

**"GUIDE" VS "GATEKEEPER": INFORMATION RIGHTS LEGISLATION AND
THE PROVINCIAL ARCHIVES OF MANITOBA**

BY

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**A Thesis
Submitted to the Faculty of Graduate Studies
in Partial Fulfillment of the Requirements
for the Degree of**

MASTER OF ARTS

**Department of History (Archival Studies)
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and the Provincial Archives of Manitoba

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Abstract

Access and privacy legislation (also known as information rights legislation) has been an evolving feature of Canadian life for more than twenty years. Public archives, as custodians of the records of their government sponsors, are profoundly influenced by these statutes. There are two factors that combine to make Manitoba unique in the Canadian access and privacy landscape. The Provincial Archives of Manitoba does not assume the role of "gatekeeper" of access to records in archival custody. Instead, it serves as "guide" to them and to all other records covered by the legislation, in its role as the central administrative office for the *Freedom of Information and Protection of Privacy Act*. This approach has resulted in both benefits and challenges for the Provincial Archives. By the same token, the more common role of a provincial archival institution -- actually determining access to records in its custody and control -- has, according to the literature, been challenging and problematic. This thesis is a case study of the "Manitoba model". It explores the history of public recordkeeping and the creation of a reliable government records program at the Provincial Archives of Manitoba, which provided the foundation of access to information. It also discusses how information rights legislation developed in Manitoba, the role of the Provincial Archives in this development, and the impact on it of the responsibilities which have resulted from this role. The thesis examines some of the issues arising out of Canadian access and privacy legislation which have particular implications for archival institutions and

concludes with suggestions for changes which address the question of the role of a public archives in relation to information rights legislation.

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Jacqueline Nicholls
Winnipeg, Manitoba, 2000

Introduction

Access and privacy legislation (also known as information rights legislation) has been an evolving feature of Canadian life for more than twenty years. It is designed to ensure greater accountability of democratic governments, in balance with the promotion of individual control over what is done with personal information provided to government. The advent and continuing development of information technologies, which enhance the free flow of data, have raised expectations about wider and easier public access to information and concerns about the protection of personal information.

Canadian statutes in this area are by no means homogeneous. They vary in scope, content, and structure, and range from basic access provisions and codes of practice to unitary legislation governing access and providing privacy protection. The first Canadian access statute, Nova Scotia's *Freedom of Information Act*, was passed in 1977. It was followed by New Brunswick's *Right to Information Act* (1978) and Newfoundland's *Freedom of Information Act* (1981). These early laws were seen to be "a cautious first step towards opening government records"¹ as they dealt with a limited range of access and privacy issues. All three jurisdictions have now passed legislation or codes incorporating protection of personal information.²

Quebec's *Act respecting Access to documents held by public bodies and the Protection of personal information*, proclaimed in 1982, broadened the scope

of such legislation beyond the public sector to elements of the private sector.³

The Quebec access act was also groundbreaking because it was the first legislation in Canada to bring together in one statute the two information rights of access and privacy. This innovation was followed in all subsequent provincial legislation on information rights.

Territorial legislation is seldom mentioned in the literature. The Yukon Territory access legislation, the *Access to Information Act* (1984), has been replaced by the *Access to Information and Protection of Privacy Act*, enacted in 1995. The Northwest Territories information rights legislation (the *Access to Information and Protection of Privacy Act*) came into force in January 1997. Nunavut appears to have adopted the Northwest Territorial legislation after the creation of the new territory in April 1999.

The Canadian federal government access and privacy regime consists of two separate statutes – the *Access to Information Act* and the *Privacy Act* (together known as ATIP) – which were passed in 1982 and proclaimed in 1983. The development of federal ATIP legislation was particularly influenced by passage of the *Freedom of Information Act* (1967) in the United States, and amendments to Britain's *Public Records Act* in 1968.⁴ Forerunners to the Canadian access and privacy statutes included formal and informal access policies, Cabinet Directives, private member bills, the 1977 Liberal government Green Paper "Legislation on Public Access to Government Documents" and part IV of the *Canadian Human Rights Act* (1977).⁵

Subsequent provincial legislation includes: Ontario (*Freedom of Information and Protection of Privacy Act*, 1988 and the *Municipal Freedom of Information and Protection of Privacy Act*, 1991 covering local public bodies); Saskatchewan (*The Freedom of Information and Protection of Privacy Act*, 1992 and *The Local Authority Freedom of Information and Protection of Privacy Act*, 1993); British Columbia (*Freedom of Information and Protection of Privacy Act*, 1993); and Alberta (*Freedom of Information and Protection of Privacy Act*, 1995).

Information rights legislation has been a feature of the Manitoba legislative landscape for fifteen years. Manitoba's first-generation access legislation, *The Freedom of Information Act* (R.S.M. 1988, c. F175), was passed in 1985 but not proclaimed until 1988. The second-generation legislation incorporating privacy protection, Manitoba's *Freedom of Information and Protection of Privacy Act* (C.C.S.M., c. F175), commonly referred to as FIPPA, was passed in June 1997 and proclaimed in May 1998. It was extended to the City of Winnipeg in August 1998 and to other public bodies so defined in the Act in April 2000. Prince Edward Island is the only province without access and privacy legislation.

Much has been written on access to information and privacy topics. There is, however, very little written on these issues from an archival perspective, and literature on the impact of responsibility for the central administration of access and privacy legislation is virtually non-existent, with the exception of official publications such as annual statistical reports. Furthermore, there is no study of Manitoba's unique approach to the legislation.

The Canadian mechanisms of access and privacy protection have been most thoroughly examined at the federal level. The legislative review process and the independent reviews provided by the federal Information Commissioner of Canada have resulted in several publications. Reports such as *The Access to Information Act: A Critical Review* and *Information Technology and Open Government*⁶ provide a basis for critique of the federal access and privacy statutes. They raise some interesting questions. How has the process of access to information been hampered by what were supposed to have been limited and specific exemptions to the right of access and how have concerns over privacy protection influenced government collection of personal information? Have these concerns been manipulated to frustrate the fair information practices of transparency and accountability? Is it indeed the case, as the study *Open and Shut* states, that "both acts have had a salutary effect on government record-keeping, leading to greater efficiency and consequent reductions in public expenditures"?⁷ Although this has been the case in general, the doctoring and destruction of federal records requested under the *Access to Information Act* related to the Somalia Affair violated both the federal access statute and the *National Archives of Canada Act* and has cast doubt upon this statement in the eyes of the public.

Probably the best known work on access and privacy issues from an archival perspective is Heather MacNeil's book *Without Consent: The Ethics of Disclosing Personal Information in Public Archives*.⁸ She examines the administration of access to government held personal information, with a specific

focus on personal information in government archives. The study is a useful secondary source in that the ethical considerations, as the title suggests, are examined in depth. However, the assumption that archivists are determining access to personal information in public records in their custody, weighing the public interest against protection of privacy, is simply not the case at the Provincial Archives of Manitoba⁹.

By far, the discipline that has studied access and privacy legislation the most is the legal profession. It is, of course, the discipline most qualified to interpret the legislation itself. However, this thesis does not focus on the legal interpretation of these statutes. Comparative studies have been done, and done well, by scholars such as Alasdair Roberts of Queen's University.¹⁰ The main focus of these studies has been the effectiveness of access legislation. This thesis is not an attempt to measure the effectiveness of the Manitoba statute in comparison to other jurisdictions. Rather, it is an examination of issues surrounding the administration of information rights legislation in Manitoba and their affects on the Provincial Archives of Manitoba.

Public archives, as custodians of the records of their government sponsors, are profoundly influenced by access and privacy legislation. Among other key roles, archives protect the integrity of the record as evidence of the actions of its creator. The traditional approach to access to public records in government archives facilitated their use; kept barriers to public access minimal and respected the right to individual privacy.

Just as the legislation itself is not homogeneous in Canada, the official role for public archives varies. Manitoba is unique for a combination of two reasons. In all but two Canadian jurisdictions¹¹, the enactment of access legislation has given public archives the role of “gatekeeper” of access to public records in archives, or of making access determinations to these records.¹² Manitoba made a conscious decision to reject the “gatekeeper” model. Regardless of whether the records are in archival custody, applications for access are sent to the creator department, agency or public body directly by the applicant. The Provincial Archives is not an intermediary in the process. It does assist the public to understand the procedures for making requests, advises the public on its rights and of course assists the public to locate records in archival custody through descriptive archival tools. It is also worthwhile to note that records do not leave archival custody to be reviewed. The creator must review the material for an access application at the Provincial Archives and follow standard rules of procedure for handling archival documents. This ensures the protection and preservation of records designated as archival.

In Canada, only two government archives serve as the central administrative unit for information rights legislation, the Provincial Archives of Manitoba and the Yukon Archives. The Provincial Archives of Manitoba (PAM) coordinates the province-wide administration of the *Freedom of Information and Protection of Privacy Act*. The Government Records office of the Provincial Archives carries out administrative functions under the legislation such as the production of public directories of records, central “help-line” services for the

public, training of employees of public bodies involved in implementation of the Act, the coordination of statistics for the production of annual reports on the legislation, secretariat support for the privacy assessment review process and review of the statute under legislative requirement. In other words, PAM acts as a "guide" to the records rather than as a "gatekeeper" for them.

The distinction between the roles of "gatekeeper" and "guide" is an important one. Given the continuing transfer of ever growing amounts of records to archival custody, the role of an archives as "gatekeeper," making access determinations on an increasing volume of archival records, becomes troublesome. In some jurisdictions, the overwhelming responsibilities placed on archival institutions in this regard have altered their traditional roles and routine functions. On a CBC radio program in 1989, former Assistant National Archivist Michael Swift observed that:

One of the things that I think most of us didn't foresee was that this would have a real impact on what had been the traditional role of archives. Archives, I think, certainly everywhere in Canada and certainly in the Public Archives of Canada, had seen their role as a role of acquiring, preserving, and making accessible information of historical value. That role remains, but one of the interesting effects of the access legislation or perhaps the details of administering the access legislation is that it has put the archivist in a new and sometimes uncomfortable role, not being simply the gate opener, but sometimes the gate closer in interpreting and applying the legislation.¹³

This thesis is a case study of the "Manitoba model". It explores how information rights legislation developed in Manitoba, the role of the Provincial Archives in this development, and the impact on it of the responsibilities which

have resulted from this role. Chapter one will outline the history of Manitoba government public recordkeeping and the establishment of a government records management program at the Provincial Archives in 1981. This chapter will also discuss how access to records was administered prior to Manitoba access legislation. Reliable, retrievable records are the foundation of access to information and the protection of privacy, as Terry Cook so aptly states in his 1999 report on the City of Winnipeg archives and records management program:

...[L]egal obligations under the [Manitoba] *Freedom of Information and Protection of Privacy Act* depend on good records being created, indexed, maintained, and preserved. Beyond that, the very rights of citizens -- past and present -- are protected by records and archives. In this way, records are truly a "public trust" held in stewardship on behalf of the citizen. And government's accountability also rests on [a] reliable record-keeping system, without which accountability no genuine democracy or social cohesion can really exist.¹⁴

Chapter two will examine how the Provincial Archives of Manitoba, particularly the Government Records program, came to be involved in the effort to develop access legislation for Manitoba. The archives influenced the way in which access to archival information is implemented. Because the records management program and access legislation were unfolding at the same time, they had a symbiotic effect. The Government Records program formally assumed responsibility for *The Freedom of Information Act* at the time of proclamation (1988). The impact of this central administrative role on the Provincial Archives of Manitoba will be explored.

Chapter three will discuss the decision to incorporate privacy protection in a unitary information rights statute for Manitoba, the *Freedom of Information and Protection of Privacy Act*. This more expansive legislation was accompanied by more expansive responsibilities for PAM.

Finally, chapter four will examine some of the benefits, implications and challenges for the Provincial Archives arising from its role in central administration of FIPPA and for archives in a more general sense, in a society with a heightened awareness of access and privacy issues. This chapter will propose several ideas for approaching the ever increasing burden of information rights statutes.

The views presented in this thesis are the author's own and do not necessarily represent the official views of the Provincial Archives of Manitoba or the Government of Manitoba.

Endnotes

- ¹ Colin McNairn and Christopher Woodbury, *Government Information: Access and Privacy* (Toronto: Carswell Thompson Professional Publishing, 2000), 1-1.
- ² Nova Scotia replaced its original access law with the *Freedom of Information and Protection of Privacy Act* (S.N.S. 1993, c.5), a unitary statute which incorporated personal information protection. New Brunswick and Newfoundland enacted separate statutes to deal with the protection of privacy, the *Protection of Personal Information Act* (C.C.N.B., c. P-19.1) and the *Privacy Act* (R.S.N. 1990, c. P-22) respectively.
- ³ The only other Canadian legislation to date which approaches this mandate is Manitoba's *Personal Health Information Act* (1997). It was drafted as a companion bill to the larger *Freedom of Information and Protection of Privacy Act* and extends into the private health-care sector, covering only personal health information. Federal Bill C-6, the *Personal Information Protection and Electronic Documents Act* is a first attempt by the federal government to extend data protection legislation to the private sector.
- ⁴ Robert Hayward, "Federal Access and Privacy Legislation and the Public Archives of Canada," *Archivaria* 18 (Summer 1984), 49. Britain's amended *Public Records Act* reduced the closure period of public records from 50 years to 30 years. As will be discussed in chapter two, the "thirty-year rule" adopted by many Canadian archives stemmed from these British roots.
- ⁵ Canada, Standing Committee on Justice and Solicitor General on the Review of the *Access to Information Act* and the *Privacy Act*, *Open and Shut: Enhancing the Right to Know and the Right to Privacy* (Ottawa: Queen's Printer, 1987), 3.
- ⁶ See bibliography for complete citation of these publications.
- ⁷ *Open and Shut*, 5.
- ⁸ Heather MacNeil, *Without Consent: The Ethics of Disclosing Personal Information in Public Archives* (Metuchen, NJ: SAA and The Scarecrow Press, 1992).
- ⁹ The Provincial Archives of Manitoba (PAM) and Government Records are often used interchangeably in this thesis. The responsible minister for the *Freedom of Information and Protection of Privacy Act* is the Minister of Culture, Heritage and Tourism and this department, specifically the Provincial Archives' Government Records office, has responsibility for the central administration and

coordination of the Act. As the head of PAM, the Provincial Archivist takes an active role in this responsibility.

¹⁰ Roberts is an Associate Professor in the School of Policy Studies at Queen's University. His Web Site on FOI in Canada is an amazing compilation of studies, links and resources on the subject, see: Resources on Freedom of Information Law Web Site <<http://qsilver.queensu.ca/~foi/>>. McNairn and Woodbury's comparative analysis of Canadian access and privacy statutes (see endnote 1) is an invaluable resource.

¹¹ As is the case at the Provincial Archives of Manitoba (PAM), the Provincial Archives of Newfoundland and Labrador (PANL) does not make access determination on records in their custody which are restricted under access or privacy statutes. As will be discussed in more detail in chapter two, the situation at PANL is quite different from PAM's.

¹² New Brunswick is an exception to this rule but for all intents and purposes continues to be the "gatekeeper." Under the New Brunswick *Right to Information Act* (S.N.B. 1978, c. R-10.3), information that is in archival custody is no longer subject to that Act. The *Archives Act* (C.C.N.B., c.A-11.1) of New Brunswick applies to these records but contains its own detailed access provisions that closely resemble the general provincial access system. (McNairn and Woodbury, 2-22). Further to the issue of custody and control, the majority of public archives in Canada today continue to follow the "total archives" philosophy. They acquire archival material from both the public and private sector. It is important to note that access legislation does not apply to materials placed in government archives by or on behalf of bodies not identified by legislation as government institutions. Access to the information in these records is based on arrangements made with the donor. The focus of the thesis is access to public records which are subject to access and privacy acts.

¹³ Michael Swift, Assistant National Archivist, on CBC Radio, *Ideas*, "Access to Information," (Montreal: Canadian Broadcasting Corporation Transcripts, 15 February 1989), 4. CBC re-broadcast this program in 1996.

¹⁴ Terry Cook, *In the Public Trust: A Strategic Plan for the Archives and Records Management Services in the City of Winnipeg* (Gloucester, Ontario: Clio Consulting, 29 November 1999), 22.

Chapter 1

Laying the Foundation for Access Legislation: The History of Public Recordkeeping and the Establishment of the Government Records Program at the Provincial Archives of Manitoba

There was no legal "right" of access to Manitoba government records prior to proclamation of the *Freedom of Information Act* in 1988. Other than information that was routinely available, it must have been rare indeed to obtain access to any records of government departments or agencies that were considered to be necessary to support government activities and functions. The only records which were available to the public were records which had reached the end of their life-cycle (no longer required to conduct business) and which had been preserved for historical purposes in the Provincial Archives of Manitoba (PAM).

This chapter will examine the history of public recordkeeping in Manitoba. It will be shown that although efforts were made to come to grips with the accumulation of public records, the failure to deal effectively with the management of government records resulted in a crisis which was identified by the Provincial Archivist in 1980. The chapter will look at the establishment of a government records program at PAM in 1981 and the impact of this program on the identification and orderly disposition of records. In addition, this chapter will discuss how access was determined to those records which made their way into archival custody.

The Provincial Archives emerged from the Legislative Library of Manitoba¹ in a series of gradual legislated steps in order to collect manuscript materials and address the more pressing problem of the accumulation of public records in government departments. The core collection of the Legislative Library is said to have been established in 1870 as a small library of published material on government matters by Lieutenant-Governor Adams G. Archibald. In 1884 the first Provincial Librarian, J.P. Robertson, was hired and in March 1885, *An Act respecting the Library of Legislature of Manitoba* (S.M. 48 Vic., c.7) was passed. In 1919 the first mention of an "archives" was included in the revised *Provincial Library and Museum Act* (S.M. 1919, c. 145). It contained the word "archives" but there is no evidence that this mandate was acted upon by the acquisition of public records. The Legislative Library's archival activities mainly involved acquiring manuscript materials from individuals and private sector organizations.²

The earliest documentary evidence about public records in the extant archival files of the Legislative Library of Manitoba does not appear until 1934. There is no information of note in the files until May 1939 when the Provincial Librarian drafted a letter for the signature of John Bracken, Premier of Manitoba and Minister in charge of the Provincial Library. The letter, to be directed to the heads of departments and agencies, stated that until proclamation of Part II of the re-written *Legislative Library Act* (S.M. 1939) (which authorized the establishment of a "Public Records and Archives" branch) "your cooperation is requested in having all the records of your department, and of the boards and commissions operating under the jurisdiction of your department, maintained in

respect to their value as Archives of the province."³ The letter was signed by Bracken and sent on June 1, 1939. The archival sections of the 1939 Act were never proclaimed and there is no evidence that the directive produced any significant transfer of archival public records to the Provincial Library. The initial failure to pursue proclamation was likely a result of the war. The war, however, did focus attention on the importance of public recordkeeping.

The Canadian Historical Association (CHA) recognized that Canada's involvement in World War II would result in a massive amount of documentation and that, with a few exceptions, the records management infrastructure at all levels of government, was not in place to deal adequately with it. The association began advocating in 1940 for the protection and preservation of records related to Canada's war effort. Pleas to preserve wartime material continued throughout the war.⁴ Premier Bracken responded to the CHA's request by forwarding a letter under his own signature to all Ministers, Deputy Ministers, and to the Chairman of the Municipal and Public Utility Board asking them to preserve all records that may relate to war activities "in order to make them available for the largest use for future historical scholarship in the national interest."⁵ The Provincial Librarian took this initiative by Bracken, and the "understanding and sympathetic replies" of departments, as an encouraging sign "that these two appeals has [sic] resulted in the establishment of a consciousness of the value of the programme."⁶ This "consciousness" did not result in an archival program for public records during this time. Many of the war

related records which did survive were not transferred to the custody of the Provincial Archives until the 1960s.⁷

Interest in public recordkeeping was being stimulated by publications distributed by the National Archives in the United States and by a report on "The Preservation of Public Records, 1944" by the Municipal Finance Officers Association of the United States and Canada.⁸ The 1944 annual meeting of The Canadian Historical Association gave special attention to the subject of public records and archives. The President of the CHA, Professor George W. Brown of the University of Toronto, prepared a paper which was published in *The Canadian Historical Review* in March 1944. A reprint of the article was sent to Premier Stuart Garson who then forwarded it to his cabinet. Garson reminded his ministers that Bracken had corresponded on two occasions about the preservation of public records. Garson wrote:

May I emphasize again the necessity for your co-operation in maintaining a policy of preservation of public records. In the postwar period it may be possible to advance such a policy with the establishment of a division of government service that will deal adequately with the problem of storage, destruction and preservation. In the meantime your attention to this matter with such facilities as are available will be appreciated.⁹

The Minister of Health and Public Welfare, Ivan Schultz, responded to the correspondence stating that creation of a provincial archives did not have to wait until after the war. In the interim he was looking for guidance on the appraisal of archival records: "Professor Brown's address is not particularly helpful in enabling a Departmental head to ascertain what material in his Department

would be useful as part of our permanent records."¹⁰ This guidance was not forthcoming but the Provincial Librarian, J.L. Johnston, did make recommendations on how to proceed with a Public Records and Archives program. In 1945 he sent a memorandum to Schultz, whose duties now included chairing the Committee of Council on Libraries. The correspondence outlined measures for Cabinet Committee consideration that included the proclamation of Part II of the *Legislative Library Act*. In addition, the Provincial Librarian recommended the creation of a Public Records and Advisory Council which would be empowered to advise on filing systems and records procedures, define the distinction between non-permanent and permanent records, recommend rules and regulations for the transfer of records to a public records and archives division, provide records advisory services to government departments and local governments, stimulate the appraisal and acquisition of private records, and recommend policies in regard to both public and private archival records. Among the ingredients required to establish a public records and archives branch were space and staff. Separate spaces were recommended for the public records and archival records.¹¹ Johnston stated that in order to "make the most effective contribution," a trained and experienced archivist and staff were required. In his words, "the beginning is all important."¹² Ironically, records of the Committee of Council on Libraries have not survived. However, the office files of the Legislative Library illustrate that no move was made by the government to act upon these recommendations and a progress

report that warned that the accumulation of records was becoming an urgent problem.

It seems that in some departments, however, the directives of Bracken and Garson to preserve public records were being followed. The result was a serious space problem. Legislative Counsel G.S. Rutherford brought the problem to the attention of J. L. Johnston in 1947 when several requests were made to amend acts to deal with the destruction of documents. Rutherford stated that he was writing to Johnston "since not only is authority for destruction [original emphasis] of documents required, but also it is important to see that, at the same time, documents of permanent value are not destroyed ... I note that Part II of the *Legislative Library Act* deals with this subject. That Part, however, does not come into force until proclaimed and it has not been proclaimed ... If you think it advisable you will possibly bring it to the attention of the government."¹³

Evidence of a formal call for action to be taken in the realm of public records is contained in the 1949 Annual Report for the Legislative Library. The Provincial Librarian comments that there is "a minimum of Public Records of the Manitoba Government and local governments" in the archival holdings of the Library and that "there is an urgent need for stimulating in Canada a policy of adequate preservation of the records of the provincial government and of local government."¹⁴

The first part-time archivist, James A. Jackson, became a member of the staff of the Provincial Library in 1946 and the first full-time Provincial Archivist,

Hartwell Bowsfield, was hired in 1952.¹⁵ In 1954, the Minister in charge of the Provincial Library instigated the establishment of a Select Special Committee to enquire into the Keeping and Disposal of Public Papers, Documents and Records. The first (and only) committee report found that there were two major problems with the management of public records: an "enormous mass of provincial records accumulated over many years" and a "basic problem of preservation of provincial records, particularly as to what records should be preserved, how preserved and for how long."¹⁶ As a result of this committee's report, two stop-gap statutes were enacted instead of proclaiming Part II of the *Legislative Library Act*.

Neglect of proper records disposition since the founding of the province in 1870 resulted in the "enormous mass" of uncontrolled records. The *Destruction of Papers Act, 1954* was passed to attempt at least to provide some storage space relief. The Act authorized the destruction of some routine series of records such as duplicates of financial records, licences, permits and payroll records. Unfortunately, some significant records relating to law enforcement and women and children created in the Department of the Attorney-General also appear to have been destroyed.¹⁷

The other statute that was enacted in 1955 and came into force on January 1, 1956, the *Public Records Act*, is now viewed as a significant milestone in the history of the Provincial Archives. It was the first legislation to deal with both the retention and destruction of public records. Sub-section 3(1) of this Act effectively repealed the *Destruction of Papers Act, 1954* and

prohibited the destruction or removal of public records, except as permitted, and notwithstanding any other act. The Act and Regulations (M.R. 26/56 and 2/57) provided for the establishment of a documents committee for each department or agency. The members on each committee included a representative from the Treasury, Attorney-General, Comptroller-General, Legislative Library and a nominated member from the department. Each departmental documents committee was to decide which records should be kept or destroyed and how long they should be retained. A committee's proposed schedule was then submitted to the Lieutenant Governor-in-Council for approval. When approved, the schedule was issued in the form of an Order-in-Council and applied by the department. The Act also provided for routine records¹⁸ destruction on the authority of the head of the department and the filming of records prior to destruction. The statutory intent may have been a milestone but it was hardly a breakthrough for public recordkeeping.¹⁹ One of the major problems with the documents committee structure under the *Public Records Act* was lack of leadership. Minutes of the committees suggest they were passive bodies, which left the onus on departments to bring forward records schedules for consideration. Departments did not regard it as a serious responsibility.

Ten years after proclamation of the *Public Records Act*, the Dominion Archivist, Dr. W. Kaye Lamb, issued a eye-opening report to the Minister in charge of Libraries in Manitoba. The history of the commissioning of Lamb's "Survey of the Provincial Archives and Public Records of the Province of Manitoba"²⁰ is an interesting one. Since 1954, the Manitoba Historical Society

(MHS) had occupied office space in the Archives branch of the Provincial Library. The archival material (predominately photographs and manuscripts) was integrated with Archives branch holdings and their library was reportedly integrated with collection of the Provincial Library. Space in the Legislative Building was at a premium and the Archives was slowly outgrowing its shared accommodations with the Legislative Library and the MHS. In 1964, W.L. Morton, acting in his capacity as Chairman of the Centennial Committee, Council of the Manitoba Historical Society approached Stewart McLean, Minister in charge of Libraries, to see if he was amenable to having a survey made to determine where the headquarters of the Manitoba Historical Society and the Provincial Archives should be located. This survey, it was suggested, would be best conducted by or under the direction of Dr. Lamb. McLean believed "it would be in order for the Manitoba Historical Society to have a survey made" but pointed out that any suggestion of the separation of the Provincial Archives from the Provincial Library would have to be considered "long and seriously." McLean also wanted to ensure that both Hartwell Bowsfield, the Provincial Archivist, and Marjorie Morley, the Provincial Librarian, were involved in the survey.²¹

Lamb met with Bowsfield, Morley and Morton on May 21, 1964 to discuss the idea and agreed that he himself would conduct the survey of the manuscript division of the Archives. What he also suggested as "essential if archival and records policies are to be worked out satisfactorily" was an "adequate survey of the records still in the vaults and file rooms of the various

departments of the Government." For this task, Lamb proposed using two members of his staff at the Public Archives of Canada, W.W. Bilsland and W.O. Potter.²² Some confusion then ensued about who was to pay for the cost of the survey. McLean thought the Manitoba Historical Society was footing the bill and the Historical Society assumed that, because the survey was to include public records, the costs should be borne by the government. Funding was finally secured from Treasury Board in 1965-66 and the Lamb report was delivered to McLean in February 1966.

Lamb made four main recommendations. The Archives should be given legal existence by proclaiming an amended and expanded *Legislative Library Act* and should include responsibilities for records management. The association of the Provincial Archives and Legislative Library should continue. Adequate space should be made in the Legislative Building for the Archives so that it may operate "as a public record office for Manitoba in this location." Finally, space should be included in this accommodation for the MHS so that its association with the Archives and Library could continue.²³

The findings of the report included the following statement: "In July 1965 approximately 650 cubic feet of public records were in the custody of the Archives. Three-quarters of them had come from three departments - Public Works, Health, and Mines and Natural Resources. Much of this small collection seems to have come to the Archives as much by accident as by design."²⁴ This pattern of transfer "by accident" to archival custody continued until 1981 when the Government Records program was initiated.

The preface to part two of the Survey, devoted to public records, was penned by W.W. Bilisland, Head of the Disposal and Scheduling Section of the Public Archives of Canada Records Centre. In a preview of what was to greet archivists many years later, Bilisland described the process of the Survey in these terms: "We saw most of the major departmental records areas for both active and dormant records, including the attics, basements, sub-basements; fire traps and rat holes in which some departments housed their records. We frequently uncovered records of which the departmental representatives were unaware."²⁵ Emphasizing the main recommendations of the Survey, the report included three broad recommendations for public recordkeeping drawing attention to eighteen detailed points. The recommendations were to repeal the *Public Records Act* and Regulations; amend and expand Part II of the *Legislative Library Act*; and remind departments "either by legislation, by regulations issued under the proposed Act or by other means, of their responsibilities in the field of records management."²⁶

A few points of the report stand out for the reason that they took many years to accomplish. The recommendation that a records centre system under the direction of the Provincial Archivist be established was not achieved until 1981. The suggestion that a statutory "provision requiring all departments to schedule all of their records without delay, preferably within five years from the date of proclamation of the proposed Act"²⁷ did not happen for over twenty years.²⁸ One significant recommendation, "the assigning to one senior office in each department" the responsibility for records management, has never

materialized as intended.²⁹ One of the most pressing points about the need to rectify the abysmal storage conditions that placed the public records of Manitoba in jeopardy was ignored.³⁰

Some substantial recommendations were acted upon, including a re-written *Legislative Library Act* incorporating Part II, "Public Records and Archives." It came into effect in 1967. Provisions of the Act included the establishment of a standing Public Documents Committee with the Provincial Archivist as chair and the Provincial Archives providing secretariat support. The legislation prohibited the removal or destruction of any government record without the approval of the Committee and authorization by the Minister responsible for the Archives. The disposal of court records also required the approval of the Chief Judge. The Act mandated the Archives to acquire, preserve, and make accessible any documents from the private sector and enabled the acquisition of records of municipalities and school authorities.

The intervening years between the proclamation of Part II of the *Legislative Library Act* in 1967 and the appointment of the third Provincial Archivist, Peter Bower, in 1980 are remarkable because of the failure to develop an effective public records program. Apathy and inactivity on the part of most departments and agencies except when the filing cabinets were overflowing resulted in banal Provincial Documents Committee meetings to deal with the destruction of records.³¹ Notable exceptions dealt with the transfer of some valuable archival records. These were, however, few in number. Accession records indicate that approximately 2,000 cubic feet of records were in archival

custody prior to the establishment of a records management program in 1981. Given that the Lamb report identified 650 cubic feet of public records in archival custody in 1965/66, this means that only about 1,350 cubic feet of government records were transferred to archival custody in the fourteen years between 1966 and 1980.³²

The failure was not due to inaction on the part of the Provincial Archives. In a Provincial Documents Committee (PDC) meeting in 1968, the second Provincial Archivist and Chairman of the PDC, John Bovey, remarked on the fact that the implementation of schedules authorized by the Documents Committee should result in the orderly transfer of records to archival custody. "Such systematic deposits," he said, "are not occurring at present with the regularity that is desirable and should be expected."³³ Some of the problems can be attributed to the "Regulation Respecting the Preservation of Public Records under The Legislative Library Act" (L120 - R1). It was almost identical to the repealed Regulations (M.R. 26/56 and 2/57) under the *Public Records Act*. The new addition was the insertion of minimum retention periods for certain common series of records. They hardly served as guidelines for assisting departments in managing their records³⁴ and were proven to be ineffectual in assisting with space savings. The issue of a records centre system with the ability to destroy records securely came up on several occasions in the 1970s in the Provincial Documents Committee meetings. On March 10, 1979, the *Winnipeg Tribune's* John Barr reported that a number of government documents containing personal information from the Department of Health and Social Welfare were found

blowing around in the parking lot at the Law Courts Building. They escaped from a truck carrying 3,000 cubic feet of paper to the city incinerator for destruction. One government official with the Department of the Attorney-General was quoted as saying that "destroying paper has a low priority with the department of government services'... that meant a closed truck was likely assigned to other, higher, priority needs ... this week's destruction of files was the first he could recall in recent years. No paper shredder is now available to destroy the documents before they are burned."³⁵

As has been indicated, having a statute in place to address a certain issue is not a panacea. In the context of the *Legislative Library Act*, Part II, the Manitoba government needed to act upon Lamb's recommendation to establish a central public records program to deal with the full life-cycle of government records creation and disposition under the direction of the Provincial Archivist. In Lamb's words, "Time was when an archives department was supposed to be doing its job if it took care of obsolete records that happened to be of historical interest. A modern archives must concern itself with records much more directly, and at an earlier stage."³⁶ In addition, a kick-start is frequently required to set the wheels in motion. Cooperative participants are the key ingredients in realizing the spirit and intent of legislation. Such were the needs and circumstances in 1980 when the new Provincial Archivist, Peter Bower, and three colleagues (Barry Hyman, Al Hanslip and Sid Restall) set out to expose the state of Manitoba's public records.

Peter Bower had declared his intention to breathe life into the archives when he was introduced to the Provincial Documents Committee in February 1980 as the new Provincial Archivist and committee chairman. It is recorded in the minutes of this meeting that: "Mr. Bower stated that records management would receive much attention in the years ahead and that the Provincial Archives would become aggressive in this area ... and that a concerted effort would be made to transfer historically valuable records to the Archives from government offices and records storage areas."³⁷

Correspondence with the Department of Finance one month later indicates that the newly appointed Provincial Archivist was attempting to get to the bottom of the records management problem in Manitoba. Finance had reportedly been

quite active in promotion and development activities including education, some consultative assistance to departments, some research, the initiation of the Departmental Records Office function, inactive records management and the development of 'tools' such as the Subject Guide to Administrative Records in the Government of Manitoba. Generally, we have been acting as a catalyst to generate an awareness of the importance of Records Management in the Government.³⁸

The substance of the memo declared PAM's intention to take over responsibility for records management while acknowledging the contribution Finance had made.

In August 1980, the above mentioned photo essay (entitled "The Public Records of Manitoba") was produced in an attempt to portray the sorry state of

Manitoba's important and irreplaceable legislative, legal, financial, administrative, operational, historical and cultural records.³⁹ The essay was sent to the Minister of Cultural Affairs and Historic Resources who brought it to the attention of Cabinet. The visual impact of the deplorable treatment of public records for over 110 years was effective.⁴⁰ Bower wanted to put the days of what his predecessor John Bovey had termed "serendipity archives" well behind the institution. He recounted the haphazard and appalling state of recordkeeping in these terms: that some records of archival significance survived is in part due to the neglect to dispose of them; that many did not survive is almost surely due to the neglect to properly identify and care for them.⁴¹

A proposal was brought forward to create a Public Records Branch of the Provincial Archives. In response, a committee consisting of the Deputy Ministers of the Departments of Cultural Affairs and Historical Resources, Government Services, Finance, Attorney-General, and the Clerk of the Executive Council was established in 1980/81 to guide and support the Archives' development of a records management program. Planning work had also begun on the removal of records from the attics and basements of the Legislative Building and the provision of a records centre.⁴² After so many years of painstaking effort to draw attention to the need for care of public records, the goal posts were in sight.

According to the Annual Report of the Archives in 1981, six new staff positions were approved through the estimates process and a Government

Records Division began operations in September 1981. The division's mandate was to

administer an integrated records programme affecting all departments, agencies, and corporations of the Crown with responsibility for the development of effective records keeping; the promotion of records inventorying and retention scheduling to permit appraisals and inform Documents Committee disposal approvals; the operation of an economical retrieval, storage, and disposal system for records covered by schedules; and the administration of government records transferred to the Provincial Archives.⁴³

In 1981, Gordon Dodds was hired as the Chief of Government Records and the records management program was underway. He began work on a Records Authority Schedule form that would be used to provide accurate information on any records series in any department or agency. When signed by the members of the Documents Committee and the Minister, it would constitute the authority for retention and disposal of records therein described. The form was designed to concisely describe and control records series throughout their life-cycle.⁴⁴ Other achievements which were soon accomplished included regular site inspections and systems evaluations, the establishment of a records centre for secure storage of material scheduled for disposal at future dates (for semi-active records), plans developed for a government-wide records disposal service in conjunction with the records centre (which was to begin in 1982/83) and a series of training workshops on records management.⁴⁵ Evidence that the work of the division was in full swing came in the Annual Report of the Archives for 1982/83. In just over one year of operation, the Records Centre had reached 95

percent of its holding capacity and planning was already underway to look for alternate space. In addition, more than 11,000 feet of archival government records were awaiting completion of the renovations to vault space in the Manitoba Archives Building.⁴⁶ Secure destruction of records through the government-wide records disposal service, operating from the Government Records Centre, began in the fall of 1982.⁴⁷

The new approach to government records also involved a change in the composition of the Provincial Documents Committee. It was re-designed to consist of Directors/Executive Directors of Justice, Finance, Office of the Provincial Auditor, Government Services, Chief of Government Records (Secretary) and the Provincial Archivist (Chair). In the past, committee members had been appointed by the deputy minister of each of the departments mentioned above. This sometimes resulted in appointment of junior employees with a limited understanding of or interest in record keeping. The newly formed PDC was composed of representatives of senior management who had an interest and stake in proper record keeping. The routine or "housekeeping" nature of the committee's work evolved into a professional, rigorous, and systematic approach to management of government records.⁴⁸

The first transfers of archival records under the new program began in September 1981. Of the fifty-seven transfers from departments that year, only sixteen were under Records Authority Schedules. The percentage of records under orderly disposal was slowly growing so that by 1982, out of the 190 transfers of archival records, forty-three were under Records Authority

Schedules.⁴⁹ The following chapter will discuss the rapid acceleration of the control of government records due to impending access legislation.

Prior to implementation of the records management program in 1981 at PAM, there were two obvious factors which caused the early transfer of government records to archival custody: the paper burden (which continues to be a factor) and a genuine historical interest by some government employees who recognized the importance of preserving the records.⁵⁰

How was access to government records in the archives determined? The accumulation of public records in the archives was so slight in the early years that records could be examined on an item level by archivists. For the most part, though, access to this material was unrestricted. Beginning in 1955 under the *Public Records Act*, the Documents Committee reviewed the request for transfer of material and determined access conditions. Access was not always clear but most often the records were open to the public by the time they came into archival custody. Some examples of restricted series included transfers of Children's Aid Societies case files and Unmarried Mother and Filiation Files. The Documents Committee considered these series in 1960. Minutes record that the Archivist requested samples of the files for permanent retention: "In view of the very confidential nature of material on the files, the Committee recommended that any samplings filed in the archives be released for viewing only on permission of the Minister of Health and Public Welfare."⁵¹ The committee was also concerned about whether departments and agencies would transfer records to archival custody if they thought access would be unrestricted. Kaye

Lamb had discussed the issue in his report of 1966. He wrote, "...it is important that departments should know that the transfer of records to the Archives need not mean that they become available automatically for unrestricted use by the public. Subject to any overall rule governing public access that the Government may establish, conditions of access may be stipulated by departments at the time of transfer."⁵² Some of the earliest Records Authority Schedules approved by the Documents Committee included examples of varying access provisions such as a fifteen year closure period on Deputy and Assistant Deputy Minister's files.⁵³

The most common rule applied prior to 1981 to records deemed restricted was the thirty-year rule. Precedence for this period of restriction was provided by British Parliamentary tradition. In Britain, the 1958 *Public Records Act* normally granted access fifty years after the creation of the record. In 1967 the Act was amended to provide for a normal access period of thirty years after creation unless records were previously open. Allowable variations in the United Kingdom for extending the closure beyond thirty years depended on the following: actual harm had to be shown to result from the release and be based on matters affecting national security and defence, or be information provided in confidence or involve the necessity to protect privacy.⁵⁴

The thirty year rule was adopted by most Canadian archival institutions including the National Archives of Canada which incorporated it into the *Access Directive* for transfer of public records to the Public Archives of Canada in 1977.⁵⁵ The advantage of the thirty-year rule was what some have termed the

"passage of time principle": "This principle assumes that the reasons for and appropriateness of denying access diminish over time. Or, to put it another way, the public interest in permitting access to government records increases over time".⁵⁶ For reasons which will be discussed in the context of privacy protection, this thirty year time is no longer seen to be sufficient.

At the Provincial Archives of Manitoba, after the informal adoption of the thirty-year rule, research agreements (usually authorized by the Deputy Minister responsible for the records in question) were the vehicle by which the public gained access to restricted records.⁵⁷ In general, agreements were geared toward *bona fide* academic research and in some respects the "average person" had much more limited access than today under FIPPA.⁵⁸

By 1982, the tide had turned in public recordkeeping in the Government of Manitoba and a solid foundation in records and archives management had been established for the access statute for the province which would appear on the horizon in the fall of that year.

Endnotes

- ¹ Also known as the Provincial Library until the late 1960s.
- ² By 1935, the manuscript holdings of the library were approximately three feet in extent. Provincial Archives of Manitoba (hereafter PAM), Manitoba Culture, Heritage and Recreation, Legislative Library Office Files, A 0033, GR 1596, 1884-1971.
- ³ PAM, Manitoba Culture, Heritage and Recreation, Legislative Library Office Files, A 0033, GR 1596, box 5, Preservation of Public Documents, J.L. Johnston, Provincial Librarian, to John Bracken, Premier of Manitoba, May 19, 1939.
- ⁴ Ibid., Professor Reginald G. Trotter, Queen's University, Past President of The Canadian Historical Association, to John Bracken, Premier of Manitoba, May 21, 1941. This correspondence was pursuant to an earlier letter of May 30, 1940. Attached to the letter was a leaflet produced by Professor Fred Landon, University of Western Ontario, vice-president of the Canadian Historical Association titled "The Preservation of War-time Material." It makes modest suggestions about keeping scrapbooks of local war activities and a diary of daily war effort events because "all of this information will be of the greatest interest to the community in a few years hence." The most telling remark however is Landon's final two sentences which Manitoba failed to heed: "One last word of caution is that having gathered records of the war period, such records should receive good care. It is for the future that they are being collected, not for the moment."
- ⁵ Ibid., Provincial Librarian's draft of the memorandum, June 6, 1940. The note on the top of Johnston's draft states that the text was approved and forwarded to all Ministers and Deputy Ministers on June 11, 1940.
- ⁶ Ibid., J.L. Johnston to Reginald G. Trotter, May 30, 1941.
- ⁷ PAM, Government Records, Record Group (RG) system finding aids.
- ⁸ PAM, Manitoba Culture, Heritage and Citizenship, Provincial Documents Committee, Committee Support Files, CH 0048, t.b.1, J.L. Johnston, "Notes re Provincial Public Records and Archives," n.d. [c. 1945].
- ⁹ Ibid., Stuart S. Garson, Premier of Manitoba and Minister in charge of the Provincial Library to Ivan Schultz, Minister of the Department of Health and Public Welfare, May 31, 1944. Brown's article attached to this correspondence "The Problem of Public and Historical Records in Canada," is an impassioned

plea to "draw attention to the serious need for constructive policy" to remedy the "general situation with regard to historical records in Canada [which] is a lamentable, and even disgraceful, one." Brown's idea was that "an archives should first of all be a public records department for the preservation of non-active records of the government. It should serve the government in this important respect as every government department does in its own way. If this practical purpose is achieved, other historical interests will be served in their turn, and archives will cease to be regarded merely as a kind of academic luxury which should be neglected in preference to almost any other interest which comes to the government's attention."

¹⁰ Ibid., Ivan Schultz to Stuart Garson, June 8, 1944.

¹¹ It is assumed by this statement that the Provincial Librarian meant that a public records unit would deal with the disposition of records for destruction and permanent retention. It is upon this principle that the current Government Records Centre, part of the Government Records division, operates in the pursuit of an integrated records management and archival program. The function of Minister in Charge of Libraries was transferred to Ivan Schultz in 1944 at the request of Premier Garson who was finding his responsibilities a heavy burden. PAM, Executive Council, Premier's Office Files, Garson Administration, EC 0016, GR 43, G95, "Library", 1944.

¹² PAM, Manitoba Culture, Heritage and Citizenship, Provincial Documents Committee, Committee Support Files, CH 0048, t.b.1, J.L. Johnston to Ivan Schultz, April 25, 1945. Johnston makes a point of defining what the records of government are: public papers of cabinet ministers as policy makers; records of senior officials of government responsible for making policy effective, correspondence and records of departments, boards, commissions and institutions such as land titles offices, educational institutions and courts of law; temporary research organizations; parliamentary papers and records created by legislative assemblies and records filed with the assemblies. He goes on to lament the tradition which had been established that the papers of Ministers are personal property. This is an important statement in the context of what came into the custody of PAM pre-1981. Very few records of Ministers have survived, undoubtedly for this very reason. The tradition was pointedly dispelled in 1981 when the Government Records program was established. The records of the Minister of Health and Public Welfare during Schultz's time in office have survived. They were rescued from the storage locations in the Legislative Library Building and transferred to archival custody in 1982. Schultz had maintained an organized and well categorized alpha-numeric filing system which is evident in the Records Transfer Box Lists (see GR Finding Aids) of: PAM, Health and Public Welfare, Minister's Office Files, H 0001, GR 157, 1941-1959.

¹³ PAM, Manitoba Culture, Heritage and Citizenship, Provincial Documents Committee, Committee Support Files, CH 0048, t.b.1, G.S. Rutherford, Legislative Counsel, to J.L. Johnston, Legislative Librarian, August 14, 1947. The statutes requiring amendments were the *Vital Statistics Act*, the *Treasury Act*, and the *Government Liquor Control Act*.

¹⁴ "Statement presented by the Provincial Librarian of the Government of Manitoba to the Royal Commission on National Development in the Arts, Letters and Sciences", 6-7, appended to the *Annual Report of the Legislative Library*, 1949 (Winnipeg, Queen's Printer, 1950).

¹⁵ Manitoba, *Annual Report of the Legislative Library*, 1946, 1952.

¹⁶ *Journals of the Legislative Assembly of Manitoba*, Vol. XCI, 1954, 107-109.

¹⁷ "Schedule B" of the *Destruction of Papers Act, 1954* (S.M. 1954, Cap. 5) lists twenty-three series or classes of records of the Department of the Attorney-General which may be destroyed. Among this list are: pre-1940 "general correspondence relative to assize and speedy trial calendars in all judicial districts; general correspondence relating to summary conviction appeals; monthly gaol calendars and general correspondence relative thereto; applications and correspondence relative to incorporation of companies; general correspondence relative to applications under The Wives' and Children's Maintenance Act." Manitoba is fortunate that such a large volume of court records have survived. However, relatively few records of policy and administration in the Department of the Attorney-General from an early period have survived. Manitoba Justice continues to be one of the most active departments from a records management perspective it is therefore not surprising that economy of space was an issue in the middle of the last century.

¹⁸ These types of routine or unimportant records were set out in Manitoba Regulation 26/56.

¹⁹ According to the annual reports of the Legislative Library, there were no Documents Committee meetings held in 1961, one meeting in 1962, three meetings in 1963. No public records were transferred to the Archives in those years.

²⁰ PAM, Manitoba Culture, Heritage and Recreation, Legislative Library Office Files, A 0033, GR 1596, box 7, "Archives."

²¹ *Ibid.*, Stewart E. McLean, Minister in charge of Libraries, to Dr. W.L. Morton,

Provost, University of Manitoba, University College, May 14, 1964; Morton to McLean, May 22, 1964.

²² Ibid., W. Kaye Lamb, Dominion Archivist to McLean, June 3, 1964.

²³ In the Public Records and Archives section of *The Annual Report of the Legislative Library Act, 1968* (Winnipeg, Queen's Printer, 1969), 9, the Archives is recorded as having moved to new accommodations in Room 247 of the Legislative Building. In May 1965 the offices of MHS moved into the Manitoba Museum of Man and Nature but their collection of archival material stayed with the Provincial Archives and the Archives continued to answer all of the Societies research correspondence.

²⁴ PAM, Manitoba Culture, Heritage and Recreation, Legislative Library Office Files, A 0033, GR 1596, box 7, Archives, Dr. W. Kaye Lamb, "Survey of the Provincial Archives and Public Records of the Province of Manitoba," February 1966, 3.

²⁵ Ibid., 7.

²⁶ Ibid., 9.

²⁷ Ibid., 8-9.

²⁸ Robert Tapscott, interview with the author, September 8, 2000. Tapscott estimated that by 1989/90 approximately eighty percent of government records were scheduled. It is the author's opinion that this is as close to "all" records being scheduled as will ever be achieved given the dynamic nature of records creation in a government organization.

²⁹ Departmental Records Officers (DROs) are in place in all departments and agencies. However, all but a handful of the sixty-six are in senior positions. According to estimates of the Chief of Records Advisory Services in the Government Records division, DROs spend approximately five percent of their time on records management (Tapscott, September 8, 2000). This lack of commitment on the part of government poses a serious challenge to the Government Records office in their attempt to uphold the statutory requirements of the *Legislative Library Act*, Part II.

³⁰ Fourteen years later, the Provincial Archivist was to expose these same conditions in his pictorial essay "The Public Records of Manitoba." One can only presume that the first hand experience of the exact storage locations Lamb had

identified in 1965 as "shocking" were exponentially deplorable a decade and a half later.

³¹ PAM, Manitoba Culture, Heritage and Citizenship, Provincial Documents Committee, Minutes, CH 0046, 1968-1979. In 1968, the Provincial Archivist reported "at present too many departmental records of historic importance remain in departmental storage rooms. Some of them, in fact, have remained in storage since 1870. They are of no practical use to the departments holding them and are almost completely inaccessible to researchers." *Annual Report of the Legislative Library Act*, 1968, 11.

³² PAM, Government Records, RG system finding aids; PAM, Manitoba Culture, Heritage and Citizenship, Government Records Accession Registers, CH 0102, GR 4528, 1981-1992. To put this volume of archival records in perspective, under the current orderly disposition of government records, an average of 4000 cubic feet of records come into archival custody each year (Tapscott). From January to August 2000 there were 340 transfers totaling 5326.5 cubic feet of archival material. PAM, Government Records Accession Registers, CH 0102, 1993-2000. It is an excellent illustration of the myth of a paperless office and none-the-less illustrates how little was transferred to PAM pre-1981. Some major accomplishments were achieved in relation to the institution as a whole between the years 1966 and 1980. The Provincial Archives became a separate branch of the Department of Tourism, Recreation and Cultural Affairs in 1971, the Hudson's Bay Company Archives (HBCA) was deposited with the Provincial Archives in 1974 and the Archives, including the HBCA, and Legislative Library were moved to the newly renovated Winnipeg Civic Auditorium in 1975.

³³ PAM, Manitoba Culture, Heritage and Citizenship, Provincial Documents Committee, Minutes, CH 0046, October 17, 1968. In the 1978 report of the activities of the Provincial Archives, John Bovey remarked that "the volume of public records which should be transferred from departmental filing rooms and storage areas was again smaller than it ought to have been, from the point of view of the originating departments and the researching community as well as the archivists." *Annual Report of the Legislative Library and Archives*, 1978 (Winnipeg, Queen's Printer, 1979), 5.

³⁴ Section 3 provides for the destruction under the authority of the head of a department or agency (not the PDC) "of a type and kind set forth in column 1 of Schedule A; but the authorization shall not be given until the appropriate retention period set out in column 2 of Schedule A has elapsed." An illustration of the vagueness with which the descriptions of classes of records were "set forth" is "Type 5" is described as "time books, time sheets, and other records that have served their original purpose after the information therein has been

transcribed to other documents." This type of record could be destroyed after ten years. Regulation L120-R1, 5.

³⁵ Clipping from *The Winnipeg Tribune*, Saturday March 10, 1979 attached to a memo from John Bovey, Provincial Archivist to M.E. Bayer, Assistant Deputy Minister, Tourism and Cultural Affairs, March 14, 1970. PAM, Manitoba Culture, Heritage and Citizenship, Provincial Documents Committee, Committee Support Files, CH 0048, t.b.1. The subject of the memo is the "physical destruction of documents to be scheduled for disposal." The substance of the memo is that the City of Winnipeg is closing their incinerator on April 1, 1970 and that land-fill sites will be used instead. Unless the records authorized to be destroyed are shredded before being buried, more embarrassing situations like the one reported will be occurring. His suggestion was that "our Minister ask the Minister of Government Services if his department can provide an adequate alternative incinerator, or centralized shredding equipment adequate to meet the needs of the government departments and crown [sic] corporations."

³⁶ PAM, Manitoba Culture, Heritage and Recreation, Legislative Library Office Files, A 0033, GR 1596, box 7, "Archives", Lamb to McLean, June 3, 1964.

³⁷ PAM, Manitoba Culture, Heritage and Citizenship, Provincial Documents Committee, Minutes, CH 0046, February 21, 1980.

³⁸ PAM, Manitoba Culture, Heritage and Citizenship, Provincial Documents Committee, Committee Support Files, CH 0048, t.b. 1, Hugh Barnstead, Systems Planning and Development, Department of Finance, to Peter Bower, Provincial Archivist of Manitoba, March 27, 1980. Attached to Barnstead's correspondence was a draft Position Paper on "The Role of the Documents Committee in the Government of Manitoba" dated December 1979. The argument of the paper was that given the growth in Government programs and the resulting complexity of records to support programs, policies and processes, the role of the PDC should be strengthened so that it could be instrumental in providing affirmative directions for records management. The recommendations included establishing a records management program which would work in the areas of policy, procedures and guidelines development, training, records advisory services and program development such as micrographics management, records centre operations and vital records management. Clearly, the work of Finance in this analysis was of benefit to the Provincial Archivist.

³⁹ PAM, Still Images Section, Archives Administration Collection; Set 22.

⁴⁰ Peter Bower, interview with the author, August 29, 2000. Bower is currently Executive Director, Access and Privacy Unit, Office of the Ombudsman (former

Provincial Archivist of Manitoba 1980-1998).

⁴¹ Ibid.

⁴² *Annual Report of the Manitoba Department of Cultural Affairs and Historical Resources*, Fiscal Year ending March 31, 1981, (Winnipeg: Queen's Printer, 1981), 20. The project of records removal took two years to complete with the assistance of summer students and amounted to over 10,000 linear feet of material. (Tapscott, September 8, 2000). The storage spaces in the Legislative Building were but one example of countless dumping grounds in government offices.

⁴³ Manitoba Department of Cultural Affairs and Historical Resources, *Annual Report of the Legislative Library and the Provincial Archives*, (Winnipeg: Queen's Printer, 1981), 19.

⁴⁴ PAM, Manitoba Culture, Heritage and Citizenship, Provincial Documents Committee, Minutes, CH 0046, October 26, 1981. The two senior archivists hired in the Government Records division (Dodds and Tapscott) had been employed in the Records Management section of the Archives of Ontario prior to joining the staff of PAM. Tapscott stated that the scheduling processes and procedures were based on the Ontario model although modifications were made to suit the circumstances of Manitoba's recordkeeping. (Tapscott, September 8, 2000).

⁴⁵ *Annual Report of the Department of Cultural Affairs and Historical Resources*, 1981-82, 17-18.

⁴⁶ *Annual Report of the Department of Cultural Affairs and Historical Resources*, 1982-83, 23. A conservation program was established at PAM in 1982 to advise on the preservation of archival holdings and actively conserve records of permanent value.

⁴⁷ PAM, Manitoba Culture, Heritage and Citizenship, Provincial Documents Committee, Minutes, CH 0046, August 23, 1982.

⁴⁸ Bower, (August 29, 2000).

⁴⁹ PAM, Manitoba Culture, Heritage and Citizenship, Government Records Accession Registers, CH 0102, GR 4528, 1981-1992.

⁵⁰ Bower, (August 29, 2000).

⁵¹ PAM, Manitoba Culture, Heritage and Citizenship, Provincial Documents Committee, Committee Support Files, CH 0048, t.b. 1, Minutes of the Documents Committee, February 17, 1960.

⁵² PAM, Manitoba Culture, Heritage and Recreation, Legislative Library Office Files, A 0033, GR 1596, box 7, "Archives", W. Kaye Lamb, "Survey of the Provincial Archives and Public Records of the Province of Manitoba," February 1966, 3.

⁵³ Examples of Records Authority Schedules with fifteen year restrictions on access: CCA 0007 - Consumer and Corporate Affairs, Deputy Minister's Office Files (approved in December 1982); AG 0008 - Agriculture, Assistant Deputy Minister's Office Files (approved in June 1983); Provincial Documents Committee; CH 0047.

⁵⁴ *Access to Public Records: A Manual of Guidance, Consultation Draft*, (Kew, Richmond, Surrey: Public Records Office, March 1999), 11. Available on the Public Record Office Web Site, <<http://www.pro.gov.uk/recordsmanagement/access/default.htm>>.

⁵⁵ In addition to establishing the right to access after thirty years with the exception of those records declared exempt, the Directive provided for the determination by departments of access restrictions, "the definition of access in terms of research purposes rather than a general right of access, and the responsibility of the Dominion Archivist for advising departments on matters respecting access to government records." Robert J. Hayward, "Federal Access and Privacy Legislation and the Public Archives of Canada," *Archivaria* 18 (Summer 1984), 49. It is obvious that PAM decided to follow the lead of the Public Archives of Canada.

⁵⁶ Robert Craig Brown, "Government and Historians: A Perspective on Bill C-43," *Archivaria* 13 (Winter 1981/82), 121; Daniel German, "Access and Privacy Legislation at the National Archives, 1983-1993: A Decade of ATIP," *Archivaria* 39 (Spring 1995), 196-197.

⁵⁷ PAM, Manitoba Culture, Heritage and Recreation, Provincial Archives, Government Records, Departmental Files, CH 0049, GR 2339. Departmental correspondence to Dept. of Municipal Affairs re: Access to Cabinet Committee Records, 21 July 1983. File no. 232 Municipal Affairs, 1981-1987.

⁵⁸ Gordon Dodds, interview with the author, August 22, 2000. Dodds is currently Provincial Archivist of Manitoba (former Chief, Government Records, PAM, 1981-1998).

Chapter 2

The Development of Access Legislation in Manitoba and the Role of the Provincial Archives of Manitoba

Any freedom of information legislation is only as good as the quality of the records to which it provides access. Such rights are of little use if reliable records are not created in the first place, if they cannot be found when needed or if the arrangements for their eventual archiving or destruction are inadequate.¹

The foundation of all access to information legislation is the existence of recorded information to which the legislation pertains. Information rights legislation has had a profound impact on the control of government records in Manitoba. If the Provincial Archivist's photo essay can be said to have given a kick-start to the establishment of a Government Records program, the prospect of access legislation was fuelling the efforts of the Government Records program, departments and agencies to manage government information.

This chapter will examine how the Provincial Archives of Manitoba, particularly the Government Records program, came to be involved in a collaborative effort to develop access legislation for Manitoba. Because the records management program and access legislation were unfolding at the same time, they had a symbiotic effect. It will be shown that the involvement of the archives left an indelible mark on some of the provisions of *The Freedom of Information Act* and the policies for its implementation. Responsibility for the Act was formally assumed by the Government Records program at the time of

proclamation and this central administrative role has left a permanent mark on the operations of Provincial Archives of Manitoba.

The prospect of access to information legislation was discussed in the Legislative Assembly on at least two occasions in the spring of 1983 by the Attorney-General, Roland Penner.² Penner had been watching access to information developments in a few provincial jurisdictions, in the federal sphere, and in the legal community. Various sources have stated that access legislation was a personal passion of the Attorney-General, who believed deeply in the concept of open, accountable and democratic government.³

Evidence of the impact on the records management program at PAM of the anticipated access legislation is found in the Provincial Documents Committee minutes of the spring of 1983. The regular program of scheduling government records continued in 1983, but with the prospect of access to information legislation in mind. The Provincial Archivist emphasized that in order to develop an access guide "to its fullest utility, Government Records was attempting to accelerate the records scheduling process in departments because it was primarily on the data generated by the schedules that the government must depend when the proposed Freedom of Information act was proclaimed."⁴

In a 1983 article directed to the archival community, an outline of the work of the Government Records program reinforced Bower's point in describing the progress made in two years of operation:

Through the records inventory and schedule, it is becoming possible to prepare guides and indexes to current records keeping

in support of access to information and to afford the public with necessary support on personal privacy. And, through the various types of descriptive finding aids required to gain access to holdings of government records at the Archives, it is possible to reconstruct the whole spectrum of records keeping in the Manitoba government and permit researchers to understand not only what there is but why it is there. This too is central to the reason for preserving the public records as a natural and proper function of government.⁵

The integrated records management-archives program appears to have been working well and the scheduling process seems to have facilitated the description of archival government records. The program continued to grow in 1983-84, as records management workshops were conducted for government employees and responsibility for the central micrographics service for the government was absorbed.⁶

As the Provincial Archives prepared for new access legislation, the Manitoba government continued work on the legislation. Eugene Szach was hired in 1982 as a research director responsible for drafting freedom of information legislation for Manitoba. He recalls that the Attorney-General wanted an act that was easy to use and suggested the Canadian Bar Association *Model Bill* as a guide. As Szach began to look at the issues, however, and examine the federal bill, he realized that access legislation was extremely complex.

The development of federal access and privacy legislation must be briefly examined in light of the fact that Manitoba's *Freedom of Information Act* was based upon both it and responses to proposed federal legislation by the Canadian Bar Association (CBA).

In the late 1960s and early 1970s political scientist Donald C. Rowat of Carleton University published a series of articles urging more open government and freedom of information laws. During that time, Barry Mather and Gerald "Ged" Baldwin (then members of the House of Commons) introduced a series of private member's Bills. In 1974, Ged Baldwin introduced in the Commons Private Member's Bill C-255, "An Act respecting the right of the public to information concerning the public business." The subject matter of the bill was referred to the parliamentary Standing Joint Committee on Regulations and Other Statutory Instruments in December of that year.⁷ "The Committee held a series of hearings, lasting nearly two years, and called witnesses from inside and outside government to examine all aspects of "the question of freedom of information and protection of privacy."⁸ In June 1977, the federal government tabled a Green Paper on freedom of information entitled "Legislation on Public Access to Government Documents," which was also referred to the Standing Joint Committee. That same year, the Bar Association published a research study on freedom of information by Professor T. Murray Rankin entitled "Freedom of Information in Canada: Will the Doors Stay Shut?" The Bar Association subsequently created the Special Committee on Freedom of Information whose mandate on behalf of the CBA was to "carry out further research, to develop and present the Association's views on freedom of information and eventually to prepare a draft model bill." *Freedom of Information in Canada: A Model Bill*, based largely on Rankin's study, was published in 1979.⁹

Debate on the subject of access legislation began to appear in the journal of the Association of Canadian Archivists, *Archivaria*, in the summer 1977 issue. Terry Eastwood's article entitled "The Disposition of Ministerial Papers" examined how retention and disposal decisions for ministerial records were made in Canadian jurisdictions. Integral to this discussion was access to these records and the role of these records in holding governments accountable for their actions. The debate surrounding the appropriate degree of access to government records, and whether ministerial papers were public property or the private property of the minister centered on the doctrine of ministerial responsibility to the prime minister, to cabinet and to the people through Parliament. Eastwood said: "The efficient discharge of such responsibilities generally is regarded as demanding a certain degree of confidentiality."¹⁰ The inference of the principle of ministerial responsibility is that the minister has the power to decide how much information should be released about policies and decision-making. This issue came to the fore in the government's Green Paper which favoured retaining the system of ministerial responsibility, and allowing the minister final authority over access to government documents. The CBA dismissed this approach and recommended a two-tiered review process: an independent commissioner empowered to release documents; and formal judicial review. This review mechanism was adopted in the *Access to Information Act* in 1982.¹¹

In addition to the federal legislation, Eugene Szach studied the legislation in effect in eastern Canada and the United States¹² and consulted with Murray

Rankin and Ken Rubin.¹³ Consultations with departments and agencies, often in the form of questionnaires, were used in order to understand the existing policies on access to government information and the special considerations of some government programs and services governed by other Manitoba statutes.

The Manitoba Attorney-General's department also sought the assistance of the Provincial Archives as the logical source for information on recordkeeping issues and access restrictions to the government records in its custody. The identification, analysis and protection of recorded government information from creation to final disposition was the mandate of the Government Records program of the Provincial Archives. Through the scheduling process, including review and approval by the Provincial Documents Committee, the Archives was already examining basic records administration issues which also happened to be related to access legislation, such as what constitutes a Manitoba government record.

The *Legislative Library Act* (section 16) attracted the attention of Eugene Szach to the Archives since the Act was the only statute in effect in Manitoba which dealt with access (or restrictions on access) to government records.¹⁴ The October 14, 1982 minutes of the Provincial Documents Committee make reference to a meeting of the Provincial Archivist and Szach at the Archives on October 4, 1982. This marked the formal beginning of PAM's involvement in developing access legislation for Manitoba.¹⁵ Peter Bower recently indicated that when the Archives was approached by Szach to assist with the development of the legislation, it heartily agreed. He explained that the profile of the Provincial

Archives in the Manitoba government needed to be raised and he saw this then as an opportunity to do that. Bower also said that it was fundamental to the Government Records program because, although scheduling had already begun, he expected that control of government records would be greatly enhanced by the prospect of access legislation.¹⁶

The Freedom of Information Act (S.M. 1985-86, c. 6) provided a legal "right of access" (S. 3) to records held by Manitoba government departments and agencies, subject to "limited" and specific exemptions. The right of access of "the applicant" was not limited to residents of Manitoba, or of Canada for that matter. Other rights in the act included the right to file a complaint (S. 14) with the Manitoba Ombudsman if the applicant felt subject to unjustifiable non-compliance. The applicant also had the right to submit a request for correction of personal information (S. 13) held by government. As implied above, the access review process gave an applicant the avenue of complaint to the Manitoba Ombudsman (powers of recommendation) and the right to final appeal to the Manitoba Court of Queen's Bench (S. 30) (binding order power of the judiciary)¹⁷. In addition to investigating complaints under the act, the duties of the Ombudsman included an annual report to the Legislative Assembly on his activities under FOI (S.55).

Exemptions to the right of access (four mandatory and eight discretionary) were intended to protect individual privacy rights and the legitimate confidentiality needs of government. Mandatory exemptions were signaled by the terminology "shall refuse to give access" whereas discretionary exemptions were signified by

"may refuse to give access." Personal privacy protection was included by making it a mandatory exemption. However, a separate law governing privacy protection would have to wait for over a decade. Access to records containing personal information for *bona fide* research or statistical purposes (S. 41 (5)) was permitted by means of a formal research agreement. As discussed in detail below, a published access guide to enable applicants to locate records was included in the Act at the suggestion of the Provincial Archives. All provincial departments, agencies and Crown corporations were subject to *The Freedom of Information Act* with the exception of the officers of the Legislative Assembly (the Provincial Auditor, the Chief Electoral Officer and the Ombudsman).

Without delving into each and every section of the FOI Act in detail, a few provisions stand out as points meriting discussion. The right of access in the legislation was additional to any rights of access already available under existing provincial laws or by custom or practice (S. 61). By placing this section in the Act, the Manitoba government allowed records which were open prior to proclamation to remain open at the archives and upon arrival at the archives if they had been so treated by the department or agency. Eugene Szach also drafted a subsection which ensured that FOI prevailed where any conflict existed between FOI and "any access provision or access restriction contained in a Schedule prepared or approved under *The Legislative Library Act*" (S 64(4)). The Act did not apply to any rights of access, procedures for obtaining access and restrictions on access contained within *The Child and Family Services Act* and regulations, *The Workers Compensation Act*, *The Vital Statistics Act*, *The*

Statistics Act and *The Securities Act* (S. 66). It is noteworthy that despite many positive steps taken in the Act toward open government, some of the “legitimate” exemptions required for confidentiality in government were taken to the extreme. Section 38 allowed for the mandatory denial of access to Cabinet confidences for thirty years. As will be discussed in the next chapter, thirty years is the longest closure period for Cabinet records in Canada.

The two most significant proposals of the Provincial Archives to be included in *The Freedom of Information Act* were the requirement to produce an access guide or, as the federal legislation called it, an access register, and the mechanism for gaining access to records -- by obtaining the approval of the records' creator. Under these two provisions of the Act the Provincial Archives of Manitoba serves as the “guide” to public records in the archives and government offices, not the “gatekeeper” of access to them.¹⁸ The decision to make the records' creator the decision-maker in access requests to restricted records, including restricted records in the archives, was described by Peter Bower and Gordon Dodds as a self-protective measure to avoid being swamped as the “gatekeeper” to the massive amount of archival records being brought under control by the records management program. They did not want to partake in the “black hole” of access determination on an increasing number of archival government records.¹⁹ The Archives' recommendation on access determination was accepted by Cabinet. This approach has never been challenged. As Peter Bower indicated, there is precedent for it. Prior to FOI, departments stipulated access requirements on archival records through the Provincial Documents

Committee process. Similarly, the Archives did not make access determination on archival records governed by other acts such as *The Child and Family Services Act*, *The Vital Statistics Act* or *The Family Maintenance Act*. So, it made sense to continue on with the way access had always been implemented when restrictions applied. Gordon Dodds indicated that he has been questioned by other jurisdictions on how this was achieved. In 1990 he made the following observations to Richard Valpy, Territorial Archivist, Northwest Territories:

Direct application to the creator department allows the Archives to preserve its facilitative role -- records management, protection of records, guidance to information, assistance to departments, monitoring of government performance, and so on The most effective task for the Archives is to undertake to administer such a statute because of its natural affinity with information and records management. We have found in Manitoba that receipt and decision-making directly by departments and agencies provides a sharpening of the process -- makes the creators and custodians of the record more accountable. To support this view, the Manitoba Archives does not even give access to records transferred to archival vaults from departments and agencies, unless there is indication of prior public access ... we have found this approach to be economical of resources and it has not raised any research impediments.²⁰

The Provincial Archives decision to advance this method of access determination may have been a result of observing the experience with access legislation at the National Archives of Canada. A flurry of discussion on the topic of the role of archives in regard to access legislation was published in 1978 in *Archivaria*. This came on the heels of the federal government's Green Paper discussion of the question of access. With the prospect of federal legislation on access looming on the horizon, Terry Cook of the National Archives remarked in

Archivaria that "there are two requirements essential to effective freedom of information legislation whether broadly or narrowly framed. First, there must be an adequate index to the information; if the sources of information are unknown, informed requests for access cannot be made. Second, should the public servant or minister controlling certain information refuse to release it, the citizen seeking access must have a route of appeal."²¹ Also among the articles was Jean Tener's "Accessibility and Archives." She discussed access to archival records in both the private and public sphere. Among the many interesting points she raised was her comment on the role of archives in access determination:

Ideally, the archivist should contribute not only to the implementation of policy, but also to its formulation. Too much discretionary power presents the danger that the archivist will become policeman and censor ... quite apart from the political and social implications of the present situation, archivists cannot afford to assume the role of gatekeeper for public records, if only for practical reasons. Such archival functions as classification, arrangement, description, and preservation already threaten to swamp available resources.²²

In 1984, Robert Hayward published an article on the history of access policies at the Public Archives (now the National Archives) of Canada and the provisions of the "new" legislation. The most pertinent section discusses the impact of the legislation on the role of the Public Archives in access determination:

The results of the legislation are far reaching indeed. Most basic is the matter of who controls the record as well as the access to the record. The legislation makes the government institution that

controls the record legally responsible for access requests. Until the present time, there has existed within the federal government a clear distinction between transfer of records to the Archives and access to them ... though the Archives held the records, departments maintained a residual control over access to them. This will no longer be the case.²³

Other issues relevant to the Manitoba which emerged in Hayward's account of the Public Archives' experience with the new access legislation include the problem it had coping with access determination on annual increments of government records of about two thousand linear metres, and the reluctance of certain departments to transfer records to archival custody if it meant "another authority would control the release of 'their' information." Hayward concluded that under the new legislation "the archives assumes the mantle of 'gatekeeper' of the record."²⁴ He also foresaw a change in relationship between the research community and archivists as archives assume the role of just another government institution in the access process instead of an "information broker." There were important lessons to be learned in this argument.

An article by Daniel German published in 1995, "Access and Privacy Legislation and the National Archives, 1983-1993: A Decade of ATIP,"²⁵ picked up where Hayward left off. The article differed in that it was less critical in its approach, focusing on the successes with the legislation at the National Archives. Much energy was devoted by German to the citation of statistics on the number of applications received and the volume of records which had been reviewed under the acts at the National Archives. In the context of the process

of document review under ATIP, German did, however, mention problems in applying various exemptions and exclusions of the ATIP acts, problems which the Provincial Archives of Manitoba was eager to avoid:

Once a request has been received under ATIP, applying these varying exemptions and exclusions can be difficult, particularly since all departments (especially, of course, the National Archives) hold materials that originated with other institutions. These other agencies, by their presumed experience with the topic of the papers, possess a better knowledge of the sensitivity of the documents in question. In order to obtain the benefit of this expertise, consultations with the originating departments may be the recommended course of action to ensure the proper application of ATIP. In addition to this, though, prior to applying those sections of ATIP related to defence, international relations, and national security, consultation with offices having an interest in these areas is mandatory.²⁶

German does not probe the implications of this extra layer of decision-making required to process access applications. His account raises the question of whether archivists are truly qualified to be the "gatekeepers" for records in archives if they must defer to the records' creators so frequently. The situation described above indicates that the role of "gatekeeper" to archival records is an uncomfortable one for archives, as they are forced to apply the legislation to issues documented in records about which archivists do not have subject matter expertise and thus are not really able to make access determinations.

Similarly, the current situation at the Archives of Ontario with the Ontario *Freedom of Information and Protection of Privacy Act* indicates that the subject matter expertise is not one archivists have or should be expected to have.

Although under the Ontario legislation, the Archives of Ontario is responsible for

determining access to records in its custody, experience with this role has revealed its limits. In some cases, the Archives reports, frequent requests for information under the access and privacy legislation have resulted in re-appraisal of records series to lengthen the time the records remain in the custody of government departments, so that these agencies can provide the access determinations the Archives is unable to make:

In assessing operational need, ministries should also consider the frequency with which the public requests access to program files. In a few cases this might mean that a ministry keeps records for longer than might otherwise have been the case because a public need for the records remains. For example, the ministry's primary need for information within program files may only be two years, but the public has repeatedly requested access to these records for up to five years. Perhaps individuals have wanted to know why certain decisions affecting their personal interests were made. **It is not feasible or effective for the Archives to administer these requests** [original emphasis]. For one thing, ministry personnel are more familiar with these issues and programs. Moreover, **the public expects records of recent origin to be found in the ministry administering the program. They also expect answers to their questions from the program that made the decisions** [emphasis added].²⁷

The Provincial Archives of Manitoba has avoided such re-appraisal by rejecting the "gatekeeper" role. Records series are scheduled according to legislative, financial, administrative, operational, historical and cultural requirements for preservation without having to consider (or reconsider) whether there is a heavy demand for access to the records. It should be noted, so that there is no misunderstanding, that government records coming into archival custody are most often not "old." The average retention period for Manitoba

government records, after which records are either destroyed or come into archival custody, is about five to seven years, particularly for "program files" mentioned above.

The Provincial Archives of Newfoundland and Labrador (PANL) is the only other archives in Canada which does not make access decisions on archival records restricted under their provincial access legislation, the *Freedom of Information Act*. According to Provincial Archivist Shelley Smith, the creator of the record determines access to records if they are restricted. The Archives really has nothing to do with the legislation. However, she described the Newfoundland access legislation as "very rudimentary." She added: "Nobody has responsibility for the Act, there are no annual reports under the Act, and there is no requirement to produce a directory of records [access guide]." As far as she knows, there have never been any formal requests under FOI for access to records in archival custody.²⁸ When asked if the access mechanism to restricted archival records has worked this way since the legislation was passed in 1983, Smith responded that in practice it has but it was not formally articulated until 1994 when the Department of Justice made a request to retain the right of access determination to the records transferred from their department. Smith stated: "I believe that archivists should promote access and that it is not our role to deny access. If the creator of the records has issues with access, let them make those decisions."²⁹

The discussion of which department would be responsible for the administration of Manitoba's freedom of information legislation was underway as

early as May 1983. Although the Attorney-General, Roland Penner, had introduced the concept of the legislation and had hired Eugene Szach to research and draft the legislation, it was recognized early on that the archives had a vested interest in the Act and that, in Penner's words, "it could well be the Department of Cultural Affairs which already had the major responsibility for the handling of government information and documents and the archives."³⁰

The Speech from the Throne in March 1985 announced that freedom of information legislation would be proposed during the session.³¹ Bill 5, the Freedom of Information Act, was given first reading in the legislature on March 15, 1985. Upon introduction for second reading on June 4, the Attorney-General described the legislation in these terms:

Having worked on this legislation, very closely, for close to three years; having considered the major piece of Freedom of Information legislation in this country, the federal bill; having considered the New Brunswick bill; having considered the Nova Scotia bill -- and those are the only bills extant in the country -- I can say, with a sense of certainty, that the bill which I have introduced for second reading today is the best in the country. Indeed, Sir, it has been so described to us by Professor Murray Rankin, an acknowledged international expert in the field, who prepared the Canadian Bar Association model bill, from which we learned a great deal.³²

During debate on second reading, the opposition raised the issue of privacy protection. Although the legislation provided for access to and correction of personal information, there were no specific sections of the Act which limited the collection, use and disclosure of personal information by public bodies.³³ The question was raised again when Bill 5 went to the Standing Committee on

Statutory Regulations and Orders in July 1985. The Attorney-General indicated that data protection legislation was of particular interest to him and that the government was looking to developments in Europe. Ultimately, the goal was to bring forward privacy legislation but it appears the government wanted to get the access legislation off the ground first.³⁴

On July 11, 1985, *The Freedom of Information Act* was passed unanimously by the Manitoba Legislative Assembly.³⁵ The Minister of Culture, Heritage and Recreation was designated as the Minister responsible for the Act. The Government Records program became the central administrative unit providing operational support for the Minister because of its central role in managing government records. The Provincial Archives was required by the Act to: publish and update at least every two years an *Access Guide* which enabled applicants to understand the organization of government and locate the records created by government (S. 50-52); review the Regulation and administration of the Act within government and prepare operating guidelines (S. 53); and report annually to the Speaker of the Legislative Assembly on the administration of the Act and the statistics of implementation by departments and agencies (S.54). The types of statistics gathered included the number of applications received and processed, the numbers of applications for which access was granted, partially granted or denied, response times, exemptions categories invoked in denial of access, fees collected, and costs involved. These statistics were gathered quarterly. The access applications were anonymized, forwarded to

Government Records for compilation and distribution weekly to Access Coordinators.

The new Act could not come into effect until adequate preparation for providing access had been made. Until the Act came into effect, the Provincial Archives' central role included the preparation of the *Access Guide* (to be published simultaneously in English and French), developing and coordinating implementation strategies and providing education and training. These responsibilities involved extensive cooperation and collaboration government-wide.

Also in order to prepare for proclamation an inter-departmental FOI implementation committee was struck. It consisted of seven members -- representing Finance, Community Services, Government Services, two representatives from the Department of the Attorney General and two representatives from Culture, Heritage and Recreation (Peter Bower and Gordon Dodds). The committee was to study implementation methods, draft forms and regulations, and prepare the civil service. Many departments and agencies developed policies and procedures tailored to their particular needs and delivered specialized training sessions for their staff.³⁶ In addition, a Deputy Ministers Steering Committee "monitored and guided progress across government."³⁷

The delay in implementing the Act resulted in allegations by the opposition that the NDP government was "dragging their feet" on proclaiming the FOI Act because "they did not want damaging information to come out prior to an

election", which was expected in the fall of 1985 or spring of 1986.³⁸ In fact, the main reason for the delay was the need to continue to develop the necessary records management infrastructure and *Access Guide*. Although substantive progress had been made since the creation of a records management program in 1981, the so-called "foot-dragging" continued for another three years until the means of identification and control of records were in place to allow the access legislation to operate effectively.³⁹

The management of government records was far from the straightforward task some seemed to assume it was. Not much imagination is needed to picture the enormous task that faced the Government Records program, even with sound policies and procedures in place and statutory requirements behind it. A basic understanding of the importance of information management to the daily business of government was lacking in most departments and agencies. It was difficult (and continues to be difficult) for departments to commit the time and resources necessary to organize, manage and identify the records being created. In addition to current records there was a huge backlog of material. Records had been stockpiled in closets and hallways for over 100 years. "Custody" and "control" were alarmingly deficient.

While the government prepared for the implementation of the new access regime, public attention continued to be focused on the access legislation, particularly in the legal community. In November, 1985, the Law Society of Manitoba Legal Studies and Legal Aid Manitoba presented a forum on freedom of information. Speakers compared the federal access legislation to the recently

passed Manitoba statute. It was noted by Allan Fineblit (then Chairman of Legal Aid Manitoba) that the Canadian and Manitoba access laws were remarkably similar in scope and content on such matters as the limitations on access (exemptions) and the appeal processes. Inger Hansen (then Information Commissioner for the federal access act) and Gordon Earle (Manitoba Ombudsman) spoke about their roles in the first instance of appeal.⁴⁰

In December 1995, the judge of a pre-proclamation civil suit in the Court of Queen's Bench made reference to *The Freedom of Information Act* and the history of access to public records in a legal evidentiary context. A reporter for *The Winnipeg Free Press* was attempting to gain access to the amount of compensation given when the government expropriated real property for the Core Area Initiative and the North Portage Development projects. Without the Act in effect, the only recourse was to prove that records were "public" and in the public interest to release. Justice Jewers discussed access in the following terms:

The common law of England, which is part of our legal heritage, does recognize a right in all persons who have a sufficient interest at law, to inspect public records and public documents. The next questions are whether the documents ... are public documents ... and whether the applicant is a person having sufficient legal interest to claim the right If it is important that court files be open to public inspection – and it unquestionably is – it is surely equally important, and consonant with the notion and principles of open government now embraced in our freedom of information legislation (not yet proclaimed), that the conduct of government, and specifically, the expenditure of public monies, be open to public scrutiny.⁴¹

Throughout 1986 and 1987, pressure continued to mount in the political arena to proclaim the Act. Two additional positions were approved for the Government Records program in order to advance the work of scheduling, preparation of the access guide, and training. Both the Attorney-General and the Minister of Culture, Heritage and Recreation (as Minister responsible for the Act) adamantly defended the length of time it was taking to schedule records by reminding members of the Legislative Assembly of the abysmal state of recordkeeping that the Provincial Archivist had exposed in 1980, the scope of the Act which extended to all government departments, agencies and Crown corporations, and their varying stages of readiness. The government declared the goal for proclamation as the spring of 1988.⁴²

By February 1988, members of the opposition were calling for either proclamation of the Act or resignation of the Minister responsible for the Act. Judy Wasylycia-Leis, the Minister of Culture, Heritage and Recreation, countered that "there has been progress, steady progress in the identification, the description and the scheduling of the record [sic] system." She went on to say "the management of records and information is not only critical to proclamation, but it is essential to the effective administration of The Freedom of Information Act."⁴³ No matter how legitimate the excuse, it was wearing thin in the Legislative Assembly. As it turns out, the resignation called for by the opposition was not necessary as the NDP government was defeated just a short time afterward in 1988.

The Freedom of Information Act was proclaimed on September 30, 1988, just over three years after it received Royal Assent and almost six years after its inception. Those years were an exhausting and arduous time for the staff of Government Records at the Provincial Archives of Manitoba. However, published reports document the remarkable progress. According to the 1986-87 *Annual Report* for the Department of Culture, Heritage and Recreation, the new Records Centre facility (with increased storage space for semi-active and archival records) became operational. The space gained was being quickly filled by the routine and orderly transfer of scheduled records. Government Records staff was busy in the records advisory and FOI training areas. The report stated that "Seven hundred and sixty-five field visits were made to government offices throughout the province to explain preparations for Freedom of Information, encourage improved records management practices, and to safeguard records designated for permanent preservation in the Archives' vaults."⁴⁴

During the next fiscal year, in response to the mounting pressure mentioned above, even more emphasis was placed on identifying and describing records systems in preparation for proclamation of the Act. The Chief of Records Advisory in Government Records remembers that fiscal year as being particularly taxing as the push had come from government to complete the work so that the *Access Guide* could be published.⁴⁵ The Provincial Documents Committee met eighteen times in 1987/88 and considered over 2,800 schedules from various departments and agencies.⁴⁶ Emphasis was also placed on preparing staff for proclamation. An eight minute training video was produced to

educate civil servants and public interest groups about the principles, provisions and procedures of the legislation. Training also took place for access coordinators in departments and agencies and departmental records officers.

Concentrated staff time in Government Records was also being devoted to the production of the *Access Guide*. The first edition was published in September 1988 in both official languages and distributed to all government departments and agencies, public libraries and municipal offices. The *Guide* was designed to describe the structure and function of each public body covered by FOI. It identified and described the records systems in the custody or control of government, and indicated where the records were held, what kind of information they contained and whether they were designated as archival or to be destroyed after a stated retention period. A subject index attempted to make the *Access Guide* more accessible to the public which was unlikely to be familiar with most government programs, services and responsibilities. As well, a glossary of terms common to most government offices made the information contained in the *Guide* more user-friendly. In addition, the *Guide* described basic features of *The Freedom of Information Act* such as exemptions and exclusions and instructed the user on how to apply for access, the fees involved, where to send the application and how to make a complaint if the response received was not satisfactory. The *Guide* was not only a public access tool but it also served as an invaluable reference for departments and agencies if applications needed to be transferred to another government unit for response.

The majority of the work for the *Guide* was done by Michèle Fitzgerald, a Government Records archivist. The result was an impressive first foray into this kind of descriptive publication. Entries were compiled from information drawn from completed Records Authority Schedules. When the detail on the schedule was insufficient, departmental representatives were consulted. Departments also provided summaries of their responsibilities and current organizational structure.⁴⁷ The basic format of the *Guide* has not changed significantly since 1988, but much additional information about government organization and records has been included over the years in order to make it more comprehensive. In the author's estimation, no other public access tool produced under information rights legislation in Canada surpasses the detailed, consistent, and current description of Manitoba government records in the *Guide*.⁴⁸ This reflects the strengths of the Government Records program in Manitoba, which include the fact that it had responsibility for records management, archival government records and central administration of access legislation. Traditional archival expertise in describing records for public access (incorporating information about the context of the records' creation to make them meaningful) dovetailed well with the need to describe current records systems for access purposes under FOI.

In the 1988/89 fiscal year, records management activities continued to be "focused primarily on preparing departments and agencies to manage access to information requests and on central support through enhanced records controls."⁴⁹ The flow of new Records Authority Schedules through the Provincial

Documents Committee was dramatically reduced now that the legislation was in effect and the *Access Guide* had been published. The Committee considered 712 retention and disposal schedules in that year, a reduction of almost seventy-five percent from the previous year. This still meant that a large number of records were being brought under control of the records management program.⁵⁰

Other effects of the legislation were beginning to be felt in the public service areas of PAM. According to the 1989-90 departmental report, "telephone and written inquiries of the Archives increased to 12,868, a 37% increase over 1988-89 and a 70% increase over 1987-88. These increases reflect the growing demand for information since The Freedom of Information Act was proclaimed September 30, 1988."⁵¹ This suggests enhanced public awareness of rights of access. The more likely cause of the increase was the growing volume of public records coming into archival custody as a result of the expanded scheduling program. The annual report also states that the "Government Records Centre was used more heavily than at any time in its nine-year history due largely to FOI-related requirements. Storage of inactive records reached 4,927 transfers ... (15,902') representing an increase of 92% over 1988-89."⁵² The Chief of Records Advisory estimated that by 1989, eighty percent of government records were scheduled. The description of activities of the Provincial Documents Committee stated that by the end of 1990, they anticipated that 90 percent of government records would be scheduled.⁵³

The work of Government Records in the central administration of FOI also involved gathering statistics from departments and agencies on their experience

with the Act. These statistics were rolled up for *The Freedom of Information Annual Report* tabled by the Minister responsible for the Act. Two staff years gained by the Archives (records analyst and training coordinator) to prepare for the Act's proclamation were lost. This left a skeletal staff (approximately two staff years) to perform the task of keeping the *Access Guide* up-to-date. The Manitoba Government is a fluid and rapidly changing organization. It was (and continues to be) an almost insurmountable challenge to publish up-to-date information. The *Access Guide* was to be published in 1990 but due to a government reorganization anticipated for 1991, publication was postponed until that year.⁵⁴

Section 56 of the Act required that the legislation be reviewed by a committee of the Legislative Assembly appointed within three years of proclamation. The Standing Committee on Privileges and Elections was instructed on July 25, 1991 to undertake a comprehensive review of the operation of *The Freedom of Information Act* by such means as it deemed advisable and to report back to the Legislative Assembly no later than June 30, 1992. The review did not begin until June 11, 1992. The first session of the Committee heard from the Minister responsible for the Act, followed by the critic for the official opposition and the critic for the second opposition. In response to a question raised about the cost, format and practicality of updating of the *Access Guide*, Bonnie Mitchelson, Minister responsible for the Act, responded that the goal was to have the *Guide* on-line.⁵⁵ The Standing Committee reported to the Legislative Assembly that it wished to consider public hearings. During the

spring of 1993 the Standing Committee on Privileges and Elections met twice to determine procedure (April 27, May 31) and held two public hearings in Winnipeg on June 22 and 29, 1993. There were six presenters, and four written submissions. The Committee requested a report, for its consideration, on the findings of the hearing process to be prepared by the staff (Provincial Archives) of the Minister responsible for FOI by March 31, 1994.⁵⁶ Most of the comments by presenters dealt with the over-generous discretionary exemption categories such as section 39, which deals with policy opinions, advice or recommendations. This section was similar to one in the federal legislation which Ken Rubin often referred to as the "Mack Truck" exemption meaning that it could potentially protect from access a wide scope of information. Also of note were comments about a need to increase the privacy protection provisions of the Act.⁵⁷ Of particular interest to the Archives as central administrators of the Act was the presentation made by the Manitoba Library Association. It stated that "with regard to the Access Guide itself, most of our members feel that the guide which is put out in Manitoba is one of the better ones. However, with all such guides there are problems with updating it, and of course, to reprint a volume of this size is a considerable expense, and we therefore understand the problems involved."⁵⁸

According to Gordon Dodds, the report was drafted by the Archives as requested by the Committee. It is unknown if it ever reached the Committee as it was not among the material from the Standing Committee on Privileges and Elections review of the operation of *The Freedom of Information Act*.⁵⁹

According to the FOI annual report of 1994, "The Committee did not report to the Assembly in 1994."⁶⁰ Because it was directed solely to Cabinet, the contents of the report prepared by Government Records are protected under section 19 of the *Freedom of Information and Protection of Privacy Act*.⁶¹

The issue was shelved and no further discussion or review took place until May 16, 1996. By then, however, growing public concern about protection of personal privacy had prompted a much wider reconsideration of legislation governing the management of public records in Manitoba, and elsewhere. Thus when Rosemary Vodrey, the Manitoba Minister of Culture, Heritage and Citizenship, addressed these issues on that date she announced that "new legislation combining both protection of personal privacy and access to information would replace *The Freedom of Information Act*."⁶²

This marked the end of what might be referred to as Manitoba's first-generation information rights legislation and the beginning of a second-generation law, a unitary statute which would bring Manitoba in line with almost all other Canadian jurisdictions.

It has been shown that the production of a public access guide to government functions, mandates and records forced the examination of records creation, helped develop modern recordkeeping practices such as records scheduling and brought into archival control important records that should be kept permanently. Involvement in the development of access legislation and duties of the central administrative office for FOI strengthened the government records program and raised the profile of PAM in the eyes of the Manitoba

government and Manitoba society – particularly with those who wanted to exercise their rights under the legislation. It resulted in a distinctive role for the Provincial Archives of Manitoba in the Canadian archival landscape, as other archives such as the National Archives of Canada were assigned the “gatekeeper” role of reviewing access requests to records in archival custody. By having the opportunity to reject the “gatekeeper” role in favour of the role of “guide,” PAM thus avoided the problems other archival institutions were facing in the access to information regime. Still, with these positives, the distinctive role of “guide” created new challenges and heavy responsibilities, the full impact of which were not yet felt in 1988.

Endnotes

¹ *Lord Chancellor's Code of Practice on the Management of Records under Freedom of Information, Working Draft Version 21a*, (Kew, Richmond Surrey: Public Records Office, 21 June 2000), 1. Available on the Public Record Office Web Site <<http://www.pro.gov.uk/recordsmanagement/CodeOfPractice.htm>>.

² Legislative Assembly, *Hansard*, Vol. XXXI, No. 77B - Monday, May 30, 1983 and Vol. XXXI, No. 78B, Tuesday, May 31, 1983 (Winnipeg: Queen's Printer, 1983). Available on the Government of Manitoba Web Site <<http://www.gov.mb.ca/leg-asmb/hansard/>>. Hereafter referred to as *Hansard*. On May 30, the Attorney-General indicated that the legislation was not going to be introduced in that fiscal year. "It's likely that it may be introduced and referred for intersessional study because it's a major undertaking ... and that would coincide with the perceived need for at least several months of very careful work to set up the administrative structure." In the May 31 estimates process in the House, the Attorney-General justified hiring a research director in the 1982-1983 fiscal year for legislative initiatives, predominately FOI.

³ Interviews with the author including Gordon Dodds (August 22, 2000), Peter Bower (August 29, 2000) and Eugene Szach (September 14, 2000).

⁴ PAM, Manitoba Culture, Heritage and Citizenship, Provincial Documents Committee, Minutes, CH 0046, April 21, 1983.

⁵ Unsigned article [attributed to Gordon Dodds], "In the Public Trust: PAM's Government Records Programme," *AMA Newsletter* 4, no. 3 (Autumn 1983), 2-3.

⁶ Manitoba Culture, Heritage and Recreation, *Annual Report, 1983-84* (Winnipeg, Queen's Printer, 1984), 22.

⁷ Canada, Standing Committee on Justice and Solicitor General on the Review of the *Access to Information Act* and the *Privacy Act*, *Open and Shut: Enhancing the Right to Know and the Right to Privacy* (Ottawa: Queen's Printer, 1987), 2.

⁸ Terry Eastwood, "The Disposition of Ministerial Papers," *Archivaria* 4 (Summer 1977), 3-4. See also: Richard Bazillion, "Access to Departmental Records, Cabinet Documents, and Ministerial Papers in Canada," *The American Archivist* 43, no. 2 (Spring 1980), 151-160.

⁹ Canadian Bar Association, Special Committee on Freedom of Information, *Freedom of Information in Canada: A Model Bill* (Ottawa: Canadian Bar Association, 1979). Hereafter referred to as the C.B.A. Model Bill.

¹⁰ Eastwood, 7. Eastwood notes that the responsibility, through the Governor General to the monarch, is rarely invoked in the Canadian Parliamentary system.

¹¹ Ian McClymont, "Review of *Legislation on Public Access to Government Documents* (Hon. John Roberts) and *Freedom of Information in Canada: Will the Doors Stay Shut?* (T. Murray Rankin)," *Archivaria* 6 (Summer 1978), 192-194.

¹² The maritime provinces were the first to proclaim access legislation in Canada: Nova Scotia (1977), New Brunswick (1978) and Newfoundland (1981). They were followed closely by Quebec (1982) and the Government of Canada (passed in 1982 proclaimed in 1983). Freedom of information legislation was in effect in the United States in 1967.

¹³ Professor Murray Rankin is an authority in the field of access legislation and was the main author of the Canadian Bar Association's *Model Bill*; Professor Ken Rubin is a well known advocate of open government and critic of access legislation in Canadian jurisdictions.

¹⁴ Szach, (September 14, 2000). The exact wording of section 16 of *The Legislative Library Act* (L120) is as follows: "Where the public interest so requires, the Lieutenant-Governor-in-Council, Cabinet, may direct that any public record in a department or agency or any public record transferred to the branch, shall not be made available for public inspection for such a period of time as the Lieutenant-Governor-in-Council may designate." Section 16 was repealed by Statute Law Amendment (S.M. 1985-86, C. 51. S. 26). Szach recounts the story of looking in the government telephone directory to see if he could find the people and program to which this act pertained. It seems to have been logic combined with fate, or good fortune, or both that resulted in the archives becoming involved at the front end of drafting the legislation.

¹⁵ PAM, Manitoba Culture, Heritage and Citizenship, Provincial Documents Committee, Minutes, CH 0046, October 14, 1982.

¹⁶ Bower, (August 29, 2000).

¹⁷ When asked why the Ombudsman model was chosen for the review mechanism with appeal to the Court of Queen's Bench, Eugene Szach responded that fiscal restraint is not a new concept. It seemed logical to choose someone with the capability to review decisions under the Act whose powers and duties could be easily extended and who was already in the employ of the Legislative Assembly. The Court of Queen's Bench was the logical decision, recalls Szach, for an Attorney-General who firmly believed in the judicial process. (Szach, September 14, 2000). In the late 1970s when the federal government

was contemplating access and privacy legislation, some questioned whether a parliamentary system of government was compatible with freedom of information legislation. Some wondered about the effect such legislation would have on the basic parliamentary principle of ministerial responsibility and whether FOI and a review mechanism by the judiciary would be in conflict. The Canadian Bar Association addressed this question by stating that this argument confused the concept of ministerial responsibility with the concept of enforcement of legislation. A Cabinet minister is accountable to Parliament (and through Parliament, to the people) for the actions of his or her department. However, this accountability has never extended to the interpretation and enforcement of legislation. The Canadian Bar Association states: "no constitutional, legal or practical impediment stands in the way of judicial involvement in the adjudication of freedom of information questions and ... the defence of ministerial responsibility is a time-worn dogma that collapses upon an examination of the English and Canadian constitutional precedents." (CBA Model Bill, 12.) In other words, the concepts of ministerial responsibility and accountability are based on political policies and traditions. The enforcement of accountability from the perspective of access legislation is a statutory right, a constitutional right that can be adjudicated by the judiciary.

¹⁸ The only other Provincial Archives to assume the central administrative role for information rights legislation is the Yukon Archives. Its role differs from Manitoba's in that it also acts as "gatekeeper" to records in its custody. In its central administrative role Yukon Archives has the additional burden of being a go-between in the application for access process. In Manitoba, applications for access are sent directly to the Access Coordinator of the department which created the record or has responsibility for making access decisions. In the Yukon, the Archives receives all applications and then must forward them to departments if the requests are for current or semi-active records. Candace Shelton, telephone interview with the author, September 15, 2000.

¹⁹ Bower, (August 29, 2000), Dodds, (August 22, 2000).

²⁰ Recounted in interview with Dodds, (August 22, 2000).

²¹ Terry Cook, "Freedom of Information: The Role of the Courts," *Archivaria* 6 (Summer 1978), 156.

²² Jean Tener, "Accessibility and Archives," *Archivaria* 6 (Summer 1978), 26-27.

²³ Robert J. Hayward, "Federal Access and Privacy Legislation and the Public Archives of Canada," *Archivaria* 18 (Summer 1984), 53.

²⁴ Hayward, 54. The author's use of the terminology of "gatekeeper" in the context of archives should be attributed to Tener and Hayward.

²⁵ Daniel German, "Access and Privacy Legislation and the National Archives, 1983-1993: A Decade of ATIP," *Archivaria* 39 (Spring 1995), 196-213.

²⁶ German, 204.

²⁷ Archives of Ontario, Recorded Information Management, "Information Bulletin #1: Retention Periods, Archival Access and the Freedom of Information and Protection of Privacy Act." "The Archives of Ontario does, however, make it clear that consultation with the creators or "originating ministries" is not automatic. "Records transferred to the Archives of Ontario fulfil a new purpose. They are now research records. Access decisions will be administered on the basis that these records are now archival documents in the Archives custody and that decisions about disclosure, access and use are best handled by the Archives." Available on the Archives of Ontario Web Site <<http://www.gov.on.ca/MCZCR/archives/english/rimdocs/infobll.htm>>.

²⁸ Shelley Smith, telephone interview with the author, September 15, 2000. When asked what she thinks is the reason why people were not applying for access to archival records, she said that the groups commonly using the act (the media, Aboriginal groups, people applying for access to their own personal information in social services and healthcare records, and the Leader of the Opposition) are most commonly interested in current [active] records. In addition, she explained that Newfoundland tends to be an open culture. Very few records are restricted when they come into archival custody. She noted: "As a matter of fact, some departments transferring records have to be reminded that certain types of records should be restricted (cabinet confidences – not under FOI but under other legislation, personal information)." She also stated that although they have the Mount Cashel Inquiry records at PANL, no formal application under the provincial access legislation is required. Instead, researchers write to the provincial Justice department which decides on access to these records.

²⁹ Ibid.

³⁰ *Hansard*, Vol. XXXI, No. 77B, Monday, May 30, 1983 and Vol. XXXI, No. 78B, Tuesday, May 31, 1983.

³¹ Legislative Assembly, News Briefs [now referred to as News Releases], March 8, 1985. Available on the Manitoba Government Web Site <<http://www.gov.mb.ca/cgi-bin/press/release/pl>>.

³² Hon. Roland Penner, *Hansard*, Vol. XXXIII, No. 62A, Tuesday, June 4, 1985.

³³ *Hansard*, Vol. XXXIII, No. 63, Wednesday, June 5, 1985.

³⁴ Legislative Assembly, Standing Committee on Statutory Regulations and Orders, *Bill 5 - The Freedom of Information Act: Proceedings*, Vol. XXXIII, No. 2, Tuesday, July 2, 1985 (Winnipeg: Queen's Printer, 1985), 32.

³⁵ *Ibid.*, 24. *Hansard*, Vol. XXXIII, No. 88, Thursday, July 11, 1985.

³⁶ Wendy Elliott, interview with the author, October 12, 2000. Ms. Elliott is currently employed by Government Records as the FIPPA Contact and Development Officer. She was formerly the Access Coordinator for Manitoba Family Services (named Community Services in 1985 when the act was passed).

³⁷ The Deputy Ministers' Committee had this steering role during the 1987-88 fiscal year. *The Freedom of Information Act Annual Report, 1988* (Winnipeg: Manitoba Culture, Heritage and Recreation), 1.

³⁸ Gary Hunter, "Foot-dragging alleged on access to data," *Winnipeg Free Press*, August 25, 1985, 3.

³⁹ Dodds, (August 22, 2000). The Attorney-General, Roland Penner, also spoke to the issue in the House in May 1986. He was asked by the opposition when the *Freedom of Information Act* would be proclaimed now that the election was over. Penner responded that "we have an interdepartmental committee working on that matter, meeting virtually every week, sometimes more than twice a week, in order to cope with the tremendously complex problem of arranging the file schedules, from which thereafter the access guide must be prepared because without both of those, file schedules in each department and the access guide, the act cannot operated efficiently and the time requirements within the act [30 days] ... simply could not be met." *Hansard*, Vol. XXXIV, No. 4A, Tuesday, May 13, 1986. It was the Government Records Office and the Provincial Documents Committee that were working overtime to achieve the mammoth task of bringing government records under control.

⁴⁰ *The Law Society of Manitoba Legal Studies and Legal Aid Manitoba present Freedom of Information, November 16, 1985* (Winnipeg: Law Society of Manitoba, 1985).

⁴¹ Manitoba Court of Queen's Bench, Civil File, Canadian Newspapers Co. Ltd. v. Government of Manitoba, December 9, 1985, Suit no. 85-01-06496, Jewers, J., 11-12, 27.

⁴² *Hansard*, Vol. XXXIV, No. 29, Wednesday, June 18, 1986; Vol. XXXIV, No. 83B, Monday, September 8, 1986; Vol. XXXV, No. 8A, Monday, March 9, 1987;

Vol. XXXV, No. 18, Tuesday, March 24, 1987; Vol. XXXV, No. 57, Thursday, May 28, 1987.

⁴³ *Hansard*, Vol. XXXVI, No. 11, Thursday, February 25, 1988.

⁴⁴ Manitoba Culture, Heritage and Recreation, *Annual Report*, 1986-87, 17.

⁴⁵ Robert Tapscott, interview with the author, September 8, 2000.

⁴⁶ Manitoba Culture, Heritage and Recreation, *Annual Report*, 1987-88, 19. According to the Government Records Office, there are now approximately 6,500 Records Authority Schedules authorizing the retention and disposition of government records in Manitoba.

⁴⁷ PAM, Manitoba Culture, Heritage and Citizenship, Provincial Documents Committee, Committee Support Files, CH 0048, 1987.

⁴⁸ *The Access and Privacy Directory, Provincial Government and Government Agencies*, produced under FIPPA, replaced the *Access Guide* when the new information rights legislation was proclaimed in Manitoba in 1998. It will be discussed in further detail in the next chapter. The access guides or directories of records in the other jurisdictions include: *Infosource (Canada)*; *Access to Information Index (Yukon)*, a new guide is in development based on the Alberta model); *British Columbia Directory of Records*, 1994 (2 vols. and a Companion, it was extremely detailed but has never been updated); *Alberta Directory*, 1995 (as will be discussed in the next chapter, it has not been updated and is not as detailed as Canada or Manitoba); *Access Directory (Saskatchewan)*, it is kept up-to-date, but is a laundry list of records with little detail and no disposition information); *Directory of Records, Provincial Ministries and Agencies (Ontario)*, this directory is most similar in scope to the Manitoba version).

⁴⁹ Manitoba Culture, Heritage and Recreation, *Annual Report*, 1988-89, 15.

⁵⁰ *Ibid.*, 25.

⁵¹ Manitoba Culture, Heritage and Recreation, *Annual Report*, 1989-90, 30.

⁵² *Ibid.*, 31.

⁵³ Tapscott, (September 8, 2000); Manitoba Culture, Heritage and Recreation, *Annual Report*, 1989-90, 34. Ninety percent was also reported as the goal in the next annual report.

⁵⁴ *The Freedom of Information Act Annual Report*, 1990, 3.

⁵⁵ Legislative Assembly, Standing Committee on Privileges and Elections, *Operation of the Freedom of Information Act: Proceedings* (Winnipeg: The Committee, June 11, 1992), 6-7. The third edition was published in 1993 but it was not until publication of the fourth edition in 1995 that the *Access Guide to Government Records and Information* was made available on-line (*Freedom of Information Act Annual Report*, 1995, 6). Anyone familiar with the publication will appreciate that it is a large publication (in excess of 500 pages) which took considerable effort to publish in electronic and hard copy formats.

⁵⁶ Legislative Assembly, Standing Committee on Privileges and Elections, *Operation of the Freedom of Information Act: Proceedings* (Winnipeg: The Committee, April 27, 1993; May 31, 1993; June 22 and June 29, 1993).

⁵⁷ Ibid.

⁵⁸ Legislative Assembly, Standing Committee on Privileges and Elections, *Operation of the Freedom of Information Act: Proceedings* (Winnipeg: The Committee, June 22, 1993), 33.

⁵⁹ The author searched the original records of this Committee and no final report was among the papers. PAM, Legislative Assembly, Clerk of Committees, Committee Records, Privileges and Elections (4th Session – 35th Legislature, Nov. 1992 to April, 1994), LA 0015, GR 5387.

⁶⁰ *The Freedom of Information Act Annual Report*, 1994, 4.

⁶¹ Clause 19(1)(e) of the *Freedom of Information and Protection of Privacy Act* reads as follows: "The head of a public body shall refuse to disclose to an applicant information that would reveal the substance of deliberations of Cabinet, including ... (e) a record prepared to brief a minister about a matter that is before, or is proposed to be brought before, Cabinet or that is the subject of communications among ministers relating directly to government decisions or the formulation of government policy."

⁶² *The Freedom of Information Act Annual Report*, 1996, 6.

Chapter 3

The Manitoba *Freedom of Information and Protection of Privacy Act* and the Role of the Provincial Archives of Manitoba

This chapter will discuss developments leading to the proclamation of the *Freedom of Information and Protection of Privacy Act* in 1998 (C.C.S.M., c. F175) and the impact of responsibility for the central administration of this statute on the Provincial Archives of Manitoba.

Manitoba's second-generation access legislation was ushered into existence by activities in other Canadian jurisdictions, and more importantly, by increasing public awareness of privacy issues. The 1990s saw striking advances in information technology, the explosion of access to the seemingly boundless content of the World Wide Web and the realization that data could be manipulated in many ways. Consumers joined "reward" programs by the millions, thus trading the profile of their daily transactions for the opportunity of a discount. Grocery shopping, banking, ordering a magazine subscription and donating to a charity resulted in annoying "junk mail" arriving at doorsteps no longer addressed to "the householder" but to the names of the occupants. Behind the daily activities of ordinary people were computers, facilitating service and compiling data. What was being done with this personal information? Who was gaining access to it? Newspapers and bookstores were bursting with reports and predictions of the invasion of our personal privacy that went far beyond being annoyed with the contents of the mailbox.¹

Governments collect, by far, the largest volume of personal information and often, the most sensitive information. From birth to death, people interact with governments and supply them with personal information in order to obtain benefits and services, exercise rights and co-exist lawfully -- or unlawfully, for that matter. Personal information is divulged to register the birth of your child, get a marriage certificate, pay taxes, obtain a driver's license, register your vehicle, conduct land transactions, get a divorce, request daycare subsidies, and collect welfare. And the list could go on and on.

Much has been written from a legal, ethical and philosophical perspective about the concept of "privacy." What is "privacy" in the context of data protection statutes? Some definitions of "private" or "privacy" in the vast sea of literature on the subject include a few notable ones of relevance to this thesis, as they specifically discuss the concept of information privacy. In *Open and Shut*, the report on the review of the federal ATIP acts, the Standing Committee on Justice and Solicitor General identified the need to provide a simple definition of privacy adapted to the purposes of data protection "in order to facilitate and guide implementation and interpretive activities." The definition the Committee thought should be incorporated into the federal statute as it best suited Canadian law, is taken from Alan Westin's *Privacy and Freedom*. Westin defines privacy as "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others." In the words of the Committee, "especially as applied to claims by individuals, this definition is both useful and more fruitful than earlier formulations based on a

vague notion of the 'right to be left alone.' [quotation marks added]"² In 1994, Bruce Phillips, the Privacy Commissioner of Canada, said information privacy is built upon the principle that "all information about an individual is fundamentally his or her property. This means that no one should have more control over the information than the person it concerns. To disclose or withhold the information is for the subject to decide. Privacy is fundamental to the democratic notion of self-determination or autonomy...."³

Europe has led the way in dealing with protection of personal information in the public and private sectors. In 1970, the German state of Hesse enacted the first privacy legislation with its *Data Protection Act*. Sweden soon followed with a national *Data Act* in 1973. "By 1976," write Peter Gillis and Tom Riley, "data protection legislation was general enough in Europe and the question considered of such importance, that the Council of Europe's Committee of Europe appointed a Committee of Experts on Data Protection to work toward a Europe-wide convention to govern the field."⁴ The Organization for Economic Cooperation and Development (OECD) developed and adopted guidelines for fair information practices⁵ in 1980. The OECD's *Guidelines on the Protection of Privacy and Transborder Flows of Personal Information* were intended to protect personal information and ensure the free flow of data between member countries. Canada proclaimed the *Privacy Act and Access to Information Act* in 1983 and signed the OECD *Guidelines* in 1984. The *Guidelines* are based on eight principles of fair information practice which are to be used as minimum standards for the protection of privacy⁶: collection limitation (only as much

information as is needed should be collected by lawful means and where possible with consent of the individual); data quality (data should be relevant to the purpose for which it was collected, accurate, complete and up-to-date); purpose specification (the purpose of collection must be clearly identified at the time of collection, with subsequent use limited to the original or a consistent purpose and notice given for any additional use); use limitation (data should not be used or disclosed for any other purpose unless the consent of the data subject is obtained or by authority of law); security safeguards (data should be protected against unauthorized access, destruction, use, modification or disclosure); openness (policies and practices about the management of personal information should be made available as well as the nature, main purposes of use and the identity and location of the collector of that information); individual participation (individuals should have a right of access to information related to them in a timely fashion and at minimal cost, with mechanisms of recourse if access is denied and inaccurate or incomplete information requires correction); and accountability (for compliance with the principles).⁷ The OECD said its *Guidelines* apply to both automated and non-automated data: "The Guidelines are neutral with regard to the particular technology used; automatic methods are only one of the problems raised in the Guidelines although, particularly in the context of transborder data flows, this is clearly an important one."⁸

In 1995, the European Union (EU) passed a Data Protection Directive to harmonize privacy laws among its member states and provide for protection of personal information. All member countries were to have new legislation in place

by 1998 that complied with the EU directive by providing protection of personal information in both the private and public sectors. "These laws must contain provisions to block transfers of information to non-member states (such as Canada) that do not provide an 'adequate' level of protection."⁹

In North America, the United States was the first jurisdiction to enact privacy legislation with the *Privacy Act* in 1974. In Canada, federal privacy legislation was introduced originally as part of the *Canadian Human Rights Act* (1977).¹⁰ As indicated above, an act specifically devoted to information privacy, the *Privacy Act* was passed by the federal government in 1982 and came into effect in 1983. The underlying principles of fair information practice were incorporated into all subsequent Canadian legislation that dealt with the protection of privacy.

The realization that a full scheme of privacy protection in Manitoba, which limited the collection, use and disclosure of personal information by public bodies,¹¹ did not come in the wake of one significant crisis but rather in light of mounting evidence that if something was not done to protect the privacy of individuals, the provincial government would eventually face a crisis. A few events, which occurred at about the same time, precipitated the decision to move forward with enhanced protection of personal information in government custody. In 1994 the Manitoba government committed the province to a "\$100 million dollar" health information network project. The initiative, commonly known as "SmartHealth" (for the company that was awarded the contract), was intended to provide a health information network, which was accessible to doctors, hospitals,

labs, pharmacies, ambulances and any other health care providers. It was to improve health service, provide rapid access to health information and reduce the abuse of the system by detecting duplication of services.¹² The project was slow to progress and the medical community raised concerns about information management issues throughout the development phase. The College of Physicians and Surgeons of Manitoba and the Manitoba Medical Association would not support the initiative unless legislated safeguards were put in place to protect personal health information.¹³

The government was also being asked to sell in bulk other types of data or, if a sale was rejected, to provide access in the form of bulk disclosure. On March 14, 1996, the "Weekly Report of Freedom of Information Act Applications" included the following requests for access received by Manitoba Justice:

Requests access on a machine-readable medium to those Land Title records which are public and which are currently available through Manitoba Online and through the Justice Department itself.

Requests access on a machine-readable medium to those Personal Property Registry records which are public and which are currently available through Manitoba Online and through the Justice Department itself. Need the entire record, including schedules which are currently available in machine readable format.¹⁴

As the government was coming to realize, there is a substantial difference between going into a public registry office to examine records one by one and disclosing them in bulk in electronic form. The definition of "public" takes on new meaning if, for example, tax assessment records are on the World Wide Web

and anyone can search them from their desktop by the name of an individual and locate all properties that individual owns.

Safeguards were clearly necessary to protect the vast amount of personal information held by the Manitoba government. In May 1996, Harold Gillishammer, Minister of Culture, Heritage and Citizenship and the Minister responsible for FOI, announced the government's decision to conduct a full-scale review: "Balancing the right to information and the right of privacy is the goal of new legislation being proposed by the Manitoba Government. New legislation is needed to acknowledge the spectacular growth of electronic technology and the incredible range of information now available to people."¹⁵ Gillishammer and Health Minister Jim McCrae issued a joint press release to explain the method of review of the proposed legislation: "The intention of the consultation process is to ensure new legislation addresses the impact of technology and to develop legislation that acknowledges the need to secure personal health information."¹⁶

This review and the process of drafting the new legislation created a great deal of work for Government Records at the Provincial Archives and Manitoba Health. Extensive research was undertaken to examine legislation in other jurisdictions and two discussion papers, designed to frame the consultation process, were produced: *Access to Information and Privacy Protection for Manitoba* by Government Records and *Privacy Protection of Health Information* by Manitoba Health. The discussion papers were made available on the Manitoba Government Web Site. Copies were distributed to public interest groups and also made available at the Provincial Archives and the Legislative

Library. The *Access to Information and Privacy Protection for Manitoba* discussion paper outlined developments in information rights in other jurisdictions, described fair information practices, and explained the history of access legislation in Manitoba. It pointed out that the Manitoba FOI Act did not include some of the fair information practices outlined by the OECD. The gaps in existing statutory provisions were explained as follows:

To date in Manitoba, complaints on matters of information privacy, other than abuse of the personal privacy exemption in the *FOI Act*, have been pursued under *The Ombudsman Act* at the Ombudsman's discretion. On other issues, recourse may be made to *The Privacy Act (1972)* [Manitoba]. This legislation predates any of the information privacy laws of the last fifteen years and deals largely with violations of privacy through unauthorized surveillance, libel, improper use of documents and personal likenesses, and defamation. It does not address privacy of personal information issues, which are being highlighted by recent electronic data-matching and communications capabilities.¹⁷

The discussion paper also posed the following five questions: should the new legislation be extended to public bodies beyond government including self-regulating professions? Should any of the exemption categories in FOI be changed? Are there privacy concerns not adequately addressed by the principles of fair information practice? What kind of appeal process should allow redress of complaints about access and privacy issues? Should penalties apply if personal privacy provisions are abused?¹⁸

Fifty-eight individuals and organizations and numerous government departments made oral and written submissions to Government Records concerning new access and privacy legislation.¹⁹ The public responses were

made available in the Legislative Library Reading Room and the Provincial Archives Reference Room. Many of the responders spoke favourably of the idea of combining access and privacy legislation into one unitary statute. Almost all who responded to the question about the scope of the legislation thought that local public bodies such as school divisions and municipalities should be brought under the new legislation. Conspicuous in their absence were responses from Manitoba's three universities and no response was received from the City of Winnipeg. Not surprisingly, the self-regulating professions such as the College of Physicians and Surgeons and the Law Society of Manitoba did not favour extension of the act to their organizations.²⁰ With few exceptions, public respondents recommended the Commissioner model (with binding order power) for the complaint review process. Many saw the court process as costly and believed a Commissioner would be a stronger advocate for equality of access.²¹ The office of the Manitoba Ombudsman was chosen by the government to continue as the review mechanism with the added power of being able to go to court on behalf of the applicant (FIPPA, S. 68).

A few of the respondents in the information management/archival field addressed the issue of the need, above and beyond the principles of fair information practice, for resources and effort to be directed at records management in the local public body sector. Tom Nesmith, founder and director of the Master's Program in Archival Studies, Department of History, University of Manitoba/Winnipeg, included the following statement in his submission:

There can be no meaningful institutional accountability, right of access, right of privacy, and no protection of these rights over time, in what might be considered a new information right, the "right to archives", if such original records are not under proper control through records and archival programmes. These interests Manitobans have in these records will not be served if records are misidentified, misfiled, cannot be found readily, or at all, are thoughtlessly destroyed, or for those records of enduring or archival value, left without proper protection over time.²²

Public and government department responses were gathered and the drafting process began. The Provincial Archives was an active participant, working with representatives from Manitoba Health, Gail Mildren (General Counsel, Manitoba Civil Legal Services), and Valerie Perry (Manitoba Legislative Counsel). The drafting committee began work on a bill to provide for privacy protection to personal information. The original idea was to draft one bill which would encompass the protection of all personal information, including personal health information, regardless of where it was located as the nature of recordkeeping is such that personal health information is often integrated with what might be called more general personal information.²³ This is the case in many kinds of series such as employee files or case files: It was decided by Manitoba Health that a separate personal health information act was required to meet the demands of the health care sector in both scope (extension to health information in the private sector) and timeliness in response to the SmartHealth initiative. The committee broke off into their respective areas of expertise with Gail Mildren and Valerie Perry working on both bills. The two acts were drafted as companion pieces of legislation, Bill 50, the *Freedom of Information and*

Protection of Privacy Act (FIPPA) and Bill 51, the *Personal Health Information Act (PHIA)* (C.C.S.M., c. P33.5). The adoption of two privacy laws – FIPPA and PHIA -- has caused difficulty in the implementation and administration of the two acts because information is often integrated and the acts themselves are complex.²⁴ PHIA, rather than FIPPA, is used as the avenue for access to one's own personal health information. It is noteworthy that Manitoba is the first jurisdiction in Canada to enact personal health information legislation.

A close examination of FIPPA reveals its underpinnings in the Alberta statute. British Columbia and Alberta were the most recent examples of unitary access and privacy statutes at the time Manitoba began to consider new legislation in 1996. Manitoba was therefore able to model its legislation on statutes that represented the principles it wished to uphold. Of course modifications were made to reflect Manitoba's existing model and the results of the consultation process. Part 2, the access side of Manitoba's unitary information rights legislation, remained mainly unchanged. Government Records maintained its role as the central administrative unit for FIPPA. The creators of the records continue to play the "gatekeeper" role in determining access to records in their custody and in the custody of the archives. As indicated earlier, the FOI's Ombudsman model of complaint review was continued. The Ombudsman, however, was given expanded powers of audit and investigation under the privacy protection provisions and the ability to go to court on behalf of an applicant. Ultimate recourse in the appeal of access applications resides with the Manitoba Court of Queen's Bench.

The *Freedom of Information and Protection of Privacy Act* was passed on June 27, 1997 after much debate and public input in the Committee process.²⁵ It came into force for Provincial Government agencies on May 4, 1998. FIPPA was to be phased in for local public bodies by a date fixed by proclamation. Although the intention was to do so after one year, FIPPA was not proclaimed for local public bodies until April 2000 due to the need to train staff and prepare directories of records. The City of Winnipeg asked to come under FIPPA early. The Act came into effect for the city on August 31, 1998.

As the title of this chapter suggests, with the new legislation came additional responsibilities for the Provincial Archives in its role as the central administrative unit for FIPPA. Since the access provisions were largely unchanged, the two most significant new concerns for the Archives were Part 3, "Protection of Privacy" and the extension of the Act to local public bodies. They presented a steep learning curve for the staffs of the archives, government departments and agencies and local public bodies.²⁶ With the exception of the City of Winnipeg, which had an access by-law in place in 1996²⁷, the concepts and implications of both the access and privacy sides of the legislation were new to the local public bodies.

Protection of privacy meant that the production of a public access guide to government records systems (previously the *Access Guide* under FOI) had to be redesigned to fulfill the fair information practice of openness or transparency. In addition, new publications had to be created for local public bodies. Section 75 of FIPPA requires that a directory to assist in identifying and locating records in

the custody or under the control of government bodies be prepared, kept up-to-date, and made available to the public. The author of this thesis, Jackie Nicholls, was assigned the role of "FIPPA Directories Coordinator" in May 1996²⁸. The provincial government directory of records received priority attention, as it had to be published and distributed by the date of proclamation. Nicholls began updating and overhauling the directory. She offered workshops in 1997 to train the staffs of the departments and agencies about what the new provisions of FIPPA meant for both the description of records for the *Directory* and the management of records. The new government access guide was entitled the *FIPPA Access and Privacy Directory* (Provincial Government and Government Agencies). Section 75(5) requires all personal information banks to be reported in the *Access and Privacy Directory*. They must be described in a specific, prescribed fashion.²⁹ For the Manitoba government, each personal information bank (PIB) listed in the *Directory* must include the following information: the name of the PIB (the name of the records series or information system which has been identified as a personal information bank); the authority for collection (which must be a law of Manitoba or Canada, necessary for a program or activity or for law enforcement/ crime prevention purposes); the purpose for collection (why the personal information is collected and how it is used); the kind of information maintained (including both general and personal information); other uses and disclosures³⁰ (of all or part of the personal information for purposes other than that for which it was collected); the retention and disposition (how long the information is maintained and whether it is destroyed or transferred to the

Provincial Archives). For the first time in Manitoba, records which were not yet scheduled for retention and disposition by the Provincial Documents Committee were included in the *Access and Privacy Directory* because of the requirement to identify PIBs. It was eye-opening to see how many series were unscheduled. Government Records was aware of the existence of many electronic recordkeeping systems but had not yet determined how they might be scheduled. Until resources could be devoted to working on unscheduled records series, the information gathering process for the *Directory* served to identify target areas for records advisory.

The resources assigned to prepare the *Directory* were 1.5 staff years (not including translation) and the job took almost two years to complete. The *Access and Privacy Directory* (over 600 pages) was published in 1998 in both official languages and made available at all Manitoba public libraries, government departments, Manitoba Statutory Publications (for purchase) and online on the Manitoba Government Intranet and Internet web sites. Until quite recently, the *Directory* was the largest item of information on the Manitoba government site.³¹

Work began on the local public bodies' directories of records in 1998. Again, the task was enormous, but this time the Archives did not have the benefit of the sort of inside knowledge of the administrative structures and records of local public bodies that it had of Manitoba government agencies as a result of its role in provincial records management. It was decided that a series of handbooks for the local public body sectors would be produced that would include a guide to the Act tailored to local public bodies, administrative

procedures for implementing the act and the directories of records for each kind of local public body in that sector. The three volumes that comprise the FIPPA handbooks for local public bodies are the *FIPPA Handbook for Educational Bodies*, the *FIPPA Handbook for Local Government Bodies* and the *FIPPA Handbook for Health Care Bodies*. It was also decided that the only feasible approach to the description of the records of local public bodies aimed for a general description of common records. There are 370 local public bodies which fall under the Act. They include: 201 urban and rural municipalities; 11 conservation districts; 32 planning districts; 38 Northern Affairs community councils; 55 school divisions and districts; 3 universities; 3 colleges; 12 regional health authorities; and 15 hospitals which have retained their board structure. It was inconceivable that directories like the provincial government *Access and Privacy Directory* could be produced for each public body, although that is the ideal long-term goal.

The varied size and the complexity of Manitoba local public bodies makes identification of common records series a challenge. The mandate of the Archives includes the collection of archival records of municipalities and school divisions. However, it was clearly understood by the Archives that receiving into archival custody transfers of "daily registers of attendance" from mainly defunct school districts and "tax assessment rolls" from a handful of municipalities was not going to provide much insight into the current recordkeeping systems of local public bodies. Fortunately, some sectors had produced directives on records management and the staff of the Provincial Archives had been involved in a

records advisory capacity. *The Municipal Act* (C.C.S.M., c. M 225) includes a comprehensive records Regulation which was used as the basis for the "Directory of Municipal Records." Manitoba Education and Training, in conjunction with the Provincial Archives, had developed *Guidelines on the Retention and Disposition of School Division and District Records* in 1996. Work was done by both the Archives and Manitoba Education to revamp the *Guidelines* in conjunction with the "Directory of School Division and District Records."

There were some exceptions to the general directory of records model. Keewatin, Assiniboine and Red River Colleges had already been subject to FOI, as they fell within the definition of government agencies. Their records were scheduled under the authority of the Provincial Documents Committee. When FIPPA came into effect for local public bodies, the college directories were updated and moved out of the provincial government directory into the *FIPPA Handbook for Educational Bodies*. The three universities were approached to create their own directories of records, as these public bodies are large and complex and a general records directory for all three was seen to be of little use to both the public and the public bodies themselves. The University of Manitoba and the University of Winnipeg have produced impressive directories of records, which will undoubtedly assist them with the management and appraisal of their recordkeeping systems. There are two other exceptions to the "general descriptions" model, the City of Winnipeg and the Winnipeg Regional Health Authority (in process). The City of Winnipeg had already produced its own

access guide under its "Sunshine By-law". The City of Winnipeg Archives is currently working on updating this guide to incorporate the description of personal information banks. All of the general directories of records have been completed with the exception of the health care sector. This is proving to be a particularly difficult sector to coordinate, as they are predominately concerned with ensuring compliance with the *Personal Health Information Act*. Although control of health care records has been a constant in this sector, electronic recordkeeping poses new challenges to the identification and description of discrete personal information banks.

Another challenging responsibility for the Archives has been educating staff in all public bodies to understand the provisions of the Act, respond to requests for access to information and implement privacy protection under the *Freedom of Information and Protection of Privacy Act*. Wendy Elliott was seconded from her position as FOI Access Coordinator for Manitoba Family Services in the spring of 1997 and assigned the role of "FIPPA Development and Contact Officer." She is responsible for training and educating staff, and supporting public bodies in their administrative role under FIPPA. From 1998 to May 2000, Elliott has provided training in the form of introductory sessions and sector specific workshops to 6, 255 people within government and in the various local public bodies throughout the province.³² In the Government Records Office, her staff year is the only one completely devoted to FIPPA.³³

The Archives also provides secretariat support to the Privacy Assessment Review Committee (PARC) which is established under section 46 and 77 of the

Freedom of Information and Protection of Privacy Act as an instrument of privacy protection for personal information. The Committee consists of senior officials from departments that hold large bodies of personal information.³⁴ The Committee provides advice to heads of public bodies when personal information is proposed to be used or disclosed for purposes not otherwise authorized under FIPPA (such as data matching or linking or disclosure on a volume or bulk basis). The privacy assessment review process is intended to balance the privacy interest of individuals with the public interest of disclosure. The Provincial Archivist, Gordon Dodds is Chair of the Committee, and Nancy Stunden, Chief of Access and Privacy Services, Government Records, is Secretary of PARC. This review process is unique to Manitoba's legislation.³⁵

As part of its central administrative duties, Government Records collects statistics which are used to summarize the activities of public bodies in responding to applications for access to records and in protecting personal information under the Act. This information is published in the *Freedom of Information and Protection of Privacy Act Annual Report* written by Government Records and tabled by the Minister responsible for FIPPA. Similar to those gathered from government departments and agencies under FOI, the types of statistics include the number of applications received and processed, the numbers of applications for which access was granted, partially granted or denied, response times, exceptions categories invoked in denial of access, fees collected, and costs involved. These statistics are gathered quarterly. The questions are anonymized and forwarded to Government Records for

compilation and distribution weekly to Access and Privacy Coordinators. Similar annual statistics will be gathered for local public bodies for inclusion in the annual report.

The Provincial Archives seized the opportunity to “steer not row” in 1982 when it became involved in access legislation. It unquestionably furthered the records management program in the early years and brought under control records important to the heritage of Manitoba. When asked what benefits the Provincial Archives has obtained with its expanded role in central administration for the new *Freedom of Information and Protection of Privacy Act*, Gordon Dodds stated that this role has kept the archives in a central and integral position in government, has brought in staff years and an increased budget.³⁶ There are also benefits to PAM by the continuation of its existing role as “guide” to information rather than the “gatekeeper” making access determinations for access to archival records, which are increasing in volume by an average of four thousand cubic feet per year. The mechanisms of access are logical (access to archival records is determined by the records’ creator) and appear to be working well.

According to the *Manitoba Freedom of Information and Protection of Privacy Resource Manual*, “the functions of the Provincial Archives respecting FIPPA are directly related to its responsibilities for administration of the records management program of the Manitoba Government.”³⁷ This seems to have been the case under *The Freedom of Information Act* but is it applicable under FIPPA? The extension of the Act to local public bodies has stretched the resources of the

Government Records Office very thin. All of these responsibilities under the *Freedom of Information and Protection of Privacy Act*, on top of the core functions of the Government Records program, mean some things are left undone. For example, there are only two archivists (and one manager) working on the entire archival side of the government records program. With one of the archivists committed more than half of the time to FIPPA, the description of archival records, a core archival function, cannot be accomplished. Furthermore, the responsibilities under FIPPA for the Provincial Archives show no signs of relenting.

Other jurisdictions which even have a distinct office (apart from the archives of the jurisdiction) devoted to the central administration of access and privacy legislation find the role consistently under-resourced. Like Manitoba, section 82 of Alberta's *Freedom of Information and Protection of Privacy Act* (FOIP) requires that the Minister responsible for the Act publish a directory to assist in identifying and locating records. In 1999, the Alberta FOIP Act came under review and the Review Committee recommended "that a cost-benefit analysis should be undertaken regarding the Directory, which is required under section 82 of the Act, for consideration during the next review of this legislation, however, until then, the requirement of the section should continue."³⁸ The problem at the heart of the recommendation is resources. The central administrative office for FOIP (which is part of the Alberta Municipal Affairs ministry) has not been able to secure the funds required to update *The Alberta Directory of Records* since 1995, and it has not yet incorporated directories of

records for local public bodies. The cost-benefit analysis has not begun but it is expected that recommendations about the production of the Directory will deal with the way in which it is produced and who is responsible for its production. The recommendations will likely include rewording of S. 82 of Alberta's *Freedom of Information and Protection of Privacy Act* to indicate that it will be an online publication, that responsibility for "publishing" the identification and location of records and personal information banks should lie with the creator of the records and that the central administrative office should be linked to each creator in order to provide a central access point to this information. It is worth noting that the FOIP office of the Alberta government is devoted solely to these responsibilities for this legislation and presently has twelve staff members. Because it has not secured the necessary funding, the *Alberta Directory of Records* is not yet being updated.³⁹

Although a critique of the overall effectiveness of Manitoba's access and privacy legislation is beyond the scope of this thesis, certain problems, challenges and possibilities for the Provincial Archives stem from its unique role in access and privacy legislation. The next chapter will explore issues touching on the future of FIPPA at the Provincial Archives of Manitoba.

Endnotes

¹ Several American newspaper and journal articles about the use of driver and vehicle licencing (DVL) records were written in 1994 when the *Driver's Privacy Protection Act* was passed by the United States Senate. The bill was introduced in the wake of repeated invasions of privacy due to open access to DVL records including the highly publicized 1989 murder of actress Rebecca Schaefer. Her stalker, through a private investigator, traced the actress's address from motor vehicle records. For example, see various articles in *News Media and the Law* (Winter 1992 and Winter 1994); Jerome. L. Wilson, "Keep State Auto Files Accessible and Public," *The National Law Journal* (February 7, 1994), 15-16. In British Columbia, the *Globe and Mail* reported that access to, and improper disclosure of personal information put abortion clinic workers and patients on alert after it was discovered their home address were traced through their vehicle licence plates. See: "B.C. to probe tampered records of abortion clinic workers," *Globe and Mail* (January 10, 1995), A5. In 1996, *The Economist* magazine reported on the sale of personal information by telemarketing companies to anyone willing to pay. This included the sale of addresses of children and their parent's names to a reporter posing as a convicted pedophile and murderer. See: "Inside information," [unsigned editorial], *The Economist* (June 29, 1996), 24. Also in 1996, *The Winnipeg Sun* wrote a cover story on Canada as an emerging "surveillance society" where all electronic transactions are tracked and profiled. See: Bartley Kives, "High-Tech Confidential," *The Winnipeg Sun*, April 26, 1996, 1. See also: Jeffrey Rothfeder's monograph entitled *Privacy for Sale: How Computerization Has Made Everyone's Private Life An Open Secret*, (New York: Simon & Shuster, 1992) which recounts story after story of information privacy invasion resulting in the disruption or destruction of lives.

² Canada, Standing Committee on Justice and Solicitor General on the Review of the *Access to Information Act* and the *Privacy Act*, *Open and Shut: Enhancing the Right to Know and the Right to Privacy* (Ottawa: Queen's Printer, 1987), 58. The well-known aphorism of privacy as "the right to be left alone" is ascribed to American jurists Samuel Warren and Louis Brandeis.

³ Bruce Phillips, "Must protect privacy from electronic vultures," *Canadian Speeches: Issues of the day* 8, no. 1(April 1994), 30.

⁴ Peter Gillis and Tom Riley, *Privacy in the Information Age: A Handbook for Government and Industry Professionals* (Sacramento: Government Technology Press, 1996), 21.

⁵ An early statement of fair information practices is included in the United States *Privacy Act* (1974) according to *Manitoba Freedom of Information and Protection*

of *Privacy Resource Manual* (unpublished, 2000), 1-2. Hereafter referred to as the *FIPPA Manual*. The manual was produced by the Provincial Archives, Government Records Office, Manitoba Culture, Heritage and Tourism, and Manitoba Justice, Civil Legal Service Special Operating Agency.

⁶ The phrases "protection of privacy" and "protection of personal information" are used interchangeably in this thesis.

⁷ Organization for Economic Cooperation and Development, Council of Ministers, *Guidelines on the Protection of Privacy and Transborder Flows of Personal Data* (Paris: OECD, 1980), 10-11. Hereafter referred to as *OECD Guidelines*.

⁸ *OECD Guidelines*, 25.

⁹ Industry Canada, *Electronic Commerce in Canada*, "The International Evolution of Data Protection." Available on Industry Canada Web Site, <<http://e-com.ic.gc.ca/english/fastfacts/43d10.html>>. Federal Bill C-6, the *Personal Information Protection and Electronic Documents Act*, is not only an attempt to deal with e-commerce in the private sector but to meet international obligations or standards in order to participate in the global economy.

¹⁰ *FIPPA Manual*, 1-1.

¹¹ A definition of some of the common terms used in FIPPA is required. "Use" of personal information means access to and use of personal information by the public body that collected the information, in order to accomplish its objectives. The "use" must be authorized under section 43 of FIPPA. "Disclosure" of personal information means the release (making known, revealing, exposing, showing, providing, selling or sharing) of personal information to any person or organization outside the collecting public body by any means (for example, by providing copies, verbally, electronically or by any other means). A disclosure of personal information must be authorized under section 44 of FIPPA. "Public body" means a Manitoba government department, government agency, or a local public body. "Local public bodies" are defined as public bodies other than Manitoba government departments and agencies including: local government bodies (urban and rural municipalities, conservation and planning districts, Northern Affairs community councils); educational bodies (school divisions and districts, colleges and universities); and health care bodies (regional health authorities who are responsible for hospitals and personal care homes, as well as hospitals not under the jurisdiction of a regional health authority). These definitions are included in S. 1 of FIPPA and more informally described, as above, in the "Directories of Records – Introduction," common to all three FIPPA handbooks for local public bodies. (See bibliographic reference).

¹² The news release stated that the tender for a "\$100 million dollar computer network was awarded ... to SmartHealth. The new Manitoba based company specializes in health care information technology and is a wholly owned subsidiary of the Royal Bank." The project was to take five years to implement. Legislative Assembly, News Briefs [now referred to as News Releases], December 13, 1994. Available on the Manitoba Government Web Site <<http://www.gov.mb.ca/cgi-bin/press/release/pl>>. In May 2000, the NDP government announced that it was ending the project "due to disappointing progress." Manitoba Government News Release, May 9, 2000.

¹³ See Alison Krueger, "Hands off charts: MMA," *Winnipeg Free Press* (April 10, 1997), A1, A2.

¹⁴ "Weekly Report of Access Applications under *The Freedom of Information Act*," PAM, Government Records Office Files, CH 0053. Under informal access policies of the Provincial Archives, these anonymized transcriptions of weekly questions received by government departments and agencies are made routinely available upon request.

¹⁵ Manitoba Culture, Heritage and Citizenship, *Access To Information and Privacy Protection for Manitoba: A Discussion Paper* (Winnipeg: Government Records, CHC, 1996), 2.

¹⁶ Manitoba Government News Release, "Government Invites Discussion of New Privacy Legislation: Protection of Personal Health Records to be Balanced with Right to Access Information," May 16, 1996.

¹⁷ *Access To Information and Privacy Protection for Manitoba: A Discussion Paper*, 6.

¹⁸ *Ibid.*, 9. This last question came in light of the "Somalia Affair" at the federal level. The Somalia Inquiry revealed that the Department of National Defence had tampered with documents which had been requested under the *Access to Information Act* by a CBC reporter. These records were relevant to the inquiry into charges that Canadian military personnel were guilty of murder and torture of Somalis while on duty in Somalia. See: Gerald McDuff, "Public should expect honesty," *Winnipeg Free Press* (May 8, 1996), A13. Manitoba's *Freedom of Information and Protection of Privacy Act* (S. 85) does include offence provisions of up to \$50,000 in fines for the willful disclosure of protected personal information, misleading or lying to the Ombudsman, obstructing the Ombudsman in his duties, or destroying a record which has been requested under the act with the intent to evade access. To the author's knowledge, these offence provisions have not been invoked since the Act came into effect in 1998.

¹⁹ *FIPPA Manual*, 1-4 and *Government Records*, Provincial Archives of Manitoba. *Access to Information and Protection of Privacy (ATIPP): Responses to Discussion Paper Submissions*, Compiled by Manitoba Culture, Heritage and Citizenship, 1996 (unpublished).

²⁰ Outside of Quebec, British Columbia is the only Canadian jurisdiction whose information rights legislation covers self-regulating professions as defined in Schedule 3 of B.C.'s *Freedom of Information and Protection of Privacy Act*, S.B.C. 1992, c. 61.

²¹ *Access to Information and Protection of Privacy (ATIPP): Responses...*, see: The Law Society of Manitoba, Submission No. 303, March 27, 1997; Association for Manitoba Archives, Submission No. 123, October 9, 1996.

²² *Ibid.*, Tom Nesmith, Submission No. 132, October 11, 1996, 3. See also: Association for Records Managers and Administrators, Submission No. 121, October 10, 1996 and Association for Manitoba Archives, Submission No. 123, October 9, 2000.

²³ "Personal health information" means recorded information about an identifiable individual that relates to the individual's health or health care history, the provision of health care to the individual and payment of health care provided. The term includes identifying numbers (i.e. Personal Health Information Number (PHIN)) or symbols assigned to an individual, as well as any identifying information about the individual that is collected in the course of the provision of health care. "Personal information" means recorded information about an identifiable individual including name, home address and telephone number, age, family status, etc. (Please see full definition in the Act). Personal information also includes any identifying numbers or symbols assigned to an individual, for example, the Social Insurance Number (SIN). These definitions are used both in S. 1 of FIPPA and S. 1 of PHIA, and more informally described, as above, in the *FIPPA Access and Privacy Directory* (Provincial Government and Government Agencies), (Winnipeg: Government Records Division, Culture, Heritage and Citizenship, 1998).

²⁴ Bower, (August 29, 2000). PHIA was passed at the same time as FIPPA and proclaimed on December 11, 1997. Manitoba Health is responsible for PHIA.

²⁵ The Standing Committee on Economic Development considered both FIPPA and PHIA on June 23, 1997. Aside from Committee debate, there were eighteen presentations made to the Committee and one written submission. The record of proceedings in *Hansard* Vol. XLVII, No. 4 - Monday, June 23, 1997 is 79 pages long.

²⁶ See endnote 11 for definition of the term local public bodies.

²⁷ "A By-law of The City of Winnipeg relating to Access to Information" (The City of Winnipeg By-Law No. 6420/94), referred to as the "Sunshine By-law", came into force on January 1, 1996.

²⁸ Nicholls had been an Access Archivist in Government Records since January 1995.

²⁹ A personal information bank (PIB) refers to only those series of records and information systems that are organized and capable of being retrieved by a personal identifier (an individual's name or identifying number).

³⁰ Other use refers to the release within a department or that part of a department which collected the information. Disclosures refers to the release of personal information to any person or organization external to the collecting department.

³¹ It has been overtaken by the new FIPPA web site which includes, in addition to the provincial and local public bodies' directories, the policy and guide manuals, information on how to apply for access, and statutory forms, etc. In total the site has about 1500 hard copy pages, translating into many more web pages of information.

³² Statistics compiled from *The Freedom of Information and Protection of Privacy Act Annual Report*, 1998, 8 and the *FIPPA Annual Report*, 1999, 7. Year 2000 statistics supplied by Wendy Elliott in interview with the author, October 12, 2000.

³³ On paper there are approximately 3.5 staff years devoted to FIPPA, the FIPPA Contact and Development Officer (Wendy Elliott), the FIPPA Directories Coordinator (Jackie Nicholls), two support staff who devote part of their time to FIPPA related work (Christel Ehrentraut and Zelma Zozman) and the Chief of Access and Privacy Services (Nancy Stunden). With the exception of Wendy Elliott, all the above mentioned employees have also had duties related to core archival functions which take them away from FIPPA on a regular and frequent basis.

³⁴ Manitoba Consumer and Corporate Affairs, Education and Training, Family Services and Housing, Health, Highways and Government Services, Industry and Mines and Justice.

³⁵ *FIPPA Manual*, 5-120.

³⁶ Gordon Dodds, interview with the author, August 22, 2000.

³⁷ *FIPPA Manual*, 2-8. Chapter two of the manual deals with the administration of the Act and defines the duties and responsibilities of the Minister Responsible, the government officials involved in the implementation of FIPPA and the Provincial Archives as the central administration and coordination office for FIPPA.

³⁸ Alberta Legislative Assembly, *Final Report of the Select Special Freedom of Information and Protection of Privacy Act Review Committee* (Edmonton: Legislative Assembly, March 1999), recommendation 76, pp. 13, 65.

³⁹ Telephone interview with Hilary Lynas, Information Management and Privacy Branch, Alberta Municipal Affairs, September 5, 2000.

access and privacy landscape. The Provincial Archives does not assume the role of “gatekeeper” of access to records in archival custody, instead, it serves as “guide” to them and to other all records covered by the legislation, in its role as the central administrative office for the *Freedom of Information and Protection of Privacy Act*. This approach has resulted in both benefits and problems for the Provincial Archives. By the same token, the more common role of a provincial archival institution -- actually determining access to records in its custody and control -- has, according to the literature, been challenging and problematic. It is difficult to tell which is the more onerous of approaches.

This chapter will explore the benefits and challenges of the “Manitoba model.” In addition, the chapter will examine some of the issues arising out of Canadian access and privacy legislation which have particular implications for archival institutions. The chapter will conclude with suggestions for changes which address the question of the role of a public archives in relation to information rights legislation.

As discussed in chapter two, the Provincial Archives of Manitoba had the opportunity to reject the “gatekeeper” role because it was fortunate enough to be involved in the development of access legislation from the very beginning. It is puzzling, however, to consider how this was achieved, as the responsibility for determining access under most, if not all, Canadian access laws lies with the public body which has “custody” or “control” of the records. It therefore seems straightforward that access to records in archival custody would be determined by an archives. The decision to reject the “gatekeeper” role does not seem to be

a discretionary administrative issue but rather a legislative interpretation.

McNair and Woodbury's comparative study of Canadian access legislation, indicating New Brunswick as the sole exception, states the rationale for the conventional "gatekeeper" role of archives: "Sometime after government records are no longer in active use they will be transferred to the archives. The source of old records will not, therefore, be the institution that originally created or received them."³ This may be a drastic oversimplification of the actual process of transfer of records to archives but it is nonetheless a logical deduction from the usual statutory provisions, which deem an archives to be the new "source" of the records and thus primarily responsible for access to them.

McNair and Woodbury's deduction is, however, incorrect in relation to Manitoba.⁴ When asked how Manitoba accomplished its different method of access to archival records, Eugene Szach, who drafted Manitoba's 1988 *Freedom of Information Act* (FOI), pointed to section 9 (3) of the act on the "meaning of greater interest." This clause states that access to the record will be determined by the department which has "greater interest" in the record. The Act says that "a department has a greater interest in a record if (a) the record was originally prepared in or for the department; or (b) the department was the first department to obtain the record." This provision enabled the Provincial Archivist, Peter Bower, and the Chief of Government Records, Gordon Dodds, to avoid having the archives make access decisions on an increasing volume of archival records.⁵

Why avoid or reject the role of decision-making on access requests? Is

not “access” one of the core functions of an archives? Literature stemming from the National Archives of Canada experience with the federal ATIP statutes indicates that implementation is a burden on resources and, like many other archives charged with this responsibility, consultations with the creator of records must often take place. This extra layer of decision-making often results in a delay for the applicant and, in any case, deferral to the records’ creators’ judgement because it is actually in the best position to know whether certain types of information ought to be made available. How, for example, would an archivist know whether to release complex information about various technical or scientific matters or about highly contentious ethical and confidentiality matters arising from detailed knowledge of the specifics of a particular case?

In Manitoba, there is also precedent for the role adopted by the archives. Restrictions on records laid down by statutes in place before FOI or which override Manitoba’s access legislation have not been interpreted or reviewed by archivists. For example, requests for information in “ward files” (children in care), transferred to archival custody 21 years after closure, are subject to *The Child and Family Services Act*. These requests are dealt with by Manitoba Family Services and Housing. When access to information legislation was being considered in Manitoba, extension of this mechanism of access to restricted records was seen as a logical approach. The creator of the record – the department which delivered the service or program – has the expertise or knowledge of content and context needed make decisions about the application of exception categories under access legislation. If discretion is improperly

invoked, if the content of the information released is controversial or requires explanation, should not the creator be held accountable?

As much as society might wish for the determination of access to information to be an apolitical process, one would be hard pressed to conclude that it is. If this were so, there would be no complaints made to ombudsmen or information commissioners. Researchers at archival institutions undoubtedly and understandably favour an unbiased review of records, and possibly view archivists as the impartial intermediary advocating on their behalf. This view is unrealistic. Investigations at the federal and provincial level reveal that departmental access and privacy coordinators often face undue pressures in their attempt to respond to access applications. If so, how could archivists possibly avoid the politicization of this role? Endeavoring to remain as apolitical as possible is a difficult goal. However, it is absolutely critical that public archives be regarded as independent authorities, if they are to carry out their mandate of protecting and preserving public and private sector records, making them accessible to government and public clients, and thereby "documenting the mutual rights and obligations entered into by society and those whom the people choose to govern."⁶

As records administration is the foundation of access and privacy legislation, it is both logical and practical that the department responsible for government records management (the Provincial Archives) assume the general role of "guide" in the central administration of *The Freedom of Information Act* and the *Freedom of Information and Protection of Privacy Act*. It is also

reasonable for the Provincial Archives to prepare the directory of government records to assist the public to identify them (which is a statutory requirement), because it has ready access to records management information. Although these directories of records are produced in many other jurisdictions by a central administrative office for access and privacy legislation which is not additionally responsible for records management, this may well be achieved with much difficulty and less than satisfactory results.⁷ The role of "guide", assisting the public to identify records it is interested in gaining access to, makes sense for an archives. It supports the principles underlying the right of access: openness (or transparency) and accountability by aiding responsible and effective records management and the protection of records for future generations.

Responsibility for access determinations is arguably well placed in the hands of the creators of records, but should it remain so in perpetuity? Surely, at least, the "passage of time" principle should translate into access to other than personal information after a reasonable number of years. Being responsible for access and privacy legislation also allows a central administrative office to create policies and procedures to facilitate access in the spirit of the legislation and within the boundaries of the statute. If the access statute does not provide freer access after the erosion of sensitivity, the central office should be able to review it and advocate change. In this regard, the Provincial Archives of Manitoba could have much to do. In a brief presented to the Special Committee to Review the [British Columbia] Freedom of Information and Protection of Privacy Act, Terry Eastwood, speaking on behalf of the Archives Association of British

Columbia, appositely relates the "passage of time" concept to these administrative issues:

All modern democracies recognize that restrictions on access to public records lessen with time ... While the principle of the passage of time acting to lessen and remove exceptions is recognized in some provisions – for example, for cabinet records – many other classes of records have exceptions applied to them without limits, creating administrative burdens in the administration of the act and diminishing the capacity of interested parties to investigate pertinent but non-current records... [there is a] need for some protection of the interests of state and a measure of confidentiality and secrecy, but the need does not last forever.⁸

Under the Manitoba legislation, the time period for closure of cabinet confidences is thirty years (FIPPA S. 19 (2)(b)), the most restrictive in Canada. Nova Scotia has the most liberal access provision to cabinet records at ten years⁹. British Columbia and Alberta are half that of Manitoba, only fifteen years. During a recent statutory review of its *Freedom of Information and Protection of Privacy Act*, Alberta examined a recommendation for the inclusion of a new section allowing for access to records more than 30 years old in the Provincial Archives of Alberta or a local public body archives. This recommendation was not accepted by the review committee, which reported that "no consensus could be reached on a solution to simplify the present process without compromising the integrity of privacy protection."¹⁰

Clause 17(4)(h) of Manitoba's *Freedom of Information and Protection of Privacy Act* puts a time limit on the protection of an individual's privacy after his or her death. When a formal application for access to a record is made under

FIPPA, the mandatory exception to disclosure protecting an individual's privacy in section 17 is not applicable if the individual has been dead for more than ten years. The *FIPPA Manual* explains that: "Section 17 may apply to protect the privacy interests of living family members referred to in, or affected by disclosure of the requested record, however."¹¹ Section 48, however, reflects recognition that the sensitivity of personal information decreases over time. It allows the Provincial Archives of Manitoba or the archives of a public body to open records of historical value containing personal information that are more than 100 years old. This section, in effect, opens all records subject to FIPPA that are more than 100 years old.

Procedures that would allow for further declassification of more current records are desirable. For example, disclosure for research purposes allows one applicant access, subject to conditions defined in a legal research agreement with that person. Declassification allows records that have been reviewed and deemed to have no applicable restrictions to be opened or made available to all subsequent researchers. It is unclear how a more active program of declassification would work in Manitoba for records at the Provincial Archives of Manitoba or at the archives of a Manitoba public body. What mechanisms could be put in place to have public bodies either routinely review records for declassification or keep declassification in mind when reviewing records for each formal application for access? Although it would seem to place an extra weight on the already heavy burden of access implementation, it is argued that in the long run, it would save both time and money. Terry Cook offers this

recommendation to the City of Winnipeg:

blocks of older records, wherever possible, [should] be opened as a block or series, or up to some cut-off date, wherever possible, rather than using file-by-file review. Once advice is received from departments that a particular series or group of records may be opened, or even one file, the City Archives thereafter can release all such records to subsequent researchers without further recourse to the creating or transferring or designated responsible department. All such decisions should be well documented, and the Archives should maintain a register or database of which records have been opened *versus* [original emphasis] which ones are closed or still require review.¹²

These decisions should be incorporated into any finding aids of the public body archives and into directories of records produced under FIPPA. Perhaps the Provincial Archives could play a useful role here when doing appraisal. It could target series it believes to be innocuous according to FIPPA exceptions and pass that information on to departments. Certainly, the government records appraisal and scheduling processes need to be re-examined to see if they are adequately incorporating consideration of whether series can be opened immediately upon transfer to archives or after defined time periods. The declassification of records under access and privacy statutes must be strongly advocated by the archival and research communities.

Alberta's act has been amended to reflect the "passage of time" concept. Section 41 of the act now allows disclosure for research purposes -- at the Provincial Archives of Alberta and the archives of a public body -- of personal information in a record that has been in existence for 75 years, or of personal information that has been in existence for twenty-five years or more, if the

disclosure would not be an unreasonable invasion of privacy (so defined in section 16 of the Act), and a written agreement is signed providing for the security, confidentiality and protection of personal information with no subsequent use unless authorized by agreement. The disclosure for research purposes of information other than personal information that has been in existence for 25 years or more is permitted provided it is not harmful to third party business interests, a law enforcement matter, subject to any type of legal privilege or restricted under another act.¹³ The legal instrument of a research agreement, balancing access to information with the necessary protection of privacy is a provision of most of the modern access and privacy statutes in Canada.

But why do the acts allow for access to records containing *personal information* for *bona fide* research and not allow for access to *other records*, such as program area office files for *bona fide* research? In the case of statutes such as *The Vital Statistics Act* (Manitoba) or *The Young Offender Act* (Canada), whose access provisions override Manitoba's *Freedom of Information and Protection of Privacy Act*, research agreements have been granted in the interests of social science. Once again, the records in question mainly contain personal information. The answer may be that it is easy to recognize personal information but not at all easy to recognize cabinet confidences or third party business information unless the records are so marked, thereby making it difficult to protect information subject to these mandatory exceptions. Third party business information aside, one remedy for the above-mentioned problem in

Manitoba would be a reduction of the 30 year closure period on cabinet records to a more reasonable timeframe, as in the Alberta and British Columbia legislation.

The routine release of information is another method of promoting government openness and accountability. In British Columbia, for example, the central administrative office for the province's access and privacy legislation, the Information, Science and Technology Agency, has produced "Guidelines for the Routine Release of Records Information." These guidelines define "routine release" as "the disclosure of certain types of information as a matter of course without the necessity of a formal Freedom of Information (FOI) request ... Routine release may be reactive (responding to requests for information when received) or proactive (systematically disseminating information in advance of requests using mechanisms such as the Internet, libraries, etc.)."¹⁴ This definition illustrates both the similarities and differences between routine release and declassification. Both promote routine access to whole categories of records for which no exceptions apply, or because the public body always exercises discretion in favour of disclosure. Routine release, however, is the proactive dissemination of information, such as the routine release of government-sponsored opinion polls or ministerial travel expenses.

Declassification is not routinely administered, but done when warranted after the creation of the records, not at the time of their creation. Both approaches save resources by quickly making available information that is clearly of public interest, rather than forcing the public to make formal application

for access to it, then have to locate it in its disparate forms and wait until it is prepared for release. These approaches to improving access should also be advocated in Manitoba.

Although the author's bias, coloured by professional practice, favours access wherever possible, the reasonable protection of the privacy of living individuals is a justifiable right. And yet, the ever growing "privacy lobby" poses worrisome problems for archives. The extremism of some in this movement in recent years, which Peter Bower, Executive Director, Access and Privacy Unit, Office of the Manitoba Ombudsman, has so aptly dubbed "privacy hysteria,"¹⁵ has resulted in calls for blanket secrecy or, worse, destruction of personal information banks such as the federal census records. The controversy over census records is the result of the complex intertwining of two federal statutes (the *Access Act* and the *Statistics Act*) as well as alleged promises of long dead politicians. Regardless of the reasons, the fact of the matter is that there will be no release of post-1901 census returns for the foreseeable future.¹⁶ Many statutes do assume that right of privacy protection is lessened or extinguished within a reasonable number of years after death, as in the case of pre-1901 census records, which are open 92 years after the date of census, or Manitoba's 100 year rule. Privacy purists argue, however, that the right to privacy of a deceased individual is extended to his or her family members. In the words of former National Archivist Jean-Pierre Wallot,

The challenges created by access to information legislation to protection of privacy, which tends to be an all-encompassing

obsession ... further complicate the work of archivists and potentially sign away the future. The sometimes misplaced calls by the Privacy Commissioner that government records containing personal information be destroyed after they have been used for the purpose for which they were collected, threaten the vast majority of our holdings ... This situation reflects the unresolved tension between the legitimate rights of individuals and the rights of communities or nations to know about their past.¹⁷

This short-sighted privacy crusade, which sets aside the fact that there is a legitimate public interest in personal information, is alarming. Records which have been designated as archival must be protected. This is an area where archives (whether "gatekeeper" or "guide") need to take an active role in arguing, as Peter Bower does, that "privacy is a fundamental right but not an absolute right."¹⁸

Another area of growing concern is what might be termed third-generation information rights legislation, or private sector privacy legislation. Many private sector organizations have already adopted codes or guidelines -- based on internationally recognized fair information practices -- which limit collection, use and disclosure of personal information and ensure the protection of such information in their custody.¹⁹ The federal government's *Personal Information Protection and Electronic Documents Act* (PIPED) (Bill C-6, formerly Bill C-54) received Royal Assent on April 13, 2000 and comes into force on January 1, 2001 for federally-regulated organizations and those conducting transborder data exchanges. Provincial private sector organizations will be phased in by January 2004, if the provinces have not passed similar private sector privacy protection statutes. This legislation will allow Canada to meet the data protection

standards outlined in the European Union Directive on Data Protection, allowing Canada to join in the booming global electronic commerce/information economy on a wider scale. Quebec is the only jurisdiction in Canada that currently meets EU requirements.²⁰

In a 1999 written brief, presented to the House of Commons' industry committee, the Association of Canadian Archivists (ACA) raised a number of concerns about the predecessor to the PIPED Act, Bill C-54. The Association made some striking observations. Significantly, the ACA pointed out that the proposed legislation would require that "use" of records for research purposes without the informed consent of the person documented, before the expiration of 110 years from the date of the document, would only be allowed if the "archival organization informs the Privacy Commissioner of the disclosure before the information is disclosed." This poses a major burden on archives and will be a cause for long delays for researchers.²¹ Yet another "gatekeeper" role!

From the "total archives" perspective²², what impact will this trend toward greater privacy protection have on private sector records acquisition? Will private sector organizations or individuals for that matter reconsider donating records to a public archives? Will we lose an important part of our documentary heritage to the privacy lobby? At the Provincial Archives of Manitoba, without proper provisions for archival research built in to private sector privacy legislation, there could be significant problems for future acquisition and intellectual control of records of the Hudson's Bay Company.

In public sector access and privacy regimes in Canada, one of the main

considerations of access and privacy legislation is the independent review of decisions respecting access to information and the management of personal information by public bodies. There are two basic models for such review in Canada: the commissioner model (with binding order power) and the ombudsman model (with recommending power). Within these two categories are variations in the practical application of the review process. In Manitoba, with the "gatekeeper" role residing with the creator of the records, a strong review mechanism is required to ensure compliance and uphold the spirit and intent of the legislation. It is unclear which of the two approaches best suits the Manitoba access and privacy regime. The public responses to the 1996 *Access to Information and Protection of Privacy* discussion paper prepared by Government Records favoured a commissioner model. As the situation currently stands, the Ombudsman is responsible for investigating requests for review under both FIPPA and PHIA. The Ombudsman's office is in need of further resources to undertake timely investigation, conduct audits, advocate on behalf of citizens and educate the public about FIPPA.²³

What should the role of a public archives be in relation to access and privacy legislation? A review of the literature reveals a few opinions on this question. The Canadian Historical Association's response to John English's recent consultation on the future role of the National Archives of Canada and the National Library of Canada stated that:

The NA should be directed to conduct general retrospective declassification reviews and open all such non-exempt blocks of

government records The NA must also abandon its "risk management" approach to access and resume its past role as honest broker between the bureaucracy and the researcher. In particular, access officers should be required to use their discretionary judgement, based on informed knowledge and training, to determine what historians need to know to pursue their research. There must also be timely access to records. If the access section cannot handle the number of requests, then more access officers must be hired.²⁴

Although containing some valid and important points, this is a nostalgic and naïve view that seems to suggest that the National Archives actually had or could possibly play such a pivotal role in determining access to records in its custody.

A retrospective article by Daniel German of the National Archives on the first ten years of experience with access and privacy legislation at the National Archives seems to suggest the limits of its current legislated role are being reached:

With all the records reviewed, both formally and informally, the surface of the still restricted holdings of the National Archives remains barely touched. Many more records require review and every day new requests from researchers pour in. With the passage of time, many previously withheld documents may also require re-review prior to their release. Together, the ATIP process results in a never-ending procession of files flowing into the ATIP office, to the researchers, or back to protected storage. Understanding this process is essential to the archival community, for, barring a parliamentary amendment, the National Archives has no choice but to apply the terms of the legislation.²⁵

One can only assume the situation has not lightened. Declassification needs to take place but how is it even remotely conceivable that the National Archives would do this on its own? A more logical solution for the National Archives must

be found other than an accelerated item or series level review process by honest archival brokers. One year later in a letter to the National Archivist from past presidents of the CHA, Irving Abella and Bill Waiser made a more promising or realistic suggestion regarding the recommendation from the English report: "The CHA consequently strongly supports the recommendation that the national archivist become more actively involved in the formulation and administration of access and privacy policy."²⁶

In the same vein, Paul Sillitoe, of the Oldham Archives Service, speaking from the perspective of the United Kingdom, had this to say of the role of archives in relation to freedom of information and data protection legislation: "We must strive to influence new legislation at the very earliest stages of debate and discussion, in cooperation with professional colleagues internationally. To do otherwise is to run the risk of becoming hapless victims of laws drafted without regard, or even reference, to archive interests."²⁷ The common thread in these statements is an active involvement in setting policies. Just as the most effective means of managing records is by taking an active role at the beginning of their life-cycle, so too is it important for archives to take an active role in development and review of legislation that is based upon and influences good recordkeeping practices.

An assessment of Manitoba's current role as "guide" suggests that although this role is logical and important, it is taking its toll on other important archival responsibilities and functions. In the early 1980s, involvement in freedom of information legislation accelerated development of the government

records management program and thus helped bring under control archival records necessary to document Manitoba's heritage. Having central responsibility of *The Freedom of Information Act* enhanced the profile of the archives and kept it central to government operations. The *Freedom of Information and Protection of Privacy Act* (FIPPA) continues to enhance this profile. A prominent role in the Manitoba government is necessary if archival leadership is to be exercised in ways which meet the evolving challenges of access and privacy legislation to archives.

However, the Government Records program of the Provincial Archives has a long checklist of exceptionally important archival tasks to accomplish with scarce resources. The initial salutary effect on corporate records management of FOI is not evident under FIPPA. Although the provincial government is more responsible in its information management practices (by including privacy protection under FIPPA), acting as the central administrative office of FIPPA no longer gives the Archives much ability to drive the responsible management of provincial government records. This is occurring as fewer and fewer resources are given by departments to maintaining accurate, up-to-date schedules of records, which then leaves Government Records with the growing task of coping with the problem. Electronic records management is a huge challenge requiring critical attention and new resources. Government business is conducted in an electronic world. The infrastructure is not yet in place to protect the integrity of electronic records over time in Manitoba. An examination of descriptive processes and systems is also needed to bring PAM's descriptions of archival

records into line with those of other provincial archives in order to improve the quality of access and public service. In the meantime, FIPPA and access and privacy issues continue to demand more attention and dominate the work of Government Records. Extension of FIPPA to local public bodies is a new area of responsibility in which PAM has limited knowledge and massive amounts of work (directories of records, additional records advisory in these sectors and training on the act). Resources are stretched to the limit and there appears to be no respite in sight.

It can and should be argued that the central role has done much for the profile of PAM. Through central "help line" services and the directories of records, it has assisted the public in applying for access under FIPPA (and FOI). But what has it done for the archival record of the future? *The Freedom of Information Act* resulted in the acceleration of records management in Manitoba thereby protecting archival records. It could also be argued that access legislation has become a heavy burden on the Government Records office, sapping resources away from the appraisal, description and control of archival records which, in the end, negatively affects access to archival government records.

In the final analysis, information rights legislation is here to stay. If anything, it is evolving into what we might term third generation legislation (affecting the private sector and electronic records). Both "gatekeeper" and "guide" models have problems which weigh heavily on the ability of archivists to fulfil "traditional roles" in appraisal, description, and public service for archival

records. It is clear that the Provincial Archives has a legitimate stake in access and privacy matters because of its corporate records management role. But when overseeing the administration of a statute supporting the public right to know encroaches on ensuring the appraisal, acquisition, description and access to archival records of the government of Manitoba, perhaps there are other options than to be the primary stakeholder shouldering responsibility for this legislation.

If the Provincial Archives re-evaluates its role, how might the burden be better distributed? One possibility is to develop strategic partnerships with other government departments and public bodies that have clear areas of interest in information rights legislation. For example, Manitoba Justice (Civil Legal Services) could take care of the policies, procedures and advice relating to legislative interpretation under the Act. Manitoba Health, Intergovernmental Affairs and Education and Training could do the liaison and training work with the local public body sectors they support -- healthcare bodies, local government bodies, and educational bodies -- assisting them to produce their own directories of records. The Provincial Archives has the benefit of years of expertise with both information rights legislation and records advisory. The production of a directory of records for Manitoba government records and records management and archives advisory services to other public bodies to help them learn to manage their records seems to more clearly fit into the boundaries of the government records program. The overall responsibility for information rights might be handled by something more like a Secretariat in support of a Ministerial

Portfolio, made up of team members from different areas of expertise. All would contribute to policies and procedures to improve upon access and privacy protection. When and if Manitoba passes its own version of PIPED (*Personal Information Protection and Electronic Documents Act*, Bill C-6), Consumer and Corporate Affairs (which is currently taking the lead in this area for Manitoba) and the Office of Information Technology (e-commerce and technology issues) could be involved. Like all public policies, access and privacy statutes are a shared and evolving area of governmental responsibility. Approaches adopted and tested at one time to carry them out may need to be reconsidered as circumstances change and experience grows.

Endnotes

¹ *Freedom of Information: A Human Right, Being a Lecture on the Montague Burton Foundation in the University of Glasgow, delivered on 6th March, 1953* by The Right Hon. Lord Radcliffe (Glasgow: Jackson, Son & Co. Publishers to the University, 1953), 6-7.

² As was discussed in the introduction to the thesis, the first Canadian access statute was Nova Scotia's *Freedom of Information Act* (1977).

³ Colin McNairn and Christopher Woodbury, *Government Information: Access and Privacy* (Toronto: Carswell Thompson Professional Publishing, 2000), 2-29.

⁴ This is also incorrect in the case of access to records at the Provincial Archives of Newfoundland and Labrador. This point is further discussed in chapter two.

⁵ Eugene Szach, interview with the author, September 14, 2000. When FIPPA was drafted, the "meaning of greater interest clause" was not included. However, the Manitoba Culture, Heritage and Tourism, Government Records Office and Manitoba Justice, Civil Legal Services Special Operating Agency. *Manitoba Freedom of Information and Protection of Privacy Resource Manual* (Provincial Government), (Winnipeg: unpublished, 2000), 1-11 (hereafter referred to as the *FIPPA Manual*) says "the term 'control' usually means the power or authority to make decisions respecting the use or disclosure of a record. Ordinarily, records that are stored on behalf of a public body by another party ... or that have been transferred for permanent preservation to an archival repository are under the control of the public body."

⁶ Manitoba Culture, Heritage and Citizenship, *Annual Report, 1998-1999* (Winnipeg: CHC, 1999), 32.

⁷ Without knowing more about the records management infrastructure of other jurisdictions, it is difficult for the author to judge whether these published directories are accurate reflections of public body recordkeeping. However, the author's personal experience of creating such directories for Manitoba has revealed that, even with such "inside knowledge", it is a painstaking and difficult task.

⁸ British Columbia, Special Committee to Review the Freedom of Information and Protection of Privacy Act, *Transcript of Proceedings (Hansard)*, Saanich, Tuesday, February 24, 1998, Issue No. 9. Available on the British Columbia Legislative Assembly Web Site <<http://www.legis.gov.bc.ca/cmt/foi/hansard/fi0224.htm>>.

⁹ Nova Scotia (S. 13 (2)(a)); British Columbia (S. 12 (2)(2)); Alberta (S. 21 (2)(a)).

¹⁰ Alberta Legislative Assembly, *Final Report of the Select Special Freedom of Information and Protection of Privacy Act Review Committee* (Edmonton: Legislative Assembly, March 1999), 11, 75-76. On page 76, the report further states: "The Committee considered the provision for disclosure of personal information in archival records (section 41) and ways in which the access needs of historical researchers and genealogists could be balanced with the protection of personal privacy. After reviewing suggestions, the Committee agreed to recommend no change to the legislation at present, but to recommend that Alberta Labour consult with the archival community to seek solutions which might simplify the accessibility of archival records."

¹¹ *FIPPA Manual*, 4-45, 5-145.

¹² Terry Cook, *In the Public Trust: A Strategic Plan for the Archives and Records Management Services in the City of Winnipeg* (Gloucester, Ontario: Clio Consulting, 29 November 1999), 85.

¹³ Alberta *Freedom of Information and Protection of Privacy Act*, section 41 (1)(a) and (b). Section 41(2) allows for the archives of a post-secondary institutions to disclose personal information for research purposes with the legal instrument of a written research agreement.

¹⁴ British Columbia Information, Science and Technology Agency (ISTA), "Guidelines for the Routine Release of Records and Information" (October 1997), 2. Available on ISTA: Freedom of Information and Protection of Privacy Web Site <http://www.ista.gov.bc.ca/FOI_POP/rr_guide.htm>.

¹⁵ Peter Bower, interview with the author, August 29, 2000.

¹⁶ See "Remarks to the Canadian Historical Association, May 29, 2000 by the Hon. John Reid, Information Commissioner of Canada," available on the Office of the Information Commissioner of Canada Web Site <<http://infoweb.magi.com/~accessca/index.html>> direct link <<http://fox.nstn.ca/~smulloy/00May29-HistAssoc.html>>; "The Census returns, privacy, and questions of governance: A submission by the Privacy Commissioner of Canada to the Expert Panel on Access to Historical Census Records" (February 9, 2000), available on the Privacy Commissioner of Canada Web Site <http://www.privcom.gc.ca/english/02_05_e_09_e.htm>; "Canadian Historical Association brief to the Expert Panel on Historical Census Records"

(February 9, 2000), available on The Canadian Historical Association Web Site <http://www.yorku.ca/research/cha/html/english/census/censusbr_e.htm>.

¹⁷ Jean-Pierre Wallot, "A Look at Archival Practices," *Citra – 1998, International Council on Archives Proceedings of the Thirty-Third International Conference of the Round Table on Archives, Stockholm 1998* (Paris: ICA, 1999), 81-82.

¹⁸ Bower, (August 22, 2000).

¹⁹ See for example: Canadian Bankers Association, *Privacy Model Code: Protecting Individual Bank Customers' Personal Information*, (Toronto: Canadian Bankers Association, 1996); and Canadian Standards Association, *Model Code for the Protection of Personal Information: A National Standard for Canada*, (Ottawa: Canadian Standards Association, 1996). Bill C-6 is based on the CSA Model Privacy Code.

²⁰ Informative descriptions of Bill C-6 are available on the Privacy Commissioner of Canada Web Site <http://www.privcom.gc.ca/english/01_06_e.htm>, the Industry Canada Web Site <<http://e-com.ic.gc.ca/fastfacts/43d11.html>>, and on the Department of Justice Canada Web Site <<http://canada.justice.gc.ca/en/news/nr/1998/attback2.html>>.

²¹ "Association of Canadian Archivists Written Brief on Bill C-54 Personal Information and Electronic Documents Act," (January 12, 1999), 6-7. Available on the Association of Canadian Archivists Web Site <<http://aca.archives.ca/official.com/c54/c54brief.htm>>.

²² See the Introduction to this thesis, endnote 10.

²³ Office of the Ombudsman, *1998 Annual Report: Access and Privacy* (Winnipeg: Office of the Ombudsman, 1999). Available on the Manitoba Ombudsman Web Site <<http://www.ombudsman.mb.ca/reports.htm>>.

²⁴ "Canadian Historical Association response to the Dr. John English consultations on the future role of the National Archives of Canada," (September 1998), 11. Available on the Canadian Historical Association Web Site <<http://www.yorku.ca/research/cha/html/english/nan1.html>>.

²⁵ Daniel German, "Access and Privacy Legislation and the National Archives, 1983-1993: A Decade of ATIP," *Archivaria* 39 (Spring 1995), 211.

²⁶ "Letter by Irving Abella and Bill Waiser to Ian Wilson" (August 23, 1999), 3. Available on the Canadian Historical Association Web Site

http://www.yorku.ca/research/cha/html/english/wilson_e.html.

²⁷ Paul Sillitoe, "Privacy in a Public Place: Managing Public Access to Personal Information Controlled by Archives Services," *Journal of the Society of Archivists* 19, no.1 (April 1998), 7.

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