

# *The Case File: Problems of Acquisition and Access from the Federal Perspective*

by PETER GILLIS

After reading Joy Parr's excellent article, "Case Records as Sources for Social History,"<sup>1</sup> no one can disagree that the case files of public and philanthropic social welfare institutions provide an excellent body of documentation to complement the usual run of assessment rolls and census data that have previously been the standard sources for the "new social history." That this should be so is not really surprising. It has always been a variety of case files, both public and private, long available in various Canadian repositories which have served as among the most important sources for those working outside the traditional political and military fields of history. In my own institution, the Public Archives of Canada, several such major series immediately come to mind: land records, immigration case files, papers of financial institutions, the records of the Provincial Secretaries Canada East and West, and criminal investigation files. Such documentation has proved invaluable to the economic and business historian, to those writing local history, and even to biographers, not to mention those dogged patrons of every archival institution, the genealogists.

But, whether used for the "new" history or more traditional work, such series of records are now presenting archivists with major challenges. The Parr article admirably outlines the problems confronting administrators of social welfare agencies wishing to open files for research purposes and goes on to make some excellent suggestions about how researchers can guarantee the confidentiality of their subjects while allowing access to their files. I would like to follow this up with a few comments about the case record problem facing archivists at the federal level in Canada, at once broadening Parr's basis of discussion to include files besides those of social welfare agencies and narrowing it to deal only with federal public records.

## THE PRESENT SITUATION

While it is accurate to say that case files are a very old type of public record, modern technology, especially electronic data processing, along with the growth of government programs to cover many more aspects of the every-day life of Canadians, has led to a proliferation of this type of file series. As well,

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<sup>1</sup> See G.J. Parr, "Case Records as Sources for Social History," *Archivaria* 4 (Summer 1977): 122-36.

greater sophistication in records management practices has meant that, where large subject files were once the order of the day, these are now often broken down into smaller components which isolate individuals, corporations, organizations, or groups within a particular subject heading. Thus, a first-class records management system leads to an ever greater number of personalized records. For example, such a large social welfare department as the Canada Employment and Immigration Commission has generated over the last decade at least ten separate and identifiable case file series.<sup>2</sup> Each series is fairly large and unique, varies in historical value, and presents its own problems of archival acquisition, selection, custody, and access. Even such a considerably smaller agency as the Corporations Branch of the Department of Consumer and Corporate Affairs can create large series of case files which deal not with individuals, but rather business firms.

For each group of case records, however, there are two constant attributes of concern to the archivist: their great extent (usually well over 100 metres) and the detailed, individualistic, confidential nature of their information. It is sufficient to say that the extent, while not under study here, usually forces the archivist to make a selection of such material. In doing so, archivists must go much beyond the random sample idea which enjoyed such vogue in archival theory during the 1950s and 1960s. Statistically accurate samples are now needed, ones that take into account variables such as name frequency, regional disparity, and the effectiveness of the government program involved. However, it is the second facet of case records—their individualistic and confidential nature and the impact this has on their acquisition and accessibility—which is of exclusive interest here.

#### TYPES OF CASE FILES AND THE PRIVACY FACTOR

To consider this problem at any length it is first necessary to analyze the various types of case files created by the federal government. There are three basic types.

1. *Personal files.* These are probably the most common type of case file. They fall into the following categories: personnel files of civil servants and employees of a Crown Corporation, social-welfare applications and assistance grants, and social and economic surveys including census data. In all three cases the type of information gathered is of an extremely personal nature, including name, address, income, work history, marital status, previous marriages, debt line, number of children, and so on.
2. *Report files.* This type of file usually results from legislation requiring a corporation, organization, or group to report on its activities either to meet certain regulations or to qualify for grants or assistance. Examples of such files are the annual reports collected by the Corporations Branch and the statements of production collected under the Emergency Gold Mining Assistance Act. Very often, confidential corporate information finds its

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<sup>2</sup> Included are Unemployment Insurance Benefit Claims, Unemployment Insurance Complaints, Unemployment Insurance Prosecutions, Canadian Manpower Mobility Program files, Training-on-the-Job files, Local Initiative Program files, Immigration Case files, Chinese Case files, Special Case files, and Deportation Case files.

way onto such files, information which in the hands of its rivals could easily ruin a business.

3. *Investigatory files.* This category is made up, for the most part, of files created by law enforcement agencies during investigations of criminal activities. Other government bodies, however, do conduct investigations, especially in such fields as business competition, resource use, transportation rates, and tariff issues. Once again, these files contain information of a confidential nature which reflects directly on the activities of an individual, corporation, or organization.

In each of these categories of files, it is obvious that the concept of privacy is a vital part of the administrative context in which such information is solicited. Civil servants involved in this process are bound either by oath or stipulations within particular pieces of legislation, or both, to regard such information as privileged. Legally they are not to knowingly communicate it to any unauthorized individual.

Of course the strictest piece of legislation along this line is the Statistics Act which forbids any dissemination of census or survey data, except under very stringently controlled circumstances where those data have complete anonymity.<sup>3</sup> But such other pieces of legislation as the Canada Pension Plan Act, the Old Age Security Act, Family Allowances Act, the Unemployment Insurance Commission Act, and the Foreign Investment Review Act also contain warnings to their employees to guard the privacy of their client public.<sup>4</sup> Civil servants take these strictures regarding privacy of information very seriously, as they should. Even where no specific reference is made to the need to protect the confidentiality of a particular series of case files, administrators usually devise strict regulations to govern access to such records.<sup>5</sup> Indeed, the position of the federal government on the privacy issue with regard to case files has been best put by the Task Force on Privacy and Computers:

The notion of privacy derives from the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit. And this is so whether or not the information is subsequently communicated accurately, and whether or not it is potentially damaging to his reputation, his pocket-book, or his prospects; the context is of course the controlling factor in determining whether or not particular information will be damaging. Competing social values may require that an individual disclose certain information to particular authorities under certain circumstances. . . . He may decide to make it available in order to obtain benefits (e.g., credit information or information imparted to his lawyer to win a lawsuit or to his confessor to win salvation). He may also share it quite willingly with his intimates. Never-

3 See the "Canada Statistics Act," *Statutes of Canada, 1970-71*, c. 15, s. 16.

4 See "Canada Pension Plan Act," *Revised Statutes of Canada, 1970*, C.C.-5, ss. 89, 107; "Old Age Security Act," *Revised Statutes of Canada 1970*, C.V.-6, s. 19; "Family Allowances Act," *Statutes of Canada, 1973*, c.44, ss. 17, 18; "Unemployment Insurance Commission Act," *Statutes of Canada, 1971*, c. 48, ss. 114, 143; "Foreign Investment Review Act," *Statutes of Canada, 1973*, c. 46, s. 14.

5 An excellent example of this type of regulation occurs in the Department of Indian and Northern Affairs. The Department requires that a researcher have a letter from the band council before access is granted to view that particular band's trust fund accounts, which are organized as case files.

theless, he has a basic and continuing interest in what happens to this information, and in controlling access to it.<sup>6</sup>

The federal government has now confirmed this concept of privacy in Part IV of the Canadian Human Rights Act, giving each individual citizen the right to see information files concerning him/herself and to correct any errors contained in such files. Most important, the Act forces government departments to obtain consent from all individuals involved when particular records collected for one administrative purpose are to be used for another purpose.<sup>7</sup> Thus, protection from unauthorized disclosure of material contained in case files is very much the order of the day within the federal government and it is expected that access by researchers to such documentation will become increasingly difficult to obtain.

#### THE CASE FILE AS AN HISTORICAL PUBLIC RECORD

Even without the most recent strictures of the Human Rights Act concerning the privacy of personal information, the public records archivist at the federal level has a difficult row to hoe with regard to acquiring and making accessible case file documentation. As mentioned above, civil servants take very seriously the rules and regulations which restrict the unauthorized dissemination of such records. Therefore, while case file series, because of their massive nature, are offered up for disposal under the records management program with great regularity, there is in the end no agreement on how such material will be made available to the public as an archival source. The only firm rule is for government personnel records; these are retained for ninety years after an individual's birth and then screened for all public officials above division chief or equivalent position whose files are then preserved permanently. The rest of the case file records for the most part sit in a sort of limbo, governed by a wide variety of schedules which include archival limitations, but which are also constantly being wrapped ever tighter in revised access rules that may render those limitations useless.

Ironically, it has been the agitation during the last few years for a Canadian freedom of information act which has bred these new conditions relating to case records. Since 1970 an increasing variety of interest groups has brought pressure at the federal level for legislation to make it easier for the public to get detailed information from the government concerning current or past projects, policies, and operations. A great number of briefs and representations have ranged from calls for almost complete access to all government information to more restrained demands such as Gerald Baldwin's for an act closely following the American legislative example.<sup>8</sup> The contents of these briefs and representations are not half as important, however, as the federal government's response to them. Basically, it has attempted to define its present position on this matter

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6 *Privacy and Computers: A Report of a Task Force Established Jointly by the Department of Communications and the Department of Justice* (Ottawa, 1972), pp. 13-14.

7 See The Canadian Human Rights Act, Part IV, *Statutes of Canada, 1977-78*.

8 Best examples of three types of briefs and representations are those of the Canadian Bar Association, Fall 1977; Gerald Baldwin's suggested Freedom of Information Act, Bill C-255; and "Access to Information: A Speech by Heather Mitchell for the Canadian Environmental Law Association."

with a cabinet access directive, first passed in 1973 and updated in 1977, designed to expedite transfer of public records to the Public Archives of Canada and ease access to public records held by that institution and other government departments. As well it has produced in 1977 a Green Paper, *Legislation on Public Access to Government Documents*, to obtain reactions to the specific measures it might wish to enshrine in a freedom of information act.<sup>9</sup> Needless to say, the Green Paper amplifies greatly positions taken in the directive and provides other alternatives, but both are inherently conservative documents which follow more closely the American Freedom of Information Act than the Swedish "open access" model.<sup>10</sup>

The premise behind these documents is that access to information is a desirable thing in a democracy, but within the British system of responsible government it is necessary to keep closed and privileged certain types of documentation for national security reasons and to protect the privacy of decision-making within the adversarial system of Canadian politics. The Green Paper goes on to expand on this need for secrecy at great length and finally sets out nine areas where a government might be exempt from disclosing information. These particular areas are drawn largely from the guidelines for "Notices of Motion for the Production of Papers," tabled in the House of Commons in March, 1973 and also coincide with exemptions outlined in the cabinet directive the same year.

It is this list of exemptions, now enshrined in at least three government documents, that has the greatest bearing on the problem of acquisition and access to case files. The list of exemptions goes far beyond the areas of national security, international relations, and the confidence of the Privy Council to include, at its broadest in the Green Paper:

1. disclosure of information obtained or prepared by any government institution or part of a government institution, that is an investigative body
  - a. in the course of investigations pertaining to the detection or suppression of crime generally, or
  - b. in the course of investigations pertaining to the administration or enforcement of any Act of Parliament;
2. disclosure of personal information as defined in Part IV of the Canadian Human Rights Act;

<sup>9</sup> See Canada, Secretary of State, *Legislation on Public Access to Government Documents*; and Cabinet Directive, No. 46, 7 June 1973 issued by the Privy Council Office. The cabinet directive on access was the first attempt by the Public Archives of Canada to deal in a definite way with the access problem in regard to public records. It is, as is admitted by all, a far from perfect document which perhaps creates more problems than it solves, especially in the area of case records.

<sup>10</sup> It is not my intention here to enter into a long debate on the merits of one freedom of information system over another. It is sufficient to say that the Swedish system, while more complicated than is often assumed by many commentators, is considered one of the most liberal, where a wide variety of information, including personal documentation, is open for inspection. The American system, like proposals made in Canada, has certain classes of records exempted from its operation. See *Freedom of Information Act and Amendments of 1974* (U.S. Senate, March 1975).

3. disclosure of legal opinions or advice provided to a government institution;
4. disclosure of financial or commercial information which among others would
  - a. result in significant and undue financial loss or gain by a person, group, organization or government institution, or
  - b. would affect adversely a person, group, organization or government institution in regard to its competitive position.<sup>11</sup>

These detailed exemptions are not at present contained in total in the cabinet directives governing transfer of public records to the Public Archives of Canada, but they are implied in two of the categories of exempted records: information the release of which would be contrary to law and information which might violate the right of privacy of any individual. Being outlined in "Notices of Motion for the Production of Papers," they hang over every civil administrator who wishes to make an archival disposition of case files. The exempted areas outline almost precisely the three types of case files described earlier in this article. The only exception is personnel files which are covered under their own special guidelines in the cabinet directive. The exemptions were drawn up to prevent unfortunate disclosures of current information which might harm legal proceedings, the reputations of individuals, the operations of business firms, or the ability of the government to function in certain circumstances. These are very worthwhile points to be considered under any freedom of information legislation. But from the archival point of view, they leave many questions unanswered and threaten effectively to remove from the operation of the Public Records Order many case file records series. There can be no doubt that this process is already underway. Statistics Canada now refuses to transfer any census data guaranteed confidentiality under the Statistics Act. This material, while not strictly a case file series, contains highly personal information about individuals and many private facts about companies and organizations. As well, the flow of law enforcement and criminal case files from the RCMP and the Department of Justice, while never large, has now almost completely stopped; this would appear to have occurred because of the personal privacy, investigatory, national security and legal opinion exemptions which are possible under present rules and regulations. Thus, while the gap in historical documentation grows in these areas, other departments which have proved less reluctant in the past to transfer case file material will be forced under these new circumstances to reassess their procedures in order to bring them into agreement with the new guidelines. Such reassessments will have further detrimental effects on the historical record.

#### RECOMMENDATIONS

It is incumbent upon professional archivists at all levels in Canada to meet head-on this challenge presented by the private nature of material stored in case files. The responsibility, however, falls mainly upon public records archivists at the federal level where the pressure appears to be the greatest. My suggestions to meet this challenge are not exhaustive, but perhaps they will

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<sup>11</sup> See Green Paper, pp. 10-11.

stimulate some thought among colleagues so that an effective strategy for the continued acquisition of and public access to case files can be designed.

First, the problem of privacy and confidentiality must be recognized as a fact. Individuals, corporations, organizations, and groups are discussed and expose themselves in these files in a very intimate and usually frank manner. That such information is, at least for a time, privileged there can be no doubt. This must be admitted as a precondition of any negotiation for archival acquisition of such information. Second, public records archivists must emphasize to the administrators of case file material that they have in the past collected and made available exactly the same type of documentation with no dire betrayal of public trust resulting from such actions. Further, it must be insisted that under the cabinet access directive the Public Archives of Canada is empowered to accept such exempted documentation and administer any access restrictions which apply to it. Finally, the position must never be abandoned that this type of file has rich potential for research purposes. While such documentation is of a private and confidential nature at the time of its creation and for a considerable period thereafter, it becomes, at some point in time, an important research aid for social scientists, historians, and genealogists. The danger is always there that such information will be released too soon and render great damage to those individuals or organizations mentioned on the file, but public records archivists must be in the forefront of those who advocate that this is a legitimate risk which must be faced and that with the application of their expertise such difficulties can be avoided. In short, archivists must take an active role in persuading federal legislators and bureaucrats that it is essential that definite limitations be placed on the various exemptions which apply to the release to the public of case file material. Those limitations must be realistic and carefully devised since the documentation itself is of such a private nature. Accordingly, the archivist must indicate that his or her role can be that of a neutral, responsible advisor on such matters.

In setting archival limitations on exempted categories, archivists should seek advice from the academic community. The form of such limitations will have a great impact on scholarly research in Canada and should not be drawn up in a bureaucratic vacuum. The scholarly research community showed some interest in obtaining the thirty-year rule as operating procedure, but has not really consistently challenged the number of exemptions placed on various types of government files. As well, academics have offered very little response to the amplification of these restrictions in the Green Paper—unlike such bodies as the Canadian Manufacturers Association which wishes to further restrict access to particular types of government information—but it must be assumed that if invited, academics would be interested in this topic.<sup>12</sup> Perhaps then consultation could begin among public administrators, archivists and academics to devise appropriate access rules for case file material, possibly through such an institution as the Social Science Federation or a revitalized Advisory Council of Public Records.<sup>13</sup>

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12 See *Submission by the Canadian Manufacturers' Association Respecting the Green Paper on Legislation on Public Access to Government Documents* (Ottawa, 1977).

13 The Advisory Council on Public Records consists of the Dominion Archivist, the Head of the Records Management Branch, two officials from the Treasury Board, various representatives

There are good indications that a form of such tripartite consultation could bring excellent results. Already it appears that historical documentation may be exempted under the regulations which will govern disclosure of personal information under Part IV of the Human Rights Act. This would remove a serious impediment to conducting research in non-current case records. The Canadian academic community did not meet with success either in securing access to historical census material or in having it transferred to the Public Archives of Canada, but its representations have not been particularly persistent or forceful. I suspect that in the proper forum and at the proper level tripartite discussions could secure satisfactory limitations on the exemptions which now govern case files.

One expects that government officials would insist that such files remain restricted for a very long period of time, perhaps ninety years as is now the case with federal personnel records. But certain exceptions would be granted to this rule such as when it could be satisfactorily proven that the researcher was making his or her research anonymous and could place adequate safeguards on working papers; when it could be demonstrated that it was in the greater public interest to make such files available; or when a researcher obtains permission from the individual, corporation, or organization to see their particular file. In return, government officials should be free to suggest to professional researchers that their institutions or disciplines devise codes of ethics regarding the use of confidential data.<sup>14</sup> The role of the archivist in this procedure should be an honest broker to assure, on the one hand, the creating department that the confidentiality of its clients' files is not being abused and, on the other hand, to monitor that researchers are not unjustly and routinely being refused access to case record series.

Case files create tremendous problems for public records archivists. Recent agitation at the federal level for freedom of information legislation has driven politicians and public servants, legitimately frightened by the prospect of having to make available at random files which contain highly sensitive material about individuals, corporations, and organizations, back to the American alternative within that country's access legislation of treating such information as privileged, in the same way as are exchanges between a lawyer and a client or a doctor and a patient. Such attitudes, while justified in protecting immediate legal rights, threaten to rob posterity of valuable source material for studying Canada's history, society, economy, and political system. This threat must be met head-on by archivists if they hope to protect this documentation. Privacy is a legitimate concept which must be protected; the challenge to archivists is to assure that this goal is adequately accomplished while at the same time taking a prominent role in devising guidelines which will open case file material to research in a way which does not invade the right to privacy.

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of other government departments and includes representation from the Canadian Historical Association and the Canadian Political Science Association. It prepared drafts of the original access directive, but has never met with any regularity to discuss problems like those outlined in this article.

14 This is already being called for by the Canada Council in its *Report of the Consultative Group on Ethics* (Ottawa, 1977).