. 1992).

8. British Columbia, s. 12.

9. British Columbia, s. 13.

10. British Columbia, s. 16.

11. British Columbia, s. 36.

12. Utah, s. 63-2-909.

13. Oregon, s. 192.495.

14. Indiana, s. 5-14-3-4(e).

15. Newfoundland, s. 8.(2).

16. Michel Duchein, Obstacles to the Access, Use and Transfer of Information from Archives: A RAMP Study (Paris: Unesco, 1983), 35.

17. Manitoba, Access Guide (Winnipeg: Manitoba Government Statutory Publications, 1988).

CONCLUSION

Through the results of the content analysis reported in the appendices of this thesis, a reader can gain a quick impression of various aspects of access legislation. For example, one might determine that the intent of one statute is to enhance government accountability while the definition of public records in another statute includes all four elements which provide documents with the necessary archival quality to be considered records. The discussion of these elements, however, has lead to more than just the simple facts of content classification.

In chapter three, the analysis revealed that the legislation enacts the right of access in four distinct forms. The most appropriate is the type which clearly establishes a right of access to records that can be exercised by persons or citizens. This category is preferred over the other three because it clearly establishes that the intent of the legislation is to establish a legal right for persons or citizens and that the object to which the right applies is something concrete and real (a record) as opposed to a vaguely defined abstraction (information). Additionally, the analysis of explicit statements of intent showed that the general aim of access legislation originates from two impulses. The first impulse approaches the issue by embracing general openness of government as its goal

whereas the second impulse approaches the issue more specifically by espousing accountability as its aim. Historically speaking, several analogous examples of each approach were recognized in the context of access to archives.

Because eligibility under access legislation is normally considered to apply to either citizens or persons, it was suggested that it might be more appropriate for all persons to be eligible under statutes which embrace general openness as their sole aim. On the other hand, citizens being the more succinctly defined group requiring accountability, it was suggested that it might be more suitable for citizens to be eligible under statutes which espouse accountability of government as their aim. The analysis revealed that this supposition was not confirmed. Presumably, the legislators responsible for enacting access legislation were not inclined to analyze the exact nature and purpose of the type of right they endorsed in order to enact an appropriate and consistent law.

Another observation coming out of the analysis of eligibility points to a potential conflict between the views of the majority of the archival community and the provisions of some access statutes. The traditional view in archives is to permit access to all researchers regardless of nationality. Archivists would presumably find it philosophically difficult to exclude researchers from accessing public records because the legislation permits access only to citizens of the jurisdiction concerned. Perhaps exceptions can be made to this rule for public records which are part of the holdings of archives, as was made at the Canadian federal level by the provision which states that the act

would not interfere with preexisting traditions of accessibility.[1] To serve their wider cultural purpose, and to support openness and intellectual freedom, archives will not want to face any eligibility restrictions imposed by access legislation. Investigation is needed to discover whether this issue has been a concern in other jurisdictions.

The comparison between definitions found in access statutes and a model definition of public records revealed a complex set of concepts that in many cases has not been suitably addressed by legislators. Judgements resulting from the interpretation of ill-conceived definitions have left archivists and other records administrators with a problematic body of jurisprudence from which to work. Several examples were given to illustrate how an inconsistent view of records and public records leads to unsuitable precedents. A useful follow-up study could focus on precedent-setting judgements within a given jurisdiction to trace the impact of such decisions on archival practices and access to public records programs in archives and government offices.

The discussion of definitions of records and public records also leads to the observation that it is more fitting for access legislation to define records as the object of access and then specify which government agents must comply to the statute. This view is promoted because the model definition of public records applies to a more comprehensive interpretation of public agencies than is typically included within the scope of access legislation. In fact, the model definition of public records is not really fitting for access legislation since statutes usually try to define public records abstractly and then establish some

means, either by formula or policy, to limit the numbers or types of agencies that must comply to the statute, ultimately leading to an inconsistent understanding of the nature of public records across jurisdictions. A consistent definition of records can be applied whether access legislation applies to all public agencies, that is, all public agencies as defined by the model definition, or a sub-set of public agencies defined by legislators in a given jurisdiction.

This approach would also support the earlier observation that it is important to clarify and emphasize the fact that access legislation applies specifically to extant records as opposed to information.

It would be useful to compare the degree to which the definitions of public records actually reflect the broader view of public records in the model definition. A topic for study could also be built around a more detailed examination of how legislators have narrowed the scope of access legislation through definitions of public records and whether the various approaches are at all similar.

Because the fifth chapter dealt with provisions of legislation that are more practical in nature and this study restricts itself to data taken from legislative sources, the discussion tended to bring forward more questions than could be answered. It would be very beneficial to gather data or conduct case studies in order to gain some insight into the implementation of access legislation in an archives setting.

One inference that clearly emerged from the analysis of legislation indicated that the "passage of time principle" that

has long been observed in archival practice is not strongly acknowledged in access legislation. This oversight may not present a problem for most archives institutions until well into the future. After all, access legislation has not been in effect in some jurisdictions until quite recently. In fifty or sixty years, we may learn that particular classes of records or information no longer need to be restricted. However, because of the mandatory nature of many exemptions, those records might be withheld indefinitely, or long after the passage of time would suggest that the interests involved no longer need to be protected.

The application of exemptions by archivists also raises the more philosophical question of whether the traditional role of the archivist as the agent of access within the government bureaucracy is being compromised in some way. It has been suggested that access legislation could put archivists in an inappropriate position by requiring them to determine whether or not records are to be released. Although this study did not address this question directly, it strongly suggests that applying access laws to historical archives may result in changes in the role of archivists and the public view of their role. This is a worthy topic of future investigation.

The application of exemptions by archivists as well as government officials raised the possibility of a disproportionate shift in responsibility for access administration to archives institutions. This possibility arises from the scenario which has government agents in departments expeditiously transferring records to archives institutions in order to avoid the

inconvenience of administering public access to records under access legislation. This too is a topic for further study.

One final area for further study emerging from the discussion of exemptions concerns the nature of exemptions themselves. Given that all governments are formed for the broad purpose of governing and that the mandates and functions ascribed to government institutions in North American jurisdictions are likely to be rather similar, one wonders why there is such a variety of exemptions present in access legislation. The similar functioning of governments would suggest parallel needs in the areas of confidentiality and privacy, yet the number and species of exemptions varies greatly from statute to statute. Because this thesis studied exemptions in order to determine the degree to which statutes adhered to the passage of time principle, information on the exact nature of exemptions on a statute-by-statute basis was not assembled. However, a useful study of privacy and confidentiality needs of governments could be constructed around a detailed examination of exemptions in access legislation.

With regard to the severability of information, the analysis merely revealed that a significant number of statutes include provisions for exempt information to be removed from records in order to permit the release of the remaining record. While there is no question that the benefits of severability are significant, the question was raised as to the general effects of this practice. In particular, would the splintering of information from records affect the probative value of documents? Has the introduction of severability resulted in more openness in

government and improved accountability of officials or has it merely resulted in the release of more records? These are questions deserving of more detailed study. It might be presumed that few historical researchers will remain content with access by severability. This issue is connected with the need to bring all restrictions to a definite end where possible.

The importance of addressing reference service and the preparation of finding aids was also raised in the context of provisions in access legislation which regulate government responsiveness to requests and order the publicity of records. Although many statutes do not address these elements, the potential now exists for significant improvements to the mechanisms of access given the enhanced need for improvements under access legislation. The need of further work and study in this area is great. Timely and effective access depends on better means of communicating knowledge of records holdings and providing retrieval of information from them.

One of the ideas put forward in the introduction to this thesis was that many of the issues that have arisen from access legislation have been related to questions and concerns that have been long-associated with archival work. The perception that access legislation is beyond the archivist's realm of concern is a view that stems largely from being caught in what Hugh Taylor coined the "historical shunt." In chapter three, the different impulses for access to records were discussed from a historical perspective and it was recounted that the French Revolution represented a turning point for the archival profession. As Taylor observes,

> the French Revolution had a profound effect on the perception of early records which, up to that time, had still been viewed as the evidences and records of the offices of origin and still been maintained by them--still, at least in theory, 'active.' At one stroke, the creation of the Archives nationales sundered the ancient records from their roots, placed them in common archives, and, in effect, labelled them 'historical.' The modern archivist was born and the historical archives emerged.[2]

In recent years, professional archival development has moved away from the view of archives as merely the end of the life-cycle of records. The appropriateness of a system which arbitrarily segregates "records" and "archives" according to age and concepts of use has been questioned in the context of an administrative environment where technological change and newly adopted rights of access have rendered those models unsuitable. New models based on a unified approach to records administration from the moment of their creation have been put forward and are slowly being assimilated by professional archivists and records managers.[3] This trend away from the traditional cultural role of archivists as guardians of historical archives--out of the historical shunt, so to speak--has been encouraged and supported by the introduction of access legislation.

Almost everything discussed in this thesis points to the need to adopt this unified approach to records administration. The establishment of a uniform legislative approach to providing access to records, wherever they are located and regardless of their age or status, suggests that, on the most fundamental level, aspects of records administration are already well on the way toward this unified strategy. Since government agencies are now legislatively obliged to adopt an open and accountable posture toward the citizenry, the traditional mandate of

government archives to provide access to public records has been expanded and conferred on all agencies. The definition of public records based on archival theory and used as a model for comparison in this analysis is applicable and appropriate for all records of government agencies at all stages of their existence. The practical concerns arising out of the implementation of access legislation also show that a unity of operation and a sharing of knowledge and experience would be advantageous, especially concerning reference service and the creation of finding aids.

It remains to be seen how well a unified approach to records administration will respond to the growing public demand for openness and accountability of government agencies. Many professional archivists are already playing an instrumental role in this area of regulation and management of public records. In doing so, archivists must be willing to step beyond the traditional historical cultural role that has defined the profession since the French Revolution and rediscover the role that their professional predecessors played in the administrative environment of government agencies. This change will certainly be met with resistance from those that are content with the historical archives tradition. But ultimately, the archivist's duty to records and the defence of their quality as evidences of actions and transactions will compel the profession to transcend this restrictive posture in favour of a broader, and it is to be hoped, more effective stance.

NOTES TO CONCLUSION

1. Canada, s. 2.(2).

2. Hugh Taylor, "Information Ecology and the Archives of the 1980s," Archivaria 18 (summer 1984): 26.

3. Jay Atherton, "From Life Cycle to Continuum: Some Thoughts on the Records Management-Archives Relationship," Archivaria 21 (winter 1985-86): 43-51.

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	Freedom of Information and Protection of Privacy Amendment Act, S.B.C. 1993, c.66.
Canada	Access to Information Act, R.S.C. 1985, c.A-1.
Manitoba	Freedom of Information Act, S.M. 1988, c.F175.
New Brunswick	Right to Information Act, S.N.B. 1978, c.R-10.3.
Newfoundland	Freedom of Information Act, Nfld. R.S. 1990, c.F-25.
Nova Scotia	Freedom of Information Act, R.S.N.S. 1989, c.180.
Ontario	Freedom of Information and Protection of Privacy Act, S.O. 1987, c.25.
Quebec	An Act Respecting Access to Documents Held by Public Bodies and the Protection of Personal Information, R.S.Q., c. A-2.1.
Saskatchewan	Freedom of Information and Protection of Privacy Act, S.S. 1990-91, c.F-22.01.
Yukon	Access to Information Act, R.S.Y. 1986, c.1.

American Jurisdictions

Alabama	Ala. Code §§ 36-12-40 to 36-12-41 (1975).
Alaska	Alaska Stat. §§ 09.25.110 to 09.25.120 (1983 & Supp. 1993).
Arizona	Ariz. Rev. Stat. Ann. §§ 39-121.01 to 39-122 (1985).

Arkansas	Ark. Code Ann. §§ 25-19-101 to 25-19-107 (Michie 1987).
California	Cal. Gov't Code §§ 6250 - 6266 (Deering 1982).
Colorado	Colo. Rev. Stat. Ann. §§ 24-72-201 to 24-72-206 (1985).
Connecticut	Conn. Gen. Stat. §§ 1-15 to 1-21k (1988).
Delaware	Del. Code Ann. tit.29, §§ 10001 - 10005 (1991).
Florida	Fla. Stat. ch.119.01 to 119.12 (1989).
Georgia	Ga. Code Ann. §§ 50-18-70 to 50-18-74 (Supp. 1989).
Hawaii	Haw. Rev. Stat. §§ 92F-11 to 92F-19; 94-7 (Supp. 1992).
Idaho	Idaho Code §§ 9-337 to 9-348 (1990).
Illinois	Ill. Ann. Stat. ch. 116, para. 201 to 211 (Smith-Hurd 1988 & Supp. 1992).
Indiana	Ind. Code §§ 5-14-3-1 to 5-14-3-10 (1987).
Iowa	Iowa Code Ann. §§ 22.1 to 22.12 (West 1989 & Supp. 1993).
Kansas	Kan. Stat. Ann. §§ 45-201 to 45-225 (1986 & Supp. 1992).
Kentucky	Ky. Rev. Stat. Ann. §§ 61.870 to 61.884 (Michie 1986 & Supp. 1992).
Louisiana	La. Rev. Stat. Ann. §§ 44:1 to 44:44 (West 1982 & Supp. 1990).
Maine	Me. Rev. Stat. Ann. tit. 1, §§ 401 to 410 (West 1989 & Supp. 1992).
Maryland	Md. Code Ann., State Gov't §§ 10-611 to 10-630 (1984 & Supp. 1992).
Massachusetts	Mass. Gen. Laws Ann. ch.4, § 7(26), ch.66, § 10 (West 1986 & Supp. 1993).
Michigan	Mich. Comp. Laws Ann. §§ 15.218 to 15.246 (West 1981 & Supp. 1993).
Minnesota	Minn. Stat. Ann. §§ 13.01 to 13.90 (West 1988 & Supp. 1993).
Mississippi	Miss. Code Ann. §§ 25-61-1 to 25-61-17 (1991).

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Montana	Mont. Const. of 1972, art. II, § 9. Mont. Code Ann. §§ 2-6-101 to 2-6-111 (1991).
Nebraska	Neb. Rev. Stat. §§ 84-712 to 84-712.09 (1987).
Nevada	Nev. Rev. Stat. §§ 239.010, 239.020, 239.030 (1991).
New Hampshire	N.H. Rev. Stat. Ann. §§ 91-A:1 to 91-A:8 (1990).
New Jersey	N.J. Stat. Ann. §§ 47:1A-1 to 47:1A-4 (West 1989).
New Mexico	N.M. Stat. Ann. §§ 14-2-1 to 14-2-3 (Michie 1988).
New York	N.Y. Pub. Off. Law §§ 84 - 90 (McKinney 1988 & Supp. 1994).
North Carolina	N.C. Gen. Stat. §§ 132-1 to 132-9 (1991).
North Dakota	N.D. Cent. Code N.D. Const. art XI, § 6 (1981).
Ohio	Ohio Rev. Code Ann. §§ 149.43 to 149.44 (Anderson 1990 & Supp. 1992).
Oklahoma	Okla. Stat. Ann. tit. 51, §§ 24A.1 to 24A.18 (West 1988 & Supp. 1993).
Oregon	Or. Rev. Stat. §§ 192.410 to 192.505 (1991).
Pennsylvania	Pa. Stat. Ann. tit. 65, §§ 66.1 to 66.4 (1959 & Supp. 1993).
Rhode Island	R.I. Gen. Laws §§ 38-2-1 to 38-2-13 (1990 & Supp. 1992).
South Carolina	S.C. Code Ann. §§ 30-4-10 to 30-4-110 (Law Co-op. 1991).
South Dakota	S.D. Codified Laws Ann. §§ 1-27-1 to 1-27-3 (1992).
Tennessee	Tenn. Code Ann. §§ 10-7-503 to 10-7-506 (1992).
Texas	Tex. Rev. Civ. Stat. Ann. art. 6252-17a (Supp. 1993).
United States	5 U.S.C.S. § 552 (Law. Co-op. 1989 & Supp. 1993).
Utah	Utah Code Ann. §§ 63-2-101 to 63-2-909 (Supp. 1992).

Vermont	Vt. Stat. Ann. tit. 1, §§ 315 - 320 (1985 & Supp. 1992).
Virginia	Va. Code Ann. §§ 2.1-340 to 2.1-346.1 (Michie 1987 & Supp. 1992).
Washington	Wash. Rev. Code Ann. §§ 42.17.250 to 42.17.340 (West 1991 & Supp. 1994).
West Virginia	W. Va. Code §§ 29B-1-1 to 29B-1-7 (1993).
Wisconsin	Wis. Stat. Ann. §§ 19.31 to 19.39 (West 1986 & Supp. 1992).
Wyoming	Wyo. Stat. §§ 16-4-201 to 16-4-205 (1990).

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APPENDIX 1

PURPOSE OF ACCESS LEGISLATION:

TYPES AND CHARACTERISITCS

Key

Types

Rec = establishes a right of access to records/public records
Inf = establishes a right of access to information
Opn = declares that records are open
Obl = obliges agencies to provide access to records

Characteristics

Dem = intent of statute linked to democratic principles or a free and open society
Pol = intent of statute is to enhance political participation
Evd = intent of statute is to enhance knowledge of the conduct of government through access to evidence of its actions
Acc = intent of statute is to enhance government accountability

JURISDICTION	Rec	Inf	Opn	Obl	Dem	Pol	Evd	Acc
TOTALS =	34	6	17	4	14	4	15	7
Alabama	X							
Alaska			X					
Arizona	X							
Arkansas			X		X		X	
British Columbia	X							X
California	X						X	
Canada	X				X			
Colorado			X					

JURISDICTION	Rec Inf	Opn Obl	Dem Pol	Evd Acc
Connecticut	X			
Delaware	X		X	X X
Florida		X		
Georgia		X		
Hawaii		X		
Idaho	X			
Illinois	X		X	X
Indiana	X			X
Iowa	X			
Kansas		X		
Kentucky		X	X	
Louisiana	X			
Maine	X		X	
Manitoba	X			
Maryland	X			X
Massachusetts		X		
Michigan	X		X	X
Minnesota	X			
Mississippi	X			
Missouri		X		
Montana	X			
Nebraska	X			
Nevada		X		
New Brunswick	X			
New Hampshire	X		X	X
New Jersey	X			

JURISDICTION	Rec	Inf	Opn	Obl	Dem	Pol	Evd	Acc
New Mexico	X							
New York	X				X	X	X	X
Newfoundland	X							
North Carolina			X					
North Dakota			X					
Nova Scotia		X			X		X	
Ohio			X					
Oklahoma	X				X	X		
Ontario	X				X			
Oregon	X							
Pennsylvania			X					
Quebec	X							
Rhode Island	X				X			
Saskatchewan	X							
South Carolina	X				X		X	
South Dakota				X				
Tennessee			X					
Texas		X					X	X
United States				X				
Utah	X				X			
Vermont	X						X	
Virginia			X				X	
Washington			X					X
West Virginia	X						X	X
Wisconsin	X				X		X	
Wyoming			X					
Yukon	X							

APPENDIX 2

STATEMENTS OF LEGISLATIVE INTENT AND PURPOSE

ALABAMA

s. 36-12-40. Every citizen has a right to inspect and take a copy of any public writing of this state, except as otherwise expressly provided by statute.

ALASKA

s. 09.25.110(a) Unless specifically provided otherwise, the public records of all public agencies are open to inspection by the public under reasonable rules during regular office hours.

ARIZONA

s. 39-121.01 D.1 Any person may request to examine or be furnished copies, printouts or photographs of any public record during regular office hours. The custodian of such records shall furnish copies, printouts or photographs and may charge a fee ....

ARKANSAS

s. 25-19-102. It is vital in a democratic society that public business be performed in an open and public manner so that the electors shall be advised of the performance of public officials and of the decisions that are reached in public activity and in making public policy. Toward this end, this chapter is adopted, making it possible for them, or their representatives to learn and to report fully the activities of their public officials.
s. 25-19-105.(a) Except as otherwise specifically provided by this section or by laws specifically enacted to provide otherwise, all public records shall be open to inspection and copying by any citizen of the State of Arkansas during the regular business hours of the custodian of the records.

BRITISH COLUMBIA

s.2. The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by (a) giving the public a right of access to records, (b) giving individuals a right of access to, and a right to request correction of, personal information about themselves, (c) specifying limited exceptions to the rights of access, (d) preventing the unauthorized collection, use or disclosure of personal information by public bodies, and (e) providing for an independent review of decisions made under this Act.
s. 4.(1) A person who makes a request under section 5 has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.

CALIFORNIA

s. 6250. In enacting this chapter, the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state.
s. 6253.(a) Public records are open to inspection at all times during the office hours of the state or local agency and every citizen has a right to inspect any public record, except as hereafter provided.

CANADA

s. 2.(1) The purpose of this Act is to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exemptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government.
s. 4.(1) Subject to this Act, but notwithstanding any other Act of Parliament, every person who is (a) a Canadian citizen, or (b) a permanent resident within the meaning of the Immigration Act, 1976, has a right to and shall, on request, be given access to any record under the control of a government institution.

COLORADO

s. 24-72-201. Legislative declaration. It is declared to be the public policy of this state that all public records shall

be open for inspection by any person at reasonable times, except as provided in this part 2 or as otherwise specifically provided by law.

CONNECTICUT

Sec. 1-19.(a) Except as otherwise provided by any federal law or state statute, all records maintained or kept on file by any public agency, whether or not such records are required by any law or by any rule or regulation, shall be public records and every person shall have the right to inspect such records ....

DELAWARE

s. 10001. It is vital in a democratic society that public business be performed in an open and public manner so that our citzens shall have the opportunity to observe the performance of public officials and to monitor the decisions that are made by such officials in formulating and executing public policy; and further, it is vital that citizens have easy access to public records in order that the society remains free and democratic. Toward these ends, and to further the accountability of government to the citizens of this State, this chapter is adopted, and shall be construed.

FLORIDA

s. 119.01 General state policy on public records.- (1) It is the policy of this state that all state, county, and municipal records shall at all times be open for a personal inspection by any person.

GEORGIA

s. 50-18-70.(b) All state, county and municipal records, except those which by order of a court of this state or by law are prohibited or specifically exempted from being open to inspection by the general public, shall be open for a personal inspection by any citizen of this state at a reasonable time and place; and those in charge of such records shall not refuse this privilege to any citizen.

HAWAII

[s. 92F-11](a) All government records are open to public inspection unless access is restricted or closed by law.

IDAHO

s. 9-338. PUBLIC RECORDS -- RIGHT TO EXAMINE. (1) Every person has a right to examine and take a copy of any public record of this state and there is a presumption that all public records in Idaho are open at all reasonable times for inspection except as otherwise expressly provided by statute.

ILLINOIS

s. 201. Public policy - Legislative intent. Pursuant to the fundamental philosophy of the American constitutional form of government, it is declared to be the public policy of the State of Illinois that all persons are entitled to complete information regarding the affairs of government and the official acts and policies of those who represent them as public officials and public employees consistent with the terms of this Act. Such access is necessary to enable the people to fulfill their duties of discussing public issues fully and freely, making informed political judgements and monitoring government to ensure that it is being conducted in the public interest. This Act is not intended to be used to violate individual privacy, nor for the purpose of furthering a commercial enterprise, or to disrupt the duly-undertaken work of any public body independent of the fulfillment of any of the fore-mentioned rights of the people to acess to information. This Act is not intended to create an obligation on the part of any public body to maintain or prepare any public record which was not maintained or prepared by such public body at the time when this Act becomes effective, except as otherwise required by applicable local, State or federal law. These restraints on information access should be seen as limited exceptions to the general rule that the people have a right to know the decisions, policies, procedures, rules, standards, and other aspects of government activity that affect the conduct of government and the lives of any or all of the people. The provisions of this Act shall be construed to this end. This Act shall be the exclusive State statute on freedom of information, except to the extent that other State statutes might create additional restrictions on disclosure of information or other laws in Illinois might create additional obligations for disclosure of information to the public.
s. 203.(a) Each public body shall make available to any person for inspection or copying all public records, except as otherwise provided in Section 7 of this Act.

INDIANA

s. 5-14-3-1. A fundamental philosophy of the American constitutional form of representative government is that government is the servant of the people and not their master. Accordingly, it is the public policy of the state that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. This chapter shall be liberally construed to implement this policy and place the burden of proof for the nondisclosure of a public record on the public agency that would deny access to the record and not on the person seeking to inspect and copy the record.
s. 5-14-3-3.(a) Any person may inspect and copy the public records of any public agency during the regular business hours of the agency, except as provided in section 4 of this chapter.

IOWA

s. 22.2.1. Every person shall have the right to examine and copy public records and to publish or otherwise disseminate public records or the information contained therein ....

KANSAS

s. 45-216.(a) It is declared to be the public policy of this state that public records shall be open for inspection by any person unless otherwise provided by this act, and this act shall be liberally construed and applied to promote such policy.

KENTUCKY

s. 61.871. The General Assembly finds and declares that the basic policy of KRS 61.870 to 61.884 is that free and open examination of public records is in the public interest and the exceptions provided for by KRS 61.878 or otherwise provided by law shall be strictly construed, even though such examination may cause inconvenience or embarassment to public officials or others.
s. 61.872.(1) All public records shall be open for inspection by any person, except as otherwise provided ....

LOUISIANA

s. 44.31. Right to examine records. Except as otherwise provided in this Chapter or as otherwise specifically provided by law, and in accordance with the provisions of this Chapter any person of the age of majority may inspect, copy or reproduce or obtain a reproduction of any public record.

MAINE

s. 401. Declaration of public policy; rules of construction. The Legislature finds and declares that public proceedings exist to aid in the conduct of the people's business. It is the intent of the Legislature that their actions be taken openly and that the records of their actions be open to public inspection and their deliberations be conducted openly. It is further the intent of the Legislature that clandestine meetings, conferences or meetings held on private property without proper notice and ample opportunity for attendance by the public not be used to defeat the purposes of this chapter. This chapter shall be liberally construed and applied to promote its underlying purpose and policies as contained in the declaration of legislative intent.
s. 408. Except as otherwise provided by statute, every person shall have the right to inspect and copy any public record during the regular business hours of the custodian or location of such record; ....

MANITOBA

s. 3 Subject to this Act, every person has, upon application, a right of access to any record in the custody or under the control of a department, including any record which discloses information about the applicant.

MARYLAND

s. 10-612.(a) General right to information. - All persons are entitled to have access to information about the affairs of government and the official acts of public officials and employees.
s. 10-613.(a) In general. - Except as otherwise provided by law, a custodian shall permit a person or governmental unit to inspect any public record at any reasonable time.

MASSACHUSETTS

s. 10.(a) Every person having custody of any public record, as defined in clause Twenty-sixth of section seven of chapter four, shall, at reasonable times and without unreasonable delay, permit it, or any segregable portion of a record which is an independent public record, to be inspected and examined by any person ....

MICHIGAN

s. 15.231.(2) It is the public policy of this state that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and the public employees, consistent with this act. The people shall be informed so that they may fully participate in the democratic process.
s. 15.233.(1) Upon an oral or written request which describes the public record sufficiently to enable the public body to find the public record, a person has a right to inspect, copy, or receive copies of a public record of a public body, except as otherwise expressly provided by section 13.

MINNESOTA

s. 13.03. subd.3. Request for access to data. Upon request to a responsible authority or designee, a person shall be permitted to inspect and copy public government data at reasonable times and places ....

MISSISSIPPI

s. 25-61-5.(1) Except as otherwise provided by sections 25-61-9 and 25-61-11, all public records are hereby declared to be public property, and any person shall have the right to inspect, copy or mechanically reproduce or obtain a reproduction of any public record of a public body ....

MISSOURI

s. 109.180. Except as otherwise provided by law, all state, county and municipal records kept pursuant to statute or ordinance shall at all reasonable times be open for a personal inspection by any citizen of Missouri, and those in

charge of the records shall not refuse the privilege to any citizen.

MONTANA

Constit., s. 9. Right to know. No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.
s. 2-6-102.(1) Every citizen has a right to inspect and take a copy of any public writings of this state, except as provided in 22-1-1103 and as otherwise expressly provided by statute.

NEBRASKA

s. 84-712. Except as otherwise expressly provided by statute, all citizens of this state, and all other persons interested in the examination of the public records, as defined in section 84-712.011, are hereby fully empowered and authorized to examine the same, and to make memoranda and abstracts therefrom ....

NEVADA

s. 239.010. 1. All public books and public records of state, county, city, district, governmental subdivision and quasi-municipal corporation officers and offices of this state (and all departments thereof), the contents of which are not otherwise declared by law to be confidential, shall be open at all times during office hours to inspection by any person ....

NEW BRUNSWICK

s. 2 Subject to this Act, every person is entitled to request and receive information relating to the public business of the Province.

NEW HAMPSHIRE

s. 91-A:1 Preamble. Openness in the conduct of public business is essential to a democratic society. The purpose

of this chapter is to ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people.
s. 91-A:4 I. Every citizen during the regular or business hours of all such bodies or agencies, and on the regular business premises of such bodies or agencies, has the right to inspect all public records ....

NEW JERSEY

s. 47:1A-1. Legislative findings. The legislature finds and declares it to be the public policy of this State that public records shall be readily accessible for examination by the citizens of this State, with certain exceptions, for the protection of the public interest.
s. 47:1A-2. Except as otherwise provided in this act or by any other statute, ...Every citizen of this State, during the regular business hours maintained by the custodian of any such records, shall have the right to inspect such records.

NEW MEXICO

s. 14-2-1. Every citizen of this state has a right to inspect any public records of this state ....

NEW YORK

s. 84. Legislative declaration. The legislature hereby finds that a free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions. The more open a government is with its citizenry, the greater the understanding and participation of the public in government. As state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible. The people's right to know the process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality. The legislature therefore declares that government is the public's business and that the public, individually and collectively and represented by a free press, should have access to the records of government in accordance with the provisions of this article.

NEWFOUNDLAND

s. 3. The purpose of this Act is to provide a right of access by the public to information in records of departments and to subject that right only to specific and limited exceptions necessary for the operation of the departments and for the protection of personal privacy.

NORTH CAROLINA

s. 132-6. Every person having custody of public records shall permit them to be inspected and examined by reasonable times and under his supervision by any person ....

NORTH DAKOTA

Constit., s. 6. Unless otherwise provided by law, all records of public or governmental bodies, boards, bureaus, commissions, or agencies of the state or any political subdivision of the state, or organizations or agencies supported in whole or in part by public funds, or expending public funds, shall be public records, open and accessible for inspection during reasonable office hours.

NOVA SCOTIA

preamble. WHEREAS since 1848 the people of the Province of Nova Scotia have had responsible government whereby the members of the House of Assembly and the members of the Executive Council are responsible for the actions to the people who have elected them through regularly held elections; AND WHEREAS the people of the Province should be protected from secrecy in respect of the conduct of public business by officials of the Government; AND WHEREAS the principles recited herein should be consistent one with the other and should operate without contradiction; AND WHEREAS these principles can be better maintained by assuring the people that the Government is operating openly and by providing to the people access to as much information in the hands of Government as possible without impeding the operation of Government or disclosing personal information pertaining to persons or matters other than the person desiring the information; THEREFORE be it enacted by the Governor and Assembly as follows:.
s. 3. Every person shall be permitted access to information respecting ....

OHIO

s. 149.43(B) All public records shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours ....

OKLAHOMA

s. 24A.2. Public policy - Purpose of act. As the Oklahoma Constitution recognizes and guarantees, all political power is inherent in the people. Thus, it is the public policy of the State of Oklahoma that the people are vested with the inherent right to know and be fully informed about their government. The Oklahoma Open Records Act shall not create, directly or indirectly, any rights of privacy or any remedies for violation of any rights of privacy; nor shall the Oklahoma Open Records Act, except as specifically set forth in the Oklahoma Open Records Act, establish any procedures for protecting any person from release of information contained in public records. The purpose of this act is to ensure and facilitate the public's right of access to and review of government records so they may efficiently and intelligently exercise their inherent political power. The privacy interests of individuals are adequately protected in the specific exceptions to the Oklahoma Open Records Act or in the statutes which authorize, create or require the records. Except where specific state or federal statutes create a confidential privilege, persons who submit information to public bodies have no right to keep this information from public access nor reasonable expectation that this information will be kept from public access; provided, the person, agency or political subdivision shall at all times bear the burden of establishing such records are protected by such a confidential privilege. Except as may be required by other statutes, public bodies do not need to follow any procedures for providing access to public records except those specifically required the the Oklahoma Open Records Act.

ONTARIO

s. 1. The purposes of this Act are, (a) to provide a right of access to information under the control of institutions in accordance with the principle that, (i) information should be available to the public, (ii) necessary exemptions from the right of access should be limited and specific, and (iii) decisions on the disclosure of government information should be reviewed independently of government; and (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that

information.
s. 10.(1) Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless the record or the part of the record falls within one of the exemptions under sections 12 to 22.

OREGON

s. 192.420 Every person has a right to inspect any public record of a public body in this state, except as otherwise expressly provided ....

PENNSYLVANIA

s. 66.2 Every public record of an agency shall, at reasonable times, be open for examination and inspection by any citizen of the Commonwealth of Pennsylvannia.

QUEBEC

s. 9. Every person has a right of access, on request, to the documents held by a public body.

RHODE ISLAND

s. 38-2-1. Purpose. - The public's right to access to records pertaining to the policy-making responsibilities of government and the individual's right to dignity and privacy are both recognized to be principles of the utmost importance in a free society. The purpose of this chapter is to facilitate public access to governmental records which pertain to the policy-making functions of public bodies and/or are relevant to the public health, safety, and welfare. It is also the intent of this chapter to protect from disclosure information about particular individuals maintained in the files of public bodies when disclosure would constitue an unwarranted invasion of personal privacy.

SASKATCHEWAN

s.5 Subject to this Act and the regulations, every person has a right to and, on an application made in accordance with this Part, shall be permitted access to records that are in the possession or under the control of a government institution.

SOUTH CAROLINA

s. 30-4-15. The General Assembly finds that it is vital in a democratic society that public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy. Toward this end, provisions of this chapter must be construed so as to make it possible for citizens, or their representatives, to learn and report fully the activities of their public officials at a minimum cost or delay to the persons seeking access to public documents or meetings.
s. 30-4-30.(a) Any person has a right to inspect or copy any public record of a public body, except as otherwise provided by s. 30-4-40, in accordance with reasonable rules concerning time and place of access.

SOUTH DAKOTA

s. 1-27-1. Records open to inspection. If the keeping of a record, or the preservation of a document or other instrument is required of an officer or public servant under any statute of this state, the officer or public servant shall keep the record, document, or other instrument available and open to inspection by any person during normal business hours ....

TENNESSEE

s. 10-7-503.(a) All state, county and municipal records ... shall at all times, during business hours, be open for personal inspection by any citizen of Tennessee, and those in charge of such records shall not refuse such right of inspection to any citizen, unless otherwise provided by state law.

TEXAS

s. 1. DECLARATION OF POLICY. Pursuant to the fundamental philosophy of the American constitutional form of representative government which holds to the principle that government is the servant of the people, and not the master of them, it is hereby declared to be the public policy of the State of Texas that all persons are, unless otherwise expressly provided by law, at all times entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. The people, in delegating authority, do not give their public servants the right to

decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created. To that end, the provisions of this Act shall be liberally construed with the view to carrying out the above declaration of public policy.

UNITED STATES

s. 552.(a)(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

UTAH

s. 63-2-102.(1) In enacting this act, the Legislature recognizes two constitutional rights: (a) the public's right of access to information concerning the conduct of the public's business; and (b) the right of privacy in relation to personal data gathered by governmental entities.
s. 63-2-201.(1) Every person has the right to inspect a public record free of charge, and the right to take a copy of a public record during normal working hours, subject to Sections 63-2-203 and 63-2-204.

VERMONT

s. 315. Statement of policy. It is the policy of this subchapter to provide for free and open examination of records consistent with Chapter I, Article 6 of the Vermont Constitution. Officers of government are trustees and servants of the people and it is in the public interest to enable any person to review and criticize their decisions even though such examination may cause inconvenience or embarrassment. All people, however, have a right to privacy in their personal and economic pursuits, which ought to be protected unless specific information is needed to review the action of a governmental officer. Consistent with these principles, the general assembly hereby declares that certain public records shall be made available to any person as hereinafter provided. To that end, the provisions of this subchapter shall be liberally construed with the view towards carrying out the above declaration of public policy.
s. 316. Any person may inspect or copy any public record or document of a public agency, ...

VIRGINIA

s. 2.1-340.1.B. This chapter shall be liberally construed to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government. Any exception or exemption from applicability shall be narrowly construed in order that no thing which should be public may be hidden from any person.
s. 2.1-342.-A. Except as otherwise specifically provided by law, all official records shall be open to inspection and copying by any citizens of this Commonwealth during the regular office hours of the custodian of such records.

WASHINGTON

s. 42.17.251. The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist of remaining informed so that they may maintain control over the instruments that they have created. The public records subdivision of this chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy.
s. 42.17.260.(1) Each agency, in accordance with published rules, shall make available for public inspection and copying all public records, unless the record falls within the specific exemptions ... .

WEST VIRGINIA

s. 29B-1-1. Pursuant to the fundamental philosophy of the American constitutional form of representative government which holds to the principle that government is the servant of the people, and not the master of them, it is hereby declared to be the public policy of the state of West Virginia that all persons are, unless otherwise expressly provided by law, entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments of government they have created. To that end, the provisions of this article shall be liberally construed with the view of carrying out the above declaration of public policy.
s. 29B-1-3.(1) Every person has a right to inspect or copy

any public record of a public body in this state, except as otherwise expressly provided ....

WISCONSIN

s. 19.31. In recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employes who represent them. Further, providing persons with such information is declared to be an essential function of a representative government and an integral part of the routine duties of officers and employes whose responsibility it is to provide such information. To that end, ss. 19.32 to 19.37 shall be construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business. The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied.
s. 19.35.(1)(a) Except as otherwise provided by law, any requester has a right to inspect any record.

WYOMING

s. 16-4-202.(a) All public records shall be open for inspection by any person at reasonable times, except as provided in this act [ss. 16-4-201 through 16-4-205] or as otherwise provided by law ....

YUKON

s. 2. The purpose of this Act is to provide reasonable access by the public to information in records of departments and to subject that right only to specific and limited exceptions necessary for the effective operation of departments in the public interest.

APPENDIX 3

ELIGIBILITY GRANTED TO PERSONS OR CITIZENS

Key

Per = eligibility granted to persons
Cit = eligibility granted to citizens

JURISDICTION	Per	Cit	Section
TOTALS =	50	11	
Alabama		X	s. 36-12-40.
Alaska	X		s. 09.25.120
Arizona	X		s. 39-121.01 D.1
Arkansas		X	s. 25-19-105.(a)
British Columbia	X		s. 4.(1)
California	X		s. 6250.
Canada		X	s. 4.
Colorado	X		s. 24-72-203.(1)
Connecticut	X		Sec. 1-15.
Delaware		X	s. 10003.
Florida	X		s. 119.01(1)
Georgia	X		s. 50-18-71(a)
Hawaii	X		[s. 92F-11](b)
Idaho	X		s. 9-338.
Illinois	X		s. 203.
Indiana	X		s. 5-14-3-3(a)

JURISDICTION	Per	Cit	Section
Iowa	X		22.2
Kansas	X		s. 45-218.
Kentucky	X		s. 61.872.
Louisiana	X		s. 44.31.
Maine	X		s. 408.
Manitoba	X		s. 3
Maryland	X		s. 10-612.(a)
Massachusetts	X		s. 10.(a)
Michigan	X		s. 15.233.(1)
Minnesota	X		s. 13.03. subd.3.
Mississippi	X		s. 25-61-5.
Missouri	X		s. 109.190.
Montana	X		Constitution, s. 9.
Nebraska	X		s. 84-712.
Nevada	X		s. 239.010
New Brunswick	X		s. 2
New Hampshire		X	s. 91-A:4
New Jersey		X	s. 47:1A-2.
New Mexico		X	s. 14-2-1.
New York	X		s. 84.
Newfoundland		X	s. 4.
North Carolina	X		s. 132-6.
North Dakota	X		Constitution, s. 6.
Nova Scotia	X		s. 3.
Ohio	X		s. 149.43(B)
Oklahoma	X		s. 24A.5.

JURISDICTION	Per	Cit	Section
Ontario	X		s. 10.
Oregon	X		s. 192.420
Pennsylvania		X	s. 66.2
Quebec	X		s. 9.
Rhode Island	X		s. 38-2-3.
Saskatchewan	X		s. 5
South Carolina	X		s. 30-4-30.(a)
South Dakota	X		s. 1-27-1.
Tennessee		X	s. 10-7-503.
Texas	X		s. 4.
United States	X		s. 552.(a)(3)
Utah	X		s. 63-2-201.(1)
Vermont	X		s. 316.
Virginia		X	s. 2.1-342.-A.
Washington	X		s. 42.17.270.
West Virginia	X		s. 29B-1-3.
Wisconsin	X		s. 19.35.(1)(a)
Wyoming	X		s. 16-4-202.
Yukon	X		s. 3.

APPENDIX 4

DOCUMENTARY NATURE IN PUBLIC RECORDS DEFINITIONS

Key

Adq = the definition adequately indicates that records have documentary nature
Inf = documents are composed of information ...
Rcd = ... which is recorded

JURISDICTION	DEFINITION	Adq	Inf	Rcd
TOTALS =		4	27	23
Alabama	NOT DEFINED			
Alaska	PUBLIC RECORD(S)			
Arizona	NOT DEFINED			
Arkansas	PUBLIC RECORD(S)		X	X
British Columbia	RECORD(S)		X	X
California	PUBLIC RECORD(S) WRITING(S)		X	X
Canada	RECORD(S)			
Colorado	PUBLIC RECORD(S) WRITING(S)			
Connecticut	PUBLIC RECORD(S) FILE(S)		X	X
Delaware	PUBLIC RECORD(S)		X	X
Florida	PUBLIC RECORD(S)			
Georgia	PUBLIC RECORD(S)			
Hawaii	GOVERNMENT RECORD		X	

JURISDICTION	DEFINITION	Adq	Inf	Rcd
Idaho	PUBLIC RECORD(S)		X	X
Illinois	PUBLIC RECORD(S)		X	X
Indiana	PUBLIC RECORD(S)			X
Iowa	PUBLIC RECORD(S)		X	X
Kansas	PUBLIC RECORD(S)		X	X
Kentucky	PUBLIC RECORD(S)			
Louisiana	PUBLIC RECORD(S)		X	
Maine	PUBLIC RECORD(S)		X	X
Manitoba	RECORD(S)		X	X
Maryland	PUBLIC RECORD(S)			
Massachussets	PUBLIC RECORD(S)		X	
Michigan	PUBLIC RECORD(S) WRITING(S)			X
Minnesota	GOVERNMENT DATA		X	
Mississippi	PUBLIC RECORD(S)			
Missouri	NOT DEFINED			
Montana	PUBLIC RECORD(S) WRITING(S)			
Nebraska	PUBLIC RECORD(S)	X		
Nevada	NOT DEFINED			
New Brunswick	DOCUMENT(S)	X	X	X
New Hampshire	NOT DEFINED			
New Jersey	PUBLIC RECORD(S)			
New Mexico	NOT DEFINED			
New York	RECORD(S)		X	
Newfoundland	INFORMATION		X	X
North Carolina	PUBLIC RECORD(S)			

JURISDICTION	DEFINITION	Adq	Inf	Rcd
North Dakota	PUBLIC RECORD(S)			
Nova Scotia	RECORD(S)		X	X
Ohio	PUBLIC RECORD(S)			
Oklahoma	RECORD(S)	X		
Ontario	RECORD(S)		X	X
Oregon	PUBLIC RECORD(S) WRITING(S)		X	X
Pennsylvannia	PUBLIC RECORD(S)			
Quebec	DOCUMENT(S)	X		X
Rhode Island	PUBLIC RECORD(S)			
Saskatchewan	RECORD(S)		X	X
South Carolina	PUBLIC RECORD(S)			
South Dakota	NOT DEFINED			
Tennessee	NOT DEFINED			
Texas	PUBLIC RECORD(S) PUBLIC INFORMATION		X	
United States	NOT DEFINED			
Utah	PUBLIC RECORD(S) RECORD(S)			
Vermont	PUBLIC RECORD(S)			X
Virginia	OFFICIAL RECORD(S)			
Washington	PUBLIC RECORD(S)		X	
West Virginia	PUBLIC RECORD(S) WRITING(S)		X	
Wisconsin	RECORD(S)		X	X
Wyoming	PUBLIC RECORD(S)			
Yukon	RECORD(S)		X	X

APPENDIX 5

PHYSICAL AND DOCUMENTARY FORMS IN

PUBLIC RECORDS DEFINITIONS

Key

PfOpn = provides an open-ended list of physical forms
PfRes = provides a restricted list of physical forms
DfOpn = provides an open-ended list of documentary forms
DfRes = provides a restricted list of documentary forms
Mix = makes no apparent distinction between physical and documentary forms

Cop = copies of records are also records
Elc = specifically cites electronic or machine-readable forms as legitimate record forms

JURISDICTION	DEFINITION	Pf Opn	Pf Res	Df Opn	Df Res	Mix	Cop	Elc
TOTALS =		44	0	21	0	17	8	18
Alabama	NOT DEFINED							
Alaska	PUBLIC RECORD(S)	X						
Arizona	NOT DEFINED							
Arkansas	PUBLIC RECORD(S)	X						
British Columbia	RECORD(S)	X		X		X		X
California	PUBLIC RECORD(S) WRITING(S)	X						X
Canada	RECORD(S)	X		X		X	X	X
Colorado	PUBLIC RECORD(S) WRITING(S)	X						
Connecticut	PUBLIC RECORD(S) FILE(S)							

JURISDICTION	DEFINITION	Pf Opn	Pf Res	Df Opn	Df Res	Mix	Cop	Elc
Delaware	PUBLIC RECORD(S)	X						
Florida	PUBLIC RECORD(S)	X		X		X		
Georgia	PUBLIC RECORD(S)	X		X		X		
Hawaii	GOVERNMENT RECORD	X						X
Idaho	PUBLIC RECORD(S)	X						X
Illinois	PUBLIC RECORD(S)	X		X		X		X
Indiana	PUBLIC RECORD(S)	X		X		X		X
Iowa	PUBLIC RECORD(S)	X						
Kansas	PUBLIC RECORD(S)	X						
Kentucky	PUBLIC RECORD(S)	X						
Louisiana	PUBLIC RECORD(S)	X		X		X	X	X
Maine	PUBLIC RECORD(S)	X						
Manitoba	RECORD(S)	X		X		X	X	X
Maryland	PUBLIC RECORD(S)	X		X		X	X	X
Massachussets	PUBLIC RECORD(S)	X		X		X		
Michigan	PUBLIC RECORD(S) WRITING(S)	X						X
Minnesota	GOVERNMENT DATA	X						
Mississippi	PUBLIC RECORD(S)	X		X		X	X	
Missouri	NOT DEFINED							
Montana	PUBLIC RECORD(S) WRITING(S)							
Nebraska	PUBLIC RECORD(S)	X						X
Nevada	NOT DEFINED							
New Brunswick	DOCUMENT(S)	X						X
New Hampshire	NOT DEFINED							
New Jersey	PUBLIC RECORD(S)							

JURISDICTION	DEFINITION	Pf Opn	Pf Res	Df Opn	Df Res	Mix	Cop	Elc
New Mexico	NOT DEFINED							
New York	RECORD(S)	X		X		X	X	
Newfoundland	INFORMATION	X						
North Carolina	PUBLIC RECORD(S)	X		X		X		X
North Dakota	PUBLIC RECORD(S)							
Nova Scotia	RECORD(S)	X						
Ohio	PUBLIC RECORD(S)							
Oklahoma	RECORD(S)	X						
Ontario	RECORD(S)	X		X		X	X	X
Oregon	PUBLIC RECORD(S) WRITING(S)	X		X				
Pennsylvannia	PUBLIC RECORD(S)			X				
Quebec	DOCUMENT(S)	X						X
Rhode Island	PUBLIC RECORD(S)	X		X		X		
Saskatchewan	RECORD(S)	X						
South Carolina	PUBLIC RECORD(S)	X						
South Dakota	NOT DEFINED							
Tennessee	NOT DEFINED							
Texas	PUBLIC RECORD(S) PUBLIC INFORMATION			X				
United States	NOT DEFINED							
Utah	PUBLIC RECORD(S) RECORD(S)	X						X
Vermont	PUBLIC RECORD(S)			X				
Virginia	OFFICIAL RECORD(S)	X		X		X		
Washington	PUBLIC RECORD(S)	X						
West Virginia	PUBLIC RECORD(S) WRITING(S)	X						

JURISDICTION	DEFINITION	Pf Opn	Pf Res	Df Opn	Df Res	Mix	Cop	Elc
Wisconsin	RECORD(S)	X						X
Wyoming	PUBLIC RECORD(S)	X		X		X	X	
Yukon	RECORD(S)	X						

APPENDIX 6

ARCHIVAL QUALITY IN PUBLIC RECORDS DEFINITIONS

Key

Mad = documents are made ...
Rec = received ...
Prs = and preserved
ConBus = in the course of the conduct of business

JURISDICTION	DEFINITION	Mad	Rec	Prs	Con Bus
TOTALS =		33	16	37	26
Alabama	NOT DEFINED				
Alaska	PUBLIC RECORD(S)				
Arizona	NOT DEFINED				
Arkansas	PUBLIC RECORD(S)			X	X
British Columbia	RECORD(S)			X	
California	PUBLIC RECORD(S) WRITING(S)	X		X	X
Canada	RECORD(S)			X	
Colorado	PUBLIC RECORD(S) WRITING(S)	X		X	X
Connecticut	PUBLIC RECORD(S) FILE(S)	X	X	X	X
Delaware	PUBLIC RECORD(S)	X	X	X	X
Florida	PUBLIC RECORD(S)	X	X		X
Georgia	PUBLIC RECORD(S)	X	X	X	X
Hawaii	GOVERNMENT RECORD			X	

JURISDICTION	DEFINITION	Mad	Rec	Prs	Con Bus
Idaho	PUBLIC RECORD(S)	X		X	X
Illinois	PUBLIC RECORD(S)	X	X	X	
Indiana	PUBLIC RECORD(S)	X	X	X	
Iowa	PUBLIC RECORD(S)			X	
Kansas	PUBLIC RECORD(S)	X		X	
Kentucky	PUBLIC RECORD(S)	X		X	
Louisiana	PUBLIC RECORD(S)	X		X	X
Maine	PUBLIC RECORD(S)	X	X	X	X
Manitoba	RECORD(S)				
Maryland	PUBLIC RECORD(S)	X	X		X
Massachussets	PUBLIC RECORD(S)	X	X		
Michigan	PUBLIC RECORD(S) WRITING(S)	X		X	X
Minnesota	GOVERNMENT DATA	X	X	X	
Mississippi	PUBLIC RECORD(S)	X		X	X
Missouri	NOT DEFINED				
Montana	PUBLIC RECORD(S) WRITING(S)				X
Nebraska	PUBLIC RECORD(S)				
Nevada	NOT DEFINED				
New Brunswick	DOCUMENT(S)				
New Hampshire	NOT DEFINED				
New Jersey	PUBLIC RECORD(S)	X		X	X
New Mexico	NOT DEFINED				
New York	RECORD(S)	X		X	
Newfoundland	INFORMATION			X	
North Carolina	PUBLIC RECORD(S)	X	X		X

JURISDICTION	DEFINITION	Mad	Rec	Prs	Con Bus
North Dakota	PUBLIC RECORD(S)				
Nova Scotia	RECORD(S)			X	
Ohio	PUBLIC RECORD(S)			X	
Oklahoma	RECORD(S)	X	X	X	X
Ontario	RECORD(S)			X	
Oregon	PUBLIC RECORD(S) WRITING(S)	X		X	X
Pennsylvannia	PUBLIC RECORD(S)				
Quebec	DOCUMENT(S)			X	X
Rhode Island	PUBLIC RECORD(S)	X	X		X
Saskatchewan	RECORD(S)			X	
South Carolina	PUBLIC RECORD(S)	X		X	
South Dakota	NOT DEFINED				
Tennessee	NOT DEFINED				
Texas	PUBLIC RECORD(S) PUBLIC INFORMATION	X		X	X
United States	NOT DEFINED				
Utah	PUBLIC RECORD(S) RECORD(S)	X	X	X	
Vermont	PUBLIC RECORD(S)	X	X		X
Virginia	OFFICIAL RECORD(S)	X		X	X
Washington	PUBLIC RECORD(S)	X		X	X
West Virginia	PUBLIC RECORD(S) WRITING(S)	X		X	X
Wisconsin	RECORD(S)	X		X	
Wyoming	PUBLIC RECORD(S)	X	X		X
Yukon	RECORD(S)				

APPENDIX 7

PUBLIC PROVENANCE IN PUBLIC RECORDS DEFINITIONS

Key

PubPrv = "Public records" means records of public provenance
NotRes = "Public records" means records that are not restricted

JURISDICTION	DEFINITION	Pub Prv	Not Res
TOTALS =		52	6
Alabama	NOT DEFINED		
Alaska	PUBLIC RECORD(S)	X	
Arizona	NOT DEFINED		
Arkansas	PUBLIC RECORD(S)	X	
British Columbia	RECORD(S)	X	
California	PUBLIC RECORD(S) WRITING(S)	X	
Canada	RECORD(S)	X	
Colorado	PUBLIC RECORD(S) WRITING(S)	X	
Connecticut	PUBLIC RECORD(S) FILE(S)	X	
Delaware	PUBLIC RECORD(S)	X	
Florida	PUBLIC RECORD(S)	X	
Georgia	PUBLIC RECORD(S)	X	
Hawaii	GOVERNMENT RECORD	X	
Idaho	PUBLIC RECORD(S)	X	

JURISDICTION	DEFINITION	Pub Prv	Not Res
Illinois	PUBLIC RECORD(S)	X	
Indiana	PUBLIC RECORD(S)	X	
Iowa	PUBLIC RECORD(S)	X	
Kansas	PUBLIC RECORD(S)	X	
Kentucky	PUBLIC RECORD(S)	X	
Louisiana	PUBLIC RECORD(S)	X	
Maine	PUBLIC RECORD(S)	X	X
Manitoba	RECORD(S)	X	
Maryland	PUBLIC RECORD(S)	X	
Massachussets	PUBLIC RECORD(S)	X	X
Michigan	PUBLIC RECORD(S) WRITING(S)	X	
Minnesota	GOVERNMENT DATA	X	
Mississippi	PUBLIC RECORD(S)	X	
Missouri	NOT DEFINED		
Montana	PUBLIC RECORD(S) WRITING(S)	X	
Nebraska	PUBLIC RECORD(S)	X	
Nevada	NOT DEFINED		
New Brunswick	DOCUMENT(S)	X	
New Hampshire	NOT DEFINED		
New Jersey	PUBLIC RECORD(S)	X	
New Mexico	NOT DEFINED		
New York	RECORD(S)	X	
Newfoundland	INFORMATION	X	
North Carolina	PUBLIC RECORD(S)	X	
North Dakota	PUBLIC RECORD(S)	X	

JURISDICTION	DEFINITION	Pub Prv	Not Res
Nova Scotia	RECORD(S)	X	
Ohio	PUBLIC RECORD(S)	X	X
Oklahoma	RECORD(S)	X	
Ontario	RECORD(S)	X	
Oregon	PUBLIC RECORD(S) WRITING(S)	X	
Pennsylvannia	PUBLIC RECORD(S)	X	
Quebec	DOCUMENT(S)	X	
Rhode Island	PUBLIC RECORD(S)	X	X
Saskatchewan	RECORD(S)	X	
South Carolina	PUBLIC RECORD(S)	X	
South Dakota	NOT DEFINED		
Tennessee	NOT DEFINED		
Texas	PUBLIC RECORD(S) PUBLIC INFORMATION	X	
United States	NOT DEFINED		
Utah	PUBLIC RECORD(S) RECORD(S)	X	X
Vermont	PUBLIC RECORD(S)	X	X
Virginia	OFFICIAL RECORD(S)	X	
Washington	PUBLIC RECORD(S)	X	
West Virginia	PUBLIC RECORD(S) WRITING(S)	X	
Wisconsin	RECORD(S)	X	
Wyoming	PUBLIC RECORD(S)	X	
Yukon	RECORD(S)	X	

APPENDIX 8

TEXT OF PUBLIC RECORDS DEFINITIONS

ALABAMA

NOT DEFINED

ALASKA [09.25.110]

PUBLIC RECORD(S): Unless specifically provided otherwise the books, records, papers, files, accounts, writings, and transactions of all agencies and departments are public records ...

ARIZONA

NOT DEFINED

ARKANSAS [25-19-103 (1)]

PUBLIC RECORD(S): "Public records" means writings, recorded sounds, films, tapes, or data compilations in any form, required by law to be kept or otherwise kept, and which constitute a record of the performance or lack of performance of official functions which are or should be carried out by a public official or employee, a governmental agency, or any other agency wholly or partially supported by public funds or expending public funds. All records maintained in public offices or by public employees within the scope of their employment shall be presumed to be public records.

BRITISH COLUMBIA [Schedule 1]

RECORD(S): "record" includes books, documents, maps, drawings, photographs, letters, vouchers, papers and any other thing on which information is recorded or stored by graphic, electronic, mechanical or other means, but does not

include a computer program or any other mechanism that produces records.

CALIFORNIA [s. 6252(d) ; s. 6252(e)]

PUBLIC RECORD(S) WRITING(S): "Public records" includes any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by the state or local agency regardless of physical form or characteristics. "Public records" in the custody of, or maintained by, the Governor's office means any writing prepared on or after January 6, 1975. 2ND DEFN: "Writing" means handwriting, typewriting, printing, photostating, photographing, and every other means of recording upon any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, magnetic or punched cards, discs, drums, and other documents.

CANADA [s. 3]

RECORD(S): "record" includes any correspondence, memorandum, book, plan, drawing, diagram, pictorial or graphic work, photograph, film, microform, sound recording, videotape, machine readable record, and any other documentary material, regardless of physical form or characteristics, and any copy thereof.

COLORADO [24-72-202.(6) ; 24-72-102.(7)]

PUBLIC RECORD(S) WRITING(S): "Public records" means and includes all writings made, maintained, or kept by the state or any agency, institution, or political subdivision thereof for use in the exercise of functions required or authorized by law or administrative rule or involving the receipt or expenditure of public funds. .... 2ND DEFN: "Writings" means and includes all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials, regardless of physical form or characterisitics.

CONNECTICUT [s. 1-18a(d)]

PUBLIC RECORD(S) FILE(S): "Public records or files" means any recorded data or information relating to the conduct of the public's business prepared, owned, used, received or retained by a public agency, whether such data or information be

handwritten, typed, tape-recorded, printed, photostated, photographed or recorded by any other method.

DELAWARE [s. 10002.(d)]

PUBLIC RECORD(S): "Public record" is information of any kind, owned, made, used, retained, received, produced, composed, drafted or otherwise compiled or collected, by any public body, relating in any way to public business, or in any way of public interest, or in any way related to public purposes, regardless of the physical form or characteristic by which such information is stored, recorded or produced. ...

FLORIDA [119.011(1)]

PUBLIC RECORD(S): "Public records" means all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings or other material, regardless of physical form or characteristics, made or received pursuant to law or ordinance or in connection with the transaction of official business by an agency.

GEORGIA [50-18-70.(a)]

PUBLIC RECORD(S): As used in this article, the term "public record" shall mean all documents, papers, letters, maps, books, tapes, photographs, or similar material prepared and maintained or received in the course of the operation of a public office or agency.

HAWAII [[s. 92F-3]]

GOVERNMENT RECORD: "Government record" means information maintained by an agency in written, auditory, visual, electronic, or other physical form.

IDAHO [9-337(10) ; 9-337(12)]

PUBLIC RECORD(S): "Public record" includes, but is not limited to, any writing containing information relating to the conduct or administration of the public's business prepared, owned, used or retained by any state or local agency regardless of physical form or characteristics. 2ND DEFN: "Writing" includes, but is not limited to, handwriting, typewriting, printing, photostating, photographing and every

means of recording, including letters, words, pictures, sounds or symbols or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, magnetic or punched cards, discs, drums or other documents.

ILLINOIS [s. 2.(c)]

PUBLIC RECORD(S): "Public records" means all records, reports, forms, writing, letters, memoranda, books, papers, maps, photographs, microfilms, cards, tapes, recordings, electronic data processing records, recorded information and all other documentary materials, regardless of physical form or characteristics, having been prepared, or having been or being used, received, possessed, or under control of any public body. "Public records" includes, but is expressly not limited to ... [specific types listed]

INDIANA [5-14-3-2]

PUBLIC RECORD(S): "Public record" means any writing, paper, report, study, map, photograph, book, card, tape recording, or other material that is created, received, retained, maintained, used, or filed by or with a public agency and which is generated on paper, paper substitutes, photographic media, chemically based media, magnetic or machine readable media, or any other material, regardless of form or characteristics.

IOWA [22.1]

PUBLIC RECORD(S): Wherever used in this chapter, "public records" includes all records, documents, tape, or other information, stored or preserved in any medium, of or belonging to this state or any county, city, township, school corporation, political subdivision, or tax-supported district in this state, or any branch, department, board, bureau, commission, council, or committee of any of the foregoing.

KANSAS [45-217.(f)(1-2)]

PUBLIC RECORD(S): (1) "Public record" means any recorded information, regardless of form or characteristics, which is made, maintained or kept by or is in the possession of any public agency. (2) "Public record" shall not include records which are owned by a private person or entity and are not related to functions, activities, programs or operations funded by public funds or records which are made, maintained

or kept by an individual who is a member of the legislature or of the governing body of any political or taxing subdivision of the state.

KENTUCKY [61.870.(2)]

PUBLIC RECORD(S): "Public record" means all books, papers, maps, photographs, cards, tapes, discs, diskettes, recordings or other documentary materials regardless of physical form or characteristics, which are prepared, owned, used, in the possession of or retained by a public agency. "Public record" shall not include any records owned by a private person or corporation that are not related to functions, activities, programs or operations funded by state or local authority.

LOUISIANA [s. 1.(2)]

PUBLIC RECORD(S): All books, records, writings, accounts, letters and letter books, maps, drawings, photographs, cards, tapes, recordings, memoranda, and papers, and all copies, duplicates, photographs, including microfilm, or other reproductions thereof, or any other documentary materials, regardless of physical form or characteristics, including information contained in electronic data processing equipment, having been used, being in use, or prepared, possessed, or retained for use in the conduct, transaction, or performance of any business, transaction, work, duty, or function which was conducted, transacted, or performed by or under the authority of the constitution or laws of this state, or by or under the authority of any ordinance, regulation, mandate, or order of any public body or concerning the receipt or payment of any money received or paid by or under the authority of the constitution or the laws of this state, are "public records," except as otherwise provided in this Chapter or as otherwise specifically provided by law.

MAINE [s. 402.3.]

PUBLIC RECORD(S): Public records. The term "public records" shall mean any written, printed or graphic matter or any mechanical or electronic data compilation from which information can be obtained, directly or after translation into a form susceptible of visual or aural comprehension, that is in the possession or custody of an agency or public official of this State or any of its political subdivisions and has been received or prepared for use in connection with the transaction of public or governmental business or

contains information relating to the transaction of public or governmental business, except: ... [exemptions]

MANITOBA [s. 1]

RECORD(S): "record" means any kind of recorded information, regardless of physical form or characteristics, and without restricting the generality of the foregoing includes (a) any correspondence, memorandum, file, register, index, book, plan, map, drawing, diagram, photograph, film, painting, pictorial or graphic work, microform, sound recording, video tape, and machine-readable record, (b) any manual, handbook or other guideline used by the officers or employees of a department to interpret an enactment or to administer a departmental program or activity which affects the public, (c) where the form of a record is such that the record cannot be understood without explanation, a transcript of the explanation of the record, (d) a copy of a record, and (e) a part of a record.

MARYLAND [s. 10-611.(f)]

PUBLIC RECORD(S): Public record.-(1) "Public record" means the original or any copy of any documentary material that: (i) is made by a unit or instrumentality of the State government or of a political subdivision or received by the unit or instrumentality in connection with the transaction of public business; and (ii) is in any form, including: 1. a card; 2. a computerized record; 3. correspondence; 4. a drawing; 5. film or microfilm; 6. a form; 7. a map; 8. a photograph or photostat; 9. a recording; or 10. a tape. (2) "Public record" includes a document that lists the salary of an employee of a unit or instrumentality of the State government or of a political subdivision.

MASSACHUSSETS [4 ss. 7, cl. 26]

PUBLIC RECORD(S): "Public records" shall mean all books, papers, maps, photographs, recorded tapes, financial statements, statistical tabulations, or other documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any agency, executive office, department, board, commission, bureau, division or authority of the commonwealth, or of any political subdivision thereof, or of any authority established by the general court to serve a public purpose, unless such materials or data fall within the following exemptions ...

MICHIGAN [15.232(c) ; 15.232(e)]

PUBLIC RECORD(S) WRITING(S): "Public record" means a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it was created. This act separates public records into 2 classes: (i) those which are exempt from disclosure under section 13, and (ii) all others, which shall be subject to disclosure under this act. 2ND DEFN: "Writing" means handwriting, typewriting, printing, photostating, photographing, photocopying, and every other means of recording, and includes letters, words, pictures, sounds, or symbols, or combinations thereof, and papers, maps, magnetic or paper tapes, photographic films or prints, microfilm, microfiche, magnetic or punched cards, discs, drums, or other means of recording or retaining meaningful content.

MINNESOTA [13.02 Subd. 7.]

GOVERNMENT DATA: "Government data. "Government data" means all data collected, created, received, maintained or disseminated by any state agency, political subdivision, or statewide system regardless of its physical form, storage media or conditions of use.

MISSISSIPPI [25-61-3.(b)]

PUBLIC RECORD(S): "Public records" shall mean all books, records, papers, accounts, letters, maps, photographs, films, cards, tapes, recordings or reproductions thereof, and any other documentary materials, regardless of physical form or characteristics, having been used, being in use, or prepared, possessed or retained for use in the conduct, transaction or performance of any business, transaction, work, duty or function of any public body, or required to be maintained by any public body.

MISSOURI

NOT DEFINED

MONTANA [2-6-101.]

PUBLIC RECORD(S) WRITING(S): (1) Writings are of two kinds: (a) public; and (b) private. (2) Public writings are: (a) the written acts or records of the acts of the sovereign authority, of official bodies and tribunals, and of public

officers, legislative, judicial, and executive, whether of this state, of the United States, of a sister state, or of a foreign country; (b) public records, kept in this state, of private writings, except as provided in 22-1-1103; (3) Public writings are divided into four classes: (a) laws; (b) judicial records; (c) other official documents; (d) public records, kept in this state, of private writings. (4) All other writings are private.

NEBRASKA [84-712.01.(1)]

PUBLIC RECORD(S): Except where any other statute expressly provides that particular information or records shall not be made public, public records shall include all records and documents, regardless of physical form, of or belonging to this state, any county, village, political subdivision, or tax-supported district in this state, or any agency, branch, department, board, bureau, commission, council, subunit, or committee of any of the foregoing. Data which is a public record in its original form shall remain a public record when maintained in computer files.

NEVADA

NOT DEFINED

NEW BRUNSWICK [s. 1]

DOCUMENT(S): "document" includes any record of information, however recorded or stored, whether in printed form, on film, by electronic means or otherwise.

NEW HAMPSHIRE

NOT DEFINED

NEW JERSEY [47:1A-2]

PUBLIC RECORD(S): Except as otherwise provided in this act or by any other statute, ... all records which are required by law to be made, maintained or kept on file by any board, body, agency, department, commission or official of the State or of any political subdivision thereof or by any public board, body, commission or authority created pursuant to law by the State or any of its political subdivisions, or by any

official acting for or on behalf thereof (each of which is hereinafter referred to as the "custodian" thereof) shall, for the purposes of this act, be deemed to be public records.

NEW MEXICO

NOT DEFINED

NEW YORK [s. 86.4.]

RECORD(S): "Record" means any information kept, held, filed, produced or reproduced by, with or for any agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes.

NEWFOUNDLAND [s. 2(c)]

INFORMATION: "information" means information in any form including information that is written, photographed, recorded or stored in any manner whatsoever and on file or in the possession or under the control of a department.

NORTH CAROLINA [s. 132-1.]

PUBLIC RECORD(S): "Public record" or "public records" shall mean all documents, papers, letters, maps, books, photographs, films, sound recordings, magnetic or other tapes, electronic data-processing records, artifacts, or other documentary material, regardless of physical form or characteristics, made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina government or subdivisions. ...

NORTH DAKOTA [North Dakota Conn., s. 6]

PUBLIC RECORD(S): Unless otherwise provided by law, all records of public or governmental bodies, boards, bureaus, commissions, or agencies of the state, or any political subdivision of the state, or organizations or agencies supported in whole or in part by public funds, or expending

public funds, shall be public records, open and accessible for inspection during reasonable office hours.

NOVA SCOTIA [s. 2(f) ; s. 2(h)]

RECORD(S): "information" means information in any form including information that is written, photographed, recorded or stored in any manner whatsoever and on file or in the possession or under the control of a department and includes personal information. 2ND DEFN: "record" means the form in which information is kept.

OHIO [s. 149.43(A)(1)]

PUBLIC RECORD(S): "Public record" means any record that is kept by any public office, including, but not limited to, state, county, city, village, township and school district units, except ... [exempt records listed]

OKLAHOMA [s. 24A.3.1.]

RECORD(S): "Records" means all documents, including, but not limited to, any book, paper, photograph, microfilm, computer tape, disk, and record, sound recording, film recording, video record or other material regardless of physical form or characteristic, created by, received by, under the authority of, or coming into the custody, control or possession of public officials, public bodies, or their representatives in connection with the transaction of public business, the expenditure of public funds or the administering of public property. ...

ONTARIO [s. 2]

RECORD(S): "record" means any record of information however recorded, whether in printed form, on film, by electronic means or otherwise, and includes, (a) correspondence, a memorandum, a book, a plan, a map, a drawing, a diagram, a pictorial or graphic work, a photograph, a film, a microfilm, a sound recording, a videotape, a machine readable record, any other documentary material, regardless of physical form or characteristics, and any copy thereof, and (b) subject to the regulations, any record that is capable of being produced from a machine readable record under the control of an institution by means of computer hardware and software or any other information storage equipment and technical expertise normally used by the institution.

OREGON [192.410(4) ; 192.410(5)]

PUBLIC RECORD(S) WRITING(S): "Public record" includes any writing containing information relating to the conduct of the public's business, including but not limited to court records, mortgages and deed records, prepared, owned, used or retained by a public body regardless of physical form or characteristics. 2ND DEFN: "Writing" means handwriting, typewriting, printing, photostating, photographing and every means of recording, including letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, magnetic or punched cards, discs, drums, or other documents.

PENNSYLVANNIA [s. 66.1(2)]

PUBLIC RECORD(S): "Public Record." Any account, voucher or contract dealing with the receipt or disbursement of funds by an agency or its acquisition, use or disposal of services or of supplies, materials, equipment or other property and any minute, order or decision by an agency fixing the personal or property rights, privileges, immunities, duties or obligations of any person or group of persons: Provided, That the term "public records" shall not mean any report, communication or other paper, the publication of which would disclose the institution, progress or result of an investigation undertaken by an agency in the performance of its official duties or any record, document, material, exhibit, pleading, report, memorandum or other paper, access to or the publication of which is prohibited, restricted or forbidden by statute law or order or decree of court, or which would operate to the prejudice or impairment of a person's reputation or personal security, or which would result in the loss by the Commonwealth or any of its political subdivisions or commissions or State or municipal authorities of Federal funds, expecting therefrom however the record of any conviction for any criminal act.

QUEBEC [s. 1]

DOCUMENT(S): This Act applies to documents kept by a public body in the exercise of its duties, whether it keeps them itself or through the agency of a third party. This Act applies whether the documents are recorded in writing or print, on sound tape or film, in computerized form, or otherwise.

RHODE ISLAND [38-2-2.(d)]

PUBLIC RECORD(S): "Public record" or "Public records" shall mean all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, or other material regardless of physical form or characteristics made or received pursuant to law or ordinance or in connection with the transaction of official business by an agency. For the purposes of this chapter, the following records shall not be deemed public: [exemptions listed]

SASKATCHEWAN [s. 2(1)(i)]

RECORD(S): "record" means a record of information in any form and includes information that is written, photographed, recorded or stored in any manner, but does not include computer programs or other mechanisms that produce records.

SOUTH CAROLINA [30-4-20.(c)]

PUBLIC RECORD(S): "Public record" includes all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials regardless of physical form or charcteristics prepared, owned, used, in the possession of, or retained by a public body. ...[list of specific exempt types]

SOUTH DAKOTA

NOT DEFINED

TENNESSEE

NOT DEFINED

TEXAS [Art. 6252-17a.2.(2) ; Art. 6251-17a.3.(a)]

PUBLIC RECORD(S) PUBLIC INFORMATION: "Public records" means the portion of all documents, writings, letters, memoranda, or other written, printed, typed, copied, or developed materials which contains public information. 2ND DEFN: Public information. (a) All information, collected, assembled, or maintained by or for governmental bodies, except in those situations where the governmental body does not have either a right of access to or ownership of the

information, pursuant to law or ordinance or in connection with the transaction of official business is public information and available to the public during normal business hours of any governmental body, with the following exemptions only: ... [exemptions follow]

UNITED STATES

NOT DEFINED

UTAH [63-2-103 (17)(18)]

PUBLIC RECORD(S) RECORD(S): "Public record" means a record that is not private, controlled or protected and that is not exempt from disclosure as provided in Subsection 63-2-201(3)(b). 2ND DEFN: "Record" means all books, letters, documents, papers, maps, plans, photographs, films, cards, tapes, recordings, electronic data, or other documentary materials regardless of physical form or characteristics: (i) which are prepared, owned, received, or retained by a governmental entity or political subdivision; and (ii) where all of the information in the original is reproducible by photocopy or other mechanical or electronic means.

VERMONT [T.1 s. 317.(b)]

PUBLIC RECORD(S): As used in this subchapter, "public record" or "public document" means all papers, staff reports, individual salaries, salary schedules or any other written or recorded matters produced or acquired in the course of agency business except: ... [exemptions follow]

VIRGINIA [s. 2.1-341.]

OFFICIAL RECORD(S): "Official records" means all written or printed books, papers, letters, documents, maps and tapes, photographs, films, sound recordings, reports or other material, regardless of physical form or characteristics, prepared, owned, or in the possession of a public body or any employee or officer of a public body in the transaction of public business.

WASHINGTON [42.17.020(26)]

PUBLIC RECORD(S): "Public record" includes any writing

containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.

WEST VIRGINIA [29B-1-2.(4) ; 29B-1-2.(5)]

PUBLIC RECORD(S) WRITING(S): "Public record" includes any writing containing information relating to the conduct of the public's business, prepared, owned and retained by a public body. 2ND DEFN: "Writing" includes any books, papers, maps, photographs, tapes, recordings or other documentary materials regardless of physical form or characteristics.

WISCONSIN [19.32(2)]

RECORD(S): "Record" means any material on which written, drawn, printed, spoken, visual or electromagnetic information is recorded or preserved, regardless of physical form or characteristics, which has been created or is being kept by an authority. "Record" includes, but is not limited to, handwritten, typed or printed pages, maps, charts, photographs, films, recordings, tapes (including computer tapes), and computer printouts. "Record" does not include drafts, notes, preliminary computations and like materials prepared for the originator's personal use or prepared by the originator in the name of a person for whom the originator is working; materials which are purely the personal property of the custodian and have no relation to his or her office; materials to which access is limited by copyright, patent or bequest; and published materials in the possession of an authority other than a public library which are available for sale, or which are available for inspection at a public library.

WYOMING [16-4-201.(a)(v)]

PUBLIC RECORD(S): "Public records" when not otherwise specified includes the original and copies of any paper, correspondence, form, book, photograph, photostat, film, microfilm, sound recording, map, drawing or other document, regardless of physical form or characteristics that have been made by the state of Wyoming and any counties, municipalities and political subdivisions thereof and by any agencies of the state, counties, municipalities and political subdivisions thereof, or received by them in connection with the transaction of public business, except those privileged or confidential by law.

RECORD(S): "information" means information in any form including information that is written, photographed, recorded or stored in any manner whatsoever. 2ND DEFN: "record" means the form in which information is kept.

APPENDIX 9

EXEMPTIONS WITH LIMITED DURATION

JURISDICTION	Exemptions of Limited Duration Over Total Number of Exemptions			Percentage Per Statute of Exemptions With Limited Duration
	Permissive Exemptions	Mandatory Exemptions	Total	
Alabama	0/0	0/0	0/0	N/A
Alaska	0/1	0/5	0/6	0%
Arizona	0/1	0/0	0/1	0%
Arkansas	0/0	1/11	1/11	9%
British Columbia	3/9	1/3	4/12	33%
California	0/2	2/14	2/16	13%
Canada	3/11	0/3	3/14	21%
Colorado	0/3	0/11	0/14	0%
Connecticut	0/0	0/15	0/15	0%
Delaware	0/0	0/13	0/13	0%
Florida	0/0	2/27	2/27	7%
Georgia	0/0	1/15	1/15	7%
Hawaii	0/0	0/5	0/5	0%
Idaho	0/0	0/34	0/34	0%
Illinois	0/0	1/31	1/31	3%
Indiana	17/17	9/10	26/27	96%
Iowa	0/26	0/0	0/26	0%
Kansas	0/0	37/38	37/38	97%

JURISDICTION	Exemptions of Limited Duration Over Total Number of Exemptions			Percentage Per Statute of Exemptions With Limited Duration
	Permissive Exemptions	Mandatory Exemptions	Total	
Kentucky	0/0	0/10	0/10	0%
Louisiana	0/0	0/25	0/25	0%
Maine	0/0	0/9	0/9	0%
Manitoba	1/8	2/4	3/12	25%
Maryland	0/6	1/19	1/25	4%
Massachusetts	0/0	1/13	1/13	8%
Michigan	2/19	0/0	2/19	11%
Minnesota	0/0	62/62	62/62	100%
Mississippi	0/0	1/3	1/3	33%
Missouri	0/0	0/0	0/0	N/A
Montana	0/0	0/0	0/0	N/A
Nebraska	0/11	0/0	0/11	0%
Nevada	0/0	0/0	0/0	N/A
New Brunswick	0/0	0/9	0/9	0%
New Hampshire	0/0	0/7	0/7	0%
New Jersey	0/1	0/0	0/1	0%
New Mexico	0/0	0/5	0/5	0%
New York	0/10	0/0	0/10	0%
Newfoundland	0/6	0/8	0/14	0%
North Carolina	0/0	0/4	0/4	0%
North Dakota	0/0	0/0	0/0	N/A
Nova Scotia	0/10	0/0	0/10	0%
Ohio	0/0	0/7	0/7	0%
Oklahoma	0/11	0/0	0/11	0%

JURISDICTION	Exemptions of Limited Duration Over Total Number of Exemptions			Percentage Per Statute of Exemptions With Limited Duration
	Permissive Exemptions	Mandatory Exemptions	Total	
Ontario	1/8	1/3	2/11	18%
Oregon	16/16	16/16	32/32	100%
Pennsylvania	0/0	0/4	0/4	0%
Quebec	5/16	1/5	6/21	29%
Rhode Island	0/1	3/21	3/22	14%
Saskatchewan	1/7	1/3	2/10	20%
South Carolina	0/0	0/11	0/11	0%
South Dakota	0/0	0/2	0/2	0%
Tennessee	0/0	9/11	9/11	82%
Texas	0/1	2/22	2/23	9%
United States	0/0	0/9	0/9	0%
Utah	42/42	6/6	48/48	100%
Vermont	0/0	1/20	1/20	5%
Virginia	6/46	0/0	6/46	13%
Washington	1/31	0/5	1/36	3%
West Virginia	0/0	0/9	0/9	0%
Wisconsin	0/0	0/8	0/8	0%
Wyoming	0/5	0/11	0/16	0%
Yukon	0/14	0/0	0/14	0%

APPENDIX 10

SEVERABILITY OF EXEMPT INFORMATION

Key

Sev = statute provides that exempt information can be severed from a record in order to disclose the remaining portion

JURISDICTION	Sev
TOTAL =	35
Alabama	
Alaska	
Arizona	
Arkansas	
British Columbia	X
California	X
Canada	X
Colorado	
Connecticut	
Delaware	
Florida	X
Georgia	X
Hawaii	
Idaho	X
Illinois	X
Indiana	X

JURISDICTION	Sev
Iowa	
Kansas	X
Kentucky	X
Louisiana	X
Maine	
Manitoba	X
Maryland	X
Massachusetts	X
Michigan	X
Minnesota	
Mississippi	X
Missouri	
Montana	
Nebraska	X
Nevada	
New Brunswick	X
New Hampshire	
New Jersey	
New Mexico	
New York	X
Newfoundland	X
North Carolina	
North Dakota	
Nova Scotia	X
Ohio	
Oklahoma	X

JURISDICTION	Sev
Ontario	X
Oregon	X
Pennsylvania	
Quebec	X
Rhode Island	X
Saskatchewan	X
South Carolina	X
South Dakota	
Tennessee	
Texas	
United States	X
Utah	X
Vermont	
Virginia	X
Washington	X
West Virginia	
Wisconsin	X
Wyoming	X
Yukon	X

APPENDIX 11

RESPONSIVENESS TO REQUESTS

Key

Res = statute makes provisions to require government agencies to respond to access requests in a specific manner

JURISDICTION	Res
TOTAL =	42
Alabama	
Alaska	
Arizona	
Arkansas	
British Columbia	X
California	X
Canada	X
Colorado	X
Connecticut	
Delaware	
Florida	X
Georgia	X
Hawaii	
Idaho	X
Illinois	X
Indiana	X

JURISDICTION	Res
Iowa	X
Kansas	X
Kentucky	X
Louisiana	X
Maine	
Manitoba	X
Maryland	X
Massachusetts	X
Michigan	X
Minnesota	X
Mississippi	X
Missouri	
Montana	
Nebraska	X
Nevada	
New Brunswick	X
New Hampshire	X
New Jersey	
New Mexico	
New York	X
Newfoundland	X
North Carolina	
North Dakota	
Nova Scotia	X
Ohio	
Oklahoma	X

JURISDICTION	Res
Ontario	X
Oregon	X
Pennsylvania	
Quebec	X
Rhode Island	X
Saskatchewan	X
South Carolina	X
South Dakota	
Tennessee	
Texas	X
United States	X
Utah	X
Vermont	X
Virginia	X
Washington	X
West Virginia	X
Wisconsin	X
Wyoming	X
Yukon	X

APPENDIX 12

PUBLICITY OF RECORDS

Key

Pubs = statute makes provisions to require government agencies to prepare finding aids to assist researchers

JURISDICTION	Pubs
TOTAL =	17
Alabama	
Alaska	
Arizona	
Arkansas	
British Columbia	X
California	
Canada	X
Colorado	
Connecticut	
Delaware	
Florida	
Georgia	
Hawaii	X
Idaho	X
Illinois	X
Indiana	

JURISDICTION	Pubs
Iowa	X
Kansas	
Kentucky	
Louisiana	
Maine	
Manitoba	X
Maryland	
Massachusetts	
Michigan	
Minnesota	X
Mississippi	
Missouri	
Montana	
Nebraska	
Nevada	
New Brunswick	
New Hampshire	
New Jersey	
New Mexico	
New York	X
Newfoundland	X
North Carolina	
North Dakota	
Nova Scotia	
Ohio	
Oklahoma	

JURISDICTION	Pubs
Ontario	X
Oregon	
Pennsylvania	
Quebec	X
Rhode Island	
Saskatchewan	X
South Carolina	
South Dakota	
Tennessee	
Texas	X
United States	X
Utah	X
Vermont	
Virginia	
Washington	X
West Virginia	
Wisconsin	
Wyoming	
Yukon	