

The *Access to Information Act* and its Impact on Federal Public Records:
An Exploration of the Issues from an Archival Perspective.

by

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Abstract

The *Access to Information Act* has been in force in Canada for twenty years, changing the way public records administration is conducted in the federal government. The passage of the Act crafted a new regime of access to both active and historical public records, and generated debate on the desirability of the new rules, as they apply to historical records. The new access rules emphasised the relationship between accountability and record-keeping but did not offer a distinction between the different roles and access status of a record during the different phases of its life cycle.

This thesis aims to explore the issues brought about by the *Access to Information Act*, and its partner legislation, the *Privacy Act* from an archival perspective. It seeks to elucidate, by means of analysing the development of access rights to historical records in Canada the debate inspired by the application of the Act to all public records, regardless of age. Also, it shows the legislative relationship between the *Access to Information Act*, the *Privacy Act* and the *National Archives Act* and examines the strengths and weaknesses of that relationship. Then, the thesis continues on to explore the broader effects on public records in the federal government, including the so-called “chilling effect.” The thesis proposes that the greatest effect of the *Access to Information Act* on records from an archival perspective is that it changed the access landscape, making archivists examine their role in the delicate balance between preserving privacy and providing access.

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Introduction

Modern archival practice is shaped and defined by interconnected threads of theory, legislation, regulations and standard operating procedures developed over years of trial and error. At the heart of archival practice is the activity of providing access to the holdings of the repository. Access can be a problematic term, as it is understood in several different contexts. Several textbooks regarding archives management refer to access in terms of the “right” or “permission” to consult records.¹ For the purposes of this thesis, access as the right or permission to consult records will be held distinct from “accessibility,” the availability and ability to consult records. The provision of access is both a regular, everyday activity and a concept governed by complex and sometimes competing sets of objectives. The rules come from several venues: the canon of archival theory, the juridical system in which the archival institution operates, and the practical obstacles that vary from institution to institution. These rules vary in enforceability from the recognized business rules that have been adapted over time to form corporate culture, to Orders in Council, to legislation passed by Parliament.

This thesis aims to explore the effects of the passage of the Canadian *Access to Information Act (ATI Act)* of 1983 on the administration of federal public records from the archival perspective. The passage of the Act ushered in

¹ For example, see:

Archives Association of British Columbia, A Manual For Small Archives (Vancouver: Archives Association of British Columbia, 1999).

Judith Ellis, ed. Keeping Archives (Port Melbourne, Vic.: Thorpe in association with the Australian Society of Archivists, 1993).

a new era of access to historical public records, and generated debate on the desirability of legislated access to historical sources. Although we have some sense of the consequences of the Act for archives and archivists, most of the “evidence” is impressionistic, expressed as it is in public discourse about the operation of the act and in the rather limited archival literature discussing it. This thesis seeks to evaluate the strands of this discussion to elucidate the various archival issues that have arisen, in the hope of assessing those worthy of deeper study. It is assumed that the consequences created by the federal legislation will mirror the situation in the provinces where similar legislation has come into force since the federal act was passed.

The *Access to Information Act* packaged the concept of “access” into a series of manageable definitions, provisions and exemptions for the purposes of regulating access to the active records of government at the request of any citizen or permanent resident. As an administrative structure named under the purview of the Act, the Public Archives, as it was then called, had to adapt to the new access era with regard to both its archival holdings and its own operational and administrative records. The new access regime shone a spotlight on the relationship between accountability and record-keeping and did not offer a distinction between the different roles and access status of a record during the different phases of its life cycle.

Before the passage of the *ATI Act*, the public’s main entry point to Canadian government records was the Public Archives. Archivists played a mediating role between the creating agency and the researcher, and often saw

themselves as advocates for the release of records for research purposes. John Smart, in his 1983 *Archivaria* article, stated that, "The continued development of a real archival profession in Canada requires that archivists become identified with the social objective of freedom of information in their society."² Transfer of records to the Archives was the first step in providing a right of access to others than the records' creators and administrative users. This process of transfer and accessibility of records was not codified in the federal government until the issue of Cabinet Directive 46 (CD 46) in 1973. This Directive made provision for access to records that were more than thirty years old and under the Public Archives' custody and control. The significance of this directive was the recognition of what Canadian historian Robert Craig Brown calls the "passage of time" principle: that the reasons for and the appropriateness of denying access diminish over time.³ The Access Directive of 1978 extended the definition of public record to include "machine readable records," but access was still discussed only in terms of making records in the Archives available for research.

The late 1970's saw much discussion on the issue of liberalized access not only to the holdings of the Archives, but to the active administrative and operational records of government. In 1977, the Government's Green Paper, "Legislation on Public Access to Government Documents" laid out its concerns with regard to modifying existing practices to allow routine disclosure and active dissemination of government records. While the Green Paper considers access

² John Smart, "The Professional Archivist's Responsibility as an Advocate of Public Research." *Archivaria* 16 (Summer, 1983) 141.

only in the area of administration and policy formulation,⁴ it was a good indication that the government of the day was committed to seriously discussing an access act. One of the major issues for the Liberal government under Trudeau was the maintenance of cabinet confidences. Having inherited the Westminster model of government from Great Britain, ministers of cabinet rely on the assurance that matters of debate within Cabinet will be held confidential for a prescribed amount of time in order to protect their ability to speak freely, without fear of political reprisal in the public arena.

In a study of access rights, it is important to note that the primary purpose for keeping public archives is to preserve the recorded memory of government for the purpose of future reference and interpretation. Indeed, the ways in which the public has gained access to archives is dependent upon the historical and administrative context in which access was sought. Terry Eastwood has described the stages of archival development as comprising three distinct phases, and muses that, "A stage four in our development might well see us stand up against formidable obstacles in the way of realizing archives as arsenals of democratic accountability and continuity."⁵ As the debate concerning access legislation in Canada developed, a major component of the argument for liberalized access focused on issues of citizen participation in the democracy, and the vital function of records to render account of government action. For

³ Robert Craig Brown, "Government and Historian: A Perspective on Bill C-43," *Archivaria* 13 (Winter 1981-82): 121.

⁴ Jean Tener, "Accessibility and Archives," *Archivaria* 6 (Summer 1978): 23.

archivists, the access debate illuminated their roles vis-à-vis themes of democratic and historical accountability.

When associated with a heritage institution such as an archival repository, the term "public" denotes the character of the institution as an agency of government. One's understanding of the term "public" is dependent on political, cultural, and personal interpretations. Originally, the role of public archives was primarily to preserve the records of ancient regimes. Access to these records was rarely a concern for the government of the day. Public archives were not public in the sense that their whole holdings were open to access. The American philosopher and political theorist, John Dewey describes the public as consisting of "(. . .) all those who are affected by the indirect consequences of transactions to such an extent that it is deemed necessary to have those consequences systematically cared for."⁶ Furthermore, "the state is the organization of the public effected through officials for the protection of the interests shared by its members."⁷ The state is an organized public; the government an organisation comprised of individuals working on behalf of the public. A public archives is a particularly important institution within a democracy because archives constitute the location of the public's access to the past actions of its government. For the purposes of this study, the word "public" will be used in the same context as it is used in the *Access to Information* legislation. That is the public are Canadian

⁵ Terence M. Eastwood, "Reflections on the Developments of Archives in Canada and Australia," in *Archival Documents: Providing Accountability Through Recordkeeping*. Sue McKemmish & Frank Upward, eds. (Melbourne: Ancora Press, 1993) 38.

⁶ John Dewey, *The Public and Its Problems* (Athens, Ohio: Ohio University Press, 1927), 16.

⁷ Dewey, 33.

citizens or permanent residents. These are useful boundaries to place on the concept of the public, as it limits the discussion to those members of society who have a stake in participating in government.⁸ One of the aims of the thesis will be to point out some of the inconsistencies within the juridical system and attempt to sort out the roots of conflict between groups within the system.

The development of access rights in western democracies differed in details and timeline from country to country. Sweden, for example, first adopted public access legislation as part of its *Freedom of the Press Act* in 1766.⁹ Sweden, however, was well ahead of other countries in establishing access to government information legislation. Canada's closest neighbour, the United States, adopted a *Freedom of Information Act* in 1966 that replaced the vague provisions from the 1946 *Administrative Procedure Act* and stated that public access to most government documents was to be the general rule. The *FOI Act* was amended in 1974 and a related *Privacy Act* was also passed.

In Canada, the first *Access to Information* legislation passed was at the provincial level in Nova Scotia in November of 1977. It listed the types of information that must be made available to the public along with a list of exempt categories, and incorporated privacy concerns as well. While Canada shares

⁸ Trevor Liverton discusses this limitation: "The extension of this right to noncitizen permanent residents reduces to some extent the "purity" of the argument that the principle of free access derives from the sovereign citizens' need for evidence and information. Still, there is a vast difference between permanent residents, who have made a commitment to the polis, and all other noncitizens. This commitment, which entails a personal stake in the well-being of the state, goes a long way toward justifying the extension of this right to permanent residents." In Trevor Liverton, *Archival Theory, Records and the Public* (Lanham, Md. & London: Scarecrow, 1996)

⁹ The right of access was interrupted in Sweden from 1773-1809 during a period of absolutism, but the Freedom of the Press Act was re-established with the parliamentary government.

many similarities with other western democracies, its governance differs in its details from other countries with ATI legislation, particularly the United States. The major differences come from the conventions associated with the Westminster model of parliamentary government, with its tradition of ministerial responsibility and cabinet solidarity. The events of the decade between 1973, when *Cabinet Directive No. 46* made the "30 Year Rule" and 1983 when the *Access to Information Act* was adopted, saw a major shift in thinking about access to information and its meaning for Canada's parliamentary system of government. The discussion of access moved outside the context of historical research using sources held by the Public Archives of Canada, and concentrated on public access to the active records of government. For the Archives, this shift cast the issue of access in a new light, creating new administrative processes for its provision and forcing a fundamental shift in thinking on the subject of access to government records.

This paper is concerned with examining the effect and impact of the *ATI Act* on the National Archives from several perspectives: political, administrative and archival. Traditionally, access to archival holdings was given meaning through the canon of archival literature and held up by what Terry Cook calls the "twin pillars of the archival profession, appraisal and arrangement/description."¹⁰ To provide access to records, archives first had to acquire them, and therefore the conditions respecting transfer and the decision-making involved with selecting records for accession determined the quality of holdings and by

extension the quality of access. Records were obviously acquired and organized for the purpose of making them available for research. The means of providing access was accomplished by providing the means to find records, mainly through arrangement and description. Aiding researchers in this way contributes in a significant way to ensuring the right of access, as some records arrive at the archives in an "inaccessible" state by virtue of poor file management.

The National Archives is an institutional member of several communities, each with its own set of rules and reasoning regarding the issues of access and privacy. It is a participant within the Canadian archival community; the international archival community, and is an administrative entity within the federal government. Analysis of the various professional and ethical rules governing the various activities of the National Archives is an indispensable tool in weaving the tapestry of relationships that reveal the external structure of its fonds. It may be argued that the defining rules of the archival profession, to which the National Archives subscribes, is the body of evolving archival theory that governs and informs archival practice. This body of theory has provided the basis for a series of governing rules set out by the International Council on Archives.¹¹ These rules are vague and general, as they need to be to apply across the complex juridical systems that are based on political boundaries, but nonetheless provide a basis for guiding archival practice. Superimposed upon these general guidelines are the specific governing rules laid out by Canadian legislation. The

¹⁰ Cook, Terry, "What is Past is Prologue," *Archivaria* 43 (Spring 1997): 20.

¹¹ International Council on Archives, "Code of Ethics," adopted September 6, 1996 Beijing, China. www.ica.org/biblio/c_ethics_e.html

particular statutes that govern the activities of the National Archives with respect to access are the *National Archives of Canada Act* (1987), the *Access to Information Act* and the *Privacy Act*.

These pieces of legislation were drafted with knowledge of their interdependency, but they are still not a perfect fit with the principles that govern archival practice. This thesis will attempt to elucidate the points at which the legislation supports archival goals, and those points at which these intertwined pieces of legislation fall short of providing the strong framework necessary to build, maintain and provide access to a strong archival legacy.

Gabrielle Blais, in her RAMP study on access to archival records indicates that the effects of access legislation on access to archives was complemented by the notion of accountability. She states that government accountability has two major philosophical underpinnings: that decision-making has to be marked by a clear trail of evidence and that government actions have to be executed in an unbiased, efficient manner.¹² In terms of the archives' role in preserving accountability over time, Blais observes that the archives' own processes must support the general principles of government accountability. To this end, she puts forward that three criteria must be respected when access regulations are developed. First, there must be equal terms of access for all researchers. Second, access conditions must be as precise and specific as possible, and

¹² Gabrielle Blais, *Access to Archival Records: A Review of Current Issues: A RAMP Study*. (Paris: UNESCO, 1995): 1.3

third, that the rights to privacy of individuals should be strictly enforced.¹³ The creation of a network of rules that supports the image of government accountability and transparency is crucial to making sure that accountability is maintained. In this regard, the *ATI Act* put the Archives on a level playing field with other government agencies, making sure the same rules of access are applied across government agencies.

The first chapter will set the political, cultural and archival contexts for the passage of access legislation, and examine its main provisions. The concept of access will be discussed in its various interpretations, as the word is problematic in its various meanings. It will place the Public Archives of Canada within those contexts, as it has an important role to play as the national archival institution for the Canadian archival community, for the government of which it is a part, and for the public itself as the key repository of Canada's documentary heritage. It will also set the stage for the following chapters, which will deal with the effects of the 1983 ATI legislation.

Chapter two will explore the main provisions of the *ATI Act*, with special focus on how those provisions affected the Archives and the extent to which the *ATI Act* affected the terms of the *National Archives Act* of 1987. The policies and procedures for archival appraisal, acquisition and description, and the role of the National Archives in the overall management of public records, including its role in records and information management will be explored in the context of the ATI regime.

¹³ Blais, 4.3.

Chapter three will examine the effects of the *ATI Act* on the National Archives' relationships with the research community and on the research use of the archives holdings of public records. In particular, it will examine the concern over the so-called "chilling effect" on records creators and whether the terms of the act contrive to limit historical research as compared to that which was conducted before passage of the act.

The activities of the Public Archives of Canada in the provision of access to records, before the advent of access legislation, were focused on achieving a systematic approach to records disposition within the federal government in order that archival records would be available when researchers sought them out. After the *Access to Information Act* came into effect, the issues concerning records management and the system that governed disposition did not go away, but the focus concerning access shifted. Researchers could now obtain access to active records within departments and semi-active records stored in records centres; it was their right to do so. The public debate concerning access shifted from concerns regarding access to records older than thirty years, but focused now on the issue of government accountability and the citizen's right to informed participation in the democratic process. The Archives had to adapt to this shift, as well as adapting to the new workload imposed by the provisions of the Act. No longer was the Archives responsible for carrying out the wishes of the departments in terms of conditions of access, but it was responsible for evaluating access requests according to ATIP.

The passage of the *ATI Act* in Canada has effected a shift in thinking throughout the archival community in Canada, but is most pronounced in its effect on the National Archives. Not only were the Archives affected in terms of practical workload and new administrative processes, but archivists had to grapple with the intrusion of this complex piece of legislation in terms of the way they viewed their professional goals. This struggle is ongoing, and will continue to shape and mould the professional consciousness for years to come.

Chapter One

Access to Records Before 1983: Public Records Disposition

In 1966, the Extraordinary International Archives Congress passed the following resolution. "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 will be employed to make this principle effective."¹⁴ Passed in the same year as the United States' *Freedom of Information Act*, the resolution was an important acknowledgement that archivists had made the leap from regarding research as the purview of the privileged academic elite and were moving toward liberalised access regardless of nationality or credentials. Canadian efforts for liberalised access to archives were well represented on the international archival scene by the Dominion Archivist, Dr. W. Kaye Lamb, who expressed the goal of the International Council on Archives in the following terms, "Our aim, . . . should be to make it possible for a scholar to examine the complete surviving sources that relate to important policies and significant events, and to enable him to describe and appraise them in the full light of all surviving evidence."¹⁵ This statement, while powerful, was not grounded in any legislative framework at home. In 1966 in Canada, the terms of access to the various record groups of government agencies held by the Public Archives were decided in consultation with officials from the department or

¹⁴ International Council on Archives, "Resolutions Recommendations and Wishes of the Extraordinary International Archives Congress," *Archivum* 16 (1966): 233.

¹⁵ W. Kaye Lamb, "Liberalization of Restrictions on Access to Archives," *Archivum* 16 (1966): 35.

agency transferring the records. The departments could refuse to transfer their records if their demands regarding disclosure were not met.

The idea that access to archives by the public is desirable in a democracy can be traced back to a decree passed in 1794 during the French Revolution: "Every citizen is entitled to ask in every depository . . . for the production of the documents it contains."¹⁶ This decree was an important step in the acknowledgement of the "people" as participants in and members of the democracy. Historians also participated in the democracy as the interpreters of the past actions of government. While archives have always been kept for the purpose of future reference, Michel Duchein points out that access was not always extended to scholars, much less to the general public.¹⁷ "Actually, the preservation of archives has always been linked to the exercise of power, since the possession of memory is essential to governing and administering. Access to archives was therefore a privilege, not a right."¹⁸ Duchein points out that access to archives prior to the nineteenth century was often restricted to "privileged persons or the owners of the archives themselves."¹⁹ The primary purpose for the keeping of public archives was (is) for the purpose of preserving rights of the ruling body, and Duchein explains that "history itself was conceived as an accessory in maintaining sway over bodies and souls."²⁰ Access to

¹⁶ Quoted in Ernst Posner, "Some Aspects of Archival Development Since the French Revolution," in Archives and the Public Interest: Selected Essays by Ernst Posner. Ken Munden, ed. (Washington, DC: Public Affairs Press, 1967), 26.

¹⁷ Michel Duchein, Obstacles to the Access, Use and Transfer of Information from Archives: A RAMP Study. (Paris: UNESCO, 1983), 2.

¹⁸ Duchein, 2.

¹⁹ Duchein, 2.

²⁰ Duchein, 2.

archives was a privilege that bore with it great responsibility to the creator of the records for accurate, sensible and respectful interpretation.

Within governments, archives occupied a unique position as the agency that housed and could provide access to public records. In Canada, while the Public Archives was created as a branch of the Department of Agriculture, access to inactive government records was frustrated by the slow acknowledgement that departmental records should be transferred to the archives according to a predefined and systematic schedule. Access to public records depended on their being transferred to the Public Archives, as other government agencies did not provide access to their records, at least not in any regular or predictable fashion. The right of access was first discussed in connection with inactive government records. The development of access rights and their impact on the Public, and then the National Archives is best examined in light of the history and development of the institution itself.

In 1870, Henry H. Miles addressed the Quebec Literary and Historical Society (QLHS) recommending the establishment of a public archival repository. He argued that the status quo of Canada's documentary heritage was in a sorry state, records were not inventoried, and little regard was paid to storage conditions.²¹ In 1871, the QLHS presented a petition to Parliament stating that, "authors and literary inquirers are placed in a very disadvantageous position in this country in comparison with persons of the same class in Great Britain,

²¹ H.H. Miles, "On Canadian Archives. Transactions of the Literary and Historical Society of Quebec," (Quebec, 1871): 53-71.

France and the United States, in consequence of being practically debarred from facilities of access to the public records, documents and official papers in manuscript illustrative of the history and progress of society in Canada.”²² In response to this appeal, the government of the day appointed Douglas Brymner “Senior Second Class Clerk,” responsible for Canada’s public archives and reporting to the Minister of Agriculture. The archives branch fit within the mandate of the Department of Agriculture for “arts and manufactures,” where it would remain until the *Public Archives Act* was passed in 1912. Brymner’s appointment was aimed at organizing and providing access to material that could provide the basis for writing Canadian history. Brymner had fairly vague instructions, so he set out to gather Canadian records dispersed across the country and Europe, and to create a venue where Canadian scholars could gain access to archival source material at home.

The motivation behind the QLHS petition to establish an archives for the Dominion was politically motivated, for it was founded on the idea that the writing of Canadian history would foster patriotism. From its beginnings as Brymner’s “noble dream,” the Public Archives of Canada has been a focal point for the development of a unified national heritage, based on the analysis of the records in its holdings. The scholars who gained access to the early holdings of the Archives were indeed privileged, trusted as they were with writing the history of British North America. There was great hope that the body of literature they produced would help to unify the Dominion. To support the efforts of early

²² Duncan McArthur, “The Canadian Archives and the Writing of Canadian History,” Canadian
Footnote continued on the next page.

Canadian historians, Brymner set about the “repatriation” of Canadian records held abroad. This early archival project can be described as a large-scale rescue mission. Archives’ staff or agents sought to acquire records and visited repositories and record offices abroad, taking inventories and even selectively transcribing records relating to Canada. The Archives began, then, as a heritage institution, devoted to supporting Canadian scholarship, not as a government record office as was the case for other national archival institutions. It was only later on that the Archives would fashion a stronger role for itself in the administration of federal public records, although from the beginning it advocated the use of those records for the interpretation of Canada’s history.

During the early years of the Public Archives’ operation, efforts to acquire government records were frustrated by the lack of a legislated mandate, and the division of responsibility for government records between the Archives and the Department of the Secretary of State. The Archives’ role was cast as a passive “keeper of historical records,” while the Department of the Secretary of State held the authority over the disposition of federal records. No rules existed to compel departments to transfer records to the Archives or to prevent them from destroying records.

Ian Wilson recounts an interesting example of the division between these two departments. In 1871, Brymner identified an accumulation of official records in the former Government House in Montreal and began the process of discussion with the Quebec government to obtain custody. Meanwhile, by way of

Historical Association Reports (Ottawa: Canadian Historical Association, 1934).

an Order in Council, Henry J. Morgan, who held the title of Keeper of the Public Records in the Department of the Secretary of State, gained authorization to retrieve the records and began the work of arranging them.²³ The confusion over the responsibility for federal records created an uncomfortable tension between the two. Brymner could see that systematic acquisition and research access to the historical records of the government depended on his establishing a records office under the auspices of the Archives. For years to come, the Archives and eventually the government itself would search for a solution to this problem. In these early days, it was an unintended consequence of the Archives' emphasis on cultural heritage that politicians and bureaucrats could not see the need for the Archives involvement in the disposition of records. It certainly seemed to them that the political goal for which the Archives was established, the accumulation of sources for the writing of a history to frame the Canadian identity, was being admirably met. The Canadian government could hardly see the need to build the infrastructure required to place the disposition of inactive records of government under the influence of the Archives. This may be partially explained by the fact that the records themselves were still relatively young and not yet considered as "historical."

Brymner's concern over the absence of rules governing the disposition of public records is reflected in his 1882 *Annual Report*, in which he deemed it necessary to repeat an entire paragraph from the 1881 report: "There must be, in the hands of those who have occupied positions of a public nature, either as

²³ Wilson, Ian, "A Noble Dream': The Origins of the Public Archives of Canada," *Archivaria* 15
Footnote continued on the next page.

responsible advisors of the Crown, or as representative men in various capacities, correspondence which would be of immense service in a historical point of view, but which there is every probability will be destroyed, or lost in the course of time.”²⁴ Brymner was also concerned about the loss of parliamentary and departmental proceedings, reports of committees and other records of administration whose disposition was not governed by any rules or regulations.

Under Brymner’s successor, Sir Arthur Doughty, the Archives Branch expanded in terms of staff and budget and gained the legislative mandate it required. In 1906, Doughty threatened the Prime Minister with resignation if he did not receive the resources necessary to make the archives “an important factor in the development of our national life.”²⁵ Doughty was given free reign by Prime Minister Wilfred Laurier to improve the holdings of the archives and did so with vigour. The Archives moved from the Langevin Block to more spacious facilities on Sussex Drive, and Doughty spent most of his efforts and his increased budget “repatriating” Canadian records from Britain and France, many of them painstakingly transcribed by hand.

In 1912, the *Public Archives Act* was passed. It outlined the responsibilities of the Dominion Archivist, establishing that he report to the Secretary of State, rather than to the Minister of Agriculture. The Act did not, however, establish a formal agreement for the timely transfer of inactive records

(Winter 1982-83): 16.

²⁴ Canada. *Sessional Papers*, 1882. no. 35 Report of the Minister of Agriculture. Appendix 1. Archives p. 7. The annual reports of the Archives Branch were first published as part of the reports of the Department of Agriculture. For simplicity, the annual reports will be referred to hereafter as Archives Report for ____.

from government departments and agencies to the Archives. The Public Archives was defined in terms of those records in the custody and control of the Dominion Archivist:

The Public Archives shall consist of all such public records, documents and other historical material of every kind, nature and description as, under this Act, or under the authority of any order in council made by virtue thereof, are placed under the care, custody and control of the Dominion Archivist.²⁶

This broad definition gave Doughty the scope he needed to fulfill his vision, as subsequent sections of the Act laid out his authority to acquire records, and other material to augment the holdings of the Archives as he deemed appropriate. The transfer of records from departments of the Government, however, was not placed under the direct control of the Dominion Archivist, but left to the ad hoc discretion of the Governor in Council, that is, the cabinet.²⁷ This provision reflected the strong sway of the principle of collective cabinet and individual ministerial responsibility for the conduct of government affairs. Because the chances of turning the cabinet's attention to records disposition were slim, it also effectively slowed the process of achieving a comprehensive approach to the scheduling and disposition of the government's records.

Evidence of the hit and miss quality of disposition was uncovered by a Royal Commission on the State of Public Records appointed in 1912 "to inquire into the state of the records of the Public Departments of the Dominion." The

²⁵ Wilson, 26.

²⁶ Canada. Parliament. The Public Archives of Canada Act. R.S.C. 1966 c. 222 Section 6.

²⁷ The Public Archives of Canada Act, Section 7.

commission recommended that the Treasury Board should regulate the destruction of records. The Commissioners had found that some departments sought approval from the Governor in Council to dispose of unwanted documents, but some did not. The result was that a mass of useless material was accumulating, to the detriment of the economical running of government.

As a rule the departments suffer the accumulation of papers to continue unchecked, to their very real inconvenience as well as to the detriment of the more important and valuable documents, which, engulfed by rubbish, share the common neglect, and, if not speedily rescued bid fair to participate in the common ruin.²⁸

The Commission sought to have the process regulated. The principle recommendation was the creation of a Public Records Office by extension of the present Archives Building. The Commission did not, however, achieve any legislative change. In fact, it was the difficulty of having the *Department of State Act* changed to reflect the Archives' role as keeper of the records that was later to pose a problem for Doughty's successor, Dr. Gustave Lanctôt, in drafting a new Archives Act. Also during Doughty's tenure, there was serious discussion about amending the 1912 Act, to create a department under the name of the Department of Historical and Public Records, with the Dominion Archivist assuming the role of Deputy Head of that Department. In Doughty's mind, the issue of access to public records was not as pressing as amassing the sources required to feed historical research, mainly the materials acquired abroad.

²⁸ Canada. Report of the Royal Commission appointed to inquire into the state of the Records of the Public Departments of the Dominion of Canada (Ottawa, 1924), 11.

Lanctôt began service as Dominion Archivist in 1937 during the very difficult years of the Great Depression. He carried his tenure through the war years to 1947. Like both Brymner and Doughty, Lanctôt focused a great deal of his attention on the cultural role of the Archives, but also became interested in the disposition of government records. He was involved in drafting a new Archives Act. It was not passed, but the issue of whose responsibility it was to control the disposition of inactive government records was resurrected. Correspondence between Lanctôt and F.P. Varcoe, Deputy Minister of Justice, reveals that a new Archives Act would not adequately address the issue of authority over public records. "Your bill provides that the Archives shall constitute the public record office of Canada; section 4 of the *Department of State Act* provides that the Secretary of State shall have charge of the state correspondence and shall keep all records and papers not specifically transferred to other departments; section 5 provides that the Secretary of State shall be the Registrar General of Canada"²⁹ Dr. Lanctôt replied by revising his draft and by re-examining the recommendations of the Royal Commission on Public Records. In order for the Archives to become a true Public Records Office, the *Department of State Act* would have had to be revised. Lanctôt's proposal for a new Archives Act was lost on this technicality.

A Public Records Commission had been established by Order in Council on May 12, 1926, but was never set up.³⁰ In 1936, Treasury Board Minute

²⁹ P.A.C., RG 37, vol. 303 F.P. Varcoe to Lanctôt. November 18, 1947.

³⁰ P.A.C., RG 35, vol. 4, file 1, memo by W.E.D. Halliday, Secretary of the Public Records Committee, February 17, 1943.

(T.160481 B.) was passed. It authorized the destruction of specific classes of documents by departments under certain restrictions. The regulation generally deals with routine accounting and personnel files, but Clause 5 states that:

documents of general historical value shall be retained indefinitely. With the object of ascertaining such value, the Dominion Archivist shall be notified by the Department concerned of the intention to destroy certain classes of documents and, unless he submits a written objection immediately, the Department may proceed to destroy such classes of documents. If objection is taken, and the Department is not content to accept the view of the Dominion Archivist, the Record shall be referred for the decision of the Treasury Board.³¹

This process was designed to prevent the inadvertent destruction of records of historical value. If successful, it would provide a reliable accumulation of public records for researchers interested in studying the actions of government. It was recognized that the decision to destroy public records had a significant impact on the holdings of the Archives themselves and on the government's documentary heritage and corporate memory. This was the first time that the government had made any attempt to address the issue of disposition in any formal way. The policy left several loose ends hanging, however, as it only addressed record-keeping at the end of the record's life cycle. If departments were concerned about transferring records because they might eventually become accessible, they could easily avoid any possible disclosure by simply hanging on to the

³¹ P.A.C., RG 37, vol. 4 file II,: Report of the Advisory Committee on Public Records, July 16th, 1945 p. 7.

records. The policy did not provide for systematic control of the records or easy retrieval for semi-active records.

The process was left stagnant until in September 1945, a Public Records Committee was struck with the understanding that a public records policy ought to be based on service to the government itself. The committee had met informally in 1944, convened by the Secretary of State, at the request of the Prime Minister. The *raison d'être* of the committee was to make recommendations with regard to public records created during the Second World War. The committee's deliberations reveal that there was general consensus that while the proper disposition of "war records" was the reason that it had come together, the issue could not "... profitably be divorced from the more general problem of records as a whole."³² The Committee also expressed concern over the rapid accumulation of government records due to wartime activity and presented some recommendations for preventing the destruction of important documents. It further recommended that a "Permanent Advisory Committee on Public Records" be created. This Committee would be established for the purpose of "considering and advising upon measures to provide for the organization, care, housing and where possible, destruction of public records."³³

The committee gained an official mandate in 1945 and was chaired by the Secretary of State. The members were the Dominion Archivist, departmental representatives, and historians delegated by the Department of National Defence

³² P.A.C., RG 35, Series 7, vol. 4. File II: Report of the Advisory Committee on Public Records, July 16th, 1945 p. 2.

and the Canadian Historical Association (CHA). One of the first things the Committee sought to accomplish was to strengthen the mandate of the Dominion Archivist and to support the building of a systematic process for the disposition of public records.³⁴ It took the recommendations of the 1912 Royal Commission on Public Records as its basis for producing guidelines. The Committee's minutes state: "Public Archives must not be considered as merely the repository for material of sentimental or antiquarian interest but a source of information on past practices and policies."³⁵ The tone and tenor of this inaugural report indicate that the committee sought to resolve the issue of timely transfer of inactive records to a public records office, followed by a selection process complete with checks and balances before final disposition.

To this end, the Public Records Committee looked to the work of the National Archives in the United States to develop its framework for public records disposition. The Committee recognised that the time had come in Canada to put in place a systematic process for preserving the corporate memory of government departments and agencies. The Committee set about creating policy to handle the destruction of records no longer required for operational purposes. While the Treasury Board had taken some responsibility for monitoring the disposition of public records, processes for physical transfer had not been developed. The report of the 1912 Royal Commission had

³³ Ibid. 8.

³⁴ Danielle Lacasse and Antonio Lechasseur, The National Archives of Canada 1872-1997 Canadian Historical Association, Historical Booklet No. 58, 1997. p. 13.

³⁵ P.A.C. RG 35, Series 7, vol. 4. File II, Report of the Advisory Committee on Public Records, July 16th, 1945 p.12.

recommended that, "The authority of the Treasury Board should be sought for the destruction of all such documents as the competent authority may consider useless."³⁶ The Commission had also recommended that a permanent commission be appointed under the Public Records Office to select material for retention.

From the researcher's point of view, the only sanctioned mode of obtaining access to government records was through the Archives; departments continued to control use of the records by placing restrictions on access. In some cases, researchers had to obtain specific permission from the department to consult the records. The emphasis was not placed on providing citizen access to records, but rather on ensuring that records were being preserved for the long term.

The placement of the Archives within this access framework is important as it builds part of the context of the role of the archivist as an advocate for access. During the post-war period, in which the minister and mandarins could choose the conditions under which both transfer and access were provided, the archivist mediated the relationship between researcher and the department of record. This became an important role in the eyes of archivists working at the PAC, a matter of professional pride, distinguishing them from the rest of government.

Also during the post-war period, the predictions of amassing a huge accumulation of government records came true. There was an unprecedented

³⁶ Canada. Royal Commission on Public Records, Report (Ottawa: King's Printer, 1926): 112.

growth in government; and as the welfare state took shape, the administration that supported it expanded. In 1946, Dr. Lanctôt drafted a bill that would have made major amendments to the 1912 Public Archives Act. The most significant changes in Lanctôt's proposed bill were that it would formalize the Archives' role as the Public Record Office and would give the cabinet the authority to order the transfer of records from a department to the Archives.³⁷ The bill was not passed, and the Public Records Committee remained the liaison between government departments and the Archives for the next decade. The Archives was the only government agency that had as part of its mandate the provision of access to researchers, though even this was not explicitly stated in legislation. The mechanism set up by the Treasury Board to deal with the destruction requests of departments only scratched the surface of the record-keeping system that the government required. Essentially an ad hoc policy, it was driven by the departments' desire to get rid of records. Presumably, at the department's end, the impetus to go through the review cycle involving the Public Records Committee and the Dominion Archivist would be that there was a critical mass of records that needed to be dealt with. The only efficient means for public records to be accessioned by the Archives was through systematic disposition, and without a strong handle on records management, access rights to government documents would remain stagnant because the records would simply not make it through the bureaucratic maze to end up in the care of the Archives.

³⁷ P.A.C., RG 37 vol. 303, file: Public Archives Act, 1947.

Lanctôt's successor, Dr. W. Kaye Lamb, assumed the position of Dominion Archivist in 1948. Lamb was a strong advocate of access to records held by the Archives and to public records in general. The political climate was right for Lamb to raise the profile of the Archives in the sense of its service to the public as a heritage institution and its service within government in terms of the disposition process. He also recognized that the most important power that the Dominion Archivist needed was a veto over destruction of public records. This destruction veto could be tied in to a systematic transfer process.

While these efforts were moving some aspects of public records management forward, there were instances of ill-conceived and poorly coordinated efforts as well. In 1938, a Central Records Storage Building was constructed on the grounds of the Experimental Farm in Ottawa. This facility had no ties with the Archives, and there is no indication that the Public Records Committee was involved, either. It was administered by the Department of Public Works, and was not staffed by personnel familiar with records operations. The experiment failed due to inefficiency in retrieval. This failed experiment demonstrated that a records centre cannot simply be a warehouse for seldom-used records.

In his Annual Report for 1949, Lamb argued for a records centre or a "half-way house for departmental files" to be operated by the Public Archives. Departments would be invited to deposit their semi-active records in the facility. Reference and retrieval services required by the departments would be provided by Archives staff. Once the department declared the records to be no longer of

operational use, they would be reviewed by Archives personnel in order to transfer material of historical interest to the Archives and to destroy the rest. In Lamb's words, "This plan would provide an orderly solution of the public records problem at minimum cost; and, by becoming the custodian of the older files of the various departments, the Archives would be able to give immeasurably better service to outside inquirers."³⁸ This poses an interesting question, as Lamb's statement may seem to presume that the records centre might be able to provide access to the older files he makes reference to. According to all the rules and regulations in place at this point, however, departments continued to have control over access to records in records centres until the passage of ATI legislation. Perhaps Lamb was referring to the fact that if the PAC had physical custody of the records within the records centres, they would be able to point researchers to the departments that held the control over access, thus providing a measure of reference service to outside researchers. Presumably, once the PAC gained custody of inactive records, there would be a greater chance of acquiring records of historical significance.

In the establishment of a records management function under the auspices of the Archives, Lamb had the support of the Canadian Historical Association (CHA). The CHA had supported the efforts of the Public Records Committee by appointing two of its members to serve. Late in 1948, Arthur Maheux, President of the CHA wrote a letter to Prime Minister W.L. Mackenzie King in which he stated:

³⁸ Public Archives Report for 1949, x.

We should be the first to recognize that the prime function of a such a public records office is assistance to the different contributing departments of the government and we understand from the practice of other government (sic) that the Archives would render a great service to departments by holding, and making available as required, files not in current use; but we are also convinced that the service which a Public Archives gives to government is the best guarantee of the service which it will ultimately give to history.³⁹

The argument was gaining acceptance. Government was doing more and departments were squeezed for space. Inactive records were consuming valuable office space, and along with the wartime activities of the Public Records Committee, their focus on records disposition had gained a certain profile throughout the government. Lamb was quite pleased with the progress the Committee had made since its inception. In a memo to Norman Robertson, Clerk of the Privy Council, he wrote:

My impression is that the battle over the proper handling of public records has been virtually won, so far as most of the departments are concerned. The reasonable and cooperative attitude of the Public Records Committee has gained their good will, and I think that very little unauthorized destruction of documents now takes place. This matter of good will is highly important, for without it the most perfect regulations would prove quite ineffective.⁴⁰

In 1952, Lamb testified before the Royal Commission on National Development in the Arts, Letters, and Sciences (the Massey Commission) and supplied the

³⁹ P.A.C. RG 35 vol. 4 Public Records Committee File: Public Records Committee National Archives File II: Arthur Maheux, CHA President to W.L. Mackenzie King, Prime Minister.

⁴⁰ P.A.C. RG 35, vol. 4 File II W. Kaye Lamb to Norman Robertson.

commissioners with information about the workings of the Archives and ways to improve its role in the study of Canadian history. While the wealth of cultural records housed at the Archives provided historians with excellent sources for writing pre-Confederation history, it was noted that the lack of a systematic transfer policy had, over the years, created a situation that put a scholar of Dominion history in the sorry circumstance of finding a dearth of recent material available at the Public Archives. The government's recorded history was "scattered all over Ottawa, in active department files, some of them admirably kept, some it is to be feared, not much better than they were in 1912."⁴¹ The Public Records Committee had effectively insured that records would not be destroyed without review, but it did not provide for a systematic flow of records to the Archives for research.

Perhaps departments held on to their records for fear that they would be made accessible at the Archives. Col. C.P. Stacey, who was an official historian with the Department of Defense, a member of the Public Records Committee and an access advocate, certainly maintained that the Canadian civil service had a penchant for official secrecy.⁴² The argument he had received from civil servants, particularly from the Canadian Department of External Affairs was that access to correspondence between civil servants should be protected so that employees may continue to give their superiors very frank, personal advice. To this suggestion, Stacey said, "Indeed it has occurred to me that in some cases a

⁴¹ Canada. The Royal Commission on National Development in the Arts, Letters, and Sciences. Report. (Ottawa: King's Printer, 1951), 112.

civil servant might write a little more responsibly if he thought that the file might be opened before he went to his reward – or, at any rate, his pension.”⁴³ This is another take on the “chilling effect” discussion which will be covered in Chapter Three.

Building on the recommendations of the 1912 Royal Commission on Public Records, Lamb argued forcefully to demonstrate that the Archives should be involved in records scheduling and have the final decision regarding destruction or permanent retention in the archives. He also noted that it would be important for the Archivist to have the authority to accept records with restrictions on use and to refuse where restrictions appear unreasonable.⁴⁴ The process that moved access from a privilege to a right not only required an abstract acknowledgement of the desirability of public participation in government through access to public records, but also required systems in place to deal with transferring records from the custody of the departments to the Archives. In the era when access was entertained only in terms of historical research, this was the only recognized route to consult public records.

The Massey Commission had voiced the opinion that records disposition decisions should be made by the departments, rather than by the Archives.⁴⁵ Lamb disagreed, and worked to demonstrate that an inactive records centre, under the control of the Archives, was required to improve the efficiency of

⁴² C.P. Stacey, “Some Pros and Cons of the Access Problem,” International Journal 20 (Winter 1964-65): 51.

⁴³ Ibid, 51.

⁴⁴ P.A.C. RG 35 Acc. 7 Vol. 4 Public Records Committee File II.

records management in the federal government, and the flow of acquisitions to the Archives. It was important to centralize the decision-making regarding final disposition in the person of the Dominion Archivist, in order to achieve a comprehensive approach to records disposition across government agencies. Even with a solid system in place, it was important to have a secure place to store the inactive records of government.

In 1956, the Public Archives opened the Public Records Centre at Tunney's Pasture under Lamb's direction. This unassuming building was crucial in the movement of the idea of access from privilege to right, as it provided symbolic evidence to the public and to the bureaucracy that the Dominion Archivist was to be the custodian of semi-active records. In his 1955-1958 Annual Report, Lamb states, "every proposal to destroy "dead" records must pass scrutiny from the departmental, historical, financial and legal points of view."⁴⁶ The concern that the vast majority of federal records could be lost due to the absence of an administrative net to catch them had been overcome to a significant degree. The federal records centre was a brick and mortar reminder that records have uses beyond their operational lives.

In his Presidential Address to the CHA in 1958, Lamb emphasized the importance of the records centre, naming its construction as the first of several achievements during his tenure to date as Dominion Archivist. He states: "For the historian it is still more important, because it means that older records – the

⁴⁵ Jay Atherton, "The Origins of the Public Archives Records Centre, 1897-1956," *Archivaria* 8 (Summer 1979) 54.

official archives of the future – will for the most part fall automatically into the hands of the Archives as they drop out of departmental use.”⁴⁷ It is interesting to note that in the same address to the Canadian Historical Association, Lamb discussed the variety of restrictions that may be placed on access to records held by the Archives, describing the relationship of a “responsible and conscientious archivist” to the material in his care as a trusteeship.⁴⁸ “So far as official records are concerned, the problem is usually quite simple; the archivist makes the material available, or restricts its use, in accordance with rules of access laid down by the department or agency of the Government from which the papers were received.”⁴⁹

This era marked a change in direction for the Archives, as it actively marketed its services to the government, rather than the previous focus on the cultural role of the institution. In 1959-60, the “Records Management Survey Committee” was struck as a sub-committee of the Public Records Committee. The purpose of this committee was to do a preliminary inventory of the kinds of records held in each department. It produced reams of inventory sheets, and helped the Committee gain some perspective on the vast scope of the records with which it had to deal. The production of a rudimentary inventory of the departments’ records holdings was a step in the direction of achieving a regular and systematic approach to disposition.

⁴⁶ Public Archives Report for 1955-1958, 8.

⁴⁷ W. Kaye Lamb, “Presidential Address,” Ottawa: Canadian Historical Association, 1958, 1.

⁴⁸ Lamb, “Presidential Address,” 5.

⁴⁹ Lamb, “Presidential Address,” 5.

In 1961, Cabinet issued an Order in Council to alter the mandate of the Public Records Committee, broadening its scope and increasing its autonomy. One of the major changes was in the reporting relationships of the Committee. The 1945 make-up had the Secretary of State serving as Chairman. In 1961, the Chair was the Dominion Archivist, and the Order in Council provided that records, with the exception of excess copies, could not be destroyed without approval of the Committee together with the Treasury Board. The strengthened mandate of the Public Records Committee gave it veto authority over the destruction of records, but it still did not carry the weight that public records legislation would.

Lamb worked towards a public records act. His efforts were centred on records in the semi-active phase of the life cycle, as correspondence with George F. Davidson of the Privy Council Office reveals. Davidson agreed with Lamb that "where active records are concerned, these can probably be dealt with best by broad policy directives issuing from the central management authority, namely the Treasury Board, through its Administrative Improvements Division."⁵⁰ Legislated guidelines for a systematic disposition process would help encourage departments to declare their semi-active records as "inactive," so that they might be transferred to the Archives. As it was, departments had to declare records no longer needed for operational purposes before transferring them. Delays in this process were a simple and effective way of preventing access to records by researchers. Lamb wanted to see a steady flow of records into the records

centre at Tunney's Pasture from the Ottawa-based offices of the departments so that he could negotiate transfer arrangements. Departments were reluctant to give up physical custody of records, presumably because of concerns about access, and therefore often chose to keep custody and control over records long after they had finished serving operational purposes.

In 1962, the Royal Commission on Government Organization (the Glassco Commission) investigated records management in the federal government and recommended that the responsibility for public records and rules regarding their disposition be codified under legislation.⁵¹ Within the minutes from the 8th meeting of the Special Committee of Officials called to consider the recommendations of the Royal Commission, Lamb is paraphrased as having "said that he and his staff are unanimously of the opinion that legislation, although it might not be 100% effective, would be a tremendous help."⁵² In 1962, the Commission recommended that the responsibility for public records and rules regarding their disposition be codified under legislation.⁵³ Several years later in 1966, the government issued the *Public Records Order*, which linked the Archives' mandate to acquire historical records with the responsibility to manage current records used and located in the departments and to establish records scheduling and disposal. This Order in Council expressed the government's intention to inventory, control, and organize government records in a systematic way. The crucial point made by the *Public Records Order* was the placement of

⁵⁰ W. Kaye Lamb, MG 31, D8 Vol. 12 File 11.

⁵¹ Lacasse and Lechasseur, 17.

⁵² W. Kaye Lamb MG 31 D8 Vol. 12 File 12

considerable responsibility for federal records management and sole authority for disposition of government records with the Dominion Archivist. Three Royal Commissions, spanning a period of fifty years, had reported that the Archives should be responsible for the disposition of federal public records. The *Public Records Order* made it so.

In addition, the *Public Records Order* laid out some very specific responsibilities for the departments. The departments were understood to be those central departments of government with a minister in charge, as listed in the *Financial Administration Act*. Section 8 (1)(a) of the Order indicates that each department shall designate an officer of the department who has a thorough knowledge of records management to act as Records Co-ordinator. This guaranteed that departments would have a designated person responsible for, and knowledgeable about the records generated by the department. Further, this section provides that departments had to submit to the Dominion Archivist any proposal to destroy records, other than those covered by existing schedules, or to remove records from the ownership of the Government of Canada. It designated a deadline of May 1, 1969, to submit for the Dominion Archivist's approval, retention and disposal schedules applying to all operational records. Fundamentally, it made clear that departments were not to destroy records or permit records to be removed from the ownership of the Government of Canada without the approval of the Dominion Archivist.

⁵³ Lacasse and Lechasseur, 17.

The *Public Records Order* ushered in a new era of regularized disposition for records of the Government of Canada and clearly established the authority of the Dominion Archivist to control records management activities. While all of the developments up to and including the regularized disposition rules of the *Public Records Order* contributed to the building of the bureaucratic infrastructure necessary for liberalised archival access, there was still no defined right of access to public records and the information they contained. The primary statute providing guidance regarding the mandate of the Public Archives was the *Public Archives Act* of 1912. Unfortunately, it did not make any explicit statements about access at all. From issues of disposition, the government turned its attention to the philosophical issues surrounding access to active public records.

Shortly after the passage of the *Public Records Order*, the government began to tackle citizens' need to know about the daily operation of government. In 1969, the government produced a report on government information, with an emphasis on public accessibility, *To Know and Be Known*. The task force focussed on the flow of information within government and its dissemination to the public. It acknowledged a diminishing need for secrecy as time passed, but found no precedent for legislation establishing the right of and rules for access.⁵⁴ It also recommended a national information policy be based on the general principle that the public has a "right to know" about the decisions and activities of the federal government in order to create a more participatory democracy. Although the report did not result in any immediate and dramatic change, it did

begin the search for a means to align access with modern conceptions of democracy, which ultimately ended in access legislation.

⁵⁴ Canada. Task Force on Government Information To Know and Be Known, vol. 2 (Queen's Printer: Ottawa, 1969) 26.

Chapter Two

Cabinet Directive 46 and the Access to Information Act

By the early 1970's, the "access question" had gained political attention and the effort to find the means to solve it occurred in two stages. Cabinet Directive 46 was the government's initial attempt at resolution but it failed to satisfy those concerned with the broadened focus of the access question. Nonetheless, it did constitute a significant advance in terms of access to records within PAC's holdings. The second stage saw the government roll out a series of comprehensive and complementary legislation dealing with aspects of access to public records and the information they contained. This solution saw the matter broadened beyond the archival sphere.

In May of 1969, the Prime Minister proclaimed a new policy of openness – to make "available for research and other public use as large a portion of the records of the Canadian government prior to July 1, 1939 as would be consistent with the national interest."⁵⁵ While the rhetoric implies public disclosure of public records for any "public use," the wording of the Directive that gave expression to this policy is more restrictive in that it clearly casts access in terms of research. The first step in gaining the right of access was the acknowledgement that researchers ought to be given access to public records in the custody of the PAC. Under *Cabinet Directive 46* (CD 46), which was passed in 1973, access

⁵⁵ Canada. Secretary of State, "Transfer of Public Records to the Public Archives and Access to Public Records Held by the Public Archives and Departments," Appendix 2 to Legislation on Public Access to Government Documents (Ottawa: Supply and Services, 1977): 35-37. For simplicity, hereinafter cited as Cabinet Directive No. 46.

could be extended to researchers who wanted to consult records thirty years old or older and which were under the custody and control of the Public Archives. "Access" was defined as "permission to members of the public to view, copy and use a public record **for research purposes**."⁵⁶ The thinking behind this so-called "thirty-year rule" was that the reasons for denying access diminish over time.⁵⁷ The Directive, with its emphasis on a records' age as one of the factors determining its disclosure, was focused on access for research purposes.

The definition of an exempted record held within it the kernels from which the formulation of mandatory exemptions in the *ATI Act* would be crafted. The definition of an exempted record had four main parts. The first was a broad exemption indicating that records may not be released if the disclosure would be contrary to law, that is, to any provisions of existing acts of Parliament. The second handled the exemption related to relations with other governments. It specifically exempted records that contain information that is restricted pursuant to an agreement made between the Government of Canada and any other government. Third party information was handled as a vague exemption permitting officers of the Crown the discretion to decide whether the release of a record might be considered by any government to be a breach of faith on the part of the Government of Canada. The fourth exemption deals more broadly with the matter of relationships with other governments, permitted the exemption of records that "might embarrass the Government of Canada in its relations with any other government." The definition of an exempted record also dealt with the

⁵⁶ Cabinet Directive No. 46.

issue of personal privacy, exempting records that might “violate the privacy of any individual.” Security and intelligence were dealt with as a specifically exempt category, protecting them from disclosure. Personnel records were also exempt, subject to a time limit of 90 years from the date of birth of the employee with respect to whom the record is made.

Section 2 of CD 46 is concerned with the transfer of public records from the departments to the Public Archives. This was spelled out in Section 2(2), “Every department shall apply the schedules and standards issued, established or approved by the Dominion Archivist pursuant to paragraphs 7 (d) and (e) of the Public Records Order and, subject to subsection (3), transfer to the Public Archives in accordance with such schedules and standards all public records in its possession.” According to Lamb, custody was the major obstacle he had to providing access. In his testimony before the Massey Commission he had lamented the fact that records of archival merit were scattered across Ottawa in various departments, a fact that made it very difficult for the Archives to assess what the records inventory for each department might look like. There was no systematic approach to records transfer and disposition, the Archives in some cases regarded merely as a warehouse for old papers. The provisions of CD 46, coupled with the *Public Records Order* served to make explicit both the expectation that departments were to transfer records and that once records were transferred that they would be made accessible for research purposes. The allowable exemptions under the Directive not only defined those records that

⁵⁷ R.C. Brown, Archivaria 13 (Winter 1981-82): 121.

were not to be released, but Section 2 provided that records could be exempt from transfer to the Archives if they fell within the definition of exempted record.

Even more restrictive were the two additional clauses that departments could use to exempt records from transfer. Section 2(3)(b) allowed departments to hold onto records still required for the efficient operation of the department, as determined by the Deputy Head of the department. This is a necessary concession, as circumstances often change and records may be needed longer than the schedule permitted. Section 2(3)(c) allowed departments to withhold records from transfer to the Archives if they "contain information the disclosure of which, in the opinion of the appropriate Minister, would be prejudicial to the public interest."⁵⁸ This clause raised one of the most troublesome issues from the point of view of the government of the day, which believed that a more permissive access policy would erode ministerial responsibility. The Directive therefore retained the Minister's discretion to hold up the transfer of records, and as long as transfer was delayed, so was ready access. Records less than thirty years old and under the custody of the Public Archives, remained under the control of the originating department, and were, therefore subject to the discretionary power of the Minister responsible. Section 2 (3) essentially provided the department the discretion to transfer only those records about which there were no access concerns. The Directive specified guidelines regarding the transfer of records to the Public Archives, but these guidelines were unenforceable. Without putting a terminal date on exemptions, the broad discretionary powers of

Ministers meant that many public records could still be withheld from public view with little or no explanation.

The section of the Directive dealing with access to public records in the Public Archives states that access had to be given to any public record more than thirty years old that has been transferred to the Public Archives. Records in the Archives that were under thirty years old could only be released under mutually agreed upon terms as negotiated between the creating department and the Dominion Archivist. It is notable that the Directive also deals with access provisions for records still within the departments. While the specifications of the directive essentially gave the appropriate Minister the discretion to deal with requests for access to departmental records which were under thirty years old, it did not assume that records would be completely off limits under the custody of the departments.

The Dominion Archivist's role was cast as an advisory one, with duties placed on the Deputy Head of a department to advise the Archivist when he/she was of the opinion that a record fell within the definition of an exempted record. The Directive also specified the Dominion Archivist's responsibility to advise departments on matters of policy respecting access to public records, a role that was lost along the road to access legislation.

In terms of the guidance given to departments regarding access to the records within their custody and younger than thirty years, the Directive instructed that normal practices be followed with respect to security classification

⁵⁸ Cabinet Directive No. 46 2(3)(c).

such that access was not be permitted to any record received from another department if access would be refused by the originating department. This laid the foundation for checking access restrictions with other departments.

The development of a strong patron base of committed historians, complemented by advances in the system for disposition of records, had created the climate for more liberal provision of access. CD 46 constituted the first overt effort to include a regime of regulation of access in the picture. However, by the time it was issued, the whole tenor of public discussion shifted dramatically. By the early 1970's, there was a convergence of historical developments, precedents in other countries, and domestic concerns that undermined the essentially conservative and limiting approach of CD 46. From the mid-1970s, parliamentary and public discussion focused on the demand for a right of access to all public records, not just those that departments were prepared to transfer to the Archives.

In fact CD 46 did not come out of the blue. The Liberal government of the day had been feeling public pressure to institute more open government. The Prime Minister favoured participatory democracy, even if he faced opposition from more conservative political and bureaucratic quarters. The Directive, for all its limitations, opened up the question of access to active operational records of government. It became a red flag for those who favoured the kind of openness they supposed was instituted by the passage of *the Freedom of Information Act* in the United States. The debate concerning access was predominantly focussed on government accountability to the citizens and citizen participation in

the democratic process, rather than on access to government records for the purpose of facilitating historical analysis of the past actions of government. In the end the government was persuaded to bring down legislation. When they were proclaimed in 1983, the *Access to Information Act* and the *Privacy Act* constituted a comprehensive set of rules governing access to federal public records, including those containing personal information. Facilitating access while protecting personal privacy is a delicate balancing act, one that continues to challenge information professionals.

It was concern over the ability of the legislation to achieve this balance that dominated the debate concerning access legislation in the pages of *Archivaria*, the journal of the Association of Canadian Archivists. Archivists watched the access debate with keen interest. In the 1978 Summer issue of *Archivaria*, the Notes and Communications section was crowded with opinions about the form access legislation should take. It also included an article by Jean Tener entitled "Accessibility and Archives," which outlined concerns about the statutory basis for access. Beginning from the premise that strong access legislation would be of benefit to researchers, Terry Cook examined the role of the courts in adjudicating disputes regarding access. Concerned that the legislation would have no real "teeth," he argued that, "only the courts or some Information Commissioner empowered to release documents can render a freedom of information act more than political window dressing."⁵⁹ In the end, the ATI created the Office of Information Commissioner with the power to take

disputes to the Federal Court. Some provincial versions of access legislation have empowered their Commissioners with the ability to order departments to release records.

In the next edition of *Archivaria*, Dr. Wilfred Smith, Lamb's successor as Dominion Archivist, emphasized the crucial distinction between transfer of records to the Archives and access. At this time, records were not made available in many countries until they were transferred to an archival institution of the government concerned.⁶⁰ In Smith's view, in Canada there was no necessary connection between archival custody and access to federal records. In particular, the *Public Records Order* of 1966 provided that government departments would keep records on site for only as long as they were needed for operational purposes. Smith went on to argue that in practice Canada did enjoy more liberal access than most countries. This, he explained, was because of the modified thirty-year rule,

which instead of denying access to records until they are thirty years old as in Britain, for example, is based on the policy that access will be permitted to most records when they are not required for departmental operations and that with a few exceptions departments cannot withhold access for more than thirty years.⁶¹

CD 46 was the first step toward codifying the terms of access to the public records held at the Public Archives of Canada. The concept of citizen access to

⁵⁹ Terry Cook, "Freedom of Information: The Role of the Courts," *Archivaria* 6 (Summer 1978) 158.

⁶⁰ Wilfred Smith, "Accessibility and Archives: A Response," *Archivaria* 7 (Winter 1978): 147.

⁶¹ Smith, 147.

public records in archives had come a long way since the rescue mission to retrieve documents pertinent to the study of Canadian history was begun. The very beginnings of the Public Archives of Canada were built on an invitation to scholars to participate in politics by writing Canadian history, based on the sources in the custody of the Archives. Historians themselves have debated their role as political commentators,⁶² but one thing is clear: that historical interpretation of the past actions of government must be regarded as participation in the political process. The invitation to researchers to peruse, use and interpret the records of government, once thirty years had passed, was a de facto invitation for them to participate, by means of their analysis and interpretation of the government's past actions.

Further, Dr. Smith warned that, "If the proposed exemptions from general access in the new legislation are considerably more extensive than those designated in the current access directive, freedom of information legislation will result in a drastic reduction in the records available for research unless it is accompanied by regulations which provide for declassification."⁶³ Dr. Smith acknowledged that security classification was imposed by departments in accordance with section 7 of the Access Directive. As the head of the Public Archives, Dr. Smith's perspective was focused on the impact that the provisions of the new legislation would have on the resources of that institution, and its ability to continue to deliver reference service to the records in its holdings.

⁶² An example is the debate concerning the role of Canadian history that was set off by Jack Granatstein's, Who Killed Canadian History? (Toronto: Harper Collins, 1998).

⁶³ Smith, 147.

In 1977, in response to increased pressure to codify the right to access active public records, the Liberal government released its discussion paper, or Green Paper as it was known, *Legislation on Public Access to Government Documents*. The paper canvassed several options for access-enabling legislation. Much of the argument for access legislation was founded on the principle of participatory democracy. In order for citizens to effectively participate in their government, they must have the right to consult government records. Record-keeping is inextricably linked with the concept of accountability; one creates a record as part of carrying out everyday business. The Green Paper states: "Effective accountability – the public's judgement of the choices taken by government – depends on knowing the information and options available to the decision-makers."⁶⁴ This general statement of purpose embraces the principle that the more open or transparent government is, the more accountable and therefore the more democratic it is.

By its defeat in May of 1979, the Trudeau government had not introduced an access bill. The only regulation introduced by the Trudeau government after CD 46, was the *Access Directive* of 1978; a clarification that superseded CD 46. The practical implications of the *Access Directive* were few. While it offered greater incentive for departments to transfer inactive records to the Public Archives Records Centre, access was still defined only in terms of research. It extended the definition of public record to include "machine readable" records, and provided that such records having long-term value must be transferred to the

⁶⁴ Legislation on Public Access to Government Documents. 1.

Archives. Still, there was no terminal date on exemptions and it did not curtail the discretionary powers of Ministers to declare an exemption. In essence, the bulk of archival material already under the custody and control of the Dominion Archivist could be made available under the provisions of the *Access Directive*.

In 1979, the new Conservative government of Prime Minister Clark introduced Bill C-15, the *Freedom of Information Act*, but it died on the order paper when the government was defeated by a non-confidence vote. While this Bill only made it to debate at second reading, it was a defining moment in the progress toward access legislation. In 1980, Bill C-43 was introduced under a Liberal administration, received second reading in January 1981, and was referred to the Standing Committee on Justice and Legal Affairs.

The provisions of Bill C43 were analysed in the pages of *Archivaria* by Robert Craig Brown, a University of Toronto history professor, who expressed concern over the potential for conflict between the access and privacy components of the act. He stated, "Bill C43, in its unamended form, puts these two responsibilities in conflict. Some specific clauses of Bill C43, and some omissions from the bill, will have the effect of severely restricting rather than enhancing access to the historical records of Canada."⁶⁵ The new legislation brought forward the issue of the function of an historical record versus an operational one, and the potential for the concepts of access and privacy to be used in an adversarial, rather than a balanced manner.

⁶⁵ Robert Craig Brown, "Government and Historian: A Perspective on Bill C43," *Archivaria* 13 (Winter 1981-82) 121.

Bill C43 received Royal Assent in June of 1982 as two separate Acts, the *Privacy Act* and the *Access to Information Act*, and ushered in a new era of access in the federal government. It also created new responsibilities at the Public Archives. In general, archivists agreed that access to information would be a positive step toward increased use of archival material and archival resources. In a paper published very shortly after Bill C-43 was passed, John Smart made the case that archivists must be advocates for liberal access to public records, and asserted that the profession would be judged in the 1980's on how well they responded to that call.⁶⁶ Others have argued that the advent of the *ATI Act* presented such bureaucratic hoops to jump through, that archivists' utility to the researcher would be restricted. Researchers have argued that the provisions of the Acts have had the effect of closing records previously open, and frustrating those attempting to use them for the purpose of historical enquiry.

The main provisions of the *Access to Information Act* were based on the purpose clause of the *Act*, which simply stated that every citizen or permanent resident has the right to view the operational records of government, with limited and specific exemptions. It was also not intended to supplant existing access procedures in departments but to supplement them. The practice of routine disclosure and active dissemination was to be encouraged. The limited and specific exemptions were divided into two categories: mandatory and discretionary. The mandatory exemptions indicate that the head, as designated

⁶⁶ John Smart, "The Professional Archivists' Responsibility as an Advocate of Public Research, *Archivaria* 16 (Summer 1983): 147.

under the Act,⁶⁷ shall refuse disclosure of records relating to or containing information about: information obtained in confidence from other governments, policing services for provinces and municipalities, personal information as defined in the *Privacy Act*, third party information, and statutory prohibitions as laid out in Schedule II of the Act.

The most important change was that access was no longer defined in terms of research, but as a general right. Section 4 of the Act states that: "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*, has a right to and shall, on request, be given access to any record under the control of a government institution."⁶⁸ This means that it was no longer necessary for the Archives to rely on recommendations from the department that transferred the record for instructions regarding access by the public. Under Section 3(1) of CD 46, the right of access was defined specifically with respect to records older than thirty years. Under the new Act, the access rules applied to all records, wiping away the distinction between records in the custody of the archives and those in the departments. Researchers no longer had to convince the government why they should be granted access; the department carried the burden of applying limited and specific exemptions to requests for access.

⁶⁷ The head is normally a designate under the Minister responsible.

⁶⁸ *Access to Information Act*, R.S., 1985, c. A-1, s. 4(1).

The new access regime meant that traditional researchers as well as anyone else could exercise the right of access to any records of government, regardless of age. The rules were uniform across the board, both in terms of access and in terms of the exemptions applied to the right of access, and this is the location of the major bone of contention for historical researchers. With no passage of time caveat placed on exemptions, with the exception of cabinet records, the exemptions may not always seem as reasonable for archival or inactive records. The exemptions are listed in detail through sections 13-25 of the *ATI Act*. The act of transferring custody and control of the records from the department to the Archives, however, also transferred the burden and responsibility of applying appropriate exemptions barring the release of records (or parts of records) that fall under exempt categories. While the rules levelled the playing field in some respects, and opened up the range of time that records could be accessed, no means were introduced to quell the concerns of historical researchers who felt that the exemptions should be limited by a terminal date.

An analysis of the phases that a record goes through as it moves through the life cycle helps to illuminate its varied roles and uses, and highlights the "passage of time" issue. In terms of archival use, records that have been accessioned are, by practice and definition, past their operational use. For records that document political decisions, the passage of time has the effect of reducing the political consequences of disclosure. While these records are no longer as politically potent as they were when they were in active use, archivists generally agree that they are still useful for purposes other than those for which

they were created. As records move through the life cycle, they shed old uses and take on new life, as creative researchers bring unique perspectives, questions and interpretations to them. This issue was championed by the Canadian Historical Association, which lobbied to have the passage of time principle embedded within the provisions for protection of personal information.

In 1983, there was general discussion among historians, most notably Robert Craig Brown, who brought his concerns to the pages of *Archivaria*, that the exemptions noted in the *ATI Act* were not fettered by a general passage of time rule. In most cases, even those records that fall under exempt categories of the Act have a diminishing value of confidentiality as time goes by. Like other contextual attributes that bring meaning to aggregates of records, the concept of confidentiality is situational. After the appropriate period of time has passed, and the records are released for research purposes, the researcher should be able to reconstruct the rationale for rendering the records confidential. The consequences of breaching that confidentiality, however, will have ceased to exist. The *Privacy Act*, however, specifically addressed the issue of personal information contained within public records transferred to the Archives. In sections 7 and 8, the *Privacy Act* makes clear that it may **permit** the use and disclosure of personal information for statistical and historical research, however no right of access exists for such information. The *Privacy Act* permits the discretionary disclosure of personal information in subsection 8(3):

Subject to any other Act of Parliament, personal information under the control of the Public Archives that has been transferred to the Public Archives by a government institution for archival or historical

purposes may be disclosed in accordance with the regulations to any person or body for research or statistical purposes.

Furthermore, the regulations relevant to subsection 8(3), found in Order in Council P.C. 1983-1668, outline the conditions for disclosure of archival or historical personal information for research or statistical purposes. Summarized, the conditions provide that disclosure could be permitted if the information is of such a nature that it would not constitute an unwarranted invasion of privacy of the individual to whom the information pertains; one hundred and ten years have elapsed following the birth of the individual to whom the information pertains; in cases where the information was obtained through the taking of a census or survey, ninety-two years have elapsed following the taking of the survey.

Cabinet confidences, for example, were the subject of heated debate during the late 1970's. They are the subject of a clause of the Act, maintaining their confidentiality for a fixed period of time. Subsection 69(3)(a) states that the exemption does not apply to "confidences of the Queen's Privy Council for Canada that have been in existence for more than twenty years." The inclusion of a terminal date on this exemption indicates an acknowledgement that the justification for keeping this group of records confidential diminishes and eventually disappears over the passage of time. However, the political message contained within those records can be amplified when examined through the lens of historical analysis. The records, while protected from scrutiny for a period of time to safeguard the political decisions made within the safety of the cabinet deliberation, must at some point become available in order that the historian may

use the distance that time provides to illuminate times past. Historical analysis can be a political activity, but not one that has the same political consequences as those analyses that take place contemporary to the creation and use of the records.

Prior to the passage of the Acts, the passage of time was the guiding principle for access – the Access Directive was based on the thirty year rule. After the achievement of ATIP, passage of time took a back seat as a criteria for the release of records. Access was being recognized as a general right, and no time period was specified except in a very few clauses of the Act.

Only a month after the passage of the *ATI Act*, Dr Wilfred Smith issued a statement to the Archives' staff indicating how he expected to handle the public service impact of the Act. He stated, "As a policy, the Public Archives will respond to any access request for archival government records under our control in a manner consistent with the *Access to Information Act* without requiring the submission of a formal request as specified by that Act."⁶⁹ This was part of Dr. Smith's strategy to ensure that research interests did not suffer as a result of the introduction of the Act's provisions. While the Act was not intended to interfere with existing routines for active dissemination and routine disclosure, the Archives did have to ensure that a pre-defined process of vetting requests that could fall under one of the exempt categories was in place.

In his last Annual Report as Dominion Archivist, Dr. Wilfred Smith commented on the new legislation:

The Access to Information and *Privacy Act* came into effect in July 1983 and a great deal of attention was given to implementation of the act by the Public Archives. The effect on research was explained to the research community and a special unit was established to review the requirements of the legislation in regard to requests for access to government records in the Public Archives. Additional person-years were granted to permit the Archives to surmount the increased workload imposed by the legislation.⁷⁰

The effect on research was mitigated by the Archives by its implementation of the "informal" access review for historical records already within the custody of the Archives and through communication with the research community.

To properly understand the provisions of the *ATI Act*, one must take into the account the restrictions on access that are imposed by the *Privacy Act*. The general rule is that privacy trumps access, but archivists bring perspective to that rule, in that the reasons for safeguarding privacy diminish over time, just as do the reasons for safeguarding confidentiality. Because the *Privacy Act* impacts the *ATI Act* and the processes that contribute to administering access, the Acts will be described in this chapter as "ATIP," Access to Information and Privacy. It is essential that the two acts be understood as a collaborative effort in achieving the balance between access and privacy.

This loss of passage of time as a guiding principle was the most basic issue for the Archives senior staff to sort out as they prepared to change practices to support the requirements of the Act. Under ATIP, transfer of records

⁶⁹ P.A.C. RG 37, vol. 530 File: ATIP 9. memorandum from W.I. Smith August 3, 1983.

⁷⁰ Archives Report for 1983-1984, 1.

to the Archives meant physical transfer as well as the transfer of the responsibility for access determination.⁷¹ The practice previous to ATIP was that the department could determine access restrictions on records held by the Archives that were younger than thirty years old. Writing in 1984, Robert Hayward worried that the new duties of archivists as administrators of ATIP would undermine their role as advocates for the interests of researchers.⁷² This concern was mitigated by the creation of a new division to deal with the review of files for the purposes of ATIP. Employees in this division are ATIP Analysts; they are required to have a background in history, but are not classified as archivists. They are charged with the task of making sure that records requested by researchers can be released under the terms of ATIP legislation. They explain the reasons for denial of access. In some cases, they sever exempt portions of records before releasing them, and provide researchers with the specific reasoning behind the severances or the decision for complete non-disclosure.

The creation of the ATIP division was the most visible impact on the resources of the Public Archives. The division was required to keep statistics regarding the administration of the *ATI* and *Privacy Acts*. Correspondence and directives from senior Archives staff during the first year of ATIP administration indicates that the reporting requirements of both Acts were taken very seriously.⁷³ Treasury Board provided institutions named in Schedule I of the Act with an Evaluation Checklist to ensure that their first access report was as

⁷¹ Robert J. Hayward, "Federal Access and Privacy Legislation and the Public Archives of Canada," *Archivaria* 18 (Summer 1984): 53.

⁷² Hayward, 54.

complete and consistent as possible. This included reporting on the properly authorized delegation Order, with position and responsibility attached. The delegation Order is a clear statement of the delegation of authority for the administration of ATIP within the agency. Other items that were required for compliance were: documentation procedures to account for all administrative actions taken in processing requests, and procedures to ensure that notices are sent to applicants when appropriate and within the specific timelines for responses to requests. In the administration of fees, agencies had to document their fee assessment process and fee waiver policy. Also to be included in the report was the ratio of requests appealed to the Information Commissioner to total requests, the ratio of requests appealed to Federal Court to total requests, the ratio in rulings for and against the institution, and the ratio of formal to informal requests. This is a summary of a quite exhaustive list, which no doubt fuelled the feeling that the administration of ATIP was going to become an exercise in bureaucratic frustration.

In 1977, the authors of the Green Paper projected that the government as a whole would receive approximately 70,000 access requests in the first year.⁷⁴ It was not until ten years after the Act was passed, in 1993, that the cumulative total of access requests reached that amount.⁷⁵ In the *Archives Annual Report* for 1987, the statistics revealed that in one year, Archives staff had processed 290 formal requests and provided 16 053 photocopies under the *ATI Act*. Under

⁷³ P.A.C. RG 37, vol. 530 File: ATIP 9. Evaluation Checklist.

⁷⁴ Legislation on Public Access to Government Documents. 1977, 26.

⁷⁵ Canada. Office of the Information Commissioner, Annual Report, 1993.

the *Privacy Act*, 6615 formal requests were processed and 613,689 photocopies provided.⁷⁶ Of the access requests, 84.48% were answered within the first 30 days, and of the privacy requests 97.85% were answered within the first 30 days. Most requests at the National Archives are administered through the informal review of ATI-flagged files and do not enter the formal access request process.

Two of the basic archival activities, arrangement and description and appraisal require a comprehensive understanding of organizational structure. A vast body of archival literature is devoted to the theory and practice of arrangement and description and appraisal. These archival functions require a good working knowledge of an organization, how it was put together, and what it does. The structural analysis of corporate divisions and their scope of work is at the heart of archival arrangement and description, and also at the heart of archival appraisal because the fundamental factor in appraisal is relevance to the repository's mandate. The advent of ATIP forced government departments to produce and keep up to date a registry of records. Subsection 5(1) of the Act stated:

5. (1) The designated Minister shall cause to be published, on a periodic basis not less frequently than once each year, a publication containing

(a) a description of the organization and responsibilities of each government institution, including details on the programs and functions of each division or branch of each government institution;

⁷⁶ Archives Report for 1987, 68.

(b) a description of all classes of records under the control of each government institution in sufficient detail to facilitate the exercise of the right of access under this Act;

(c) a description of all manuals used by employees of each government institution in administering or carrying out any of the programs or activities of the government institution; and

(d) the title and address of the appropriate officer for each government institution to whom requests for access to records under this Act should be sent.

This directory, first called the *Access Registry* and then *InfoSource*, provided archivists with a comprehensive tool for analysing the organizational structure of government. It also forced departments to take an inventory of the records under their control. Previously known as the *Access Register* and the *Index to Personal Information*, this publication provides outlines of the functional responsibilities of all government departments and agencies, with history, legislative requirements and programmes listed. It also lists the types of records generated as a result of government activities. While this was intended to assist requesters to find government information, it had an added bonus of making departments, including the Archives, take stock of their records.

The *ATI Act* is relevant to the most basic archival activities because it creates tools to support those activities. It provides a network of procedures that makes the fundamental archival work of arrangement and description and appraisal more efficient, as it requires that the structure of government is more explicit and transparent. The Act also reinforces thinking about records in terms of the life cycle, and demands attention to records as vessels of accountability

from the earliest stages of the life cycle. ATI gets people thinking about records as "records" at the early stages of the records' life cycle. This is a tangible impact of the Act and a good one.

There were administrative hurdles to overcome, as confirmed by the collaboration of the Public Archives and the Treasury Board on an "action plan" designed to "facilitate the achievement of initiatives designed to improve the management of recorded information in federal government institutions, and to ensure the preservation of recorded information of enduring value."⁷⁷ This collaboration took place one year before the *NA Act* became law and the correspondence surrounding it reveals some competition between the two agencies in terms of the approach to be taken with records management in government. It was agreed that the Public Archives would advise the Treasury Board on the management of records and deliver an annual report on the state of records management in the Government of Canada. It would be responsible for assessing and approving proposals to destroy records or to remove them from the control of the Government. PAC would also conduct evaluations of the records management function in government institutions on behalf of the Treasury Board; it would provide advice, conduct training, develop evaluation standards, and conduct research in records management. It would also administer the federal records centres across Canada which store, protect, service, and dispose of dormant records of government institutions. It would administer the National Personnel Records Centre, and administer secure sites

for the storage and protection of a set of the essential (vital) records of government institutions. It was also noted that the Archivist would continue to appraise records and select, acquire and preserve those records which have archival value. Most of these policies were later codified in the *National Archives Act*.

The action plan was set in place partially because of negative reports concerning the state of records management in the federal government. The Dominion Archivist, Dr. Jean Pierre Wallot, in a letter to Mr. G. Veilleux, Secretary of the Treasury Board confirmed that, "In general, departments and agencies are moving too slowly toward compliance with the policy."⁷⁸ In addition, the 1983 Report of the Auditor General concerning the Archives states, "... the Archives has not carried out fully its mandate under the 1966 Order in Council to evaluate and report annually to Treasury Board on records management in government. Systematic assessment is needed to detect trends and identify the underlying causes and effects of weaknesses so that Treasury Board can take corrective action."⁷⁹

The landscape of legislation changed at the Public Archives in 1987, when a new *Archives Act* was passed and gave the institution a new name, the National Archives of Canada. The *National Archives Act (NA Act)* of 1987 did not introduce any new aspect of access rights for citizens, but it does form an

⁷⁷ N.A.C. RG 55 Box 27 TBS/PAC Joint Action Plan, APB 2610-001 Information Management RG 55.

⁷⁸ N.A.C. RG 55, Box 27 Wallot to Mr. G. Veilleux, Secretary of the Treasury Board, dated October 2, 1986.

⁷⁹ Section 15.15, Report of the Auditor General of Canada, 1983.

important part of the legal framework supporting those rights, specifically with respect to the destruction of public records. It ties together the long struggle for systematic disposition with the administration of access as a recognized right. Several general perceptions of the potential effects of ATIP on the Archives emerged from the debate over Bill C-43 and its predecessors and in the preparation for the Acts to come into force. A closer look at the specific provisions of the *Access to Information Act*, the *Privacy Act* and the *National Archives Act* will bring these perceptions into focus.

The disclosure of records containing personal information is dealt with in subsection 8(2)(j) of the *Privacy Act*, which allows for research and statistical purposes under specified conditions. Also, subsection 8(3) states that:

Subject to any other Act of Parliament, personal information under the custody or control of the National Archives of Canada that has been transferred to the National Archivist of Canada that has been transferred to that National Archivist by a government institution for archival or historical purposes may be disclosed in accordance with the regulations to any person or body for research or statistical purposes.⁸⁰

This is part of the network of strategies developed by the Archives to permit research use of records containing personal information. The discretion for determining unwarranted invasion of privacy is given to the National Archivist.

⁸⁰ Quoted in National Archives of Canada, Guidelines for the Disclosure of Personal Information for Historical Research at the National Archives of Canada. (Ottawa: National Archives of Canada, 1995) 2.

The definition of “record” was revised and broadened from the version used in CD 46. According to the *Access to Information Act*, a “record” includes “any correspondence, memorandum, book, plan, map, 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.”⁸¹ This definition is very broad; it includes any documentary material discovered in a file or on a desk but does not give any indication of the purpose that a record ought to serve. The all-encompassing nature of this definition does not make room for such items as transitory records. In fact, the Access to Information Review Task Force had to commission a study about the practice of dealing with transitory records independent of established retention schedules to better understand the application of this practice.⁸²

As the custodian of the historical records of government, and as the official government record office for Canada, the National Archives continued to be a key player in the delivery of access services to Canadians. As such, the section outlining the mandate of the National Archives, S4(1), is important to understanding how the Archives, as an institution, fits into the access framework.

The objects and functions of the National Archives of Canada are to conserve private and public records of national significance and facilitate access thereto, to be the permanent repository of records of government institutions and of ministerial records, to facilitate the

⁸¹ *Access to Information Act* S. 3.

⁸² Christine M. Ardern, “Transitory Records – A Review,” www.atirtf-geai.gc.ca/paper-transitory-e.html

management of records of government institutions and of ministerial records, and to encourage archival activities and the archival community.⁸³

The mandate as stated above indicates that the National Archives of Canada assumes the responsibility for facilitating maintenance of the infrastructure necessary for the delivery of the provisions of the *Access to Information Act* for archival records.

In the absence of access legislation, the *NA Act* might have looked very different. The deliberations of the Public Records Committee in the late 1940's and early 1950's established the role of the Treasury Board in the administration of a records management process for government departments, but no legislated authority existed for the systematic identification of those records held by departments. Not until the *ATI Act* prescribed that departments provide an access register was this fundamental issue addressed in legislation. It had, however, been identified by W.E.D. Halliday as a problem for acquisition of records by the Archives in 1948.⁸⁴

The *NA Act* is a key element in the provision of access to government records throughout their life cycle, as it serves as a bridge between the *Access to Information Act* and its practical implementation. The *NA Act* does not suggest that government institutions have the duty to create records; however, its clauses regarding the duty to retain records once they are created are very clear. The duty to retain records infers the duty to develop clear guidelines on records

⁸³ Canada. National Archives of Canada Act. 4(1).

⁸⁴ Public Records Committee RG 37 Acc. 7 vol. 4: National Archives File II, January 19, 1948

management, as the provisions are clearly geared toward protecting those records that may have long-term value. Coupled with the requirement for a directory of corporate records (*Infosource*), the two Acts require some “macro” records management for compliance. The Archives’ accountability to the government and to the citizen is inextricably tethered to its function as the final approver for records destruction. Even at the end of the life cycle, the record is used to render account for the action(s) of which it is the embodiment. Therefore, the act of destruction is the final act of responsibility to the process for which the record was created; the record must be accounted for and duly sentenced before its execution.

The Archivists’ responsibility is also expressed in direct relation to the concept of access in his/her role in the destruction of records. The *NA Act* states in Section 5(1):

No records under the control of a government institution and no ministerial records, whether or not it is surplus property of a government institution, shall be destroyed or disposed of without the consent of the Archivist.

This clause is intended to ensure that records of historical significance do not fall through the cracks and are not inadvertently destroyed, but it also backs up the provisions of the *ATI Act* in a very important way. As discussed previously, the *ATI Act* and the *National Archives Act* serve each other in a close, mutually beneficial relationship. Once the *ATI Act* was in place, the missing piece of the puzzle was a re-vamped archives legislation, not the long-sought after Public Records Act. The trio of “records” legislation, the *Access to Information Act*, the

Privacy Act and the *National Archives Act* eliminated the need for the Public Records Act.

In the context of potential reforms to the *ATI Act*, National Archivist Ian Wilson explained the context of Section 5(1) in a speech entitled, "The Fine Art of Destruction." He explains that before the passage of the 1987 National Archives Act, the Deputy Heads of departments decided what records they wanted to keep for business and reference purposes, then Archives staff were permitted to pick from the "left-overs." Section 5 allows the National Archives to "preserve national archival and historic memory by providing an opportunity for us to intervene directly in government's records destruction process."⁸⁵ The provisions in Section 5 provide that records of national significance do not get lost to careless destruction, but they also provide, by default, that records schedules and Records Disposal Authorities exist, thus providing the required framework for the *ATI Act* and the *NA Act* to work effectively. The framework of legislation and policies that regulate records management serve different goals, but uphold the same right to access the records of government.

The *ATI* and the *NA Act* share a close relationship; the effectiveness of the access stipulations is dependent on the Archivists' role in the disposition process. The evolution of the National Archives from occupying a solely cultural role to that of a full-fledged government records office set the groundwork for the provision of meaningful access to government information for Canadians.

Ministerial records, those objects of debate and concern, are covered by the *NA Act*, and cannot be destroyed without the consent of the National Archivist. Here, the *NA Act* complements the right of access by providing that, while requesters may not be granted access to a minister's records while they are active, that the records in question will still be subject to selection by the National Archives.

Schedule I of the *ATI Act* lists all of the government institutions that are subject to the Act. The Act provides in subsection 77(2) for the Governor in Council to amend Schedule I by adding any department, ministry of state, body or office of the Government of Canada. During Dr. Jean-Pierre Wallot's testimony before the committee considering its order of reference on Bill C-95, the National Archives bill, the issue of the completeness of Schedule I was brought up with particular concern being drawn to the papers of Crown corporations and royal commissions.⁸⁵ Dr. Wallot informed the committee that royal commissions' papers are normally transferred to the archives because the Privy Council Office usually explicitly states in the Order in Council which creates the commission that the papers should be transferred to the public archives after completion of the work. While the law did not explicitly order the transfer of royal commissions' papers, they were either directly included by virtue of the stipulations in the Order in Council or transferred with the records of the Privy

⁸⁵ Ian Wilson, "The Fine Art of Destruction," at Access Act Reform: The Destruction of Records and Proposed Access Act Amendments A One-Day Seminar and Training Session. Ottawa: 2000. 7.

⁸⁶ House of Commons. Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-95 An Act respecting the Archives of Canada and records of government institutions of Canada and to amend the Copyright Act. (Queen's Printer: Ottawa, 1986) 1600.

Council Office. The issue of Crown corporations' papers was not discussed further.

Current critics of access laws across Canada point to the "agencification" of government activities as a challenge to the effectiveness of ATI legislation. When the government creates new bodies, the new agency may be exempted from the legislation in some cases. According to Freedom of Information law critic, Alisdair Roberts, only some of these agencies will remain subject to the requirements of the existing legislation. An example is the Liberal government's consolidation of food inspection activities from various existing government departments under the Canadian Food Inspection Agency⁸⁷ and the creation of the Canada Pension Plan Investment Board, a government-owned corporation for the management of the Canada Pension Plan.⁸⁸ The Canadian Food Inspection Agency has been added to Schedule I, but the Pension Plan Investment Board has not. Such latitude with arms-length public agencies serves to slowly deteriorate the spirit of access legislation that was stated so clearly in 1977's *Green Paper*. It also has the potential to create a gaping hole in the transfer of records to the archives, as the definition of a government institution in the *National Archives Act* references those institutions listed in the *Access to Information Act*.

Schedule I, therefore, represents the most important connection between the two Acts. It lists all of the agencies of the Canadian federal government that

⁸⁷ Canadian Food Inspection Agency Act, S.C. 1997, c.6.

⁸⁸ Canada Pension Plan Investment Board Act, S.C. 1997, c. 40.

are subject to both the *ATI* and the *National Archives Acts*. It clearly defines the scope of the Archives' responsibilities with respect to its government clients. This is in contrast to the Public Records Order, which only referenced the main departments of government (as listed in the *Finance Administration Act*). If agencies are removed from the schedule, they are no longer within the Archives sphere of responsibility, and both current political and historical accountability is lost.

The great hope held by archivists and others interested in records was that the *ATI Act*, and the infrastructure of policy that supported it, would promote a tighter grasp on records management within the federal government. One thing it did do was compel government agencies to contribute to *Infosource*. This publication has been invaluable to archivists conducting archival appraisal, as it provides, within one source, the linkages of responsibility for a particular government function. It is generally agreed that *Infosource* is outdated, but it or something like it should be improved and maintained in order that researchers can efficiently identify the agency responsible for creating the records required.

The approach to appraisal at the Government Archives Division of the National Archives developed a macro-appraisal approach, beginning in 1989, and more fully articulated in 1991. Terry Cook describes the background research phase of appraisal as "macro-appraisal." This, he states, "involves researching, understanding, and evaluating the degree of importance of the functions, mandates, programmes, decision-making processes, internal organization and structure, and activities of the records-creator (the branch,

sector, or programme entity covered by the submission.)⁸⁹ According to Cook, macro-appraisal is based on the premise, first articulated by Margaret Cross Norton in the middle of the last century, that records follow function. Using this insight as a guiding statement, Cook extrapolates that "records must be understood first within their contextual circumstances of creation and contemporary use - - (. . .), not subsequent or anticipated research use - - if they are to be intelligently appraised, and later described and made available."⁹⁰ The macro-appraisal vision could not be achieved without an ordered records management approach to transfers. Rolled into the macro-appraisal plan is also a new disposition process that relies on negotiated multi-year disposition plans to set the macro-appraisal targets and work timetables for both archives staff and department staff.⁹¹ Using a resource like *Infosource*, intended to guide researchers of active records through the maze of government bureaucratic structures to arrive at the creator agency, archivists can more easily identify the flow of functions that the records support. It may be argued that the *ATI Act* helped the Government Archives Division to more efficiently achieve its macro-appraisal vision.

The passage of the *ATI Act* essentially eliminated any further discussion of a Public Records Act as opposed to an Archives Act in Canada, as it covered

⁸⁹ Terry Cook, "An Appraisal Methodology: Guidelines for Performing an Archival Appraisal, 3rd draft" (Government Archives Division, National Archives of Canada: Ottawa, 1991): 4.

⁹⁰ Terry Cook, "Macroappraisal: The New Theory and Strategy for Records Disposition at the National Archives of Canada," presented at the Annual Conference of the Society of American Archivists, Washington, D.C., September, 1995. 5.

⁹¹ Cook, "Macroappraisal: The New Theory and Strategy for Records Disposition at the National Archives of Canada," 3.

most of the conceptual ground that needed to be legislated. It was understood and expected that the rules and regulations surrounding the practical execution of records management practices should be handled through policy documents. One of the side-effects of the *ATI* and *Privacy Acts* is that Treasury Board put out the *Management of Government Information Holdings* policy. This policy has had a positive result on the acquisition activities of the National Archives, as transfers of records arrive in a more ordered and organized fashion, thus cutting down on the work involved with the initial processing of a transfer.⁹² An early hope for the *ATI Act* was that the condition in which transfers would arrive at the Archives would be improved, possibly cutting down the considerable inventory work that could be associated with a poorly classified transfer the provisions of the Act would open the doors to departments or agencies traditionally closed to the Archives. This seems to have been the case.

Between 1983 and 1993, Daniel German observes that the Archives settled into a kind of routine with ATIP. He acknowledges that there are serious workflow problems. The processing of requests and the backlog of restricted holdings to review are a daunting task for the staff of the Access Division. Still, German ends his analysis of the first decade of the ATIP regime on a positive note, indicating that the Archives has continued to provide researchers with the information they need, while still serving the requirements of the legislation.⁹³

⁹² Paulette Dozois, "The Effect of the Access to Information and Privacy Legislation at the National Archives of Canada," paper presented at the ACA Conference, Regina. 1986.

⁹³ Daniel German, "Access and Privacy Legislation and the National Archives, 1983-1993: A Decade of ATIP," *Archivaria* 39 (Spring 1995): 211.

In his report for the Department of Canadian Heritage of the future directions of the National Archives and the National Library, Dr. John English produced a report with recommendations. In it, he noted that the *ATI Act* has had an “enormous impact” on the National Archives. He notes that many fonds remain closed because the NA does not have the staff to process the papers for privacy concerns. Unfortunately, a big gap in the development of the *ATI Act* was the lack of involvement from the Public Archives of Canada.⁹⁴ English also notes that some information protected under the mandatory exemption “relationships with other governments” (S13) may be overly restrictive. The recommendation was that the “National Archivist should take an active part in the revision of Access to Information legislation and Privacy legislation.” The structure of the law itself is not the root of the problem, but the lack of staff to carry out its provisions.

Over the years, archival practice and theory came to accept and support the notion that access should be extended to anyone who sought it. Here is the location of one difference between the intents of archival access and access based on ATI legislation. ATI legislation limits access to citizens and permanent residents, and this supports the argument for ATI as an instrument of participatory democracy – only those members of the society who have a stake may consult the records of government. On the surface, then, there would appear to be a concomitance between the aims of ATI legislation and the

⁹⁴ John English, The Role of the National Archives of Canada and the National Library of Canada Report submitted to the Honourable Sheila Copps <http://www.pch.gc.ca/wn-qdn/arts/eng6.html>

traditional role of public archives to make the sources for understanding the past available for research.

In a paper given at the ACA Conference in Regina in 1986, Paulette Dozois points out that the advent of the new access reality made archivists take stock of the "value added" that came from their reference work. Archivists' knowledge of both the internal and external structure of the fonds can help to narrow down a quite voluminous request for records, and minimise the amount of analysis required to comply with the *ATI* and *Privacy Acts*. In 2000, Dozois was part of a study that analysed the effect of the *ATI* and *Privacy Acts* on record making in the federal government. This study will be discussed in chapter three, as it deals with the issue of the "chilling effect" on records.

In his exploration of access legislations in federal, state and provincial settings in the United States and Canada, David Weber points out that since access legislation is directed at regulating a central archival activity, the administration of access to government records, it "has the potential to effect profound changes to the role of the archivist vis-à-vis government and society in general."⁹⁵ It is evident that the *ATI Act* had a definite impact on the way the Public, and then the National Archives carried out its mandate. The shape of the Archives Annual Report changed to include a section on Access and Privacy Act administration, with a piece devoted to reporting the statistics it was required to keep as a stipulation of the Acts. The *ATI Act* had a serious bearing on the terms

⁹⁵ Weber, David, Access to Public Records Legislation in North America: A Content Analysis. M.A.S. Thesis: University of British Columbia, 1994): 25.

of the *National Archives Act*, covering many of the records management issues that may have been necessary in a Public Records Act and keeping the focus of the Archives Act on destruction with respect to departmental records. ATIP also changed the way archivists thought about their activities; with a new division created to handle access requests, archivists contemplated the role of reference services in the new access landscape. No longer the sole advocate for researchers in a hostile and secretive government environment, archivists had to grapple with a new role. On balance, it appears that the Archives has adjusted well to its position within the new access regime. One problem, however, continually emerges: the Archives requires additional resources to process the backlog of restricted or potentially restricted holdings.

One of the greatest impacts of the ATIP regime was the debate that its inauguration inspired. It required that government departments pay special attention to the records under their control, and gave records handling a higher profile. The Archives had to create a special division to review the requirements of the legislation and the position of ATIP analyst was created. The Archives communicated the new legislated changes to their researchers, and sought ways to minimize any negative impact that the changes would have. The CHA was successful in having a proviso included in the *Privacy Act* to prevent the restriction of records containing personal information held by the Public Archives and available previous to the passage of the Acts. In 1987, when the *National Archives Act* was passed, the trio of legislation dealing with access to government records was complete.

An influential member of the international and national archival communities, the National Archives of Canada helps to shape archival thinking and the development of archival theory. Chapter three will delve further into the investigation of the relationship of the ATIP regime with the concept of access as articulated in archival theory. This investigation will explore the relationship between archival theory and the political reality as reflected in the legislation that provides the framework for providing access to public records held by the Archives.

Chapter Three

The Broad Effects of Access Legislation on Public Records

In Canada, the *ATI Act* has changed the way that archivists think about who their public is and the nature of their relationships with that public: as service providers, as custodians of records, as trustees of the nation's documentary heritage. A fundamental shift in thinking has occurred, in terms of archivists' approach to all aspects of archival activity. It has affected the processing of archival material and the ways in which researchers gain access to the holdings of the National Archives. The advent of the access regime has elevated the concept of accountability as it relates to the activity of record keeping to a high level of awareness among government agencies, including the National Archives. This concept has also permeated professional discourse and changed professional culture. Most specifically, the Act has made the National Archives the only government agency that is responsible for making access decisions for records other than its own.

In this chapter, these avenues of change will be explored from two main perspectives. The *ATI Act* had general impacts on Canadian political culture and the milieu for accessing government information. More specifically, this chapter will examine the effects of change brought about by the *ATI Act* on the National Archives as an institution in practical working terms, as an institution holding an important role in the Canadian state, and as an institution holding a central place within the Canadian archival community. The impact of the *ATI Act* on the major Canadian archival institution will be considered, using examples from archival

discourse as represented mainly in the ACA's scholarly journal, *Archivaria*, and supplemented by other scholarly sources devoted to exploring and developing archival theory. The effects of the "ATI regime" are far-reaching, affecting the way government, and the archives as an agency of government interacts with its public. It also has had a ripple effect through the Canadian archival community, placing the issue of access, the means by which it is provided and sub-categories such as accountability, transparency and accessibility as recurring themes in professional discourse as represented in the pages of *Archivaria* and on ACA Conference agendas.

The first, and most pervasive impact of the *Access to Information Act* is that it catapulted the word "access" into the everyday and common language. It also seeped into the professional discourse of archivists, most notably in the pages of *Archivaria*. This change first took place within the bureaucracy, as government prepared for the impact of the legislation. It then filtered through society as "professional requesters" such as Ken Rubin, who conducts many of his quests for government information in the public arena, published the results of their requests for government records.⁹⁶ Soon, the general public came to understand access as a "right," rather than as a privilege. From the late 1970's on, archivists were bringing "access" into the professional discourse from a variety of perspectives, highlighting some important areas of concern.

⁹⁶ Rubin, Ken "Rules will hinder open access to federal records," Ottawa Citizen June 22, 1983: 9.

The National Archives had always focused part of its administration on the provision of access to the holdings, within pre-established constraints. Up until the Act came into effect, the Archives had worked with researchers to assist access to government records, working with the Public Records Committee to establish regular transfer of public records and advocating access to records still under the custody and control of the departments. The government-wide focus on the issue heightened its importance and made the term a point of discussion in the archival community, both within and beyond government.

Heather MacNeil articulates archivists' responsibility both to the researcher and to the privacy interests contained within records, describing the responsibility as follows: "to ensure a just and equitable balance between these competing interests is dictated by their dual role as public trustees of the records, with a duty to safeguard the privacy interests contained in them, and as communicators of society's documentary memory, with a responsibility to facilitate access to the records that embody it."⁹⁷ MacNeil casts the archivists' role as one of facilitator in terms of access, a term consistent with Bob Hayward's assertion that the archivist's traditional role in terms of access was that of advocate for the researcher. The facilitation of access, MacNeil asserts, must be moderated by the duty to protect the individual's right to privacy. The ATIP legislation set out the terms that mediate the balance between access as a guiding principle, tempered with the obligation to protect personal privacy, preserve national security and to uphold Cabinet confidences – all within

specified periods of time. Archivists, who, under the old regime saw themselves as advocates of access for researchers had to get used to this new regime of balanced interests. This balance is an expectation of the public, built on the essential mediation between individual and state that is at the heart of liberal democratic theory.

In his discussion of the potential impact of the *ATI Act* on the both the internal work processes and service delivery at the National Archives, Bob Hayward suggested in 1984 that the constraints placed on archivists could usurp the traditional role of advocate and replace that role with a wholly bureaucratic focus.⁹⁸ Hayward argues that the *ATI* and *Privacy Acts* created a new role for the Archives. Prior to the passage of the Acts, "Archivists saw themselves as information brokers while at the same time always able to deflect the ire of researchers back upon the department that had refused access."⁹⁹ Under the new rules, the act of transferring custody also transferred responsibility for the access decision, because it is the agency or government institution having custody and control of the records that must administer access to them. This brings about a situation in which the Archives is, uniquely in the federal government, responsible to administer provisions of the Act to records it has not created. Archivists are required to analyze and understand accessioned records with a view to applying access exemptions. This is a difficult task, as many

⁹⁷ Heather MacNeil, Without Consent: The Ethics of Disclosing Personal Information in Public Archives. (Metchuen, NJ: SAA & Scarecrow Press, 1992): 5.

⁹⁸ Hayward, 54.

⁹⁹ Ibid, 54.

discretionary exemptions are dependent on understanding the creator's perspective.

The *ATI Act* changed the way archivists at the National Archives viewed their custody of the records under their care and control. The Act mandated that the Archives perform as a surrogate for the originating department in performing the function of applying the provisions of the Act to accessioned records. The Archives needed to come up with a way to balance several interests: the researchers', the provisions of the *ATI Act*, the interests and mandate of the Archives and the requirements of the originating department. In order to comply with the provisions of the Act, the Archives lost what was regarded as the vital advocacy role, unique to its position in government. Archivists depended on the role of advocate, and the researchers they served depended on the archivist's skill to mediate requests for information with the departments.

This study was begun with the basic assumption that the concept of accountability was tied in with the concept of access for archivists. Records are vehicles of understanding government actions and therefore access to them is a means of the government rendering an account to citizens for its acts of governance. As noted earlier, the purpose clause of the *ATI Act* has been interpreted to uphold the principle that a democratic government needs to be accountable to its citizens through the provision of information concerning all aspects its decision making processes, with exceptions to this rule being limited and specific. This seems at first to be a logical assumption, but when one breaks it down and attempts to make the logical connections between access and

accountability, the connections become quite complicated. In the middle of the equation is the question – where is the location of the National Archives’ accountability? Bob Hayward’s concern over the changing nature of the archivists’ work in terms of acting as advocate for the researcher is central to this question.

Jane Parkinson hones in on the location of archivists’ discomfort in this connection. She states that “In the absence of a clear delegation of authority to archivists, they cannot owe exclusive accountability either to their profession, to archives users, or to records creators, but the concept remains a useful reminder that a professional is not self-determining, or absolved from responsibility to others.”¹⁰⁰ As Parkinson observes, access and accountability are linked because accountability through access is one of the purposes that records serve. Providing access to those records is implied proof that the record creator is able and willing to render public account of the action(s) represented by the record and reinforces the trustworthiness of government itself. If one of the purposes of record keeping is to serve accountability, then the question of to whom is the record creator, and record keeper accountable is very important. For those working within government, the ultimate responsibility is to the public, a problematic concept at best. In general terms, Parkinson explains that “the term accountability means the obligation to render an account or answer for discharge of duties.”¹⁰¹ More specifically, the *ATI Act* speaks mainly to political

¹⁰⁰ Jane Parkinson, Accountability in Archival Science. (MAS Thesis: University of British Columbia, 1993): 131.

¹⁰¹ Parkinson, 12.

accountability, the duty of a government in a democracy to render account of its actions to its citizens. The responsibility to “be accountable” is a cornerstone of liberal democracy which has been refined, negotiated and shaped over time. The *ATI Act* expresses the codification of this ideal with respect to citizens gaining access to the records that document the actions of government.

In the case of the National Archives, “accountability” can be discussed in several contexts. There is the responsibility, delegated by the government to serve the mandate as laid out in the National Archives Act, which expresses the actions for which the institution is to be accountable. Because the *National Archives Act* depends on the *ATI Act* to govern which government agencies are subject to its provisions, the *ATI Act* forms part of the National Archives’ legal foundation.

There is also the notion of historical accountability, described by Jane Parkinson as an duty that “endures beyond the immediate needs of the moment, potentially for as long as the relationship that it serves persists.”¹⁰² The *ATI Act* enables an historical accountability as it determines in the schedule of agencies under its jurisdiction, the agencies that are also subject to the provisions of the *National Archives Act*. Again, in Parkinson’s words, “It is rooted in a belief in an obligation to account to the future members of the group, either by describing, explaining or justifying what one has said or done.”¹⁰³ Access rights are normally discussed and considered within the conceptual framework of democratic

¹⁰² Parkinson, 87.

¹⁰³ Parkinson, 86.

accountability; archivists bring the perspective of historical accountability to this discussion, though Parkinson also casts doubt on this as a concept. She cautions her reader to acknowledge that historical accountability cannot be understood as accountability to historians, as historians "would not be satisfied by the retention of only those records required for current administrative and public accountability."¹⁰⁴

In general conceptual terms, a public archivist is accountable to the "public," and in this connection, the public is understood to be the citizens and/or permanent residents as these are the groups to which the application of the *ATI and Privacy Acts* are restricted. The National Archives has a legislated mandate and each archivist at the NAC is delegated some responsibility for a portion of the activities that support the mandate. In performing those delegated duties, the archivist is accountable for his/her activities in fulfilling that role. Archivists may find themselves in the position of mediating the role of facilitator of access on behalf of the researcher and protector of privacy on the behalf of the individuals named within records. The archivists' responsibility to his/her professionalism and ethics is put to the test when faced with mediating this role.

A famous Australian case frames the question of public archivists' accountability in this context. In the "Heiner Case" documents relating to an official enquiry were destroyed prematurely, with the approval of the Queensland State Archivist. It was argued that the Archivist acted appropriately because her first duty was to serve the government, and she was directed to give approval for

¹⁰⁴ Parkinson, 84.

the destruction by cabinet. The main argument of the Queensland Government was that the role of the Queensland State Archives (QSA) is to assess the "historical value" of the records and that "it is no business of QSA to consider other issues (such as the interest of citizens in availability of records in possible legal proceedings) when exercising that discretion."¹⁰⁵ In his appreciation of the Heiner affair, Chris Hurley poses the question: "Should government archivists exercise their discretion to prevent destruction of documents to safeguard the rights and entitlements of private citizens or only on "historical" grounds?"¹⁰⁶ In Canada, the *ATI Act* would be helpful in dealing with such a circumstance. Section 67.1 (a) states that "No person shall, with intent to deny a right of access under this Act, destroy, mutilate or alter a record." While this author is not aware of any circumstances under which the National Archivist has been pressured to sanction the destruction of records at the order of Cabinet, it is logical to assume that the rules and policies governing the management of records throughout their life cycle would preclude such a request. As Hurley states, "a government whose right to destroy records is limited only by an independent evaluation of their historical value can remove at will all evidence of corruption and wrongdoing and thereby effectively frustrate the fight against corruption."¹⁰⁷ The coactive nature of the *ATI Act*, the *Privacy Act* and the *National Archives Act* serves to emphasize the spirit outlined in *To Know and Be Known*, that the public has the right to know what their government is up to.

¹⁰⁵ Chris Hurley, "The Heiner Affair: An Appreciation."
<http://www.caldeson.com/RIMOS/heiner.html>

¹⁰⁶ Hurley.

In serving the government requirement to be accountable to its citizens and permanent residents, the National Archives found itself with two main groups to whom it owed service. The first are its “internal” government customers: the departments transferring records and the second is the public. This is a shift from the traditional archives user: the historical researcher. This has also required a shift in thinking: to understand why the Archives legitimately serves the non-traditional and potentially unsophisticated researcher. As the archives has worked out its role within the government, it has gone through several stages of development.

Margaret Cross Norton argued that government archives serve the government – that an archives must first serve the creator of the records it holds, providing that government with a safe repository for its historical records and ongoing security for the proof of the rights, obligations and entitlements documented within those records.¹⁰⁸ For government archivists in an access regime, this argument can be extended to argue that the government is merely an extension of the public, of the public’s will and therefore the archives legitimately serves the public. This argument is all well and good if kept in the realm of the philosophical, but the “public” never makes an access to information request. Access requests are invariably submitted by individual members of the public or corporate bodies seeking answers to questions that are important to them. Ian Wilson argues that this is a proper and legitimate use of archives:

¹⁰⁷ Hurley.

Our goal is not merely to facilitate historical research, but to serve and protect all citizens by documenting government business and preserving government information to enable people – many of whom would not normally think they would ever need to use the archives – to prove citizenship, establish entitlements to pension, settle land claims, or to document other rights, privileges and obligations.¹⁰⁹

Except in the case of requests from the press, these requests are unlikely to have wide public interest.

Terry Eastwood has described the stages of archival development as comprising three definitive phases and a fourth potential one. The first is characterized by the rescue of historical materials from perceived risk, manifested in Canada during the tenures of Brymner and Doughty. The second is the establishment of the legal authority and institutional infrastructure, which came to fruition during Lamb's tenure as Dominion Archivist. The third phase concentrates on managing, maintaining and perfecting that infrastructure; this was achieved under Dr. Smith's term. The fourth moves the institution toward realizing archives as arsenals of democratic accountability and continuity, which may be characterised as beginning its development under ATIP.¹¹⁰ Applying this structure to the development of the National Archives creates a useful paradigm for this exploration of access rights and their effects on the National Archives. Eastwood casts this structure in terms of discussing the development of archives

¹⁰⁸ Margaret C. Norton, "The Place of Archives in Government," in Peter Walne, ed. Modern Archives Administration and Records Management: A RAMP Reader. (Paris: UNESCO, 1985): 147-154.

¹⁰⁹ Wilson, "The Fine Art of Destruction." 8

as a contest or conflict of ideas with reality. This model is useful in the analysis of the impact of ATIP on the Archives, as some realities are obvious, even quantifiable, others can only be animated by an understanding of the institutional and cultural thinking at play.

During Lamb's tenure, he concentrated on putting in place the necessary infrastructure to gain custody of the inactive records of departments in order to gain control over the archival material contained therein. During Dr. Smith's tenure, the procedures for smooth transfer were improved and the holdings of the Archives grew to reflect a more complete picture of the organizational structure of government. The *ATI Act* and the *NA Act* filled in the gaps existing in departmental inventories of records and ensured that the National Archivist had the final say in the destruction of government records. The largest gap that the *ATI Act* left was within the discretionary nature of additions to Schedule I of the *ATI Act*, which is cited in the *NA Act* and lists those agencies that must transfer records to the Archives. As new agencies of government are created, they may or may not be included in Schedule I of the Act, at the discretion of Cabinet. As discussed in Chapter Two, this "agencification" could lead to a serious gap in the historical record and could undermine the Archives role as an agent of historical accountability.

If archives are to become arsenals of democratic accountability and continuity, it is logical that the archival institution of the federal government

¹¹⁰ Terence M. Eastwood, "Reflections on the Developments of Archives in Canada and Australia," in Archival Documents: Providing Accountability Through Recordkeeping. Sue Footnote continued on the next page.

should take a leadership role. Two different concepts contribute to the Archives role as such an arsenal. One is its role in leading and recommending information management practices in the federal government, and the other stems from its own accountability as a government agency. It could be argued that the turning point for moving toward a new level of democratic accountability for the Public Archives was ushered in when it fell under the rules of the *ATI Act* and its own operational records were subject to access requests. The Archives was placed on the same level as all other agencies affected by the Act; it is conceivable that its role of advocate for access was usurped. In addition, the *ATI Act* brought the concept of accountability to the forefront in terms of public awareness, government thinking and the administration of the Archives.

Archivists at the National Archives have been able to take advantage of these government-wide rules to help them to more easily process transfers of records from departments. Navigating the maze of levels of government, similarly-named agencies or sub-divisions of agencies has often posed a problem to the archivist receiving a transfer from a given area, and getting to the point where he/she could make some arrangement decisions. The ATIP regime has created some new tools for archivists to use in making their holdings more accessible. To this end, the *ATI Act* created a valuable resource in *Infosource*, Treasury Board's solution to a Directory of Corporate Records. Though generally acknowledged as outdated and in need of some review, *Infosource* has provided archivists' with a tool to sort through the variety of functions performed

McKemmish & Frank Upward, eds. (Melbourne: Ancora Press, 1993): pp. 27-38.

by a multiplicity of government agencies and make them more readily accessible through the production of finding aids.

Along with making processing of archival transfers easier, the focus on functional classification of records as prescribed by *Infosource* helped to shape and promote the macro-appraisal initiative of the Government Records Division. This is not to suggest that macro-appraisal, based on functional analysis of series would not have occurred if not for access legislation, but the existence of *Infosource* made the process easier to initiate. In Cook's words, records must be understood "within their contextual circumstances of creation and contemporary use."¹¹¹ The passage of the *ATI Act* created a new environment for record-keeping in the government and increased the focus on the records that support the functions of government, making efforts at functional analysis and therefore function-based appraisal and classification achievable. In this connection, it might be argued that the infrastructure that accompanied the passage of the *ATI Act* helped to bridge the gap between the archives and the rest of government. The *Access to Information Act* has put the archives' mandate under scrutiny within the Archives, and appraisal theory has been focused and fundamentally linked to the archives' sense of purpose.

Another impact of the passage of ATIP is that some observers perceive a negative effect on record-making. This is not an effect on the Archives itself, but on the capacity of records to reflect the truth of government's actions. It

¹¹¹ Terry Cook, "Macroappraisal: The New Theory and Strategy for Records Disposition at the National Archives of Canada," 5.

therefore has the potential to affect the quality of the records eventually accessioned by the Archives. In a study of how the federal departments have mitigated the potential disturbance and disruption caused by the *ATI Act*, Jay Gilbert draws the archival community's attention to the erosion of record keeping practices in the federal government. Gilbert argues that many public servants have succumbed to the "chilling effect" of ATI legislation; that records, in some cases, have ceased to be the impartial evidence of action, but are consciously written with an eye on the influence they will have on the public or on posterity.¹¹² This means that public servants are creating records that are sanitised because of the possibility of ATI release, and may not be as rich in detail as they could have been if ATI release were not a consideration. Gilbert uses strong language to voice his distaste for the practice of circumventing the Act through the creation of incomplete or misleading records:

The implication that the direct accountability and reliability of public documents can no longer be assumed in all instances is a disturbing one, because the creation and ongoing retention of such records (those that are incomplete or obfuscate the issue to which they relate) actively sabotages the documentary heritage of our society by threatening the evidential value of records that is essential to the foundation of a strong corporate memory.¹¹³

Indeed, federal departments' reluctance to embrace the principles of transparency stated in the purpose clause of the *ATI Act* poses a change to the nature of government's corporate memory. This turn of events does not,

¹¹² Gilbert, 113.

¹¹³ Gilbert, 114.

however threaten the evidentiary value of the records; it changes the nature of the truth that the records contain. Evidentiary value remains intact; but the records are also evidence of the context of record creation within the political culture and administrative context of ATI legislation. In order to achieve the required outcome of record creation, however, most records must reveal rather than conceal the action for which they were created. The kinds of records referred to by Gilbert, those that are incomplete or obfuscate the issue to which they relate begin to reveal much about the department concerned and its relationship to the administration of the *ATI Act*. In the hands of a skilled researcher, the nuances of document manipulation may be teased out to reveal the avoidance of responsibility under the *ATI Act*. Such a researcher would have to understand the organisational structure of the fonds under scrutiny, and the administrative context in which the records were created. This would help the researcher to understand the context of creation and to frame questions of the records with that context in mind.

Discussion of the “chilling effect” leads one to ponder the degree to which the author of the records is conscious of him/herself as an author. Jenkinson asserted that the quality that separated and elevated archival records from other sources of information was their impartiality, derived from their organic creation as natural products of everyday activity. Once the discussion of public servants creating “chilled” records is introduced, it is assumed that the public servant is acutely aware of his/her actions as a record creator. To follow the thread of Victoria Lemieux’ argument in her 2001 *Archivaria* article, the ATIP regime has

had an effect on the inscribing of the record, as it impacts the handling of the record during its active life.¹¹⁴ The process of providing access becomes part of the archival record – part of the external structure, the context of the fonds. It is a related but different procedure associated with the primary function that caused the record to be created in the first place. When an access request is made, the original record is generally not amended in any way to reflect its status as record requested under ATIP.

Gilbert points to the reports of the Information Commissioner and the speeches by the National Archivist that condemn the perceived crisis of information management in the federal government as evidence of the lack of regard among government departments for proper records handling. This second issue refers to the lack of records management infrastructure within the federal government to support both the administration of the *ATI Act*, but also to support transfers to the National Archives. It is generally acknowledged that the Program Review process of the 1980's cut many records management positions, and thus decreased the efficiency of records management programs.¹¹⁵ This has escalated to the point where the Information Commissioner and the National Archivist are talking about a full-blown crisis. "Mr. Wilson argues the HRDC (Human Resources and Development Canada) fiasco strikes at the heart of the information crisis. If HRDC's poor records management is typical of problems

¹¹⁴ Victoria L. Lemieux, "Let the Ghosts Speak: An Empirical Exploration of the "Nature" of the Record," *Archivaria* 51 (Spring 2001): 81-111.

¹¹⁵ Brian Beaven, "Bullet version of Report on record keeping at Treasury Board Secretariat and other "central agencies" in relation to Access to Information Legislation." National Archives of Canada: Unpublished draft report. February 2001: 12.

across government – as many suspect – Mr. Wilson may not have the records needed to document the policies, decisions and transactions of today then they are turned over to the Archives in five to ten years.”¹¹⁶

Gilbert’s article shows that the circumstances and behaviours necessary for the chilling effect to take place are present in the federal government. The National Archives was asked to prepare a report for the Access to Information Review Task Force, the purpose of which was to investigate seven different areas of government to determine the impact of access legislation on record-keeping. A team of researchers from the National Archives began with the working hypothesis that the *ATI Act* had a significant and negative effect on records creation, but concluded that the major detrimental effects on record creation and keeping was rendered not by the passage of the *ATI Act*, but by downsizing in government and the loss of record keeping position within government departments.¹¹⁷ As part of the draft report, archivist Brian Beaven observes, after conducting a study of Treasury Board Secretariat records, that “The central agency record in the form of departmental case files (cutters) is greatly enhanced out of forces completely independent of ATI. In other words, looking only at ATI without putting it in the context of a fundamental revolution in approaches to public administration can potentially distort perspectives.”¹¹⁸ The authors of the report also cite several constraining factors in assessing the actual impact of the *ATI Act* on record keeping. They include: impact of new

¹¹⁶ Kathryn May, “Poor records threaten our national memory,” *Ottawa Citizen*, April 9, 2000.

¹¹⁷ Canada. National Archives of Canada. *The Access to Information Act and Record-Keeping in the Federal Government: Report to Access to Information Review Task Force*. 2001.

technology, lack of documentation standards against which to measure changes in record-keeping, downsizing, creation of records is an individual human behaviour difficult to measure to determine as motivated by ATIP. The team's study did not reveal a negative impact of ATIP on the records transferred to the Archives, but did reinforce the case that poor records management undermines both on the spirit of the *ATI Act* and on historical accountability.

While one can point to some advances and programs that owe their existence to the facilitating role of the *ATI Act*, the impact of its passage is more pervasive and less simple to pin down. The greatest impact of the *ATI Act* on the National Archives and archival practice in Canada was and is in terms of professional culture. The *ATI Act* put access at the top of the list of archival priorities, whether access was interpreted by some as improving accessibility or more directly in terms of ensuring that the rights of researchers are met.

Archival theory provides archivists with the tools for interpreting the administrative history of an organization affected by ATI legislation. While it is tempting to launch into a long and philosophical discussion of the nature of "truth" in our conceptualization of "record," an analysis of the external structure of the fonds is most helpful in focussing the problem. Fundamentally, archivists who are custodians of records in an environment affected by access legislation, must acknowledge the effects that such an environment may have had on the records. Writers of archival theory acknowledges and understands the role that context plays in the creation of records. A context can be one in which the purpose of

¹¹⁸ Beaven, 4.

record creation is not to render account of a legitimate activity, but to mislead the reader of the record. This is all part of the struggle that the researcher must undertake in his/her quest to learn more about the questions brought to the records. Victoria Lemieux puts it this way, "Only by listening to the virtual clamour of voices making choices behind the record is it possible to form impressions about and map the complex relationship and interplay among the act or fact that is the subject of the record, the inscriber's intended meaning, the meaning required to serve organizational and social ends, and all subsequent layers of meaning produced through mediated processes of reinscription, transmission, contextualization and use."¹¹⁹ However, the conceptualization of the records and its interpretation are two separate and distinct activities and should not be intermingled. Sorting out the different voices and imperatives behind the creation of a record is a valid and legitimate archival activity in the context of arrangement and description. There is danger, however, in the archivist bringing interpretation to the record through the activity of archival description. In our desire to make the record most accessible, it may be tempting to add one's own voice to the cacophony that Lemieux describes. The archivist treads a fine line between acknowledging the complex context of creation, handling and use, and documenting that complexity in the archival description, while stepping back and allowing the historian to be the interpreter. If the archivist was to cross that line, he/she must take off the archivist's hat and don the historian's. The archival concern behind chilled records is the concern that

¹¹⁹ Lemieux, 110.

the record is altered or sanitized by the author's self-awareness in the creation of the record.

Jenkinsonian impartiality is jeopardized if in the creation of records needs other than the business take over. The archival consequences are significant, as it is the archivist's job to understand the context of creation and use, and to communicate that context through descriptive finding aids. If the context influences the content of records, the perception of a chilling effect is a noteworthy observation. The trouble is, it is a slippery concept – one that is not universally applied or acknowledged.

Putting the discourse of the chilling effect in context itself, Peter Burke observes that, "Cultural relativism obviously applies as much to historical writing itself as to its so-called objects."¹²⁰ As historians have consciously inserted themselves, their biases and perspectives into the text itself, they have brought forward notions of different voices contributing to what Fernand Braudel of the Annales school termed "total history." If this line of reasoning is followed, the literature leads to Foucault's characterization of institutions. If the archive is an institution of constructed memory, it is clear that this was the case long before the introduction of access legislation. These questions concerning the "purity" of the archival record are ones that archivists of Jenkinson's age were talking about. Since the question keeps coming up time and again, it is not reasonable to argue that bureaucratic self-awareness was introduced by access legislation.

¹²⁰ Peter Burke, "Overture: the New History," in Peter Burke, ed. New Perspectives on Historical Writing. (The Pennsylvania State University Press: University Park, Pennsylvania, 1993) 6.

While it is clear that there is a strong relationship between recording and remembering and that this relationship influences archival theory, it is also important for a government archives to consider the bureaucratic understanding of rendering account. Archival science says little about the creation of records for the purpose of rendering account – to answer these questions, we must turn to diplomatics. The methods set out in diplomatics can help archivists to navigate the new juridical context of record creation within the ATI environment of the federal government. As Luciana Duranti states:

It is essential to recognize how the informational content of the archival fonds is determined by the functions of its creator, how its shape (the organization of collectives of documents within the fonds) is determined by the organizational structure within which it was produced, and how the form and interrelationships of its records (within each collective) are determined by the activities and procedures which generated them.¹²¹

Clearly, to determine the extent of the effect of the *ATI Act* on the records of the government of Canada, one must start with a broad analysis of the functions that a given department has been delegated by statute to carry out; what functions it is accountable for. From here, however, the informational content of the actual records produced must be examined in order to be sure that the records accurately reflect the stated functions that they should support. It is essential to have a good working understanding of the mediation that goes on between the

¹²¹ Luciana Duranti, "Diplomatics: New Uses for an Old Science (Part VI)" *Archivaria* 33 (Winter 1991-92): 13.

established procedures and the documented reality as evidenced in the documentary residue left behind.

If it is eventually demonstrated that the government is creating “chilled” records in response to the probability of being asked to produce those records through the access request process, archivists will have to use all of the tools of archival science and diplomatics to describe the circumstances of the records’ creation and use. Such records, while sterile in one sense would be interesting representatives of the need, perceived by the creator to create sterile, or “chilled” records.

This writer is sceptical of the destructive nature of a “chilling effect” as records must still be created in the course of business to accomplish tasks. Departments create the records necessary to account for the functions they carry out on behalf of the public. While it is a concern that if the author of a record is too conscious of his/her role in the creation of a record they may impair the impartiality of that record, further evidence needs to be gathered to prove this point one way or another. Coinciding with the passage of ATI was the trend toward downsizing in government – making it leaner and more efficient. Perhaps this trend favouring efficiency resulted in more utilitarian records – perhaps a coincidence, not a result of a “chilling effect.” Only an in-depth study, well grounded in the methods of diplomatics could uncover the truth as to whether the chilling effect is truth or myth. The methods of diplomatics, are intended to focus on ascertaining the authenticity and reliability of records. In order to achieve this end, these methods are also useful to pinpoint the purpose of records and the

actions that they support. Those actions, when strung together, form procedures that carry out the delegated statutory responsibilities.

The passage of the *ATI Act* in Canada has had a profound effect throughout the archival community in Canada. Whether directly affected by access legislation, an archivist practising in Canada today cannot escape the rry discussion of access, as it has permeated the professional consciousness. In her contribution to the inaugural edition of the journal *Archival Science*, Angelika Menne-Haritz discusses access as an archival paradigm. It is used, in this connection, as both an archival concept and as a political rallying point. The word access implies privilege; access to information that is not explicitly owned by the person requesting access. In the context of archival access, the archives has control over the requested records' care and custody. Here, Menne-Haritz describes access as follows, "Access in the following is understood as the key that allows archives to acquire a profile as service oriented professionally managed institutions."¹²² Acknowledging that access legislation has made an impact on how government archives do business, and also acknowledging the trickle-down effect that has placed the concept of equal and consistent access into archival discourse, Menne-Haritz characterises and reformulates access as an opportunity for archives. To this end, she argues that "the main service that archives offer to the emerging global societies is access to the raw material for memory, and thus they guarantee the capability to construct and shape memory in a way that helps us to understand the present problems and prepare for the

future.”¹²³ Since access, and the rules governing the ways in which access is to be provided are now part of archival culture, archivists must now take the opportunity to capitalize on the profile that this circumstance has created. This may be the source of the enduring effect that access legislation will continue to have on archives.

The ATIP regime has produced a profound impact on the bureaucratic processes of the Canadian federal government, and has had the effect of raising the profile of records management across the complex of agencies listed in Schedule I of the *ATI Act*. It has affected perceptions of what a government record is supposed to do, by bringing the issue of political accountability through record-keeping to the fore. It has spawned the spectre of “chilled records” and forced those interested in records as vehicles of government accountability to think about such consequences. As National Archivist, Wilson has begun a new program at the Archives, promoting accessibility both at the National Archives headquarters in Ottawa and across the country. The Archives are promoting the message that the National Archives of Canada serves all citizens and is responsible for safeguarding the individual rights of citizens as represented in records in its custody, a message consistent with the institution’s conception, its development and growth. It is also a message very much influenced and shaped by the ATIP regime. In his seminal article, “The Fine Art of Destruction,” the thrust of Lamb’s argument was aimed at convincing his audience of the

¹²² Angelika Menne-Haritz, “Access: the reformulation of an archival paradigm.” *Archival Science* (2001) 59.

¹²³ Menne-Haritz, 59.

requirement to establish statutory authority for the destruction of public records in the person of the Dominion Archivist. Wilson's speech of the same name builds on Lamb's achievement and stresses that archives are kept to "serve and protect all citizens."

Conclusion

American commentator Rick Barry recently wrote, "The keeping of public records and making them accessible to the public in timely and convenient ways may not be a profitable thing for the government to do, but it is essential to the maintenance of democracy and the protection of human rights."¹²⁴ His comments go to the heart of the *ATI Act*, and the justification for keeping archives as a political activity. Through its stages of development, the National Archives and the archivists who work there have acted as the researcher's advocate in gaining access to government records. The National Archives has supported the concept that Canadians should be able to interpret the decision-making process of their government, based on the most reliable and authentic sources – the original records that document that decision making process. As an institution, it has grown from a repository of precious and endangered materials to a repository that can genuinely claim to hold the source material that reflects government decision making.

The *ATI Act* has ensured, however, that Canadians have access to learn more than just about their government. Its effect is felt within archives that have no legislated obligation to provide access to their holdings; it has brought the issue of access into the professional discourse. More than a government institution, the National Archives of Canada plays a role within the international archival community and within the context of the Canadian archival community

¹²⁴ Richard E. Barry, "Keeping Records for Changing Organizations: Who's minding the store," unpublished draft paper, www.rbarry.com, 1997, 2.

as well. The effects of access legislation on the National Archives has filtered through the layers of its relationships and produced an awareness of access as an archival concept, as well as a legislated imperative. The principle of unfettered access influences private archives, where the bureaucratic "hoops" do not have to be jumped through. The "hoops," however, do provide helpful guidelines, as called for by Elena Danielson in 1989.¹²⁵ It is not a new phenomenon that archives are in the business of providing access to their holdings, but the obligation, as Angelika Menne-Haritz observes, is more acute in the new access era.

Prior to the debate concerning access legislation, the Public Archives of Canada was the only federal government agency that routinely provided citizens with access to public records. The period prior to the "access regime" was characterized in the Archives by attempts on the part of the Dominion Archivist, particularly Dr. W. Kaye Lamb to put in place a systematic process for the disposition of public records. Access for the researcher could only be provided after the departments had transferred their non-active records. In many cases, this was just not happening, at least not in any systematic way.

By the time his term was finished, Lamb had secured legal authority for the Dominion Archivist to have influence over the records management activities of government and control over the disposition of all public records. Lamb ensured that the infrastructure was in place to get records to the Archives, where

¹²⁵ Elena Danielson, "The Ethics of Access," American Archivist vol. 52 (Winter 1989): 52-62.

archivists could make them accessible to researchers through arrangement, description and sometimes mediation with government departments.

It was during Dr. Wilfred Smith's term that the concept of access to information became a political issue. Very quickly, the issue of access to records in the custody of the Archives was removed from the issue of acquisition and disposition. Once the debate surrounding citizen access to public records got going, it was clear that access was being discussed in terms of active records within departments as well as records in the semi-active and inactive phases of the life cycle. Public records were being discussed in terms of their value as instruments of accountability, and access to public records was considered in terms of facilitating participatory democracy.

When the *Access to Information Act* and its companion *Privacy Act* were passed in 1983, the access landscape changed for the Archives. In a very practical sense, the Archives had to hire and train an entire new division to deal with the processing of access and privacy requests. More fundamental, however, was the perception that this Act was an intrusion on the archivists' traditional role as advocate on behalf of the researcher, replaced with the tedious role of bureaucrat, implementing the provisions and exemptions of access legislation. This has raised, and continues to raise issues of the archivists' accountability, and the Archives' role in government and society. In placing the responsibility for administering the *ATI* and *Privacy Acts* with respect to records created by other departments, concern was raised that the archivist would take on a role legislated by ATIP and lose a measure of professional honour. By

virtue of being subject to the same access legislation as all other departments, the Archives' own accountability was underscored and strengthened.

The *Access to Information Act* and the *Privacy Acts* were soon followed in 1987 by the *National Archives Act*. These three pieces of legislation form the basis for a unified records management and disposition policy within the federal government. Moreover, the *ATI Act* limits the scope of agencies to whom the *National Archives Act* applies. The long struggle for systematic disposition was aided by the advent of access legislation, as the new Act required tighter control and caused more attention to be paid to the issue of destruction of federal government records. Access legislation also introduced new suspicions, based on the fabled bureaucratic penchant for official secrecy. It was argued by some that bureaucrats would simply start creating sanitized or "chilled" records to protect themselves from any repercussions of records being provided to citizen requesters.

It is clear that while the spectre of the "chilling effect" of the *Access to Information Act* on records creators is a definite possibility, and that Jay Gilbert's research clearly indicates that the circumstances are present for such a chilling effect to take place, no evidence has been brought forward to prove its existence, therefore no measurement can be taken of its effect. This would certainly be an interesting field of study, but one that can only be undertaken once an aggregate of records can be surveyed with an adequate control mechanism.

The Canadian *Access to Information Act* has had a profound effect on archival practice throughout Canada. Within the National Archives, it has

impacted on the workload in both positive and negative ways, but it has also brought forward uncomfortable issues regarding the role of the archivist within the bureaucracy. It has forced archivists to examine perceptions of their profession and its future direction. The direction is forward-looking. Building on a strong foundation of regular and systematic records disposition, the Archives is positioned to serve Canadians as an arsenal of democratic accountability and continuity. This examination will be ongoing, and the concept of access and its place within reference services, acquisition strategies, arrangement and description will continue to be at the forefront of archival thought. Ultimately, this shift in professional thought, placing access at the centre of archival debate is the most fundamental of the effects that the *Access to Information Act* has had on the National Archives of Canada and on the Canadian archival community as a whole.

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