

Federal Access and Privacy Legislation and the Public Archives of Canada

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Dead file. Lifecycle. Collective memory. To help explain their activities both to themselves and to others, archivists are fond of employing organic concepts derived from life. No doubt such allusions are the consequence of archives being the product of individual and collective human experiences. If life provides a model for understanding archives, is there a place in such a theory of archives for that most interior of experiences, the secret, which some observers believe constitutes the inner authentic self?¹ Perhaps there is. Conditions of access are placed on both private and government collections, in part, because of the secrets they contain. As with personal secrets, control over secrecy and openness gives power; it influences what others know. In government, and thus in the archives of government, secrecy is justified by the belief that the keeping of a secret is beneficial to those who do not know and is ensured by such measures as the oath of office and the *Official Secrets Act*. One author has claimed that the Canadian bureaucracy is more secretive than most.² If this is so, what about its archives and access to the secrets contained therein? In this paper I will address the issue of access by discussing past and present access practices at the Public Archives of Canada and by focusing, in particular, on the recently enacted federal access and privacy legislation and on some of the consequences this new legislation will have for archivists.

The matter of access to government records at the Public Archives has been a vexing issue dating from the establishment of the institution. As John Smart has pointed out,³ the first archivist at the federal level, Douglas Brymner, made reference to the importance of access to collections. For Brymner, however, access meant having collections adequately classified and indexed so as to facilitate their use.⁴

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1 For a discussion about the conundrums of secrecy see Sissela Bok, *Secrets: On the Ethics of Concealment and Revelation* (New York, 1982).

2 James Eayrs, *Diplomacy and its Discontents* (Toronto, 1971), p. 33. The idea of secrecy and authority in Canadian society is further developed in E.Z. Friedenberg, *Deference to Authority: The Case of Canada* (New York, 1980), pp. 33-61.

3 J. Smart, "The Professional Archivist's Responsibility as an Advocate of Public Research," *Archivaria* 16 (Summer 1983), pp. 141-42.

4 D. Brymner, "Archives — Report of Mr. D. Brymner," *Report of the Minister of Agriculture, 1872*, Sessional Paper 26, pp. 171-74.

Some archivists are of the opinion that any discussion of public access to records selected for long-term preservation should embrace every activity of an archives including hours of service, availability, and cost of photocopying, and the very selection process which determines which records are to be maintained.⁵ But for the purpose of this paper, access is defined as the ability of people outside of government to examine and use government records.

Because of Canada's colonial status when the Public Archives was established, most of the official records, as well as private papers, for the pre-Confederation period were to be found in London and Paris. To (re)patriate these records, Brymner and his successors embarked on a copying programme. By 1883 Brymner and his copyists were allowed "to have access to the Foreign Office papers, deposited in the Record Office relating to Canada down to the year 1842."⁶ Though the papers consisted of "correspondence of a confidential nature" and were "made by gentlemen occupying public positions," it was felt that "owing to the lapse of time, [the correspondence could] now be made public without impropriety."⁷ However, in 1886, while portions of the Amherst papers were being copied, the Foreign Office imposed restrictions on the copying of correspondence dated after 1763. While Brymner had been advised by the Foreign Office that "all restrictions on copying for the Canadian Archives" were withdrawn, this particular correspondence dealing with the treatment of Indians was still to be "kept secret" more than one hundred years after its creation.⁸

Since Brymner's experience with the Foreign Office,⁹ the matter of making official federal government records of permanent value available for research has changed, with the overall trend being to shorter periods of closure. In democratic societies the accepted practice has long been that the records of government be properly preserved and that, with time, the public have access to the government's archives.¹⁰ Although no formal policy regarding access to government records existed in Canada at the federal level until the 1960s, records were made available both in departments and at the Public Archives on an *ad hoc* basis, with the notable exception of diplomatic and military records shared with other countries.¹¹ Permission to see records of Canadian government departments was recognized as a departmental prerogative; by the 1950s the time between record creation and

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- 5 P. Barnes, "The Access Issue in the United Kingdom," Society of American Archivists, Annual Meeting (Berkeley, 1981), mimeograph copy.
 - 6 D. Brymner, "Report on Canadian Archives," *Report of the Minister of Agriculture*, 1883, Sessional Paper 14a, p. 4.
 - 7 *Report of the Minister of Agriculture*, 1883, Sessional Paper 14, p. x.
 - 8 Public Archives of Canada (hereafter PAC), Records of the Canadian Government Exhibition Commission, RG 72, vol. 50, docket 3059, D. Brymner to Mr. Chipman, 22 September 1886.
 - 9 For further details about the connection between British and Canadian access policies, see Don Page, "Unlocking Canada's Diplomatic Record," *International Journal* 34 (Spring 1979), pp. 251-80.
 - 10 J. Tener, "Accessibility and Archives," *Archivaria* 6 (Summer 1978), p. 17; T.R. Schellenberg, *Modern Archives: Principles and Techniques* (Chicago, 1956), pp. 4-5.
 - 11 For details, see testimony of W.I. Smith, *Minutes of Proceedings and Evidence of the Standing Committee on Regulations and other Statutory Instruments*, 30th Parliament, 1st Session (1974-76), Issue 61, pp. 6-27; W.I. Smith, "Accessibility and Archives: A Response," *Archivaria* 7 (Winter 1978), pp. 144-46; C.P. Stacey, "Some Pros and Cons of the Access Problem," *International Journal* 20 (1964-65), pp. 45-53.

availability for research was generally accepted to be thirty-five years. Researchers viewed this as a liberal access policy particularly when it was compared with the British practices which prevented examination of files of dates later than 1902.¹² Developments in the 1960s outside Canada — particularly in the United States with the passage in 1967 of the *Freedom of Information Act*, and in Britain with amendments to the *Public Records Act* effective in 1968 — accelerated access to government records.

Late in 1967 the Canadian Cabinet approved in principle a policy concerning the transfer of government records to the Archives and access to records both in departments and the Archives. The purpose of the policy was to make available to the public as large a portion of the records of the government as was consistent with the national interest. The policy was embodied in Cabinet Directive No. 46 (CD 46) which was approved in June 1973. Much of the work in developing this Cabinet Directive was the responsibility of the Public Archives assisted by the Advisory Council on Public Records. The directive established certain basic principles for access to government records: the continued primacy of departments in the determination of access; the definition of access in terms of research purposes rather than a general right of access; the possibility of access to records less than thirty years old and the right of access to all records more than thirty years old with the exception of those declared exempt; and the responsibility of the Dominion Archivist for advising departments on matters respecting access to government records. Although the directive was amended and renamed the *Access Directive* in 1977, none of its major provisions was altered.¹³

The concern of researcher access to government records as outlined in the *Access Directive* was but one limited facet of the trend during the late 1960s and early 1970s towards “openness in government” and the concept of the public’s “right to know.” Researcher access was defined in terms of *permission* and the longterm, namely thirty years after the creation of the information, whereas the public policy issue known generally as freedom of information was defined in terms of the *right* of the citizen to full, objective, and timely information and the obligation of the State to provide such information.¹⁴ Protagonists for freedom of information in Canada, such as former Member of Parliament Gerald Baldwin, the Canadian Bar Association, and the Canadian Civil Liberties Association, pressured the government to examine the question of the right of Canadians to information possessed by the government. By June 1977, at the same time as the revised *Access Directive* was issued, the Liberal government published its policy discussion paper entitled *Legislation on Public Access to Government Documents*. This paper, which espoused the principle that “assessment of government depends upon a full

12 C.P. Stacey, “Canadian Archives,” *Royal Commission Studies* (Ottawa, 1951), p. 246; L.H. Thomas, “Archival Legislation in Canada,” Canadian Historical Association, *Annual Report* (1962), p. 113.

13 For one evaluation of the Directive see T.M. Rankin, *Freedom of Information in Canada: Will the Doors Stay Shut?* (Canadian Bar Association, 1977), pp. 41-43. For another interpretation, see M.L. Friedland, “National Security: The Legal Dimensions,” study prepared for the *Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police* (Ottawa, 1979), pp. 65-66.

14 “Access to Information Legislation,” Cabinet Discussion Paper, Secretary of State and Minister of Communication, June 1980.

understanding of the context within which decisions are made,"¹⁵ was referred to the Standing Committee on Regulations and Other Statutory Instruments for study. The Committee produced a report one year later.¹⁶ It is of interest to note that the Summer 1978 issue of *Archivaria* was partly devoted to the issue of access and archives. The federal election of 1979 resulted in a Conservative government which in October of that year introduced into the House of Commons its freedom of information legislation (Bill C-15). With the defeat of the government in December, the bill died on the order paper. However, the new Liberal administration brought forward in 1980 an expanded piece of legislation that combined both access to information and privacy (Bill C-43). During the ensuing hearings on the legislation before the Justice and Legal Affairs Committee, briefs were presented by many interested parties including historians and archivists. In June 1982 the *Access to Information Act* and the *Privacy Act* were adopted by the House, although the two laws were not finally promulgated until 1 July 1983.¹⁷

Because of the newness of the legislation, I will attempt to describe briefly its main provisions and some of the mechanisms involved. The *Access to Information Act* extends the present laws of Canada to provide a right of access to information in records under the control of government institutions. The right of access is granted in accordance with the principles that government information should be available to the public and that the necessary exceptions to the right of access should be limited and specific. Sections 13 through 24 of the *Access to Information Act* set out a number of specific exceptions to the right of access established by the legislation. These exceptions are known as exemptions. Each exemption is intended to protect information relating to a particular public or private interest. In brief, the exemptions relate to policy making, national security, federal-provincial affairs, law enforcement, personal information, and commercial information. Two factors will be used to define each specific exemption. The first factor is an injury or class test and the second is the discretionary or mandatory nature of the exemptions. In the legislation, injury exemptions are introduced by the phrase "could reasonably be expected to be injurious." These exemptions identify the specific interests which must be protected from injury that might result from the premature disclosure of information. As an example, the exemption which allows a government institution to refuse to disclose a document because its release would be injurious to national defence is an injury-test exemption. It is generally understood that for an injury to take place, the factors of the injury test being specific, current, and probable must be present. Class-test exemptions are expressed by reference to clearly defined classes or types of information to be protected. In class test exemptions, no injury needs to be proved — only that the record falls within the category or class of records described. Examples of a class exemption are certain law enforcement records.

15 *Legislation on Public Access to Government Documents* (Ottawa, 1977), p. 1.

16 *Minutes of Proceedings and Evidence of the Standing Committee on Regulations and Other Statutory Instruments*, 30th Parliament, 3rd Session (1977-78), Issue 34.

17 *Access to Information Act and Privacy Act* (29-30-31 Elizabeth II, c. 111). The administrative policy that will be used to implement the legislation is found in Treasury Board Canada, *Administrative Policy Manual*, Chapter 410, "Interim Policy Guide: Access to Information Act and the Privacy Act" (June 1980). The following discussion is based on the policy. The formal or legal process is outlined; the same framework, exceptions, and time frames are employed at the Public Archives in dealing with informal requests for access.

As previously stated, exemptions can be either discretionary or mandatory in nature. A discretionary exemption is one introduced by the phrase "the government institution *may* refuse to disclose" which means information may be released by a government institution where no injury would result or where the public interest in disclosure outweighs any resultant injury. Mandatory exemptions are those introduced by the phrase "the government institution *shall* refuse to disclose" and gives the institution no discretion in invoking an exemption.

In addition to the exemptions identified, certain information is excluded from the scope of the *Act*. This includes material which is already available to the public such as publications, reference and exhibition material, and "material placed in the Public Archives, the National Library or the National Museums of Canada by or on behalf of persons or organizations other than government institutions" (Section 68(c)). Further the *Act* does not apply to confidences of the Queen's Privy Council (i.e., the Cabinet) that have been in existence for less than twenty years.

The exemptions and the categories of records excluded from the *Act* form the only basis for government institutions to refuse access to government information requested under the legislation. When information is exempted from access under the *Act*, the applicant has the right of appeal to a two-tiered system. The first stage is a complaint to the Information Commissioner, an individual with the power of an ombudsman, and the second is an appeal to the Federal Court (Trial Division).

The right of access extends to all Canadian citizens and to permanent residents within the meaning of the *Immigration Act*. In formulating an access request, applicants are encouraged to consult the *Access Register*. The *Register* is a publication which provides a description of the organization, responsibilities, and programmes of each government institution, a description of all classes of records under the control of the government institution, and the title and address of the person to whom requests for access should be sent. The *Register* will obviously be an ideal tool for future archivists and others working on administrative histories of government agencies.

A formal request for access to government records must be made in writing and it must be submitted with the appropriate fee to the institution that has control of the record. The request must be in sufficient detail so that, in the words of the legislation, "an experienced employee of the institution with a reasonable effort can identify the record" (Section 6). The legislation specifies the period within which the agency must process a request — thirty calendar days — and provides for time extensions in certain specified circumstances such as those involving third-party review.

Before discussing the impact of the access legislation on the Public Archives, it is necessary to deal briefly with the companion statute of Chapter 111, the *Privacy Act* and particularly its sections of special interest to the Archives. Since 1978 under Part IV of the *Canadian Human Rights Act*, individual Canadians have been guaranteed the right to limit access to and to correct personal information about themselves held by federal government institutions, and to control the use and dissemination of this information. In order to ensure consistency with the approach taken in the access to information legislation, the definition of what constitutes personal information has been extended to include any personal information under the control of a government institution regardless of its source or nature. As well, the exemptions, the review process, and the scope of the *Privacy Act* conforms to those of the *Access*

to *Information Act*. The *Privacy Act* can be seen as a "comprehensive data protection law which ensures that government institutions engaging in the collection, storage, use and dissemination of personal information will afford adequate protection to the personal privacy of individuals about whom such records are maintained."¹⁸ As part of a code of fair information practice, the *Privacy Act* in sections 7 and 8 identifies circumstances under which personal information may be released with and without the consent of the individual to whom the information relates.

Four clauses are of particular interest to the Archives and for archival research. The first (8(2)i) provides that personal information under the control of a government institution may be disclosed to the Public Archives of Canada for archival purposes. This provision allows archivists to examine personal information held by departments in order to determine whether or not that information qualifies as an archival record and to establish appropriate retention and disposal schedules for it. Another clause (8(2)j) permits personal information to be disclosed for research and statistical purposes, if the head of the government institution having control of the records is satisfied that it is essential for the purpose of the research project that the personal information involved be provided in a form whereby an individual can be personally identifiable. The researcher, in turn, is required to sign a written understanding that the information will not subsequently be disclosed in an individually identifiable form. The third clause (8(2)k) of interest to archival research permits the release of personal information to researchers involved in the process of settling native claims. As with the conditions for release of information under the research and statistical clause, researchers must be accredited to undertake such research and must sign a written agreement holding them formally accountable for the protection of individual privacy. The fourth section (8(3)) that has particular application to the Archives permits the discretionary disclosure of personal information by the Public Archives. This clause, which it must be stressed applies only to the Public Archives and can be administered solely by the Archives, was inserted in the legislation as the result of representations made by the Archives' research clientele who were concerned that the privacy legislation would otherwise seriously affect their ability to have access to files containing personal information.¹⁹ This concern was based on the restrictive effects the broad definition of personal information as found in the *Privacy Act* would have on access to, for example, policy files with letters in them containing information defined in the legislation as being personal, such as marital status, address, and age. Discretion is given under the clause to the Dominion Archivist to differentiate between what is sensitive and non-sensitive personal information and to disclose for research or statistical purposes that information qualifying as non-sensitive. By way of example, medical, personnel, and criminal activity and law enforcement records would probably qualify as records containing sensitive personal information. It should be noted that the privacy legislation applies only to personal information relating to living

18 *Public Government for Private People*, report of the Commission on Freedom of Information and Individual Privacy, (Ontario Government, 1980), vol. 3, p. 789.

19 *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, 32nd Parliament, 1st Session (1980-83), Issue 94, pp. 178-79.

individuals or to those who have been deceased twenty years or less. Combined the four provisions plus the corresponding regulations should ensure that archival research will not be impaired by the *Privacy Act*.

The *Access to Information Act* and the *Privacy Act* together define an access regime in stark contrast to that previously in existence. Access no longer means permission to examine government records for research purposes, with permission being at the total discretion of a government department to dole out as it wishes. Access under the new legislation is defined in terms of the right of a citizen to information under the control of a government institution. No longer is the onus on the applicant to explain why they have a need for the information, but rather on the government institution to explain why the information cannot be released. Appeal provisions to bodies independent of government are provided to curtail potential departmental abuses.

For the Public Archives, 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. With few exceptions, access to government records at the Archives less than thirty years old was controlled by the transferring agency. Though the Archives held the records, departments maintained a residual control over access to them. This will no longer be the case. Transfer to the Archives will mean not only transfer of the physical record, but also transfer of the responsibility for access determination. Although the administrative policy relative to the legislation calls for consultation, both of a mandatory and discretionary nature, with the department of greater interest prior to release of a record, the ultimate responsibility for the decision on whether a record will be released, subject to the specified exemptions, rests with the department that controls the record. In the case of records transferred to the Public Archives for archival or historical purposes, the present interpretation is that the Archives is responsible for matters relating to access.²⁰ For the Archives, this means access responsibility for some 12,000 metres of archival records now restricted, with annual increments of 2,000 metres, as well as for the Archives' own operational records.

Under these changed circumstances, will departments be forthcoming in transferring records to the Public Archives? Two responses are possible. Some departments will be more than willing to unload records on the Archives once their administrative purpose is served. Few departments are experienced in dealing with the general public and researchers; even though departments are required by law to establish reading rooms within two years of the legislation coming into force, departments are not prepared to devote already scarce resources to a task that could easily be transferred to another institution, namely, the Archives. Conversely, the proprietary tradition of government departments regarding their records, a tradition that has permitted departments to maintain access control of records no matter where they were, will take a period of time to overcome. Until the Public Archives is

20 For the interpretation of what constitutes control and the role of the Public Archives, see *ibid.*, Issue 39, p. 20.

able to demonstrate that access decisions will be made consistent with the law and not with some arbitrary abandon, certain departments will be reluctant to transfer records to the Archives where another authority will control the release of "their" information.

The relationship of the Archives relative to the research community will also change with the legislation. Under the *Access Directive* archivists could and did encourage departments to release information before it was thirty years old. Archivists saw themselves as information brokers while at the same time always able to deflect the ire of a researcher back upon the department that had refused access. This will no longer be the case. The Public Archives under the legislation becomes an active agent involved in making access decisions, like any other government institution. The Archives also becomes part of the adversarial system where access decisions can and will be appealed to the Information and/or Privacy Commissioner and to the Federal Court. Researchers, particularly in medicine and the social sciences where their research requires examination of extensive series of records that contain personal information such as Unemployment Insurance benefit claim files, will also notice a change. As discussed earlier, before the Archives permits the disclosure of such personal information, the Dominion Archivist must be *satisfied* that the research requires the disclosure and the researcher must complete a formal written statement not to release the information in a form which would identify an individual. Such conditions on access will undoubtedly involve the Archives in controversy over charges of "controlled research."²¹ The new role of the archivist in determining what information can and cannot be disclosed will be a difficult challenge, for it brings into conflict the archivist's professional responsibilities of encouraging free inquiry with the responsibilities of the government official. The age of the archivist as bureaucrat has truly arrived!

Another subtle, yet profound, change resulting from the new access legislation concerns the "most-favoured" status accorded to certain researchers by government departments. It has long been recognized that not all researchers are treated alike by departments in matters relating to access. Certain old-boy networks have existed with some privileged researchers being permitted to examine records while others were not. The new legislation brings an end to this "intellectual means test" and replaces it with an approach that puts everyone on the same footing. The result will be that what is open for one is open for all. The change will be difficult for the chosen researchers to accept: egos will be bruised. Departments will have to change their ways. The dividing line over who can and cannot examine records will become one not between the favoured and the unfavoured, but between the government researcher and the non-government researcher.²² The special position accorded to professional historians within the federal government will probably become even more of an issue than it is at present.

As the archivist assumes the mantle of "gatekeeper" of the record, changes in the way he thinks and handles records will also be necessary. Government record archivists who are used to dealing with files and boxes of files will now be required to

21 R.C. Brown, "Government and Historians: A Perspective on Bill C-43," *Archivaria* 13 (Winter 1981-82), pp. 119-23.

22 "Scholars in the Middle of Battles over Information," *New York Times*, 11 July 1982, p. 24E.

make access decisions based on a much lower level: the individual page, the paragraph, even the sentence and parts of sentences. The access legislation is defined in terms of records and information. Government institutions, and this includes the Public Archives, are required to disclose any part of a record that does not qualify for an exemption, if it can be reasonably severed. Such exacting examination of a record is foreign to the government record archivist who is involved in handling masses of information generated by modern registry systems. This work will require considerable adjustment and new methods of circulation control will have to be developed.

The access and privacy legislation should result in better records management practices within federal government institutions. By extension, archivists and researchers should begin to see a higher quality archival record. Put simply, institutions have to know what information and records they control in order to respond accurately to demands for access. The present poor state of records management at the federal level has been documented in recent studies conducted by the Public Archives.²³ The situation was graphically illustrated in the recent "Coalgate Affair" where a deputy minister had to admit that he had not initially given his former minister all the relevant information his department had in its possession simply because not all the multifarious filing systems were searched.²⁴ The new legislation should provide the necessary legal requirements to force a change in the situation. If an institution has inadequately described its records holdings in the *Access Register*, a complaint may be made to the Information Commissioner. The designated minister, namely the President of the Treasury Board, is required to keep under review "the manner in which records under the control of government institutions are maintained and managed" (Section 70(1)(a)). The requirements regarding the collection, retention, and disposal of personal information are set out in detail in the *Privacy Act* and the corresponding regulations and management policy guidelines. These requirements, plus a new records management policy which has already been issued,²⁵ should, if enforced, go a long way to bringing order to the chaos that now exists in the federal government's record-keeping practices.

The archivist's responsibility to identify records of long-term archival value should be aided by improvements in records management operations. Better record-keeping practices and the integration of regional records into the central registry system should mean more complete retention and disposal authorities. Linkages between the *Access Register* and the *Privacy Index* on the one hand with actual scheduled information on the other will be possible, thereby assisting archivists in assessing "the extent to which the important policies and programs of departments are documented for future research."²⁶ All departmental records are

23 B. Corbett and E. Frost, *Public Records Division: Acquisition Methods* (1979), an edited version of which has now been published in *Archivaria* 17 (Winter 1983-84); "Report of the Treasury Board on the State of Records in the Government of Canada 1982," prepared by Records Management Branch, Public Archives of Canada, August 1983.

24 P. Tellier to M. Lalonde, 17 February 1983, as reproduced in *Globe and Mail*, 25 February 1983, p. 8.

25 Treasury Board of Canada, *Administrative Policy Manual*, Chapter 460, "Records Management" (March 1983).

26 "Public Records Order", P.C. 1966-1749, s. 4(e)(ii).

covered by the new legislation including those of task forces and working groups, and of ministers as they relate to the operations or administration of government institutions. This broadening of the scope of what constitutes a government record should result in a more complete archival record. Because improper disposal of a government record could in essence be the equivalent of a denial of access (without the record there can be no access), archivists will be held directly accountable for decisions relating to retention and disposal schedules. Archivists in Canada are no doubt aware of the experience of their American cousins in the case involving the FBI records.²⁷ Archivists here must anticipate similar concerns.

But what records will there be for archivists to examine, identify, and ultimately place in their custody? In any discussion on access legislation and its impact on records creation, reference is made to the "chilling effect"²⁸ or the reluctance of government officials to create candid records that may be disclosed. In a conversation I had with one senior government official, he made it quite clear that he would destroy records rather than release them, particularly to the Public Archives. Other government officials, with an eye to what might appear in the media, perhaps will produce records that reflect credibility upon them. Both these possibilities exist. Conversely, in order to protect themselves, officials might also create clear, concise, and thoughtful records that document how and why a particular course of action was proposed and then taken. I know of no way to measure accurately the development of either of these possible trends. One immediate indicator will be the response of government officials to the call for more openness in government.²⁹ At any rate, archivists should be just as concerned about the impact of the new technologies — the computer, the word processor, and the updateable microfiche — on the erosion of the historical record as they are about access legislation.

One of the unfortunate developments, or perhaps put more correctly one of the lost opportunities, for archivists with the new legislation is the change in overall government responsibility for access policy. Under the *Access Directive*, the Dominion Archivist was charged with advising departments and agencies "on matters of policy respecting access to public records."³⁰ Under the new access legislation, the designated minister for policy is the Minister of Justice and for administration the President of the Treasury Board. One can only speculate on the central role the Public Archives could have played in the new access regime and the effect this role would have had on the archival record of the future.

To this point I have avoided mention of conditions of access to private records. Because of the complex nature of this matter, it is deserving of full and separate

27 M. Hopkins, " 'There's a Hole in the Bucket, Dear Liza, Dear Liza': Archivists' Responsibilities Reviewed," *Archivaria* 16 (Summer 1983), pp. 134-38. This concern took on increased meaning in September 1983 in the matter concerning the destruction of Transport Canada travel logs. See *Globe and Mail*, "On An All-time High," 30 September 1983, p. 6.

28 T.H. Peterson, "After Five Years: An Assessment of the Amended U.S. Freedom of Information Act," *American Archivist* 43, no. 2 (Spring 1980), p. 163-64; P. Horowitz and P.P. Miller, "The Freedom of Information Act: Federal Policy and the Writing of Contemporary History," *Public Historian* 4 (Fall 1982), p. 90.

29 Letter Prime Minister to Members of Cabinet, 19 September 1980; J.L. Manion, Secretary of the Treasury Board, "Opening Comments," address delivered to Access to Information Coordinators, Ottawa, 16 March 1983.

30 *Access Directive* (1977), section 7.

treatment. However, the provisions of the access and privacy laws and the categories of exemptions may provide some guidance to archivists as they are called upon to deal with access to private collections. As I have already mentioned, records placed in the Public Archives by private individuals and non-government organizations are excluded from the application of both the access and privacy acts. One would also believe that the same applies to federal government records placed in other institutions outside the federal government such as universities and provincial and territorial archives. The immediate question that arises is what is the status of federal government records found in private collections. Can a Canadian citizen seek access to such records under the legislation? Archivists may be familiar with the American case of the Kissinger records in the Library of Congress.³¹ It is probable that only a similar court case in Canada will resolve the issues of what constitutes control of a government record and whether or not a record that has been removed from the control of the Government of Canada without the approval of the Dominion Archivist is still the responsibility of the government agency that created or received it. As the matter relates to the Public Archives, there is a degree of irony. The legislation applies to government information in one area of the Public Archives (the Federal Archives Division), but does not apply to the same information held by another area (the Manuscript Division).

Finally, we as citizens have the right, and perhaps as archivists the obligation, to test the legislation over the next three years. This is when the legislation will be reviewed by Parliament and unless the legislation is used and its inadequacies discovered, we as citizens and archivists will deserve what we get. One should take note as to how fragile the concept of openness in government appears to be. Recent trends in the United States indicate that the open door is swinging back to the pre-*Freedom of Information Act* position.³² As Canadians often take their lead from events south of the border, one wonders how far the door to the record's office will open here in Canada.

31 *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136 (1980); S.E. Castano, "Disclosure of Federal Officials' Documents Under the Freedom of Information Act: A Limited Application," *Houston Law Review* 18 (1981), pp. 641-54.

32 D. Shribman, "The New 'Information Policy' Means a Less Informed Public," *New York Times*, 18 April 1982, p. 4E.