

Accessing Manitoba's Archives: Exploring the Status and Response to Freedom of Information
and Protection of Privacy Rights at the Archives of Manitoba

by

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Abstract

Manitoba's Freedom of Information and Protection of Privacy Act (FIPPA) aims to administer information rights systematically across Manitoba's public service. It has given government agencies the authority to apply the legislation to their own records, including to records they have placed in the Archives of Manitoba (AM). The government agencies determine what records of theirs shall be restricted or opened to the public. The Archives of Manitoba does not control access to these records, even though they are in its custody. However, in its current form, the legislation falls short in its capacity to make nuanced but nonetheless vital differentiations between the "active" records still in the physical custody of public agencies and the less voluminous but highly valuable archival materials held in trust by the AM. Consequently, information resources created, used, and preserved by Manitoba's public sector are subject to the same restrictive access protocols regardless of their age, and often without consideration for their contents. That no program exists in Manitoba to retroactively review archival records series restricted under FIPPA further exacerbates this problem. And with the proliferation of born-digital holdings adding to both the volume and complexity of information held by AM, it is only a matter of time before a significant amount of Manitoba's provincial government historical record will become increasingly difficult to control on a long-term basis, making the public accessibility promised by FIPPA practically unfeasible. By using the AM as a case study, this thesis attempts to provide an in-depth examination of Manitoba's Freedom of Information and Protection of Privacy Act in light of its engagement with and authority over government archives. This study looks specifically at how FIPPA and the various programs, systems, and procedures through which it is administered, interact with and impact archival access. I will also attempt to explain how political conservatism, paucity of resources, and risk

averseness have encumbered the highly sophisticated archival systems and administrative measures put in place by AM, and to suggest how certain programs of proactive disclosure (which have been implemented in other jurisdictions) might alleviate these concerns by creating a more efficient and equitable system of public access to the many kilometres of government archival records held by AM.

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Introduction

In 1766, the Swedish crown implemented a set of laws meant to enable basic public access to information produced and held by the crown. This was the world's first freedom of information (FOI) legislation and since its introduction over 250 years ago, the principles and practices of FOI have received increasing attention across the globe. While much of the work treating FOI has centred on the positive aspects of information rights law, an equally forceful and no less prolific stream of monographs, articles, opinion pieces, and government publications, has sought to challenge the way in which access laws have been administered – both within Canada and beyond its borders. Perhaps surprisingly, very little has been written about the specific challenges faced by archives as they struggle to apply information rights to their unique and rapidly evolving needs. This paucity appears particularly pronounced when one looks at the state of access rights as they relate to Canada's provincial archives. In hopes of better illustrating the hurdles faced by Manitoba's archival and recordkeeping professionals with respect to access rights administration, this thesis seeks, if in a small way, to fill this knowledge gap.

Since its proclamation in 1998, Manitoba's Freedom of Information and Protection of Privacy Act (FIPPA) has sought to provide a comprehensive framework for administering public information rights to records created, collected, and maintained by the Manitoba government and other publicly responsible bodies (such as municipal governments, universities, and school boards). The provisions of the act aim also to secure the privacy of personal information provided to the government by citizens and other concerned interests, and to withhold access to that and other information deemed restricted until a review permits it to be made available. While each of these ostensibly conflicted safeguards seeks to protect certain well-defined aspects of civic freedom, their administration within a complex and multifaceted recordkeeping context

can often lead to differing views about what information should be protected at the expense of the public's right to know.

FIPPA aims to administer information rights systematically across Manitoba's public service. However, in its current form, the legislation falls short in its capacity to make nuanced but nonetheless vital differentiations between the "active" records still in the physical custody of public agencies and the less voluminous but highly valuable archival materials held in trust by the Archives of Manitoba (AM). Consequently, information resources created, used, and preserved by Manitoba's public sector are subject to the same restrictive access protocols regardless of their age, and often without consideration of their contents. That no program exists in Manitoba to retroactively review archival records series restricted under FIPPA serves to further exacerbate this problem. And with the proliferation of born-digital holdings adding to both the volume and complexity of information held by AM, it is only a matter of time before a significant amount of Manitoba's provincial government historical record will become increasingly difficult to control on a long-term basis, making the public accessibility promised by FIPPA practically unfeasible.

By using the AM as a case study, this thesis will provide an in-depth examination of Manitoba's Freedom of Information and Protection of Privacy Act in light of its engagement with and authority over government archives. Throughout this study, I look specifically at how FIPPA and the various programs, systems, and procedures through which it is administered, interact with and impact archival access. I will also attempt to explain how political conservatism, paucity of resources, and risk averseness have encumbered the highly sophisticated archival systems and administrative measures put in place by AM, and to suggest how certain programs of proactive disclosure (which have been implemented in other

jurisdictions) might alleviate these concerns by creating a more efficient and equitable system of public access to the many kilometres of government archival records held by AM.

Because my thesis will not only seek to identify the problems of archival access brought on by FIPPA, but also to explore certain means of addressing them, my research will review literature concentrating on the development and implementation of proactive records disclosure programs throughout North America and in Britain. Work of this type tends to be thin on the ground and generally comes from sources involved with large-scale government records programs. Aligned with the passage of time principle, these programs seek, by way of systematic records sampling, to retroactively lift the administrative barriers preventing immediate access to blocks of archival records that, though technically subject to FOI legislation, no longer pose a security/privacy concern due to their age (or some other defining attribute). Paulette Dozois' "Learning Through Successes and Failures: Block Review at Library and Archives Canada – Five Years on!" shines light on this process as it has been implemented there. While not a practical guide per se, because of the many institutional similarities obtaining between Library and Archives Canada (LAC) and AM, this and other sources originating from national archives government records programs in both the UK and the US, will inform my thinking on "block review" and its potential implementation at AM.

This thesis will combine qualitative research approaches with quantitative data analysis. I will begin by introducing the administrative context of Manitoba's current access to information regime. This thesis will examine both the political rationality and policy rationale behind the creation of FIPPA. I will assess a wide variety of published government sources, academic articles and monographs, as well as non-academic articles related to information rights in Manitoba and the larger Canadian/international context.

Based on these findings, my thesis will then highlight promising approaches to proactive disclosure carried out in government records programs across Canada and throughout the world. This section will look at the solutions – some of them experimental – implemented in public archives, which seek to address issues of access caused by the proliferation of records creation in the government sector, particularly those concerning access to born-digital records. By comparing the recordkeeping contexts, scale and scope of records creation, and legislative requirements that have spurred these measures in other jurisdictions, I will assess the manner and means by which AM might successfully integrate various innovative models of access. Among these, the block review programs implemented by Library and Archives Canada and the National Archives of the United Kingdom will be examined as representing potentially useful models for application in the Manitoba context.

Chapter 1 looks at the concept of the access regime and a government archive's place within it. Here I apply Gary Dickson's anatomization of the access regime to the Manitoba context, examining the ways in which archival, recordkeeping, and access concerns intersect with the larger socio-legal information ecology obtaining in the province.

Chapter 2 will explore the history of archival theory and practice as it relates to access. This chapter will also trace the historical development of information rights law in the modern era connecting developments made in the global, national and provincial context to Manitoba's current access regime.

Chapter 3 provides a brief analysis of the information rights discourse prevailing in Canada. Further, this chapter examines FIPPA in light of ability its to ensure public access to archival records scheduled under the Manitoba Government Records Program - particularly those not likely to contain information of a personal or sensitive nature. Here I will show how

many government records series in the custody of the Archives of Manitoba are open to the public without the necessary application of a FIPPA request. Additionally, I will discuss the nature and effectiveness of the access review processes in place and by which older records – those whose age can and in many cases should attenuate access restriction based on sensitivity – are proactively opened.

The concluding chapter will attempt to pave a way forward for FIPPA as it relates to archival materials held by the Archives of Manitoba. Here I weigh the risks and opportunities of leaving FIPPA the way it is, suggesting certain measures that might be put in place to streamline access to archival records and accommodate the prolific increase in records creation experienced by today's government agencies.

Chapter 1

Freedom of Information Law and the Access Regime in Manitoba

Freedom of Information law alone will not achieve robust transparency in the operations of government, but needs to be accompanied and reinforced by a range of measures to support that law.¹

The proclamation of information access law represents an essential first step toward delivering effective and transparent information rights within a designated jurisdiction. Yet while these laws serve to define the various conceptual parameters of access and privacy protection, their execution requires a complex network of people, systems, structures and resources working in coordination toward the administration – or fulfillment – of an act as it is proclaimed. Gary Dickson, former Information Rights Commissioner of Saskatchewan and advocate for access rights across Canada, provides a useful if somewhat simplified analysis of these networks as they exist in Canada’s provincial/territorial jurisdictions. He anatomizes the body of administrative systems, structures, functions, and responsibilities implicated in the administration of information rights into identifiable, composite parts of what he and others term the “access regime”:

The access regime captures not only the statutes but also the machinery that governments and public bodies create to meet their [access] obligations. These features include those officers within executive government tasked with meeting statutory access requirements . . . and the extent to which they are supported and resourced as well as the kinds of tools and training developed to assist them in their key role. The access regime also includes the decisions, practices, and procedures of oversight bodies . . . [as well as] the executive and management levels of leadership within government and the extent to which value is assigned to complying with access legislation.²

¹ Gary Dickson, “Access Regimes: Provincial Freedom of Information Law Across Canada,” *Brokering Access: Power, Politics, and Freedom of Information Process in Canada*, eds. Mike Larsen and Kevin Walby (Vancouver: UBC Press, 2012), 69.

² *Ibid.*

According to Dickson, successful access regimes - regardless of the jurisdiction they serve - require the close coordination of people, systems, and resources distributed across all levels of government and throughout the public in an intersectional network of responsibility.³ Under this distributed framework, any agent, user, or system implicated in the creation of recorded information can be viewed as playing a role in the administration of access rights, making the access regime's underlying constituents notoriously hard to identify. Indeed, because of the integrated nature of the access regime itself, and because of the highly intersectional manner by which access rights are activated, processed, and upheld (or otherwise) within this regime, an analysis of its inner workings remains difficult unless one focuses on the points of intersection through which the rights themselves are realized. Dickson's model identifies several key points of intersection (operating both within and outside of the government service) that feature prominently in the administration of information rights across most if not all Canadian access regimes. These are defined in order as: the information rights statute(s) active in a jurisdiction; the political leadership responsible for championing and allocating funds toward information rights programming; the government department or ministry charged with setting policy, overseeing the administration, and delegating responsibility to agents with respect to information access and privacy initiatives; information coordinators responsible for administering a jurisdiction's access and privacy programs; members of the public intersecting with the access regime; and the information oversight bodies responsible for reviewing the administration of an access regime and for providing mediation in the event of disputes occurring between members of the public and a government institution.

³ Ibid.

The Information Rights Statute(s)

Predictably, the information rights statute itself represents the first of Dickson's points of intersection, or the first "feature" of an access regime writ large. An initiating intervention that underwrites all other aspects of the access regime, the proclamation of information rights legislation serves to define and confer rights of access. The legislation also defines the general structure whereby access and privacy functions are distributed throughout the government. The act empowers offices responsible for administering information rights programs, delineates the parameters by which information requests can be administered, specifies the types of information subject to the act, and determines the type of authority granted to oversight bodies charged with arbitrating complaints under the act. Further, the act typically defines the relationship between information rights and other potentially conflicting legislative obligations held by the government.⁴ To use a somewhat clichéd construction metaphor, the information rights statute provides an access regime with its blueprint, or an official reference for the assembly and maintenance of access rights, which can be interpreted, used and in some cases ignored by those intersecting with the access regime.

While statutes enacted throughout Canada carry different titles – Freedom of Information and Protection of Privacy Act, Access to Information and Protection of Privacy Act, and Personal Health Information Privacy and Access Acts - they tend to share a similar structure and confer many of the same rights, which are – in the Canadian context - articulated using the same principles of operational transparency and government accountability.⁵ In Manitoba, as in most

⁴ Ibid., 70.

⁵ Jamie Brownlee and Kevin Walby, "Access to Information and Social Justice in Canada," in *Access to Information and Social Justice: Critical Research Strategies for Journalists, Scholars and Activists*, eds. Jamie Brownlee and Kevin Walby (Winnipeg: Arbiter Press, 2015), 1; Moira Patterson, "The Media and

other Canadian jurisdictions, there exists no clear differentiating quality between the “active” government information resources maintained in the various offices, file cabinets, storage facilities, hard drives, and digital document management systems used by government bodies and the records that have, by way of records disposition programs and other means, come under the custody of the Archives of Manitoba.⁶ This is to say that, under the province’s Freedom of Information and Protection of Privacy Act, all information regardless of media form, age, or location is made subject to disclosure through the same administrative processes and according to the same oversight protocols.⁷

Political Leadership

If information rights legislation represents the blueprint for a successful access regime, the various ministries, offices, agents, and resources directed toward administering the act might be considered its infrastructure. Dickson identifies a jurisdiction’s sitting political leadership as vital to the success of its access regime, noting that (in the case of a provincial/territorial jurisdiction) the premier holds a particularly influential position. Highlighting their capacity to embrace and encourage robust government cooperation with and respect for access rights, he

Access to Government-Held Information in a Democracy,” *Oxford University Commonwealth Law Journal* 8:1 (summer 2008), 6.

⁶ FIPPA defines a “record” as: “a record of information in any form, and includes information that is written, photographed, recorded or stored in any manner, on any storage medium or by any means including by graphic, electronic or mechanical means...” C.C.S.M. c. F175, S1(1).

The majority of Manitoba’s archival records are transferred into the custody of the Archives of Manitoba according to set retention periods determined by a longstanding records scheduling program. However, the Government Records Program has accessioned several series of government records generally termed “legacy series,” which have arrived at the archives through means other than an official records schedule. Normally, these records predate the creation of the province’s records scheduling program (indeed, they often pre-date the creation of its archives) and were excluded from any measure of records control prior to their discovery and eventual transfer. These records are scheduled retrospectively upon their accession and represented in AM’s online Keystone database under the alphabetical prefix “A”.

⁷ This applies to all official bodies subject to the FIPPA. Certain bodies such as non-ministerial members of the Legislative Assembly, ministerial constituency offices, and certain Credit Unions and Caisses Populaires are not subject to access requests.

views the premier as a prime mover – a principal catalyst and important champion – for the successful implementation and continued validity of an access and privacy regime.⁸ The premier has the ability to put forward an agenda favourable to maximum possible disclosure, to ensure proportional budgeting for the administration of access and privacy requests, and to direct political support and legitimacy to the agencies responsible for complying with the act.⁹

For Dickson, ministerial direction, too, plays a pivotal role in the success of a jurisdiction's access regime. By allocating funds toward employee training programs, setting policy, and providing support to those charged with administering access requests in their institution, the executive levels of government set the tone for their department's engagement with access legislation.¹⁰ Here, top down, meaningful leadership springing from those with decision-making power can mean the difference between a responsive and forward thinking information access regime and one characterized by languid response times, systemic secrecy, and, in the worst case scenario, overt adversarialism leading to illegal non-compliance.¹¹ Former Ontario Information and Privacy Commissioner, Ann Cavoukian makes this sentiment clear in her 2005 Freedom of Information and Privacy Act annual report, where she remarks "... leadership on openness and transparency must come from the top. Public servants are more apt to disclose information without claiming inapplicable exemptions if they feel that their decisions

⁸ Dickson, 73.

⁹ Dickson uses the introduction of Freedom of Information legislation in Alberta under the Klein government as a good example of this. *Ibid.*, 73.

¹⁰ *Ibid.*, 74.

¹¹ Alasdair Roberts examines the occurrence and dynamics of administrative adversarialism, defining it as "a practice of testing the limits of FOI laws, without engaging in obvious illegalities, in an effort to ensure that the interests of governments or departments are adequately protected." Alasdair Roberts, *Limited Access: Assessing the Health of Canada's Freedom of Information Laws* (Freedom of Information Project, School of Policy Studies, Queens University), 1998, 11-17.

will be supported by both the politicians and the senior executives who lead their ministry, board, commission or local government.”¹²

Notwithstanding Cavoukian’s apt if somewhat obvious statement here, political leadership has, in Manitoba as much as in other jurisdictions, suffered at times from an excess of principled political guarantees regarding freedom of information, that fail to materialize in practical improvements to the regime itself. Indeed, if Robert Cribb is correct in his observation that throughout Canada’s information rights community “there [exists] a vast chasm between principle and practice where freedom of information is concerned,” it rests with the political leadership to ensure that stated intent regarding open government and political transparency materializes in practical, measurable advances in access to information and the networked structures that make it possible.¹³ However, as illustrated by numerous Information Commissioners’ reports, media exposés, and an increasing supply of academic studies, the instance of political backpedalling on issues related to FOI remains a persistent feature of the information rights discourse to date.¹⁴ This does much to prove correct Cribb’s observation that Access rights represent “a high risk, low reward political proposition” to the overall agenda of a

¹² Ontario Information and Privacy Commissioner, *Annual Report*, 2006 [Toronto], 10.

¹³ Robert Cribb, “Foreword,” in *Access to Information and Social Justice*, vii.

¹⁴ See: Office of the Information Commissioner of Canada, *Annual Report*, (Ottawa, 2013); Office of the Information Commissioner of Canada, *Summary of Submissions: Open Dialogue on Modernizing the Access to Information Act* (Ottawa, 2013); Office of the Information and Privacy Commissioner for British Columbia, Investigation Report F15-03, *Access Denied: Record Retention and the Disposal Practices of the Government of British Columbia* (Victoria, 2015); Office of the Information and Privacy Commissioner for British Columbia, Investigation Report F13-05, *Public Body Disclosure of Information under Section 25 of the Freedom of Information and Protection of Privacy Act* (Victoria, 2013); Adrian Wyld, “Senate Should Fall Under Access-to-Information Law, NDP Urges,” *CBC News*, November 18, 2013. Accessed February 10, 2015. <http://www.easybib.com/guides/citation-guides/chicago-turabian/how-to-cite-a-newspaper-chicago-turabian/>; Joanne Levasseur, “CentreVenture Should Be Under Freedom of Information Legislation: Experts,” *CBC News*, February 4, 2015. Accessed November 13, 2015. <http://www.cbc.ca/news/canada/manitoba/centreventure-should-be-under-freedom-of-information-legislation-experts-1>; Franke James, “Games 'Bureaucats' Play,” in *Access to Information and Social Justice*, 94-132; Fred Vallance-Jones, “Access, Administration, and Democratic Intent,” in *Brokering Access*, 287-313.

sitting government.¹⁵ And though conspicuous public criticism might serve to impress a sense of accountability on those in power, recent studies show that, with the exception of a few articulated displays of protest (most led by academics and/or members of the press), public interest in FOI remains somewhat muted. The situation relative to archival access in this regard may indeed be more precipitous still with only a relative few sporadic voices calling for increased political support related to positive information reform – in Manitoba and outside its borders.¹⁶

The Information Rights Ministry

The majority of provincial/territorial governments in Canada designate administrative responsibility for their information statute to a ministry whose functional portfolio aligns with the act, making it an ideal executor of an information rights mandate.¹⁷ Dickson argues that the strength of a jurisdiction's access and privacy regime relies on this ministry delegating supervisory and regulatory functions to a central agency – often an information secretariat – with

¹⁵ Cribb, xii.

¹⁶ While a search for materials on archival access reveals relatively few sources advocating for political intervention, a few recent publications do seem to highlight the role played by politicians, both in terms of championing progress and stalling its acceptance. See Dominique Clément, “Freedom of Information in Canada: Implications for Historical Research,” *Labour/Le Travail* 75 (2015), 104-110; Office for the Information and Privacy Commissioner for British Columbia, Investigation Report F15-03, *Access Denied: Record Retention and the Disposal Practices of the Government of British Columbia* (Victoria, 2015); Charles Kecskeméti and Iván Székely, *Access to Archives, A Handbook of Guidelines for Implementation of Recommendation No 13 on a European Policy on Access to Archives*, Council of Europe (2013).

¹⁷ The ministries chosen to administer information rights legislation vary widely between provincial/territorial jurisdictions. The choice will depend on how government's principal functions are structured into ministerial portfolios. Due to the periodic reorganization (or “re-shuffling”) of these portfolios, responsibility for information rights legislation may be subject to frequent redistribution. A good example of this is illustrated by comparing the administrative history of information rights legislation in two of Canada's provinces. In British Columbia responsibility for the administration of its Freedom of Information and Protection of Privacy Act is currently assigned to the Ministry of Technology, Innovation and Citizen's Services, but throughout the 2011/2012 fiscal year the act was managed by the Department of Labour, Citizen's Services and Open Government. By comparison, Manitoba's act is presently administered by the Ministry of Sport, Culture and Heritage, which, despite several name changes, has held responsibility for Freedom of Information legislation since its proclamation in 1985.

the power to provide an array of services in support of the access regime as a whole.¹⁸ While these services will differ between jurisdictions, the access and privacy office is commonly responsible for ensuring that government agencies are well trained and possess the necessary tools (knowledgeable access and privacy coordinators, as well as adequate manuals, templates, forms, and directories related to access and privacy) in order to effectively administer the act. This office will also conduct periodic audits of those procedures, protocols, and systems used by government officials to process access and privacy requests, and will collect statistical data related to the use of access and privacy legislation across government. In Manitoba, as well as in other jurisdictions, this data is collated on a monthly basis and consolidated for publication in an annual report meant to demonstrate government compliance with the Freedom of Information and Protection of Privacy Act.¹⁹

Given its central role in providing support and accountability to a jurisdiction's information rights mandate, it seems fitting that Dickson views the designated ministry – and particularly its access and privacy office – as vital to the success of an access regime writ large:

Any jurisdiction's success in building a strong freedom of information regime is determined by the extent to which these [access and privacy] offices achieve their goals of training, preparation of resources, and statistical tracking. Perhaps most importantly, it is essential that the deputy minister responsible for the administration of FOIP genuinely embrace the importance of government transparency and accountability.²⁰

The primary beneficiaries of this support within government, and those responsible for delivering many of the frontline services underwritten by its executive are represented across Canada's provincial/territorial jurisdictions by a host of information professionals generally referred to as access and privacy coordinators. In examining the anatomy of the access regime, Dickson

¹⁸ Dickson, 75.

¹⁹ Ibid.

²⁰ Ibid., 76.

observes a specific difference operating in the roles fulfilled by coordinators throughout Canada, linking them to the overall performance of the (respective) regimes as a whole. According to his observations, Canadian access regimes exhibiting the highest rates of compliance with access legislation define the role of access and privacy coordinator in detail and tend to confer the position on well-trained, knowledgeable individuals with institutional seniority.²¹

Manitoba's access regime takes its direction from the Minister of Sport, Culture and Heritage, which, since the introduction of FIPPA, has overseen responsibility for the Act.²² In 2008, the Department of Culture, Heritage and Tourism took charge of the newly formed Information and Protection of Privacy Secretariat (IPPS). The ministry itself currently delivers a number of diverse services and allocates funding to various programs including the Archives of Manitoba (which also houses the Hudson's Bay Company Archives), the Legislative Library, the Historic Resources Branch, the Multiculturalism Secretariat, the province's sport secretariat, and the Manitoba Status of Women Secretariat in addition to the Information and Privacy Policy Secretariat. While several of these program responsibilities function according to more or less discrete mandates, the functional-legislative relationship operating between the department's archives, Legislative Library, and Information and Privacy Policy Secretariat remains the product

²¹ Ibid.

²² When Manitoba's original FOI Act was proclaimed in 1985, researcher Eugene Kostyra was charged with supervising the Department of Culture, Heritage and Recreation, a functional precursor to the Department of Sport, Culture, and Heritage. In the intervening period between 1985 and the present day, the department has undergone several name changes and has at times undergone relatively slight amendments to its functional portfolio, which can be inferred from the authoritative titles under which the departments operated. Between 1985 and 2017 the current Department of Sport, Culture and Heritage was preceded – in sequence - by the Department of Tourism, Heritage and Recreation (1983-1990); the Department of Culture, Heritage and Citizenship (1991-1998); the Department of Culture, Heritage and Tourism (1999-2007); the Department of Culture, Heritage, Tourism and Sport (2008-2009); the Department of Culture, Heritage and Tourism (2009-2013); and the Department of Tourism, Culture, Heritage, Sport and Consumer Protection (2014-2016).

of a long standing and integrative history that will be examined in depth in the second part of this chapter.

The Information and Privacy Policy Secretariat itself, whose function was – prior to 2008 – performed by the Archives of Manitoba’s Government Records Branch, maintains responsibility over all public and government service support and liaison activities while providing advice and training to public servants in respect of information rights and their fulfilment across Manitoba. The secretariat also provides policy and regulatory guidance to the minister responsible for FIPPA, and, in alignment with Dickson’s analysis, collects, collates, and publishes data related to the use of FIPPA on a monthly and annual basis.²³

The Information and Privacy Coordinator

In a robust access regime, the access and privacy coordinator, often working in coordination with the province’s information access and privacy office, will often possess a comprehensive understanding of the jurisdiction’s access laws and may be educated in the administration and implications of freedom of information programming.²⁴ Their responsibilities frequently centre on administering information rights within a single government ministry (or cluster of smaller agencies) where they perform a variety of functions aimed at preserving public service transparency and government accountability.²⁵ These activities might include responding to public access requests; delivering training to departmental staff; developing educational materials for public clientele; and reviewing departmental information practices on a schedule set

²³ Freedom of Information Act, *Annual Report* (Winnipeg), 2015, accessed 5 May 2015, https://www.gov.mb.ca/chc/fippa/annual_reports/pdf/2015_report.pdf

²⁴ Dickson, 76.

²⁵ Ibid. See also Lorna Stefanick, *Controlling Information: Freedom of Information and Privacy Protection in a Networked World* (Edmonton: University of Athabasca Press, 2011), 79-81.

by the act.²⁶ Moreover, in proactive ministries, the access and privacy coordinator will confidently provide guidance to senior staff on issues likely to affect the department's access to information policies.²⁷

Conversely, Dickson observes that weaker access regimes often assign the role of access and privacy coordinator to junior members of the department who remain actively constrained, both in the range of functions they may perform and in the discretion with which they perform them.²⁸ Rarely are these coordinators provided the operational latitude to champion access rights within their department and they may be discouraged from promoting accountable and transparent information practices in the interest of preserving the government's standing with its citizenry.²⁹

As delineated in the Freedom of Information and Protection of Privacy Act, the day-to-day administration of Manitoba's official access and privacy laws falls to the head of a public body, which, given the scope of the act, includes large government departments, crown corporations, and municipal government, but also smaller agencies, health regions, and rural municipalities with relatively limited human and financial resources. The head of a public body in Manitoba – particularly those with responsibility over a large portfolio of functions - will, under section 82 of the act, generally delegate all or part of this responsibility to a person within their agency (though any person within or outside of the agency can act as a delegated agent). These delegates – normally occupying an executive position in a larger public body - perform the functions of a records officer, and as such maintain responsibility for responding to access

²⁶ Dickson, 76-77.

²⁷ Ibid. See also: Bruce Mann, "The Federal Information Coordinator as Meat in the Sandwich," *Canadian Public Administration* 29:4 (Winter, 1986), 580-582.

²⁸ Dickson, 77.

²⁹ Rick Snell, "Administrative Compliance and Freedom of Information in Three Jurisdictions: Australia, Canada and New Zealand," 1999, 3-4, accessed 12 January 2016. <https://www.ucc.ie/law/foi/conference/snell99.html>

requests affecting their program area, identifying records pertinent to the request, and making preliminary recommendations on access and privacy applications.

According to the *FIPPA Resource Manual for Public Bodies*, the office of Access and Privacy coordinator is, in Manitoba as in many other jurisdictions, meant to represent the “focal point for access to information and protection of privacy expertise within a public body.” More specifically, it performs a range of functions related to the control, oversight, coordination of its agency’s responsibilities respecting FIPPA, and generally maintains a defined reporting relationship with the delegated access and privacy officers in the agency. Essentially, it represents the face of FIPPA and its administration for their department. This requires, as listed in the *FIPPA Resource Manuals for Public Bodies*, the Access and Privacy Coordinator orient applicants to the information request process, assign access requests to affected program areas within its agency, provide guidance to records officers responsible for making access decisions, monitor and track access requests within each area of their agency, ensure legislated timelines are met with respect to FIPPA, contact third parties whose interest might be affected by the disclosure of records, assess potential fees levied in relation to access requests, review decisions made by access and privacy officers and recommend responses based on an interpretation of FIPPA and other related legislation, alert the Information and Privacy Policy Secretariat of access to information applications lodged with the agency, and collect and collate statistical data for publication by the Information and Privacy Policy Secretariat. A public body’s access and privacy coordinator will also oversee a host of activities related to privacy protection, which includes responding to privacy breaches (potential and actual), receiving personal information correction applications, developing and providing guidance on agency privacy impact assessments, and educating agency executives on the laws respecting privacy protection.

As with any other agency subject to Manitoba's Freedom of Information and Protection of Privacy Act, the Archives of Manitoba maintains the services of an access and privacy coordinator, who is responsible for the same functions as their colleagues throughout the Manitoba government.

The Public Interest

In Dickson's view, access and privacy coordinators, working with ample resources furnished by a centralized information office and underwritten by a supportive executive branch provide the impetus and machinery through which information rights law might be effectively administered. However, this top-down approach to access rights glosses over much of the disorder and localized tension that can develop within an access regime as perspectives on and interpretation of the act intersect within the bureaucracy itself.³⁰ As members of the public become involved with this bureaucratic structure – as individuals begin making requests for official information held by a public body thereby becoming active participants in the access regime - a new range of potential tensions arises.³¹ Given that both information rights laws and the administrative networks constructed to administer them are premised on serving this group, and insofar as its membership represents (in theory) the whole of society, these information "users" constitute the largest and most fluid component of an access regime.³² Though a great majority of this group maintain no direct control over the regime's bureaucratic structure, they

³⁰ For examples see: Jeffery Monaghan, "Four Barriers to Access to Information: Perspectives of a Frequent User," in *Access to Information and Social Justice*, 55-60; and Colin Darch and Peter G. Underwood, "Freedom of Information Legislation, State Compliance and the Discourse of Knowledge: The South African Experience," *The International Information and Library Review* 37 (2005) 77-86.

³¹ For an example of how these tensions are manifest in Canada see Franke James, "Games Bureaucrats Play," in *Access to Information and Social Justice*, 94-132.

³² Stanley Tromp, *Fallen Behind: Canada's Access to Information Act in the World Context* (Privately Published, 2008), 17-20.

can leverage a significant amount of influence over the access regime's operations. By exercising the rights conferred in information statutes, forming interest groups to catalogue problematic access denials, and by harnessing public opinion to highlight systemic flaws in the access regime, concerned members of society, when working concertedly, possess the power to provoke reform in the administration of information rights.³³ This may hold particularly true for access regimes with an oversight body whose capacity to mediate potential conflict and raise awareness around access rights is respected by both its public sector and non-government members.³⁴

The Information and Privacy Commissioner

Across Canada (and in numerous other jurisdictions throughout the world), responsibility for oversight of an access regime normally falls to an office of the information and privacy commissioner. The relative power of these bodies will vary from jurisdiction to jurisdiction but their core functions tend to remain fairly consistent across the country's provincial/territorial access regimes.³⁵ These generally include reviewing access to information decisions rendered by departments, publishing (either full or summarized) reports on access reviews, providing guidance on information rights to government agencies, and communicating bilaterally with members of the information rights community throughout Canada and the world.³⁶ In general

³³ While this is the case, Dickson notes that public efforts to improve the administration of access rights are often undertaken in an episodic manner and frequently suffer from a lack of sustained commitment. Advocacy groups coordinate much of the action taken on behalf of society. These groups tend to have vested professional interest in the successful expansion of open government initiatives. In Canada they include: the Canadian Newspaper Association; the Canadian Bar Association; the Freedom of Information and Privacy Association; the Canadian Association of Journalists; and the Canadian Tax Payers Federation. Dickson, 88-89.

³⁴ Ibid., 77, 84.

³⁵ Ibid., 77-85.

³⁶ Ibid.

terms, the office will monitor government compliance with information rights legislation and attempt to address discrepancies in the administration of access/privacy laws when they occur.³⁷

Provincial information and privacy commissioners are (traditionally) appointed as Officers of the Legislative Assembly to act as the principal auditor of access to information decisions made by public bodies subject to an information statute. Under the act, an information and privacy commissioner is empowered to investigate information-related complaints lodged by members of the public. Complaints typically involve excessive delays in responding to access requests; refusals to disclose information; extensive redaction; and/or the levying of search, preparation, and photocopying fees by the designated agency.³⁸ In each of Canada's provincial/territorial jurisdictions, the information and privacy commissioner has a broad mandate (vested by the act) to review the circumstances leading to a dispute between an applicant and the responsible public body, and to resolve said dispute using a combination of formal and information mediation.³⁹ When undertaking a review, a commissioner will usually examine all records related to the access/privacy request and may compel evidence – written or oral - from any person deemed relevant to the case.⁴⁰ The process will typically result in the commissioner making one or more recommendations to the public agency in question. This may include proposing a more compliant interpretation of access exemptions, demanding a clear justification for a refusal of access, suggesting the total or partial waiving of search fees, and/or calling for an expeditious disclosure verdict where a dispute revolves around processing delays not justified under the act.

³⁷ Elizabeth Denham, *Increase in No Responsive Records to General Access to Information Requests: Government of British Columbia*, Office of the Information and Privacy Commissioner (Victoria, B.C. 2013), 5.

³⁸ Dickson, "Access Regimes," 79, 85-87.

³⁹ *Ibid.*, 79.

⁴⁰ *Ibid.*

Six of Canada's provincial/territorial information and privacy commissioners possess order-making powers (British Columbia, Alberta, Ontario, Quebec, Prince Edward Island, and Newfoundland) and are – at least in theory - able to compel government compliance with their recommendations. The majority of these order-making commissioners function solely to monitor the administration of information rights legislation. With the exception of Manitoba, the remaining provincial/territorial access regimes (Saskatchewan, New Brunswick, Nova Scotia, Yukon, Northwest Territories, and Nunavut) maintain the customary powers of an ombudsman. This gives them the broad authority to investigate and make recommendations in response to a grievance under the act. However, their ability to compel remedial action is limited to the publication of an official report, whose recommendations can be disregarded by the institution in question so long as the intent to disregard is communicated to both the commissioner and the aggrieved applicant within 30 days of the report's publication. Should the applicant deem it worthwhile, they may, in cases of government non-compliance, appeal to the court for a binding order. Dickson observes that the position of the ombudsman-commissioner might be further weakened by the fact that they normally perform a broad range of oversight functions unrelated to the administration of their regime's information statutes.⁴¹ This may result in inadequate resources being directed to access and privacy oversight within the regime.

Contrary to other provincial jurisdictions, the province of Manitoba has adopted a tiered approach to information and privacy oversight. This model provides for separate, affiliated review offices with the first performing the functions of a typical Ombudsman and the second responsible for making binding orders in response to access and privacy disputes. The amended Manitoba Freedom of Information Act stipulates that all access and privacy complaints will be filed by the province's Information and Privacy Commissioner, who, under the Ombudsman Act,

⁴¹ Ibid., 77.

may investigate, take evidence, and attempt to facilitate a mediated solution to a dispute filed by a member of the public. As is typical, the recommendations made by the Manitoba Ombudsman-Commissioner are not binding and may be ignored upon the discretion of a department head. However, in Manitoba the Ombudsman may choose to refer a disregarded case to the Office of the Information and Privacy Adjudicator. This official (who also acts as an Officer of the Legislative Assembly) has the power to review decisions, acts, and failures to act on the part of a department head with respect to access and privacy complaints, and is also authorized to investigate the jurisdiction of decision-making powers responsive to the original dispute. Unlike the Ombudsman, Manitoba's Information and Privacy Adjudicator is required to make an order responsive to the dispute, which is binding upon both parties equally.

Manitoba's Ombudsman Office is composed of around 30 individuals (approximately 8 dedicated to the management and investigation of complaints undertaken under both FIPPA and PHIA), has, since the introduction of FOI, functioned to provide a non-partisan mediating body for all members represented in the province's access regime. Its access and privacy portfolio, which encompasses oversight related to both the Freedom of Information and Protection of Privacy Act and the Personal Health Information Act, expends a significant portion of the office's active resource allocation and accounts for a significant portion of its overall investigative/oversight activities. As per parts 4 and 5 of FIPPA (relating to the powers and duties of the Ombudsman and the right to lodge complaints related to the disclosure of information, both in terms of access and the protection of private/personal information), the Manitoba Ombudsman's office provides advice on and launches investigations concerning complaints made by aggrieved applicants to FIPPA and PHIA. Since 2002, the Ombudsman has investigated 3491 complaints made in relation to FIPPA. Of these 3059 deal with access to

information violations and 432 were launched with respect to potential privacy violations. These numbers represent only a fragment of the total inquiries (or to use Ombudsman's preferred nomenclature, "contacts") processed in relation to FIPPA, with the vast majority of potential cases triaged, solved, and/or diffused by intake staff without recourse to a formal investigation.⁴²

Like other public officials in Canada whose mandate encompasses information rights, Manitoba's Ombudsman also maintains responsibility for a broad portfolio of oversight functions related to several pieces of legislation requiring a non-partisan mediator. At various times, the office of the Ombudsman has been responsible for hearing cases related to the Ombudsman Act (c. 1987), the Personal Health Information Act (c. 1997); and the Public Interest Disclosure (Whistleblower Protection) Act (c. 2007).

Archives, Recordkeeping and the Government Records Program

Looking at the access regime in its totality – from legislative mechanism through to each of the primary points of administration, funding, oversight, and political impetus – Dickson and other commentators have in recent years sought to portray modern information rights and their performance as a fluid, integrated assemblage of processes distributed across a body of official structures responsible for achieving an articulated goal, which, in general, finds its premise in providing access to and protection over certain information resources necessary to safeguard government accountability and operational transparency.⁴³ The same body of commentators rightly questions the authenticity of these claims (those related to both the motivations and

⁴² See Manitoba Ombudsman, *Annual Report*, Winnipeg, Manitoba (1997-2016), accessed 18 June 2015. <https://www.ombudsman.mb.ca/uploads/document/files/2016-annual-report-en.pdf>

⁴³ See: Stefanick, *Controlling Information: Freedom of Information and Privacy Protection in a Networked World*; Snell, *Administrative Compliance and Freedom of Information in Three Jurisdictions: Australia, Canada and New Zealand*; Tromp, *Fallen Behind: Canada's Access to Information Act in the World Context*.

dedication of government with respect to their role in upholding access law, and to the overall efficiency and effectiveness of the agents, protocols, and processes put in place to administer it) and have, like Dickson, provided some insightful criticisms of existing regimes and their will or ability to furnish responsive access and privacy protection to the information in their charge. Often, however, an analysis of the integral role played by a government sponsored archival program in the access regime remains conspicuously missing from these analyses. Such an omission seems odd in light of the fact that Canada's various municipal, provincial, and federal access regimes tend to lean on archival and recordkeeping programs for both the development and the implementation of information management policy. Further, in their role as custodian of government archives (variously characterized as representing an aspect of corporate memory, or historical decision-making evidence of a sponsoring official body), archives are equally bound by the tenets of access to information law and are daily engaged in the provision of information access rights to the resources in their charge. Indeed, as recordkeeping professionals, many archivists are required to intervene at the earliest stages of records creation in ways that affect the access to information or privacy concerns of those with a stake in government records preservation over the long term. This early intervention is particularly vital when attempting to control, preserve, and, presumably, facilitate meaningful access to information created in born digital (or "electronic) formats.

Manitoba's archives' government records program has, since its inception, played a pivotal role in the overall management and success of the province's access regime. The following chapter will illustrate the history of this functional relationship, attempting to elucidate the contextual and evolutionary roots of archival access in Manitoba and to show how

developments in information rights occurring in North America and across the globe have informed the role of archives and recordkeeping as they exist in Manitoba.

Chapter 2

Archives, Power, and the Historical Context of Manitoba Information Rights: FOI, FIPPA and Beyond

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. [The] 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.¹

As illustrated in the above excerpt by archival theorist Tom Nesmith, the provision of information access rights by a government institution hinges on more than the legal statutes used to codify and activate those rights. Rather, the precepts enshrined in such legislation rely on a complex and imperfect constellation of modern administrative programs, which in turn draw upon a complicated range of protocols, regulations, and recordkeeping systems for their effective implementation. All of these components working as an integrated whole determine in one manner or another the success (or breakdown) of an access regime writ large.²

¹ Thomas Nesmith, Submission No. 132, October 11, 1996, Access to Information and Protection of Privacy (ATIPP): Responses, Law Society of Manitoba, quoted in Jacqueline M. Nicholls, “Guide” vs “Gatekeeper”: *Information Rights Legislation and the Provincial Archives of Manitoba* (Master’s Thesis, University of Manitoba, 2000), 86.

² Access regime, as discussed in chapter 1 is used here (and throughout this thesis) to refer to the network of relationships existing between information laws and the network of administrative processes, regulations, protocols, and systems devised by government to adequately fulfill the responsibilities defined in an access to information act. The term also covers independent agencies empowered by government to mediate disputes related to access disclosure and the implementation of the act more generally, such as the offices of information ombudsmen and information adjudicators and courts of appeal. Further, throughout this thesis, I include in the access regime the host of non-governmental actors whose participation (by filing information access requests, appealing to information oversight bodies, and critiquing the structures and processes that render disclosure decisions) helps to shape both the nature and direction of information rights in a particular jurisdiction. Dickson, 68-69.

For Nesmith, government archival programs should, and often do, play a central role in ensuring the continued vitality of the access regimes to which they contribute. By carrying out their mandates to appraise, acquire, preserve, and make available records of lasting evidential value, modern government archives are required to act as more than passive receptacles for the “inactive” government records of their sponsoring agencies.³ Government archives must increasingly serve as a principal underwriting agent of the access regimes in which they take part. They do this by participating actively in the development and implementation of recordkeeping systems, drawing up policy and providing guidance on information management standards, collaborating with departmental staff toward the creation of records disposition programs, and, importantly, and by taking a role in the development of legislation affecting the creation, maintenance and accessibility of information in all of its forms.⁴

As articulated by Nesmith, there can be no access to information if an effective recordkeeping program does not exist to collate records into coherent groupings that are made intellectually accessible to those with a stake in their preservation. In Manitoba and other modern access regimes of similar size, this program is distributed across a network of responsibility centres that utilize interoperable databases, records schedules, finding aids, indexes, central directories, archival descriptions, storage centres, vaults, and servers in an integrated information

³ Terry Cook, “Evidence, Memory, Identity, and Community: Four Shifting Archival Paradigms,” *Archival Science* 13 (2013), 100-102.

⁴ These core activities form the pillars of archival practice and are central to records management programs operating in and outside the public service. They become far more complicated and require far earlier intervention when dealing with the electronic or born-digital information resources, which, since the advent of digital forms of communication, have largely replaced paper-based records as the primary media used to create official records. Maria Guercio, “Principles, Methods, and Instruments for the Creation, Preservation, and Use of Archival Records in the Digital Environment,” *The American Archivist* 64 (Fall/Winter 2001), 4; Anna Bülow, “Risk Management as a Strategic Driver for a Large Archive,” *Collections: A Journal for Museums and Archives Management* 5:1 (Winter 2009), 61-62.

ecology underwritten by a complicated body of mandates, legislation, policy and procedure in order to control and make accessible information across a relatively vast continuum of space and time. In many respects, this superstructure of systems, people, protocols, and tools represents a typical model for information management in the twenty-first century, and one that can be seen operating in government records programs across the globe.

While the nature and intensity of engagement will differ between jurisdictions, a government archives' ability to assert its influence over the systems, structures, and laws concerning public information dictates its capacity to fulfill the essential purpose for which it exists, which is to preserve for consultation a meaningful record of government activity over time.⁵ In this sense, Nesmith's "right to archives" and the right to access exist as mutually supportive constructs working interdependently toward the effective management and disclosure of official information. However, as is the case with the records in their charge, the recordkeeping systems, decision-making processes, and the influence a government records program is able to assert over information and access management do not exist in isolation. Rather, each represents the product of a long and often painstaking process of development championed by those responsible for fulfilling obligations at every point of the information-access network, and each is defined by the historical context – the larger social, political and cultural forces – active at each stage of its evolution. This is to say that archives, recordkeeping,

⁵ An archives' ability to influence the policy and practices of its sponsoring agency's records management program hinges largely upon its relative centrality within government decision-making processes related to information management, and upon the archival leadership's ability to insinuate itself into these processes if the opportunity presents itself. In the case of provincial/territorial archives, this opportunity is likely to fluctuate significantly between jurisdictions and according to the political priorities of their sitting governments, which can produce a substantial difference in the way archives engage with and influence the larger information management community in which they participate.

access, and the public's reception of and participation in each have a history that can and should be interrogated.

Observing the link between government archives and the information rights they support, this chapter explores the history of Manitoba's access regime – both as a network of discrete administrative components and as a functional whole. By using the relationship existing between the Manitoba archives, the various recordkeeping activities it engages in, and the Manitoba Freedom of Information and Protection of Privacy Act as a case study, this chapter will explore the evolution of access in the province from the introduction of Manitoba's first piece of information rights legislation - the Freedom of Information Act (S.M. 1988 c. 13) – to the ongoing implementation of its current statute. To ground my analysis, I consider the larger historical context of Manitoba's access regime. I look at developments made over time and across jurisdictions, which have influenced the province's nearly 30-year-old act. To this end, I conceptualize access laws, recordkeeping, and “the archive” as flexible concepts from which information brokering activities stem, and by which the citizen's “right to know” is mediated, expanded, and at times hindered. Records have power, archives imbue power, recordkeeping systems control power, and at the nexus of all of this power (the power to determine value, need, and interpretation) rests the access regime. As will be illustrated, access to information laws, along with the various principles, systems and structures upholding them, find their roots in a long-evolving tradition of information management that stretches back centuries.

Though an exhaustive summary of Manitoba's access rights history sits outside the scope of this chapter (and indeed of this thesis), here I will pose some specific questions related to the development of the act and the access regime that underpins it. Primarily, the chapter will consider both the stated and perceived motivations behind access rights in Manitoba, attempting

to highlight the position of and influence levied by the Archives of Manitoba in guiding these motivations. By interrogating a broad range of government records, publications, press releases and official statements against a variety of news articles, opinion pieces, and Ombudsman's reports originating from outside the government service, it will establish what information access means to those who have a stake in it and, vitally, how access protocols have been leveraged by those responsible for administering disclosure.

Archives, Access, and Power

Archival institutions have, throughout the twentieth and early twenty-first centuries, become highly complex organizations staffed by educated archivists and information professionals whose expertise typically stretches across several fields of academic study and professional experience.⁶ Whether installed in a small community organization or a large government body, these archival institutions sit increasingly at the centre of fast-growing and technically sophisticated information infrastructures that, due to the agile development of digital communication technologies and the shifting nature of corporate structure, require constant intervention at the stage of records creation in order to ensure the legibility of tomorrow's proliferating archives. The numerous and varied ways in which records might now be created, amended, replicated, and interpreted necessitate from the archivist a manifold skill set focusing on the problematic nature of the record, its contexts of creation, its means of communication, its history, and increasingly its represented and mutable characteristics – “material,” cultural, societal, and otherwise.⁷

⁶ Geoffrey Yeo, “Foreword,” in Laura Millar *Archives: Principles and Practices* (New York: Neal-Schuman, 2010), ix-x.

⁷ See: Greg Bak, “How Soon Is Now? Writings on Digital Archiving in Canada from the 1980s to 2011,” *The American Archivist* 79: 2 (2016), 283-319; Terry Cook, “Evidence, Memory,

As the information ecology of the twenty-first century has grown in both scope and complexity so has the awareness and use of information resources evolved. Across the globe, people are confronted with new forms of information conveyed through new types of media at a rapidity that often outstrips efforts to accurately control or track usage.⁸ In the West and throughout much of the world, attempts to limit access to public information resources are met with resistance on numerous grounds.⁹ With calls for government transparency fast becoming a common feature of democratic practice, records represent increasingly politicized resources and broad access to them has become the expected norm.¹⁰ To a greater degree than before, social actors understand the power that records wield, and have become aware of the effect they have on one's ability to operate within complex and interconnected social, economic, and cultural fields.¹¹

As recognition of the power archival records (and information resources more generally) possess has grown, so has the awareness of the record's diverse and complicated qualities. How are records created and under what conditions? How are records controlled over the course of their existence, and how does this control contribute to their long-term meaning? What qualities should a record have to merit its inclusion in an archival repository? Indeed, what constitutes an

Identity, and Community," *Archival Science* 13 (2013), 95-120; Adrian Cunningham, *Digital Curation/Digital Archiving: A View from the National Archives of Australia* (Paper for DigCurr Conference, Chapel Hill, North Carolina, 2007), 1-9.

⁸ Though it should be noted that promising technologies implemented within and outside the archival context have sought to remedy this situation to promising effect. For an example see: Kristin R. Eschenfelder and Grace Agnew, "Technologies Employed to Control Access to or Use of Digital Cultural Collections: Controlled Online Collections," *D-Lib Magazine* 16 (2010).

⁹ For a sustained examination of this see chapter three of the current thesis.

¹⁰ For an example see: Dominique Clément, "Freedom of Information in Canada".

¹¹ Anne Bahde, "Conceptual Data Visualization in Archival Finding Aids: Preliminary User Responses," *Libraries and the Academy* 17 (2017), 485-506; Wendy Duff and Catherine A. Johnson, "Accidentally Found on Purpose: Information-Seeking Behavior of Historians in Archives," *The Library Quarterly: Information, Community, Policy* 72:4 (2002), 472-496.

archival record in the first place when contrasted with the vast amounts of information produced on a day-to-day basis? In recent years, such questions have spurred debate in both academic communities and in the public domain. Unsurprisingly, the archival/recordkeeping community has taken up this discussion to significant effect and throughout the last century and a half has come some way toward defining the nature of the record and the various characteristics that give it lasting corporate, social, political and cultural significance.

Examining the development of access to archival records, we question how the ideas around archival functions have incorporated thinking about access. How has access to records been conceptualized by commentators inside and outside of the archives? How was access conceptualized and facilitated at the advent of modern Western archival practice? How did these concepts change over time? Modern thinkers, including Samuel Muller, Johan Feith and Robert Fruin, Helen Samuels, and Ernst Posner, developed ideas largely with specific practical application in mind. For them, practices equalled the embodiment of theory. These ideas developed largely in isolation - within the archival profession and for the archival profession. However, with the introduction of the postmodern “archival turn,” records and their access became the subject of larger processes of cultural, social and political examination

Muller, Feith, and Fruin, whose *Manual for the Arrangement and Description of Archives*, originally published in 1898, is seen by many as the first attempt to codify modern archival practice. Interestingly, a discussion of access – one that looks at the legal implications and democratic imperative of access to archival material – is rather conspicuous by its absence in the *Manual*. Perhaps the greatest contribution the *Manual* makes to access theory is the definition and articulation of arrangement and description practices related to archives. It proffers logical, coherent and consistent methods for the intellectual and physical representation

of archives thus making them discoverable and retrievable, and thus intellectually accessible. However, the *Manual* provides far less insight into the political nature of access, nor does it make any recommendations as to the community that archives (public or otherwise) might serve. It does, however, provide some interesting discussion of the ownership of archives (by the state) and on the nature and implications of custody, especially as concerns archival transfers occurring between state agencies and the archives that serve them. To this end, Muller et al. conceived of ownership – and all legal rights tied to ownership – as a custodial feature. This is to say that, once accessioned by an archival institution, records became the legal possession of the archives. Essentially, according to the *Manual*, custody over records should, in an ideal situation, establish the archives as owners of the records, which in turn positions the archives as the sole responsible party for records control, including control over access protocols.¹²

The *Manual* does not go into great detail with regard to how such control is to be administered with respect to access, public or otherwise. It does, however, recommend making certain historically relevant records discoverable (by way of published indexes, and finding aids) for historical research. Here, the authors clearly conceive of archival records as possessing value to members of the public, but this public – as was fairly common at the time – appeared to be limited to historians, who in the nineteenth century (as well as in the twenty-first) viewed consultation of primary archival sources as a professional necessity. However, even in this case, archival functions related to facilitating access are positioned as inferior, or subordinate, to other rank-and-file activities carried out by archival staff. Section 83 of the *Manual* (concerning the publication of calendars and indexes) appeals to the archivist to publish records only when their context, order and description had been thoroughly understood. It speaks about publication as a

¹² S. Muller, J.A. Feith and R. Fruin, *Manual for the Arrangement and Description of Archives* Trans. Arthur H. Leavitt (Chicago: Society of American Archivists, 2003 edition), 24.

broad means of and vehicle for access focused on the historical significance of the record. Further, this section recommends publishing only those records with readily apparent value – those that are or are bound to provide substantial insight into certain established fields of history (legal, political, paleography for example) based on the archivists own sense of value.¹³

The *Manual* goes further to suggest that, while making archives intellectually discoverable and potentially accessible for historical purposes may be beneficial – even important – it should not be seen as a professional responsibility. Rather, it should represent an outworking of the archivist’s expertise stemming from their true professional duties related to archival arrangement, description, and management more generally. Referring to the archivist’s duty with respect to making their records accessible, the *Manual* states that:

The final duty which is incumbent on the archivist in connection with the archival collection entrusted to his care is the publication of the most important documents. It is his duty, but a duty of honor, not an official duty. It is advisable for the archivist not to begin this most attractive work too hastily. An archivist who is just beginning to get acquainted with an archival collection runs the risk of finding almost every document important, because the contents are by the very nature of the case new to him. It goes without saying, however, that it would be foolish to publish all these documents. But even the archivist who has become better acquainted with his collection is naturally often impressed by certain documents on account of their interesting contents.¹⁴

Not necessarily incidental, but far from a priority, access to records as discussed by Muller et al. remains a niche consideration to facilitate the professional needs of a small community of historical researchers. Readers of the *Manual* see virtually no trace of the debate around information access – of government accountability, transparency, or the democratization of knowledge – that would come to define later discourse surrounding archival practice.

¹³ Muller et al., *Manual for Arrangement and Description of Archives*, 186.

¹⁴ *Ibid.* 187.

While the *Manual* was meant to serve as a guide, whose prescriptions related to archival arrangement and description could be adopted or not by contemporary archives, its various tenets represented a vital first step toward the standardization of archival practice. As such, the work served to influence much thinking related to archival practice (particularly in its careful illustration of the principles of provenance, *respect des fonds*, and original order), and found its way into the archival discourse in Europe and across the Atlantic.¹⁵ However, because its treatment of access to archives remained quite brief, its impact in this regard may not have reached the same heights. Such brevity may also suggest that issues related to access in the late 19th century failed to provoke the same interest. Indeed, it might be suggested that Muller et al. placed little emphasis on access to information (except perhaps in regard to legal disputes) because it did not represent an overtly significant issue to the larger social community within which they operated.¹⁶

Nevertheless, access does not appear to have been at the forefront of archival thinking in the late nineteenth century. These discussions would have to wait until well into the 1920s and the publication of Hilary Jenkinson's *A Manual of Archive Administration* (published in 1922). The second major intervention in Western archival thinking, Jenkinson's *Manual* offers guidance on nearly all aspects of archival administration pertinent to the day. From acquisition and accessioning to description and arrangement, from the conditioning and security of an archival repository to the furniture and placement appropriate to an archival research room, the *Manual* sought to provide practical advice to archivists on a vast range of functions and activities related

¹⁵ Marjorie Rabe Barritt, "Coming to America: Dutch *Archivistiek* and American Archival Practice," in Muller et al., *Manual for the Arrangement and Description of Archives*, Trans. Arthur H. Leavitt (Chicago: Society of American Archivists, 2003 edition), xlii-xliii.

¹⁶Peter Horsman, Eric Ketelaar and Theo Thomassen, "Introduction to the 2003 Edition," in Muller et al., v-vi.

to the stewardship of “historical records.” Central to the *Manual* and to Jenkinson’s own theoretical apparatus were the notions of evidence and impartiality. To Jenkinson, archives – when properly accessioned according to provenance-based chains of custody - were to be seen as objective and impartial evidence of activity, process, and procedure - not cultural carriers of contextually contingent and highly interpretable information resources, but authentic testimony of unbiased, “organically” accrued fact. They were, according to Jenkinson himself, “documents which formed part of an official transaction ... preserved for official reference and held in official custody” that, regardless of variation in content, provenance, mass, or date range carried the two essential characteristics of impartiality and authenticity.¹⁷

Unlike Muller, Feith and Fruin, Jenkinson discussed access – its regulations and implications – at relative length. To Jenkinson, official records “were not drawn up in the interest or for the information of posterity” but could serve both of these ends so long as official archives were able to guarantee both their authenticity and impartiality.¹⁸ Like Muller et al., Jenkinson believed archives to represent a key professional credential of contemporary historians and viewed the archival field as an ally of this specific community. The value provided by archives to history researchers rested with the archivist’s ability to secure and make available impartial records, which, if proven to be authentic, would provide an unbiased record of governance across time for examination by those with the credentials to analyze and interpret past activity. Access

¹⁷ Hillary Jenkinson, *A Manual of Archive Administration* (London: Percy, Lund, Humphries & Co., 1937 edition), 11-12.

¹⁸ Jenkinson’s concept of impartiality was rooted in the idea that official records (documents created in the context of official government or corporate business activities) were not created with historical research ends in mind. Authenticity in this context can be established so long as their chain of custody can be guaranteed from creation to archival accessioning: “It would appear that not only are archives by their origin free from the suspicion of prejudice in regard to the interests in which we now use them they are also by reason of their subsequent history equally free from the suspicion of having been tampered.” Jenkinson, *A Manual for Archive Administration*, 12-13.

in this configuration, hinges upon the archivist providing impartial service to the records in their care as a means toward ensuring that the user – the historical researcher specifically – has for their consultation the most unbiased record possible:

The aim of the archivist is to hand on to future generations the documents confided to him with no diminution in their evidential value: accordingly he has to guard against the destruction not only of those elements whose value as evidence is obvious to him but also of those whose value he does not perceive.¹⁹

Interestingly, while Jenkinson's manual prescribes several rules for protecting the value of archives as a means to facilitate quality access to archives, it makes no mention of how access to those quality archives should be facilitated – save for establishing a few regulations regarding research room lighting and invigilation.²⁰ However, the reader *does* get a sense that archival work – the various activities carried out to accession, arrange, describe, and preserve records – is conducted with a view toward providing access to information. Jenkinson does explicitly mention external users (primarily historians) as the beneficiaries of this work and assumes that researchers will populate his well-lit, closely guarded archival research room. Indeed, even his dedication to impartiality – both of the records and the archival staff charged with maintaining them – finds its overarching purpose in ensuring that access to archives remains a profitable endeavour for the end user.

While Jenkinson had very little to say about who used the archives he so passionately protected, his American contemporary, Theodore Schellenberg, a senior archivist with the US National Archives (1935-1963), did not succumb to such a refrain. Schellenberg's *Modern Archives: Principles and Techniques*, published in 1956 (a full decade before the introduction of the US Freedom of Information Act), provides a comprehensive manual for the administration of

¹⁹ Ibid., 68.

²⁰ Ibid., 63-64.

a large government archives. The work codifies several archival practices and is generally understood to put forth the first fully conceptualized program of archival appraisal in the government context.²¹ The work is pioneering in other ways as well. Most important to the present study, *Modern Archives* provides a suite of policy advice and best practice related to archival access. *Modern Archives* treats issues of access restriction, reference services, and information governance with a modern lens that positions public interest as a defining operational factor within the archival institution's purview.

Influenced by the nascent but growing information rights movement generated in the years following the Second World War, and concerned with the paucity of modern North American theory relating to government archival administration, Schellenberg's provisions regarding archival access strike a very similar chord to the notions of freedom of expression and accountability put forth by champions of the UN and International Council of Archives' information rights protocol.²² Unlike Muller et al. and Jenkinson, Schellenberg's treatment of access places the archivist as a powerful arbiter of information and a knowledge broker to interests outside the historical profession with responsibilities toward the public's interest in information. Furthermore, this manual, while recognizing the relationship between professional historians and archival records, explicitly positions archival stewardship within a larger community of public stakeholders. Its chapter on reference services provides a particularly disruptive view when compared to Jenkinson's:

The end of all archival effort is to preserve valuable records and make them available for use. Everything an archivist does is concentrated on this dual objective. He reviews and appraises public records to determine if they

²¹ Terry Cook, "What's Past is Prologue: A History of Archival Ideas Since 1898, and the Future Paradigm Shift," *Archivaria* 43 (Spring 1997), 27.

²² Jane Smith, "Theodore R. Schellenberg: Americanizer and Popularizer," *The American Archivist* 44:4 (1981), 316-318.

should be kept or destroyed, and in doing this he has in mind the future use that may be made of them. He brings records into his building for such use. He houses and repairs records so that they will be preserved and used. He administers records in such a way that an arrangement that served official needs will also serve scholarly needs. He describes them in finding aids so that their content and character will be made known. He intercedes with government officials to lift restrictions so that records will be open for use. He provides access to records under conditions that will satisfy both government officials and the general public and makes records equally available to both.²³

The general public, in Schellenberg's view, constituted scholars but also public officials, and importantly, taxpaying individuals with an interest in understanding government decision-making processes, even if such understanding might bring to light instances of official malfeasance. To this end, Schellenberg appears to view the archivist as a principal arbiter of information access:

The archivist as positive arbiter of access to their holdings – Records should be open for use to the maximum extent that is consistent with the public interest. Since the purpose of an archival agency, as we have seen, is to make records available for use, an archivist normally favors a policy of free access. He is a sort of physiocrat among those who deal with records, an advocate of *laissez-faire* in the matter of use. His desire is to promote free inquiry to the fullest extent. His contribution to the search for truth lies in making available the evidence that is in his possession. He believes that in most circumstances the public interest is served best by making known the truth about matters – even unsavory matters in public life – for the truth, it is said, will make us free. He is not, himself, a muckraker (to use an American expression). He is not a gravedigger who disinters the bones of rottenness and holds them up to public view. As a responsible public official he is conscious of his obligation to safeguard the public interest. But he is not a censor. His judgment on what should be made available and what should be withheld from public use is thus based

²³ Theodore Schellenberg, *Modern Archives: Principles and Techniques* (Chicago: University of Chicago Press, 1956), 224.

on conflicting considerations, for his desire to foster free inquiry may conflict with the demands of public interest.²⁴

While Schellenberg's dedication to broad public access shows evidence of a growing appreciation of the public interest and power located in archives, the manner in which he sought to shape this powerful resource through appraisal, provides a clear example of the matters of objectivity and partiality are bound up in the archival enterprise. Unlike Jenkinson, who believed that the selection of records for archival retention was best left to their creators (primarily administrators charged with carrying out and overseeing government activity), Schellenberg made a clear distinction between functions related to records management and archival appraisal. This task – the task of selecting records – Schellenberg thought best given to archivists working with and toward the interests of historical researchers. His appraisal methodology - now understood as a use-based approach to archival selection – sought to predict trends in research based on the evidential value of records as determined by those who found value in them. This new appraisal model placed the archivist working in tandem with “subject-specialists” as the key player in determining which records made it past the archival threshold and which did not.²⁵ This form of appraisal took into account subject matter defined by those with a stake in seeing certain records become available for research. It shows the power of bias as it exists to shape the archives, which, in their ability to serve as the institutional documentary memory of a nation, corporation, province/state, or other jurisdiction, provide vital evidence of social activity. A recognition of this power – characterized as much by elision as by representation – came in the form of postmodern analysis, which throughout the 1990s and into the twenty-first century

²⁴ Theodore Schellenberg, *Modern Archives: Principles and Techniques*, 226.

²⁵ Cook, *Past is Prologue*, 27.

continues to define and reshape the manner in which archives and the archivists who populate them operate.

The postmodern intellectual movement has had a significant impact on the manner in which records, archives, and archival practice have been conceived in last two decades. Scholars external to the archival profession have undertaken much of this work. For instance, Michel Foucault's *Archeology of Knowledge*, Jacques Derrida's *Mal d'Archive (Archive Fever)*, and Arlette Farge's *Le Gout de l'archive (The Allure of the Archives)* provide foundational works upon which the archives as place, space, concept, profession and practice have been reoriented toward a more subjective and culturally contingent set of principles. In this light, archives and those who maintain them are viewed as wielding formative power over the records under their jurisdiction and thus over society's connection with the documented past – memory of it, and the ability to access and interpret it. Here, archives are construed as participating in the panoptic exercise of power deployed by centralized governing regimes whose use of seemingly banal information technologies to collect, collate, preserve and interpret data about those in its gaze – or under its jurisdiction – creates new and adaptive means of controlling people through knowledge, through the aggregation of “facts”. Archivists (as well as an array of scholars in anthropology, sociology, colonial, imperial, and geographic fields of study) have applied this concept of power to the archives in what has been termed the “archival turn,” where archives and the records they preserve are viewed as agents of power. Here, archivists and the various practices they employ to select, describe, and make accessible the documents in their care represent active mediations of what can be known of the past. Archivists are seen as the authors of artificial documentary narratives that portray the attitudes, values, preferences, and perceived needs of a dominant class whose power over records creation serves to shape potential

interpretations of past human activity, or at least what might be available for interpretation. In essence, this movement highlights the fact that archives represent neither organic nor unbiased repositories of neutral information but rather representations of positional power, which serve to bolster dominant views of historical identity and which suppress and/or sublimate other potentially conflicting “rememberings” of past human activity.

The postmodern perspective on recordkeeping contends quite conspicuously against the theories set out by Jenkinson and the continental archivists of the nineteenth and early twentieth centuries. Information, bound in records, is socially contingent and should be viewed in the context of human activity and of the complex values, attitudes, beliefs and preferences of those who create, use, and archive it.²⁶ The mere act of creating (and keeping) a record, and the various processes that enable it, are informed by socio-cultural factors existing in a broad framework of ideology. Attitudes toward information and its control are equally contingent. As archival scholar Ciaran Trace observes:

Records are more than numbers and statistics; they can be powerful objects with social import. The determinations that go into the creation of records, and the physical presence and maintenance of these particular records, have ramifications not only for the person who creates and maintains the record, but also for those whose lives are somehow contained within the record and whose lives are later shaped by it. The record has, as one of its functions, a strong element of social control.²⁷

This is to say that, in the postmodern framework, records - indeed all forms of information resources - are not situated within a purely technical process of information creation and control. Various social factors impact on records production and maintenance. To this point, Trace states

²⁶ Brien Brothman, “Orders of Value: Probing the Theoretical Terms of Archival Practice,” *Archivaria* 32 (Summer 1991), 81.

²⁷ Ciaran Trace, “What is Recorded is Never Simply ‘What Happened’: Record Keeping in Modern Organizational Culture,” *Archival Science* 2 (2002), 143.

that “records reflect the practical organizational context within which they are generated. That is to say, records reflect practical organizational concerns and cannot be viewed simply as transparent reflections of organizational routines and decision-making processes.”²⁸

Archives and the recordkeeping process that underwrites them are cultural artefacts. They bring together groupings of recorded information in order to fulfill certain perceived information needs defined by the societies, groups, and individuals who construct and control them. Like the records they house, archival institutions are not neutral in their character or composition. They do not represent inert repositories of old documents; they do not contain an unbiased or objective testimony of “what went before.” Rather, as has been illustrated by several postmodern scholars across the last two decades, archives exist to furnish culturally situated evidence of past activity as mediated through the interests, opinions, standards, ideological views and epistemologies held, again, by those responsible for their creation and control.²⁹

Access to archives – access to their contents, and the way they are shaped, organized, and interpreted – represents a key element of their existence, and the concept of archival access – the determination of who is authorized and able to contribute to and consult archives – is likewise socially constructed. Access to archives, is also a subject, or an aspect of a subject, that has been deconstructed and dynamized over the last three decades. This subject has been

²⁸ Ibid., 151.

²⁹ See: Michel Foucault, *Archeology of Knowledge*, trans. A.M Sheridan Smith (New York: Pantheon Books, 1972); Jacques Derrida, *Archive Fever: A Freudian Impression*, trans. Eric Prenowitz (Chicago: University of Chicago Press, 1996); Arlette Farge, *The Allure of the Archives*, trans. Thomas Scott-Railton (New Haven: Yale University Press, 2015); Joan M. Schwartz, “‘Having New Eyes’: Spaces of Archives Landscapes of Power,” *Archivaria* 61 (Spring 2006), 1-26; Randall C. Jimerson, “Embracing the Power of Archives,” *The American Archivist* 69 (2006), 19-32; Terry Cook and Joan M. Schwartz, “Archives, Records, and Power: From (Postmodern) Theory to (Archival) Performance,” *Archival Science* 2 (2002), 171-185, and Eric Ketelaar, “Archival Temples, Archival Prisons: Modes of Power and Protection,” *Archival Science* 2 (2002), 221-238.

analyzed in the context of power dynamics, knowledge production, cultural discourse, colonialism, imperialism and numerous other situations where power and information intersect. Writers have explored who has access to the archives and what it means to have access to the archives and their formation.

To control archives is, in effect, to maintain and exact power over the way they construct and configure representations of knowledge. Specifically, it is to control the manner in which archives are selected, acquired, and represented over time in order to construct particularized versions, or narratives, of knowledge.³⁰ Such control is likewise manifest by establishing parameters on access and use – by determining who might consult the archival holdings of a particular institution and by establishing the protocols for interpretation.³¹ In the case of a large and formally defined organization (or a network of related organizations), this control might originate from outside the archival institution itself. Here, the power to regulate actions leading to the formation, organization, discoverability, and representation of archives stems from a (relatively) remote, overarching executive responsible for the oversight of functions performed and activities undertaken by the organizations whose information output merits long-term preservation. This control may be codified in formal edicts, decrees, statutes and/or constitutional statements that, when enforced by a pre-existing judicial authority (itself a centralized expression of social power), serve to compel – or shape – internal behaviours related to records creation, management and preservation. This power may also find expression in more subtle forms of control, where top-down directives - whether overtly stated or tacitly inferred -

³⁰ Tom Nesmith, “Seeing Archives: Postmodernism and the Changing Intellectual Place of Archives,” *American Archivist* 65 (2002), 34-38. See also: Eric Ketelaar, “Tacit Narratives: The Meanings of Archives,” *Archival Science* 1.2 (2001), 131-141.

³¹ Ketelaar, “Archival Temples, Archival Prisons”, 235-236. See also: Malcolm Todd, “Power, Identity, Integrity, Authenticity, and the Archives: A Comparative Study of the Application of Archival Methodologies of Contemporary Privacy,” *Archivaria* 61 (Spring 2006), 183-184.

seek to shape the discourse around information production and define the purposes and means by which documentary forms of knowledge are made valuable within the organizational context.³² This particular embodiment of the knowledge-control-power dynamic is most obviously exemplified in large-scale organizational compacts where corporate knowledge creation is distributed across a wide range of responsibility centres. According to current theory, governments, ecclesiastical orders, corporations, law-enforcement agencies, and financial institutions provide typical models for this “top-down” and formalized construction of information control in service of power.³³

Control of this knowledge-power nexus is also manufactured closer to the archival domain itself. Agents, whose work with records focuses on preserving and ensuring access to an organization’s long-term “corporate memory” – the evidence of its functions, transactions, and decisions – play a vitally formative role in the construction of knowledge and identity, both within the organization’s immediate operational boundaries and without. These agents – whether taking on the mantle of “archivist”, “keeper”, or “archon” – shape the archives in their care through the imposition of arrangement and descriptive layers onto records, and by parsing records for inclusion based on their perceived long-term value to the institutions they serve, and – in the postmodern context – to their societal stakeholders more broadly. By selecting records that will comprise the archives, and by imposing order and meaning on them through description,

³² For good examples of this subtle form of knowledge/power working in the Dutch East Indies and South Asian contexts respectively see Ann Laura Stoler, “Colonial Archives and the Arts of Governance,” *Archival Science* 2 (2002), 87-109; Tony Ballantyne, “Archives, Discipline, State: Power and Knowledge in South Asian Historiography,” *New Zealand Journal of Asian Studies* 3.1 (2001), 88-94.

³³ Verne Harris, “The Archival Sliver: Power, Memory, and Archives in South Africa,” *Archival Science* 2 (2002), 63-86; Randal C. Jimerson, “Embracing the Power of Archives.” *The American Archivist* 69 (2006), 19-32.

archivists are, many have argued, in fact creating narratives of the past and intervening vitally on their significance as one particular form of enduring societal memory.³⁴

The forces that shape the interventions, both external (possibly in the form of legislation or other regulating instruments) and internally (by the working out of archival theory and practice) have a profound effect on archives, how they are captured, understood, interpreted, and used. Such forces also have a great deal of impact on how records are accessed and by whom. They are in possession of a power – the power to construct knowledge, memory, and evidence of the past – to define future interpretations of the past. The control-power dynamic also defines the parameters by which access to and use of archival records might be administered, both by those holding power over the archives and by those without such power.

Records have existed, in one manner or another, for thousands of years, as has the impulse to inscribe, protect and preserve information of particular import. This is to say that archives are not original to the modern era. While some of the most general conceptual features (organized collections of records viewed as indefinitely important to those responsible for their creation) appear more or less stable across time and cultural application, archives and the manner in which they are construed, used and accessed have morphed over time, space, and cultural context. This is to say that (stated above) archives, recordkeeping, and access to information, possess a history that stretches back millennia and that cuts across the socio-cultural and geographical map. Though a full historical analysis of this evolution sits outside the scope of the present study, the following section will attempt to provide a brief survey of the most salient events impacting access to information in Canada in general and Manitoba more specifically.

³⁴ See Margaret Hedstrom, “Archives, Memory, and Interfaces with the Past,” *Archival Science* 2.1-2 (2002), 21-43; Sue McKemmish, Barbara Reed, and Michael Piggot, “The Archives” in *Archives: Recordkeeping in Society* (Wagga Wagga: Centre for Information Studies, 2005), 159, 160-164.

A Very Brief History of Information Rights Law in the West: the Roots of FIPPA

On September 30, 1985, the Legislative Assembly of Manitoba proclaimed its first stand-alone piece of legislation granting private citizens a mechanism for gaining legal access to official records created and maintained by the government service.³⁵ This *Freedom of Information (FOI) Act* - a product of nearly six years of research, negotiation and drafting - sought to define the procedural responsibilities of government officials with respect to public access requests and prescribed the necessary administrative structures by which such requests might be managed.³⁶ As with similar legislation, the act prescribed “limited and specific exemptions” for the restriction of information deemed “sensitive.”³⁷ In principle, however, the act was designed to operate on the presumption of disclosure with restriction reserved for a few precisely defined situations where information, if released, might plausibly undermine the interests of a third party, or those of the province itself.³⁸

³⁵ Though given Royal Assent in 1985, proclamation of the FOI Act (Bill 5) was delayed a further three years in order for the government to develop a suitable administrative framework capable of ensuring information access according to the legislation’s mandate. The complicated process of taking FOI from official assent to royal proclamation is explored in detail in Jacqueline Nicholls’s “*Guide vs Gatekeeper: Information Rights Legislation and the Provincial Archives of Manitoba*.” Nicholls pays particular attention to the vital part played by the Archives of Manitoba in developing both recordkeeping and records scheduling programs necessary for making access to official records possible. See: Nicholls, “*Guide vs Gatekeeper*”, 55-68; Manitoba. Legislative Assembly Debates, 11 July 1985, accessed 12 July 2016 https://www.gov.mb.ca/legislature/hansard/32nd_4th/hansardpdf/88.pdf Manitoba. Legislative Assembly Debates, 30 September 1988, accessed 12 July 2016. https://www.gov.mb.ca/legislature/hansard/34th_1st/hansardpdf/48.pdf

³⁶ Though the administrative framework for FOI had yet to be developed, the act did establish in detail the scope of access coverage (S.3 – S.4), the various roles and responsibilities of government officials in respect of the act (S.7 – S.16), the mandatory and discretionary exemptions to disclosure (S.17 – S.32), and set out the essential principles of fair dealing when applying access exemptions.

³⁷ S.M. 1988 c. 13

³⁸ S.M. 1988 c. 13

The act was based on legislation previously implemented at the federal level (the Access to Information Act, 1983), in certain provincial jurisdictions (Nova Scotia, *Access to Information Act* 1977; New Brunswick, 1978, *Right to Information Act*; Newfoundland, *Freedom of Information and Protection of Privacy Act* 1981), and in the United States, which had instituted a statute ensuring the right of access to information nearly three decades earlier (*Freedom of Information Act* 1966).³⁹ Each of these statutes was likewise influenced by a longstanding legacy of governance reform and rooted in the ideas of freedom of expression (in some cases articulated as freedom of the press), government accountability, and public service transparency prototypically (though perhaps incipiently) apparent in Western socio-political contexts throughout the early modern and modern periods of governance development.⁴⁰

The progenitor and primary catalyst to this tradition in the West, Sweden's *Konglige Majestäts Nådige Förordning, Angående Skrif-och Tryck-friheten* (His Majesty's Gracious Ordinance Relating to Freedom of Writing and of the Press, generally referred to in English as the Freedom of the Press Act), was adopted by the Rikstaag in 1766, a full 200 years before the first similar piece of legislation was enacted in the United States.⁴¹ Conceived within the liberalizing ideological context that was beginning to characterize Sweden's "Age of Liberty" government, and devised by one of its most reform-minded political thinkers, Anders Chydenius, the *Nådige Förordning, Angående Skrif-och Tryck-friheten* formalized some of the basic

³⁹ Nicholls, 45.

⁴⁰ James P. Sickinger, *Public Records and Archives in Classical Athens* (Chapel Hill: University of North Carolina Press, 1999), 159, 161, 165-166.

⁴¹ In 1766, the Swedish Government under King Adolphus Frederick, was structured as a parliamentary monarchy, which instituted a separation of powers between the sitting elected parliament (or *Rikstag*) and the crown. Stephen Lambel, "Freedom of Information, a Finnish Clergyman's Gift to Democracy," *Freedom of Information Review* 97 (2002), 2.

undergirding concepts of modern access to information rights.⁴² The ordinance, by declassifying previously inaccessible information resources held by the state, represents an attempt to wrest a degree of power away from the centralized bureaucratic and executive branches of government by answering public concerns related to administrative secrecy. This significant legislative act sought to democratize the circulation of government information by recognizing the public interest in information.⁴³ A central feature of this was the belief that printed publication and public debate surrounding the affairs of state rely upon the disclosure of sources created and maintained by the agencies of government responsible for making decisions, enacting legislation, and debating policy.⁴⁴ In the closing sentence of its 10th section, the ordinance makes clear this sentiment, and in doing so establishes the responsibility of those charged with ensuring access to information as well as introducing the prospect of a punishment under the law for failure to disclose:

...free access should be allowed to all archives, for the purpose of copying such documents in loco or obtaining certified copies of them; responsibility for which is subject to the penalty laid down in S.7 of this ordinance.⁴⁵

While Sweden's 1766 act represents the first official intervention into state sponsored information rights in the West, its direct influence on Manitoba's modern access to information and privacy protection legislation is, due as much to the expanse of time as to the availability of more modern legislative models, open to debate. Ironically, such debate – rather than legislative action – appears to have defined Western perceptions of information rights for much of the next

⁴² Lambel, "Freedom of Information, a Finnish Clergyman's gift to Democracy," 3-4.

⁴³ Ibid., 49-50.

⁴⁴ Mariya Riekkinen and Marku Suksi, *Access to Information and Documents as a Human Right* (Turku: Institute for Human Rights, Åbo Akademi University, 2015), 6.

⁴⁵ His Majesty's Gracious Ordinance Relating to Freedom of Writing and of the Press (1766) Peter Hogg, trans in *The World's First Freedom of Information Act: Anders Chidenius' Legacy Today*, Juha Mustonen ed. 2006.

two centuries, until the adoption by the United Nations and its General Assembly Resolution 59 (I) in 1946.⁴⁶

The resolution called for an international conference “to formulate [the assembly’s] views concerning the rights, obligations and practices” related to freedom of information while characterizing FOI as “a fundamental human right” and “a touchstone of all the freedoms to which the United Nations is consecrated”.⁴⁷ This short statement of intent (which was ostensibly meant to spur further debate at the conference itself) drew a conceptual line between the tenets, responsibilities, and structures bound up in state-sponsored freedom of information law and the largely capitalist postwar conceptualization of “fundamental human rights” defined by the United Nations’ *Universal Declaration of Human Rights* (1948).⁴⁸ It would of course rely on

⁴⁶ In the intervening years between Sweden’s adoption of the Freedom of the Press Act and the adoption of a Freedom of Information Act in the US, a few notable pieces of legislation were proclaimed in select (sometimes tentatively) democratic Western nations. Columbia’s Code of Political and Municipal Organizations (1888) was the first bill to provide for access to official information, subject to paramountcy clauses in competing pieces of legislation, which if enacted, might override the public interest in information access. A second piece of legislation, this one adopted by the contemporary Finnish government, came into force as part of Finland’s 1919 Constitution Act. The section of the Constitution Act dedicated to information access drew upon its neighbour’s Freedom of the Press Act to frame most of its tenets. Lambel, *Freedom of Information, a Swedish Clergyman’s Gift to Democracy*, 5.

⁴⁷ General Assembly Resolution 59/1, *Calling of an International Conference on Freedom of Information*, accessed 30 June 2016. <http://www.un.org/documents/ga/res/1/ares1.htm>

⁴⁸ Both the moral and intellectual basis of the UN approach to human rights was (and still is) the long-standing tradition of liberal moralism rooted in Judeo-Christian scripture and reflexively exemplified in capitalist values. Here rights are supplied to human beings universally but also in contradistinction to all other things – sentient or otherwise – by virtue of a metaphysical connection to, and modeled after, an unseen higher power. This conception of rights, which represent one culturally wrought and particularized expression of “innate dignity” tied to limited privilege manifests – throughout the *Declaration* and other such manifestos – in an impulse to speak for those in global society deemed powerless, impoverished, and/or without agency. This is done in order to address the imbalance created by (neo-) capitalist imperialism in an increasingly (even at the time of the *Declaration*’s introduction) globalized geo-political context. What should be taken away from this is, that such a particular configuration of “human rights” represents but one cultural expression of “the innate dignity of humans/agents,” and that other configurations, which possess no less (or more) philosophical veracity exist, and should be

effective recordkeeping to ensure that such information was made safe and discoverable in the first place. Archives and recordkeeping provide the primary impetus. This is more or less – in the modern era at least – a feature of information management developing in North America.

By taking a particularized and perceptively liberal human rights approach to information access, the UN's resolution promoted a universalist approach to information rights, which continues to influence the debate – if not the application – of FOI in several Western polities.⁴⁹ Though most modern government bodies have foregone such an approach to information rights, preferring rather to frame FOI as a civil (or political) right, many commentators concerned with the broader implications of the rights themselves have in various academic, journalistic, activist works, and increasingly in the rulings of both national and international human rights tribunals influenced the larger social, cultural, and political contexts in which new laws and legal amendments come to light.⁵⁰ Further to this, recent decades have seen the proliferation of various

respected. See: John Buschman, "Information Rights, Human Rights, and Political Rights: A Précis on Intellectual and Contextual Issues for Library and Information Science," *Library Publications* 61 (2012), 17-20.

⁴⁹ See Buschman, "Information Rights, Human Rights, and Political Rights," 17-22; Ronald D. Doctor, "Social equity and information technologies: moving toward information democracy," *Annual Review of Information Science & Technology* 27 (1992), 43- 96; Toni Samek, *Librarianship and Human Rights: A Twenty-first century guide* (Oxford: Chandos Publishing, 2007), 43-61; Roman Tokarczyk, "The Comparative Normative Models of the Right to Knowledge and to Information in the Global Approach," *Proceedings of the 8th International Conference on Human Rights: The Rights to Knowledge and Information in Heterogenic Society* (Newcastle upon Tyne: Cambridge Scholars Publishing), 41-58; Joanna N. Erdman, "Harm Reduction, Human Rights, and Access to Information on Safer Abortion," *International Journal of Gynaecology and Obstetrics* 118:1 (2012), 83-86; Henry H. Perritt, "Information Access Rights Based on International Human Rights," *Buffalo Law Review* 34:1 (2012), 199-224.

⁵⁰ I am unaware of any Canadian jurisdiction – federal, provincial, or municipal – that has adopted a human rights approach to its information rights legislation. Nor at the time of writing am I aware of any major jurisdiction throughout the world that has officially embraced the human rights model of FOI. While rights – including information rights – are defined in political (generally governmental) contexts, the overarching discourse surrounding those rights, their implementation, and the social response to each of the foregoing exist in a far broader and less rarified field. Consequently, the creation of information laws depends in some measure on the

commissions, information oversight bodies, and public interest groups concerned with human rights and the extension of information law across the globe.⁵¹ These bodies - many with links to the government agencies they seek to oversee - serve as an influential check on the administration of information rights in the government sphere.⁵² Here, concerted and proactive lobbying has pushed the human rights agenda – mainly with regard to the right of free expression - into the political context, highlighting various potential drawbacks of rank-and-file information rights legislation and its capacity to ensure fair, unbiased information access to the communities it purports to serve.⁵³

While playing a peripheral but increasing role in the overall advancement of access to information law, FOI as a human right remains somewhat aspirational in Canada and its various

larger discourse revolving around the concepts and practices informing this discourse. They are, by way of public censure, academic analysis, and the larger discourse surrounding a particular jurisdiction's access regime, also held to account by concerned parties. While these interventions might not by necessity influence the manner in which information rights are administered, the contextual impact is far from negligible, especially when it is deployed in democratic jurisdictions. This push for a human rights approach to information law has been championed in Manitoba and in government jurisdictions further afield by several parties; though, as mentioned above, it has not yet prompted wholesale adoption. See Cheryl Ann Bishop, *Access to Information as a Human Right* (El Paso: LFB Scholarly Publishing L.L.C., 2012), 1-6; 21-25; Maja Daruwala and Venkatesh Nayak, eds., *Our Rights, Our Information: Empowering People to Demand Rights through Knowledge* (Commonwealth Human Rights Initiative), 29-40; Geoffrey A. Hoffman, "In Search of an International Human Right to Receive Information," *Loyola of Los Angeles International & Comparative Law Review* 25 (2003), 169-175.

⁵¹ Several countries have instituted national human rights commissions/councils in the last few decades in addition to the larger bodies that seek to provide human rights oversight to the international community, the most active of which are likely the United Nations Human Rights Council, the Inter-American Commission on Human Rights, and the European Commission of Human Rights. In Canada, in addition to the leadership provided the Canadian Human Rights Commission, each provincial/territorial jurisdiction maintains a body mandated to oversee and address human rights violations and to promote the human rights interests of its community.

⁵² Deborah Mabbet, "Aspirational Legalism and the Role of the Equality and Human Rights Commission in Equality Policy," *The Political Quarterly* 79:1 (2008), 45-46.

⁵³ Cheryl Ann Bishop, *Access to Information as a Human Right*, 2-4; Päivi Tiilikka, "Access to Information as a Human Right in the Case Law of the European Court of Human Rights," *Journal of Media Law* 6:1 (2013), 80-81.

provincial jurisdictions. More directly influential on Manitoba's specific Freedom of Information and Privacy Protection Act, and to information rights law in Canada generally, has been the US Freedom of Information Act (FOIA, 1966). This piece of legislation, which was originally passed as an amendment to the Administrative Procedure Act (which itself contained limited provisions for the release of official information), sets out the essential format and structure by which the disclosure of government records should be conducted.⁵⁴ It was created under social pressure (much of it by members of the American journalistic community) for greater transparency in the activities of government. Addressing these concerns, the FOIA placed much of the burden for disclosure on those government bodies responsible for creating/maintaining information resources and set out a series of specific conditions under which these agencies might lawfully deny requests to consult official records. Notably, it also established a clear right of appeal, allowing aggrieved citizens to file a complaint with the courts, who, on a successful appeal, might require the agency to produce the requested information under threat of judicial punishment.

Margaret DeFleur discusses the influence of the FOIA in her 1994 Ph.D. dissertation highlighting compliance measures put in place by the act:

During the decade of the 1960's, pressure mounted for greater disclosure of the activities of all branches of government. In 1966 Congress passed a lengthy amendment to the Administrative Procedure Act, and called it the Freedom of Information Act. This amendment, commonly called FOIA, placed the burden of compliance squarely on the agencies and required that they prove they were justified when denying access to records. It also clarified the conditions under which agencies could legally withhold records by specifying nine exemptions to the Act. In order to protect against the unwarranted invasions of personal privacy, the law allowed agencies to justify any decisions in writing. The FOIA amendment was written with some very real teeth to enforce its provisions. If records were not released, citizens could register a

⁵⁴ Lambel, "Freedom of Information, a Swedish Clergyman's Gift to Democracy," 6.

complaint in court about the agency. That could then enjoin that agency and order the production of any records improperly withheld. More forcefully, that statute stated that ‘in the event of non-compliance with the court’s order, the district court may punish the responsible officers for contempt’.⁵⁵

With reference to DeFleur’s last point relating to the avenues of recourse available to aggrieved requestors, the American FOI Act provides for a tiered approach to dispute resolution with mediation, administrative resolution, and judicial appeal all utilized as applicable means for seeking redress.⁵⁶

As the first stand-alone piece of information rights law enacted in the modern era, the FOIA is often seen as an archetype for most – if not all – similar laws implemented throughout the Western world. Already in its first iteration, the act authorized the full disclosure of government records with the exception of nine precisely designated classes of exempted information.⁵⁷ These exemptions, which have been adopted and further clarified in successive legislative amendments, seek to protect information resources that are clearly related to the national defence and foreign policy of the state, the internal personnel regulations of government agencies, data protected under a conflicting statute, trade secrets or financial data obtained from a private citizen or corporation, personal data pertaining to the private life or health of a private citizen, an active legal investigation, matters relating to the regulation of financial institutions, and data revealing certain types of geological and geophysical research.⁵⁸ Further, having

⁵⁵ Margaret DeFleur, *The Development and Methodology of Computer-Assisted Investigative Reporting* (PhD. Dissertation, Syracuse University, 1994), 50.

⁵⁶ Wendy Ginsberg, *The Freedom of Information Act (FOIA): Background, Legislation, and Policy Issues* (Congressional Research Service, 2014), i.

⁵⁷ Jim Smith, “The Freedom of Information Act of 1966: A Legislative History Analysis,” *Law Library Journal* 74 (1981), 234.

⁵⁸ Ginsburg, *The Freedom of Information Act (FOIA): Background, Legislation, and Policy Issues*, 4.

undergone its first amendment in 1974, the act also defined narrow time limits for agency response to information requests.⁵⁹ Where an exemption was used or when a response deadline was perceived to be unreasonable by the responsible agency, the act required detailed justification to both the court and the client. This instance marks the first time an act was directed toward specifically delineated categories of exemption to access rights held by the public.

Subsection (a) of S. 1666 of the FOIA, an ostensible precursor to more modern provisions concerning proactive disclosure, sought to encourage the publication of “orders, rulings, and opinions” made by government agencies. It stated that such information, if “in accordance with published rules” should be made accessible “for public inspection and copying”.⁶⁰ This directive also required each public body covered by the act to create and provide access to an index of each “final order, opinion, rule, statement of policy and interpretation” in order to both facilitate transparency in decision-making and to make such information easily discoverable by members of the public who may not possess the expertise or legal acumen with which to navigate a sophisticated and largely novel legislative framework.⁶¹ Additionally, the FOIA established a flight of procedures to regulate the behaviour of government agents who might easily have deferred to senior officials with a vested interest in preserving the culture of secrecy extant prior to the act’s introduction. Indeed, in many cases, this deference still wins the day in the US and across the larger information rights landscape.⁶²

Despite its many positive innovations in process and administrative regulation, the FOIA did not provide a panacea for information access. Nor has the act produced anywhere near the

⁵⁹ Smith, *The Freedom of Information Act of 1966: A Legislative History Analysis*, 234.

⁶⁰ *Ibid.*, 266.

⁶¹ *Ibid.*

⁶² Amy E. Rees, “Recent Developments Regarding the Freedom of Information Act: A Prologue to a Farce; or a Tragedy; or, Perhaps Both,” *Duke Law Journal* 44:6 (1995), 1183-1185.

salubrious effect on government accountability, transparency, or democratic participation it sought to deliver. Like many of the access regimes that have taken their legislative inspiration from the FOIA, the US act has suffered from lackadaisical implementation and a tendency toward administrative adversarialism on the part of those charged with seeing its provisions applied.⁶³ However, putting its administrative failings aside, the FOIA remains an important touchstone for information rights in the modern era. By establishing a presumption in favour of disclosure; setting out narrowly defined exemptions for the exclusion of sensitive information, mandating proactive publication, defining specific procedures for the management and facilitation of access requests, and by providing aggrieved requestors a means of judicial appeal when the access regime failed to live up to its mandate, the Freedom of Information Act laid much of the groundwork (both conceptually and administratively) upon which modern information rights would be built. In the decades following its promulgation, the Freedom of Information Act influenced the information rights community across the globe, with its basic structure finding adaptation in various pieces of North American, European, and South American FOI law.⁶⁴ Canada's own Access to Information and Privacy Acts (1983), as well as earlier information rights laws enacted in the provinces of Nova Scotia (1977), New Brunswick (1978), Newfoundland and Labrador (1981) took inspiration from the FOIA.

Canada's federal Access to Information Act (ATIA), which came into force in 1983, incorporated many of the structural features pioneered by the American act, such as specific exemptions on access and the creation of an independent appeals authority to mediate disputes

⁶³ Charles H. Koch Jr., "The Freedom of Information Act: Suggestions for Making Information Available to the Public," *Maryland Law Review* 32:3 (1972), 190; 202-204.

⁶⁴ Some of the national laws that have taken their structure in part from the US Freedom of Information Act include the Australian Freedom of Information Act (1982), the New Zealand Official Information Act (1982), the Norwegian Freedom of Information Act (1970), the French Law on Access to Administrative Documents Act (1978).

related to non-disclosure. The Canadian act also included many of the undergirding principles found in the FOIA by establishing a presumption in favour of disclosure, requirements for specific justification for non-disclosure, and by defined time limits for the agency response to access requests. Yet, differences in character and application operating between the US FOI Act and Canada's access legislation are significant. Many of these differences rest with the governing system in Canada, which is – as it was in 1983 - a Westminster-style parliamentary system favouring confidentiality, particularly as it concerns decisions made in cabinet.⁶⁵

At the time of its proclamation, Canada's ATI Act represented one of the first modern statutes to extend a broad right of access over government information to the public.⁶⁶ About 270 separate government entities came under the act's provisions.⁶⁷ Like the American act, ATIP set out limited exceptions related to national security, personal privacy, economic security and third party interests, for which information requests might be denied. The act also established specific timelines for disclosure or denial of release. Unlike the American act, ATIP excluded information used to formulate policy that touched on or stemmed from cabinet deliberations, a practice codified in numerous other pieces of contemporary legislation introduced in Commonwealth countries around the world, including laws created in Australia (1982) and New Zealand (1982).⁶⁸ Similar to legislation in other countries, Canada's access laws were derived from the constitutional imperatives of freedom of expression and democratic participation and

⁶⁵ Tromp, *Fallen Behind: Canada's Access to Information Act in the World Context*, 36-38.

⁶⁶ Prior to the introduction of ATIP in Canada, Sweden (1949), Finland (1951), and the United States (1966) had each promulgated information rights laws. Kristen Douglas and Alysia Davies, *Access to Information Legislation in Canada and Four Other Countries* (Ottawa: Library of Parliament, 2008), 1.

⁶⁷ Office of the Information Commissioner, *Background: Modernizing Canada's Access to Information Act*. Ottawa, October 17, 2016.

⁶⁸ Douglas and Davies, *Access to Information Legislation in Canada and Four Other Countries*, 2, 15, 23.

conceived (at least outwardly) as a vouchsafe to official accountability and transparency.⁶⁹ This purpose finds clear articulation in Justice Gérard Vincent La Forest's ruling in *Dagg v Canada*.

Here speaking on behalf of the Supreme Court of Canada, La Forest states that:

The overarching purpose of access to information legislation is to facilitate democracy by helping to ensure that citizens have the information required to participate meaningfully in the democratic process and that politicians and bureaucrats remain accountable to the citizenry.⁷⁰

This right of access, though, was not, as in other acts, established as an absolute right. The delicate balance of administering access rights while protecting personal privacy represented a significant consideration for Canadian lawmakers in the formulation of the ATI Act. In order to flesh out and, ultimately, bolster privacy rights related to the collection, handling and disclosure of personal information, Canada introduced the Privacy Act alongside the ATI Act in 1983.

These two statutes are often seen as complementary in operation and conflated into a single acronym – ATIP – when referenced by members of both the government service and the public.

The Privacy Act requires government entities to identify and collate all banks of personal information under their care into Personal Information Banks (PIBs), which are to be handled according to certain conditions meant to control, safeguard and administer access. Under the provisions of the combined ATIP Acts, disclosures of personal information remain limited to the person about whom the information pertains (though this person may delegate a third party to access the information on their behalf, or otherwise consent to a disclosure.)

From its inception, ATIP placed responsibility for administering access and privacy functions on the individual entities – ministries, boards, and crown corporations for example -

⁶⁹ Tromp, *Fallen Behind: Canada's Access to Information Act in the World Context*, 18.

⁷⁰ *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, par. 61.

whose activities serve to create or collect information resources.⁷¹ To this end, each entity maintains responsibility for its own recordkeeping regime as well as its access to information office. The head of each record creating entity maintains final authority over all disclosure decisions, and may delegate this authority as seen fit. Hence, the record creating authority – ministry, board, crown corporation – represents a key component of the federal access regime by creating, collecting, arranging, and (under ATIP) administering access to records in its care. These authorities provide the official face to Canada’s federal access regime and in many cases serve as the principal gatekeeper facilitating the public’s “right to know.” Importantly, Library and Archives Canada (titled “the Public Archives of Canada” at the time of ATIP’s introduction) maintains operational responsibility under ATIP for all records transferred into its custody regardless of originating/creating department.⁷²

While record creating authorities are the principal operational agent of the federal access regime, the Office of the Information Commissioner represents its primary oversight and monitoring body. Created as a provision of the ATI Act in 1983, the Information Commissioner serves as an independent mediating agent with broad powers to investigate complaints regarding non-disclosure, excessive delays in response time, and other concerns related to information access. The commissioner also possesses the power to issue reports on the findings of the commission's investigations and to recommend ameliorative measures in the event of government maladministration. The commissioner’s powers are consistent with those of a traditional ombudsman in that the office does not carry binding authority. Hence, Canada’s Information Commissioner may provide advice to and encourage agencies within Canada’s

⁷¹ Robert Hayward, “Federal Access and Privacy Legislation and the Public Archives of Canada,” *Archivaria* 18 (Summer 1984), 51.

⁷² *Ibid.*, 52-54.

access regime to embrace the spirit of ATIP, but does not have the power to enforce compliance. In the federal context, this power remains the reserve of the judiciary, to which the Information Commissioner may initiate formal proceedings.

Despite several calls for reform in the intervening years, the ATIP Acts have remained largely unchanged in both character and administrative structure since their introduction in 1983. While they represented pioneering pieces of legislation at their inception, the acts are seen by many as outmoded, or insufficient in their ability to effectively administer information rights in a socio-cultural context more aware of the power information wields, and in a globalized world where nations (generally not adherent to Commonwealth notions of official confidentiality) have issued far more liberal information rights laws.⁷³

As illustrated by Jacqueline Nicholls, Manitoba lawmakers drew upon the federal Access to Information Act in the research and development stages of the province's first piece of information rights legislation.⁷⁴ This legislative cross-pollination resulted in the creation of a Manitoba Freedom of Information Act (FOIA) that, with some specific innovations, appeared quite similar in both character and intent.

Like the Access to Information Act, Manitoba's FOI Act (officially proclaimed in 1988) granted a legal right of access to public information resources held in trust by the Manitoba government. The act invoked certain limited exemptions for records containing information related to personal and sensitive matters, and placed cabinet confidences under a thirty-year restriction (the longest closure period in Canada at the time). Similar to the federal statute, the

⁷³ For an example of the criticism leveled at Canada's Access to Information Act and the regime that underpins it, see Tromp, *Fallen Behind: Canada's Access to Information Act in the World Context*, 17-40; McKie, 314-332; Jeffery Monaghan, "Four Barriers to Access to Information: Perspectives from a Frequent User," in *Access to Information and Social Justice*, 53-72.

⁷⁴ Nicholls, 43-44.

act placed administrative responsibility for the act in the hands of the record creating/maintaining departments, and set up an Ombudsman's office to monitor compliance and mediate disputes related to non-disclosure and excessive delay.

In forming its FOI Act, the Manitoba government entered into consultations with the then Provincial Archives of Manitoba. From this discourse came some noteworthy provisions pertaining to archival records covered under the act. First, as observed by Nicholls, "the right of access [established by the act would be] additional to any rights of access already available under existing provincial laws or by custom or practice".⁷⁵ Because the province had established a blanket thirty-year restriction on most government records prior to the FOI Act's introduction, records became available for consultation in the archives once this moratorium had lapsed. By including this provision, the act allowed for archival records that had previously been opened for consultation to remain as such in the archives.⁷⁶

The second provision of note came in the form of a key administrative measure meant to lessen the operational burden on the archives created by responding to freedom of information requests. Under the act, the Archives of Manitoba would produce "access registers" in order to facilitate the discoverability of records series held by the government. However, it would not act as the access-granting agency. This decision-making responsibility falls to the record-creating agencies themselves. If, for example, a researcher requesting archival records created by the Department of Finance, which had not been released previously, they would be required to apply to the Department of Finance, whose access coordinator(s) would conduct a review of the material in question and make an access determination under the act. As Nicholls argues, the

⁷⁵ Nicholls, "'Guide' vs 'Gatekeeper': Information Rights Legislation and the Provincial Archives of Manitoba, 48.

⁷⁶ Ibid.

choice to take the archives out of the decision-making role with regard to records held in its custody placed the archivist in a role more akin to the “guide” to rather than “gatekeeper” of access.⁷⁷

Several arguments for the propriety of this decision made at the time of the FOIA’s proclamation state that, in addition to freeing the archives from a potentially debilitating burden on resources, providing a guidance role to access over archival records also disentangled the archivist from certain political aspects of access determination, allowing them to remain “impartial” brokers of information about the records in their care.⁷⁸ However, the notion of impartiality in this context requires some qualification. As we have seen, the archivist’s role is inherently rooted in partiality and subjective action. By managing the government’s records scheduling and disposition program – a responsibility that would be enshrined in the Manitoba Archives and Recordkeeping Act (introduced in 2001) – the archives *would* make determinations about *which* records possessed enough value to be preserved indeterminately as “archives”, but would not provide determinations related to their accessibility. So, archival partiality would most certainly play a part in deciding which records might be available for the long term even if it did not factor into making them accessible under information rights law. Nevertheless, by making the archives a guide to the records in its care, the act liberated Manitoba’s government archivists from embroiling themselves in technical aspects of access administration and placed responsibility for information disclosure on those with subject matter knowledge and expertise in the functional context of the records themselves: the creating agency. This would prove a pivotal decision, the merits of which are examined in the following chapter.

⁷⁷ Ibid., 49.

⁷⁸ Ibid., 108. For a good example of this line of argumentation see Jean Tener, “Accessibility and Archives,” *Archivaria* 6 (Summer 1978), 26-27.

By the early 1990s, and on the back of rapid developments in communications technology that led to the World Wide Web, concerns around the security of information began to ramp up. In order to address public calls for safeguards on personal information collected and used by the government, Manitoba began efforts to draw up a new information rights act that would converge access to information rights with a new suite of provisions related to the protection of privacy. This new Freedom of Information and Protection of Privacy Act (FIPPA) came into force on May 4th 1998 and remains the principle legislative document enabling Manitoba's access regime in 2018 (the same access regime that is described in detail throughout the previous chapter). While the act set out a more robust structure for the collection, maintenance and disclosure of personal information – including a responsibility on the part of the AM to coordinate the creation of a Public Information Bank Directory – it did little to change access to information rights or the administration of them.⁷⁹

Based on a long iterative history of development, Manitoba's information rights laws and the regimes created to facilitate them have built upon and benefitted from social innovations in governance occurring at a remove both geographic and temporal in nature. Access to information, seen now as a necessary condition for the activation of constitutional rights related to freedom of expression and democratic participation, represents a growing movement with over 70 countries now implementing information rights statutes across the globe. As much as it represents an avenue toward official transparency, information rights law also represents a tool, created by those same government interests that it seeks to make accountable. And while certain mechanisms built into these laws for the purpose of protecting privacy rights and other legitimately confidential information remain important, it is not difficult to see how, through

⁷⁹ Nicholls, “ ‘Guide’ vs ‘Gatekeeper’: Information Rights Legislation and the Provincial Archives of Manitoba, 88-89.

administering an act such as FIPPA, access regimes continue to maintain certain influence – power even – over how, when, and to what extent the public might actualize its “right to know.”

As we have seen, archives, by virtue of their mediating role as brokers of “knowledge,” “memory,” and “evidence” share in this power, and as such represent a key member of the access regimes in which they serve. Bound to the same standards of practice and regulatory structure laid down in access statutes, government archives exist within the same access-information ecology as the governing bodies they serve. It follows that they should not be insulated from public censure or criticism seeking to gain redress when the regime falls short, or when its information rights act falls short. It also stands to reason that an archives, unlike its government agency counterparts, exists to ensure the long-term discoverability and preservation of archival documents (to one designated community or another) and so should play a leading role in pushing for their access.

The following chapter will seek to understand how, in the Canada-Manitoba context, access to information laws are viewed by those that use them. It will also examine the actual extent of accessibility of Manitoba’s government archives, while looking at how FIPPA influences access over archival records created as a result of government activity.

Today’s archives, in their role as recipient and steward of an information network’s archival record, maintain responsibility for establishing the conditions, systems, and services with which to ensure the long-term preservation and accessibility of records captured on all varieties of media formats. This work involves designing and maintaining temperature and humidity controlled vaults, creating strategies for the preservation of born-digital records, implementing accessioning protocols to take legal, physical, and intellectual control over records transfers, and developing and testing risk management strategies to mitigate loss in the event of a

crisis. This role is not a new one, but with the advent of digital communications technology and the increasing complexity of information control in general, the essential custodial functions that define archival practice have become increasingly sophisticated, both contextually and professionally.

Chapter 3

The Public's Right to Know: Canada's Information Rights Discourse and Archival Access at the Archives of Manitoba

... a guarantee of public access to government information is indispensable in the long run for any democratic society. When such a guarantee is enforced, it changes the public's view of what it has a right to expect and reduces the hesitation that government officials otherwise feel about whether or not to disclose information. It works against the inevitable tendency of government secrecy to spread and to invite abuses; and it provides an avenue for publicity that is more than mere public relations ... if officials make public only what they want citizens to know, then publicity becomes a sham and accountability [appears] meaningless.¹

As we have seen, the enactment of information rights legislation in Canada and increasingly throughout the world has enabled public access to official records on a scale previously unavailable to our social predecessors. Likewise, in exploring the larger social, political and cultural contexts in which laws such as Manitoba's Freedom of Information Act have come into existence, we have sought to understand the major intellectual debates informing the creation of information rights and the governance reform processes that responded to them. Though the contours of the information rights debate have fluctuated over time, its purpose has remained fundamentally clear: to make the decisions, processes and activities of government agents transparent and accountable to those they serve – for now and for posterity. This transparency in service of accountability may find expression through access requests under information rights law. Access delivered through these means is reactionary, in that it is enacted by the requestor. However, as openly declared in the preambles of information rights legislation across the globe, access can also occur through the proactive review and routine release of government information within the government itself – by those responsible for its creation, collection,

¹ Sissela Bok, *Secrets: On the Ethics of Concealment and Revelation* (Vintage Books: New York, 1989), 179.

maintenance, and use. This is to say that the disclosure of information documenting government activity comes to fruition through a combination of proactive and reactionary efforts mobilized by those working within and outside the public service. Consequently, access to information law must be championed by a broad membership of access officials and outside interests, each holding the other accountable. By these means, government becomes truly “open.” Such is the received wisdom stemming, again, from within and outside of the public service.²

However, the situation on the ground appears far more complex. While a member of the public might possess the right to request information under a piece of access law, they do not possess this right without certain significant qualifications. As we have seen in the preceding chapters, access to information law is itself complex and reliant on a flight of processes, procedures and protocols that are often highly discretionary in nature. Laws like those enacted in Manitoba, while offering promissory statements favouring access, simultaneously lay out complicated regulatory frameworks that dictate the nature, means, and limitations of information disclosure or, in some cases, block it outright. An equally complex network of people, systems, activities, and procedures – the access regime - oversees the administration of these rules and exercises discretion over their interpretation, which, again, can easily lead to some form of non-disclosure. To add to the complexity, access laws rarely provide for the explicit and proactive release of records whose content has become less sensitive over time.³ Rarer still are these

² See Dickson, 91; Toby Mendel, *The Public's Right to Know: Principles on Freedom of Information Legislation* (London: Article 19, 1999), 1-11; Elizabeth Shepherd, “The Impact of the UK Freedom of Information Act on Digital Records Management in the Public Sector,” *Journal of the Society of Archivists* 30 (2009), 1-4; Cavoukian, xiii-xv.

³ All Canadian access statutes contain clauses allowing for the release of certain categories of restricted information after a time limit has lapsed. These clauses often apply to records classified under both mandatory and discretionary exemptions. In Manitoba, for example, Section 48 of the Freedom of Information and Protection of Privacy Act (FIPPA) gives the head of a public body the ability to disclose personal information (some of the most strictly protected

minimal declassification programs carried out in a timely manner, leaving potentially declassified records in a state of practical (and in many cases perpetual) restriction.

In Manitoba (and, indeed, throughout Canada), researchers might assume that records transferred into the custody of an archives become open and ready for access. Rarely, however, is this the case. In Manitoba and throughout the majority of Canada's provincial and national jurisdictions, the complexity of process as well as limitations placed on access (by means of legislated exemption – discretionary and mandatory) apply commensurately to records found on either side of the archival threshold. While effective records management programs facilitate the appraisal, scheduling, and transfer of archival material into the custody of a public archives, rarely does this process eventuate open access *per se*. In most cases, unless the creating institution explicitly releases the information for immediate public consumption, records enter archival custody under the same access-limiting restrictions applicable prior to their transfer. This is to say that archival records fall under many of the same limitations, rules, and exemptions afforded to non-archival information resources covered by the Freedom of Information and Protection to Privacy Act with some circumscribed exceptions.

In most cases, archival institutions are rather limited in their power to establish or influence legal access rights processes. Government archives and the programs they use to control, accession, and make available records normally focus on providing guidance, policy advice, administrative services, and final retention decisions related to the disposal of

information) in a record that is more than 100 years old. The 100-year restriction placed on personal information is only one - indeed the most prohibitive - exemption limit placed on public information in Manitoba. Additional records classified as cabinet confidences (Section 19.2); local public body confidences (Section 22.2); and advice provided to a public body (Section 23.2) all shed their excepted status after 20 years. It should be noted that this information is not declassified *per se*, only that it loses its excepted status - that it is, under the provisions of the act, it is open to an access request whose ultimate disposition rests with the discretion of one or more government agents.

government records and on describing the records in their care in order to indicate the extent of records in archival custody and to explain both their contents and contexts of creation.⁴

Disposition programs, which allow for the secure appraisal, transfer/destruction of information resources after they have outlived their business purpose(s), also constitute the statutory means by which archival records - records with long-term research value - come into archival custody and become part of the government's archives.⁵ This is itself an intricate and negotiated process

⁴ The functions of archival appraisal/acquisition and arrangement/description provide two of central pillars of Canadian archival programs from both a theoretical and operational standpoint. In the context of a government records program, these functions work in combination to shape that which might be known about government activities as they existed in the past from an internal perspective. By conducting archival appraisal – by deciding which records have archival value and which do not - archivists shape the archives (evidence of past government activity) of the government and thus determine to a significant extent what might be known about a government as it existed in the past. Archival description and arrangement – the process of intellectually structuring and explaining archival records – provides an interpretive lens by which to understand the significance of archives. Each of these functions working together end in the *construction* of an archives – both physically and intellectually – after records creation has taken place. Each of these functions, again working together, serve to construct a coherent and highly wrought body of documents that may be consulted by a community of users designated by those in control of the archives itself (or those with power over an archives). These exist as subjective processes that find their basis in the collective knowledge and professional practices devised by the archivists charged with carrying them out. However, insofar as they are conducted by people, the principles and practices through which archival appraisal and description come into effect reflect the biases (cultural and personal) held by their creators. Though particular archives, working in particular jurisdictions may implement novel measures to mitigate against this bias, or to identify and explain the biases at play, it remains important to recognize that through these biases one aspect of archival access takes shape. It is not, however, the most concrete factor leading to the disclosure of archival records, which rests with the information rights statute. See Tom Nesmith, “Seeing Archives: Postmodernism and the Changing Intellectual Place of Archives,” 34-37; Brien Brothman, “Orders of Value: Probing the Theoretical Terms of Archival Practice,” 83, 91-92.

⁵ Disposition control represents a vital function for all major government records programs in Canada. Government archives (archives responsible for preserving the documentary history of their respective government body) as a general rule maintain responsibility for setting records retention schedules, providing guidance on record management systems, and – most importantly - for providing authority to dispose of information resources created and used by government agencies. This essentially means that archivists, by order of some legislative measure (usually an act), have the power to determine if, how, and when records may be disposed of by their

requiring the coordination of activities performed by both archival staff and recordkeeping professionals. Further, the arrangement and description of archival records – the process of organizing archival records into series (or record sets) and explaining their content and context(s) of use/creation – serves to make records intellectually accessible. The product of archival arrangement and description (usually an integrated set of finding aids organized according to the government structures from which the records stem) serves to relay a body of information related to the records, and – when made public – indicate that records exist in archival custody. However, the existence of these descriptive resources does not mean that the records they refer to are open for public examination. Often, these records remain out of reach.

The complicated and distributed nature of archival work contributes an additional layer of complexity to the information rights process as it pertains to archival records held in trust by the Manitoba government. With all this complexity at play, it may come as no surprise that when one examines the discourse surrounding information rights – in Canada and throughout most nations where access to information legislation applies – one encounters an equally complex picture often characterized more by criticism than acclaim. This critical discourse revolves in large part around administrative fees charged for the identification and production of records, excessive delays in responding to access requests, and what many applicants view as the illegitimate and overly broad application of exemption/exclusion clauses found in the legislation.⁶ Its tenor fluctuates between optimistic but firm calls for redress and resigned

creating/maintaining agencies, and whether records possess archival value that merits their inclusion in an archival repository.

⁶ Criticism of access to information processes (throughout Canada and in jurisdictions the world over) has focused on a very broad and nuanced spectrum of issues. However, administrative delays related to the processing of access requests, fees levied on the processing and reproduction of records, and the use of exemption/exclusion clauses to prevent disclosure arise frequently (almost inevitably) in critical literature treating information rights law. See Tromp,

accusations of government secrecy, non-compliance and outright malfeasance. And although this discourse represents a spectrum of contrasting voices and viewpoints, one need not look far to see a clear disconnect between the vision of information rights law put forth by government officials and the public's perception of access and the transparency it promises. Even the most positive statements regarding information law and its administration often stop short of authentic praise – indeed, in some jurisdictions the casual observer might have to look quite hard to find testimony of the legislation “working” at all. Taking all of this into consideration it would not be an overstatement to say that, by using information rights law, members of the public have identified certain flaws, drawbacks, and potentially inimical limitations placed on access and built into the access disclosure process as it exists in jurisdictions across Canada. Predictably, this complex and uncomplimentary discourse extends to archives and their equally complicated relationship with information rights law.

Taking the above into account, this chapter's first section will briefly explore the public discourse surrounding information rights law in Canada. By gathering together statements made by academics, journalists, activists, and members of the larger community of access to information (ATIP/FOI) users, the first section of this chapter will survey a spectrum of attitudes, perceptions and perspectives that make up the discourse surrounding information rights law nationally as well as within Manitoba.

In order to test the claims made by researchers in Manitoba, this chapter's second section will provide an analysis of data taken from the AM's publicly accessible Keystone database, assessing the quantity of material accessible for immediate access in the archives research room. This data covers all provincial government records series described in Keystone as of October

208-221; Monaghan, “Four Barriers to Access to Information: Perspectives of a Frequent User,” in *Access to Information and Social Justice*, 53-72.

1st, 2016 (1172 in total) and is categorized according to five distinct categories – records creating agencies/departments, dates of creation, type of access restriction imposed, physical extent of records, and medium of records. By subjecting this large dataset to some basic statistical analyses (via SSPS software), I have been able to ascertain the percentage of records series restricted under FIPPA according to creating department, dates of creation, records extent, and records media. Further, I have been able to make some preliminary determinations about the number of de-restricted records accessions by date of creation.

To further develop these findings, this section will employ additional qualitative and in-depth statistical analyses that will test the rate at which records series are made openly accessible to the public over time. Here I will examine dates, rate of transfer, and rate of de-restriction in order to determine whether a sliding moratorium on records restriction has been applied to record series at the Archives of Manitoba, and whether such an activity would be (i) in line with the current spirit, intent, and application of FIPPA, and (ii) whether such declassification might be assigned at a particular and universally applicable rate (with older records transfers becoming open at a particular date according to the age of their recorded contents). By these means I hope to ascertain how growing rates of records creation have impacted FIPPA's capacity to carry out its core functions and to determine how AM has maintained its ability to provide efficient, effective, and transparent access to information created by Manitoba's various public agencies.

Responding to the findings of my statistical analysis, the chapter's final section will attempt to pave a way forward for FIPPA as it relates to records held by the Archives of Manitoba. The analysis will weigh the risks and opportunities of leaving FIPPA the way it is, suggesting certain measures that might be put in place to streamline access to archival records and accommodate the prolific increase in records creation - particularly of born-digital records -

experienced by today's government agencies. This analysis will take into account the resources, recordkeeping infrastructure, and information management processes - in short, the operating strictures and organizational culture - obtaining throughout the government service currently.

Information Rights Law and its Critics

In recent years, the discourse revolving around information rights has been established in relation to the various acts, regulations, and bureaucratic mechanisms put in place to administer access to information. This discourse seeks to question the efficacy of legislation based on the context in which it is applied, but also to examine the conceptual underpinnings of freedom of information rights writ large. Found in literature that frames academic, journalistic, activist, and popular perspectives on information rights law, the discourse informs, challenges and creates what is and can be known about information rights.

Though not rooted in the Canadian situation, Colin Darch and Peter G. Underwood provide a cogent example of this literature in their article. Focused on the post-apartheid adoption of Freedom of Information legislation in South Africa, Darch and Underwood consider the broader implications – social, political, and cultural – of information rights and the structures used to enforce them. By framing FoI legislation as a vital process of political change, this article argues that the effectiveness of information rights must be tested against a government's willingness and, importantly, its practical capacity to comply with internally defined administrative procedures.⁷ Further, Darch and Underwood suggest that, in order to understand the nature of citizen demand, effective access regimes should take note of both the socio-cultural context and compliance behaviors of those agencies charged with FOI administration. In essence, these authors argue that (i) information rights and their administration must be grounded in an

⁷ Darch and Underwood, "Freedom of Information Legislation, State Compliance and the Discourse of Knowledge: The South African Experience," 78-79.

understanding of how, why and to what extent a citizen comprehends the nature of those rights, and (ii) for a testable set of criteria by which the agents responsible for the codification and administration of access law remain sensitive to both the needs and access capacities of the society they serve.⁸

Analyses of those like Darch and Underwood tend to touch only briefly on archival access. However, their overarching imperative remains highly relevant to the administration of archival access in Manitoba: FOI legislation and the administrative structures underpinning it should be responsive to the changing perceived needs of the citizen and the various other socio-cultural and technological change processes at play in a government-based information ecology. By looking at the larger socio-historical context in which FIPPA operates – the political motivations behind its creation, the manner in which it is executed, the needs it seeks to fulfill, the resources directed toward its fulfillment, and the social response to each of the foregoing – it becomes possible to gain a nuanced and practical perspective on the overall effectiveness of the act. Furthermore, this examination suggests certain aspects of its administration that might be improved upon.

Criminologist and frequent ATIP user, Jeffery Monaghan, sets the tone for much of the information rights discourse produced by this professional community of access rights users in Canada, observing (through use of some poetic license) that:

The ATIA [Access to Information Act] remains a terrain of visibility more akin to reading a text through a keyhole than under a microscope. While some of the failures of ATI-based research are specific to poor performance within ATI offices, much of the frustration stems from systematic deficiencies that are the product of an antiquated system.⁹

⁸ Ibid., 82-84.

⁹ Monaghan, “Four Barriers to Access to Information: Perspectives of a Frequent User,” 54.

Here, Monaghan levels criticism at not only the offices and officials charged with the administration of the act but at the larger systems and structures – the network of relationships bound up in the access regime - through which access rights take shape. The keyhole-microscope analogy used in this passage provides an apt characterization of the information rights discourse as put forth by frequent users - not wholly dysfunctional, but far from sufficient as a tool of government transparency. The criticisms leveled at Canada's access regimes tend to focus on loopholes in the act as well on as certain normalized practices of administrative adversarialism used by members of the public service to complicate and undermine true, open information disclosure. Seeking to identify and expose these practices, proponents of this critique often place emphasis on articulating the “barriers to access” wrought by official members of the access regime, both the systematic and the strategically improvised.

Monaghan provides such a critique. Rather predictably, he identifies four species of administrative barrier existing within Canada's federal access regime that serve to hamper or negatively (and in many cases inconspicuously) delimit access to government information presumably secured by the Access to Information and Protection of Privacy Acts. The barriers come up frequently throughout the discourse, suggesting a prevalence of discontent existing across the information rights user base in Canada. Monaghan designates these barriers as: (i) *the political control of information*, where political interests intervene against the spirit of information rights law to block information access when it might result in a potentially incriminating or embarrassing disclosure of records; (ii) *time delays and fees*, which represent a de facto restriction on access by using provisions in an information rights act to unreasonably dissuade user access; (iii) *superficial and arbitrary document retrieval* (a barrier that may evince departmental resource shortfalls as much as administrative adversarialism) that might result in

the disclosure of unrequested and irrelevant documents, too many documents, or documents in a form or media not requested; and (iv) *redactions*, where discretionary application of an access exemption leads to excessive amounts of information being “blacked out” of a disclosure package.¹⁰ Monaghan suggests that his own attempts at using Canada’s federal access laws have often flagged in the face one or more these barriers.¹¹ The high instance of such comments from public users of the access regime suggests that government officials enforce these barriers frequently and to the detriment of meaningful information access.

While the model put forth by Darch and Underwood, and illuminated in the Canadian context by Monaghan, provides a general framework for evaluating the contextual position of FIPPA, the foregoing scholarship does little to illustrate the specific set of challenges facing Manitoba’s particular public service information ecology. In fact, very little published material on FIPPA’s creation, implementation, and/or administration currently exists outside of the relatively small selection of internal reports, audits, and public communications produced by those authorities (provincial, municipal, educational, and medical) responsible for administering the act itself. These official publications – primarily the Manitoba Ombudsman FIPPA investigation reports, Freedom of Information and Privacy Protection Act annual reports, FIPPA review reports (2004), and Department of Sport, Culture, and Heritage annual reports – do provide a more or less reliable picture of FIPPA’s administration. However, they often fail to reveal more than surface-level insight into the decision-making apparatus used to evaluate its long-term effectiveness. Moreover, with the exception of the reports filed by Manitoba’s Ombudsman, these publications rarely furnish critical speculation on the act’s limitations (potential or current), especially related to issues of archival access.

¹⁰ Ibid., 55-59, 60-64, 66-68, 68-70.

¹¹ Ibid., 53-54.

Few published materials counter the narrative put forth by Manitoba's public service sector. What little work there is primarily comes from the journalistic and academic communities, which tend to take a critical stance on Manitoba's administration of FIPPA based on their perceived professional right to information created in the public interest. Though broad in content, news articles treating FIPPA generally lean towards an exposé-focused style of critique, generally highlighting incidents of administrative misconduct committed by public agencies responsible for vetting FIPPA requests.

Such is the case with a Bartley Kives article, "Manitoba Sustainable Development 'unreasonable' in freedom-of-information response failure" published via CBC News Manitoba (July 7, 2016). The article examines a FIPPA request made by the *Winnipeg Free Press* in October 2015 for information pertaining to a conservation program implemented by Manitoba Sustainable Development, a provincial government agency. Here, Kives exposes the Manitoba government's failure to respond to a FIPPA request filed by a reporter with the *Winnipeg Free Press*. Problematically, this article also reveals a perceived pattern of government negligence by highlighting a second failure to respond, this time to the Office of the Manitoba Ombudsman acting upon a complaint filed by the *Free Press*.¹²

Other stories, such as Lauren Parsons' "New Changes to FIPPA Change Nothing," published in the *Uniter* (January 13th, 2011), seek to criticize FIPPA's legislative limitations, suggesting that the act's FOI provisions contain excessive exemptions, which, when interpreted broadly, might be applied toward the unjust denial of public information. Similar stories relaying the breakdown of FIPPA's bureaucratic procedures pepper the pages of Manitoba's newspapers

¹² Bartley Kives, "Manitoba Sustainable Development is 'Unreasonable' in Freedom-of-Information Response Failure," *CBC News* (Winnipeg, Manitoba), July 7, 2017.

and date back to the act's implementation in 1998.¹³ As an example, a story published in 2011 by the *Winnipeg Free Press* highlights the administrative loopholes applied by Manitoba's government access regime to deny Manitobans access to information, suggesting that excessive delays and cumbersome administrative procedures have led to numerous complaints leveled by users. The article found that, following a Manitoba Ombudsman investigation, some departments were able to comply with time limits only 38 percent of the time.¹⁴

Material of this nature provides a critical check on the reporting produced by Manitoba's information rights agencies. However, these articles rarely deliver more than surface-level exposure to the complex issues facing FIPPA and those charged with facilitating access to public information. Rather than seeking to identify the underlying and often systemic constraints placed on the province's FOI infrastructure – the recordkeeping systems, resources dedicated to FIPPA coordination staff, investment in professional development and innovative information tracking technologies for example – exposé-based journalism tends to highlight procedural fractures in the FOI process. This reporting rarely recognizes that those fractures are symptomatic of larger issues affecting Manitoba's public information sector.

As if in response to the exposure provided by members of the fourth estate, scholars in Canada have in recent years begun to investigate the country's various FOI regimes in more depth, though at present no sustained study exists of Manitoba's FIPPA legislation. Kevin Walby and Mike Larsen have conducted a number of targeted studies on the administration of Canada's Access to Information Act and Privacy Acts as it relates to public requests for access. Walby and Larsen look at certain "bureaucratic fortifications" existing in departments across the public

¹³ Lauren Parsons, "New Changes to FIPPA Change Nothing," *Uniter* (Winnipeg Manitoba), January 13, 2011.

¹⁴ "Response to freedom of information requests reviewed" *Winnipeg Free Press*, January 17, 2011.

service, which, in contradiction to the legislation, serve to undermine access protocols and foster distrust in those otherwise predisposed to use the act.¹⁵ They identify these fortifications as: (i) lack of control over access fees and using fees as a barrier to access; (ii) systemic delays in the release of information; (iii) resource shortfalls; and (iv) secrecy provisions built into the act itself, which, through the intervention of political interest, allow agencies to justify access denials.¹⁶ Further to this, Walby and Larsen conclude that, despite representing a “cutting edge” piece of legislation when implemented, the ATI Act (now over 30 years old) has failed to keep pace with the evolving information standards in place throughout the government.

A second collection of essays edited by Walby and Larsen, entitled *Brokering Access: Power, Politics and Freedom of Information Process in Canada* (2012), examines the manner in which Canadian access regimes – mostly the federal government’s ATIP Act – have been applied to protect government secrecy, rather than to bolster democratic imperatives of accountability and public transparency. This collection, authored by a cross-section of academics, journalists, and private researchers, highlights a disturbing number of barriers put in place by the Canadian government (and in one instance, provincial governments) to undermine the public’s access to information. Throughout, the reader is presented with several cases wherein extensive delays of disclosure, exorbitant disclosure fees, redactions, generic application of information exemptions, bureaucratic concealment, and understaffing have clearly led to dissatisfaction with the access legislation and the means by which it has been administered. The

¹⁵ Kevin Walby and Mike Larsen, “Getting at the Live Archive: On Access to Information Research in Canada,” *Canadian Journal of Law and Society* 26:3 (2011), 623-633.

¹⁶ *Ibid.*, 624, 628-631.

notion of a broader social disengagement with FOI in Canada is implied throughout each of the essays.¹⁷

Similar in character but focusing on the unique information rights challenges facing Canada's archives, University of Alberta sociologist Dominique Clément's 2015 examination of the relevance of Canada's 30 year old ATIP Act, shining a particularly bright light on the administrative measures utilized by the federal government to facilitate information access. Clément's focus falls primarily on the nature, significance, and application of the legislated exemptions written into ATIP. And while his analysis touches on several aspects of each type of exemption, Clément observes that administrative control over information defined as either a "cabinet confidence" or as "legal advice" presents a particularly problematic tool used by governments (in this case the Government of Canada) to restrict disclosure to potentially embarrassing information on political grounds.¹⁸

This conclusion is by no means unique, and while relatively little writing on bureaucratic obfuscation and the ATIP Act exists, academic critique of both the legislation and administrative regimes by which it is executed does exist to corroborate Clément's assertions. For example, consider this statement targeted at Canada's federal access regime: Why play games with "Bureaucats"? What have you got to win?¹⁹ Thus begins Franke James' critique of Canada's federal access to information regime. On the surface, the questions asked by James seem commonplace insofar as they indicate a general distrust of or resigned apathy toward government and its inability to serve the public interest. These two questions – concise and pejorative in

¹⁷ Mike Larsen and Kevin Walby, "Introduction," *Brokering Access: Power, Politics, and Freedom of Information Process in Canada*, eds, Mike Larsen and Kevin Walby (Vancouver: UBC Press, 2012), 1-27.

¹⁸ Dominique Clément, "Freedom of Information in Canada: Implications for Historical Research," 104-117.

¹⁹ Franke James, "Games 'Bureaucats' Play", in *Access to Information and Social Justice*, 94.

nature – could be applied to most any context involving interaction between “the government” (any government) and a member of “the public”. However, when viewed within the context of information rights law and its administration, these questions convey a more focused, cutting set of criticisms concerning government’s dedication to access rights and the accountable transparency thought to flow from them. Indeed, it is seemingly rhetorical questions like these that tend to characterize a large portion of the discourse related to access to information as it exists in Canada. This is to say, in brief, that despite the implementation of information rights legislation and the possibilities of disclosure afforded thereby, members of the public (both frequent and novice applicants to the act) often view its application, administration and in some case its core principles as (at best) illegitimately conservative, or (at worst) a tool for reinforcing government secrecy and the positional power it affords.

The “games” referred to in this scenario are left to the reader’s imagination, but the choice of words here seems to portray interactions between government – those “bureaucrats” – and the public as trivial, adversarial, and inevitably weighted in the favour of the governing body, whose end game exists ever at odds with the public interest. Taken out of context, these questions appear to present citizen-state interaction as a contest requiring guile and cynicism on the part of the citizen if they are to outmaneuver the government at its own insidious “games”.

However, James goes into far more depth with her critique than merely leveling general derision at government obstructionism. This is particularly evident when examining her assessment of Canada’s federal access regime in its entirety and at the provocative questions posed at the outset in their proper context. Here, we see a perspective that might accurately represent much of the critical opinion circulating in Canada with regard to information rights and the access regimes that support them. James’ blunt criticisms, though articulated with reference

to her own specific engagement with one particular access regime, bear a striking resemblance to those directed at governments in jurisdictions across Canada and throughout the world.

James' critique - a first person account of the author's own experience with access to information statutes - represents a popular (or non-academic) piece of criticism. It omits the usual decorum of an academic treatise, and does not engage directly with the various historical, sociological, political, or economic exigencies that undergird and inform the access regime and its ability to administer information rights law. Rather, James' "Games 'Bureaucats' Play," presents a brusque, incensed, sometimes comedic critique, which, in contradistinction to the run-of-the-mill indictment leveled in the article's opening queries, applies direct, specific pressure on the federal government's administration of the Access to Information Act. In doing so, James' critique also paints a familiar picture of the tenacious citizen seeking justice in the face of trenchant government obstructionism. This article provides an important piece of the access to information discourse insofar as it speaks to and from people's everyday user of ATI/FIPPA legislation.

The narrative begins with James providing an optimistic response to her not so rhetorical (and, indeed, not so resigned) introductory questions:

Why play games with Bureaucats? What have you got to win? Well, you have lots to win. That's what makes the game so fascinating and fun. I am quite sure that the Canadian Government loathes my upbeat attitude. Filing access to information (ATI) requests is supposed to make your eyes glaze over as you nod off to sleep. They don't want you relishing the task with gusto or glee. And they certainly don't want people revealing the tricks they play on unwary citizens. I chuckle as I imagine them using *Games Bureaucats Play* as a cautionary tale on what bureaucrats should never get caught doing – lest the truth leak out and they be held up to public ridicule.²⁰

²⁰ James, "Games 'Bureaucats' Play," 94.

Here the reader is presented with a dim view of information law and its workings. While taking an initially optimistic stance on the potential benefits that might be rendered from filing an access request, James proceeds to articulate a number of long-held criticisms regarding information rights in Canada that resonate throughout the freedom of information discourse. Throughout the commentary, we see a portrayal of government as insular, uncooperative, and antagonistic as regards its duty to serve the public interest generally, and to abide by the spirit of the ATI Act more specifically. To James, government – both as a structure and as a network of functions – represents as monolithic entity lacking form, nuance, and identifiable composition. In this scenario, the access to information process becomes a contest of wills pitting the disadvantaged citizen against an access regime characterized by its complicated application processes, hostile administrative protocols and, most damningly, its unscrupulous impulse toward self-preservation. James puts forth a scenario wherein the federal access regime remains actively at odds with its primary responsibilities defined under information rights law. From this brief introduction, the reader is presented with three standout criticisms of Canada's federal access regime. First, government access to information process is designed to be difficult to navigate and meant to place government officials in an advantageous position. Second, the access regime is combative and will exercise surreptitious loopholes written into the act as a means to scupper legal disclosure. Third, the access regime operates in direct opposition to the spirit of access to information law in order to protect the government, whose interests do not align with its own principles of transparency and accountability (presumably facilitated by access law). Here, access to information law is seen as needlessly complex; the access regime is viewed as overtly adversarial and prejudiciously (perhaps illegally) self-interested, or concerned only with protecting official interests.

James elaborates on her criticisms throughout the remainder of the article by examining the bureaucratic games played by government officials in their capacity as gatekeepers to official information. James identifies ten tactics used by agents of the government to discourage public use of federal access legislation and block disclosure when requests are made. James' description of each of these tactics (or "games") is accompanied by a portrayal of a government official - ostensibly a member of the access regime - as a cat (hence the titular play on words - "bureaucat") in the course of executing a dubious, access-limiting activity. This serves to portray the access regime and its participants as unethical, surreptitious, and overtly incompetent. The most cynical "games" (tactics) identified by James are presented as:

- Hot Potato: "As soon as you get a controversial file, a 'hot potato', get rid of it . . . and whatever you do, never write anything down."²¹
- Sit on it: "Stall, delay, postpone. Do nothing. That's your job! Whenever anyone asks, tell them that they will have to wait until you are finished 'doing your business'."²²
- C.Y.A. (Cover Your Ass): "Always cover your ass. And that means cover your boss's ass too, C.Y.B.A. Because if your boss - or worse, your boss's boss - gets in trouble, your ass is out the door. So if someone wrote something down that might be embarrassing, cover it up! Redact it! It's a National (and job) Security issue!"²³
- Stupid Cat Tricks: "Information is dangerous! Especially in the wrong hands. If you have to release any information to the enemy (citizens) make sure it's unsearchable, un-shareable, and almost useless."²⁴
- Litter Box Blow out: "Never leave anything in your litterbox. So when in doubt, delete! After all, if the information doesn't exist, they can't use it against you."²⁵

Like the summary criticisms leveled in her introduction, James' games, and the manner in which they are presented, reflect many of the alarming observations made by users of access legislation in Canada. Here, the failure to document important decisions, administrative stalling, broad use

²¹ James, "Games 'Bureaucats' Play," 106.

²² Ibid., 110.

²³ Ibid., 114.

²⁴ Ibid., 118.

²⁵ Ibid., 121.

of exemption clauses, excessive redaction, administrative collusion, and misuse of transitory records disposition authorizations to destroy potentially incriminating records each highlight a tactic widely used by the access regime to prevent disclosure of information. Moreover, in each of the above examples, the tactic used finds its premise in the underlying assumptions that (i) government officials remain adverse to transparency despite the existence of information rights law, and (ii) that such tactics are indeed tactics - calculated, surreptitious and not the regular outworking of administrative processes designed to facilitate information access. It is no accident that James' "bureaucat-ic" games appear to conform almost exactly with the barriers described by Monaghan and Walby.

As we have seen, the negative vision of Canada's access regime put forth by James finds ample voice across the social spectrum, though perhaps in more guarded terms. But the consistency of the message stemming from many perspectives appears to paint a rather grim picture of administrative obfuscation, endemic delay, and unreasonable fees regarding the information rights system in Canada. It makes sense that archival users might face many of the same barriers to access as those attempting to gain information in the custody of government departments. The following section will look at the rates of meaningful accessibility as relates to Manitoba's government archives, suggesting concrete solutions that might grant a higher and more convenient form of access to archival records.

Statistical Examination of Access to Information and Government Archives in Manitoba

As archives are generally seen as spaces of corporate memory, public access to their holdings represents a foundational aspect of an archives' value to society. The Archives of Manitoba is no different in this regard. But what happens to this valuable role when information rights legislation places limits on the manner in which archival records may be consulted? Like

all information resources subject to information rights law, Manitoba's government archival records are not often open for consultation *per se*; nor are they officially restricted. Rather, these archival records are subject to a process of vetting by representatives of the record-creating agency responsible for determining access under the provisions of FIPPA. This is to say that records are typically subject to review prior to their disclosure unless they have been proactively opened, or declassified. According to provisions in the act related to response timelines, this review can take up to 30 days by law, and by invoking an extension to the timeline another 30 days (or longer). The time taken to review requests creates a *de facto* temporal limitation on the record's research value by curtailing its immediate (or even short-term) accessibility. This may, in turn, hamper access to archival records and dissuade archival users from initiating or following through on an inquiry.²⁶ In many cases, this review represents a justifiable check on access meant to identify sensitive information exempted under the jurisdiction's information rights act. However, as historian Robert Craig Brown notes, "the reasons for and appropriateness of denying access diminish over time." In other words, the "public interest in permitting access to government records increases over time" with the record's age becoming a positive contributing factor toward the decision to disclose. Under this "passage of time principle," records might be proactively opened for immediate access based on the negligibility of their use resulting in a significant information breach.²⁷ Numerous acts proclaimed across Canada and throughout the world have encoded this passage of time principle in discretionary release clauses

²⁶ Mary Horodyski provides a detailed account of her experiences using FIPPA to access government archival records in Manitoba, listing the *de facto* restriction placed on disclosure by the access review process. See: Mary Horodyski, "'Society seems like it doesn't even know...': Archival Records Regarding People Labelled with Intellectual Disability Who have been Institutionalized in Manitoba" (Master's Thesis, University of Manitoba, 2017), 93-98; 134-157.

²⁷ Robert Craig Brown, "Government and Historian: A Perspective on Bill C-43," *Archivaria* 13 (Winter 1981-82), 119-123.

on records known to contain personal information (some of the most closely regulated information). Currently, section 48 of Manitoba's Freedom of Information and Protection of Privacy Act makes possible the release of records containing personal information.²⁸ A similar situation exists in relation to records restricted under section 19 of FIPPA regarding cabinet confidences, which lose their "excepted" status (meaning they might be requested under FIPPA) after 20 years.

In addition to the passage of time principle, government records may be released proactively on the order of a creating department. Such a release may happen at any time in the records' life cycle (before or after entering archival custody) and is normally based on the presumed banality of its contents with respect to legally exempted information.²⁹

While most government archival records require vetting prior to their disclosure, certain provisions do exist to proactively release material based on its age and content. Currently, no operational imperative exists in Manitoba to enforce departmental activities that might result in the large-scale proactive release of archival material (based on either age or content). However, an operational requirement of this nature could be aligned with the spirit of FIPPA, particularly its call for a presumption in favour of disclosure. The proactive release of archival materials also aligns with the spirit and intent of the Manitoba Archives and Recordkeeping Act. Altogether, if implemented systematically (or even periodically), a program of proactive release covering all departmental records represented in the archives would allow near immediate access to legally banal records with potential research value while advancing the spirit of FIPPA and offsetting costs related to the piecemeal evaluation of archival records by departmental access coordinators.

²⁸ C.C.S.M. c. F175. S.48

²⁹ Nicholls, " 'Guide' vs 'Gatekeeper'," 31.

Although a handful of scholars have discussed problems related to access under FIPPA, no work to date has systematically or empirically examined the status of information rights law and its impact on access to government archival records held in Manitoba. To this end, the following analysis will attempt to demonstrate the number of records open and available for immediate access under FIPPA. It will also examine the extent of proactive disclosure used by the Archives of Manitoba to open older records according to the passage of time principle.

There were two key research questions guiding my analyses. First, it is likely that some records held by the Archives of Manitoba have been released from access review and are thus open for immediate access under provisions of FIPPA. I sought to examine, specifically, *how many records series have been released proactively and given an open status under FIPPA?* Second, it is likely that the age of a given series plays a role in its accession status. That is, the older a series is – when ‘older’ is defined by its start year and end year, and how many years it was active – the more likely it is to be open according to provisions in FIPPA that dictate de-restriction. Here, I sought to examine, *is there a relationship between the age of a given records series and the access status of that series?* The methodology I used to address these two questions is detailed below.

Method

From September 2016 to November 2016, I collected data on all records series described in the Archives of Manitoba’s online Keystone database. All data was stored in a Microsoft Excel™ (2011) spreadsheet. Specifically, for each series, I logged the series schedule code (an alpha-numeric code representing the series’ specific identifier used for records management and disposition purposes), the series title, the series status under FIPPA (open or subject to FIPPA review), accessions transferred under a series, accession status under FIPPA (in the event that

certain accessions attached to a series were open and others are not), and the series date range (for records attached to series transferred into the custody of the Archives of Manitoba). I also divided the series date range into composite start and end dates.

Once I collected the data, I created criteria to determine whether a given series would be included in my final analyses. These inclusion criteria were as follows: (i) the series was listed as either open for immediate consultation or subject to FIPPA; (ii) the series had a clear start date; (iii) the series had a clear end date. If a series did not meet all of these criteria, I removed it from the database. I then exported this data into SPSS (v23), a software package used for statistical analyses. Using SPSS, I conducted a series of inferential and descriptive statistical analyses to address my research questions.

Results

My first research question sought to examine the number of records series that have been released proactively and given an open status under FIPPA. In total, 1151 series were identified using the Archives of Manitoba's online Keystone database. The majority ($n = 1123$, 97.6%) of these series were textual in form. The start years of the included series ranged from 1869 to 2008, and the end years ranged from 1872 to 2014. The age of these series ranged from less than 1 to 143 years, with an average age of 34.06 years ($SD = 32.0$). Of the total 1151 series identified, 355 (30.8 percent) were open with no restrictions placed on their access; the remaining 796 (69.2 percent) had restrictions placed on their access.

My second research question sought to examine whether there is a relationship between the age of a given series and the access status of that series. I addressed this research question in two ways, reflecting the different ways that the age of a series might be measured; that is, by the series' start year, end year, and overall age (i.e., end year – start year). First, I examined the

relationship between the years in which series were active and the likelihood of whether or not they were open/restricted. To do this, I conducted two separate binary logistic regressions, using access status as a binary outcome (a given series was coded as either open or with restrictions) and start and end year of the series as predictor variables, with series age (end year – start year) as a control variable. This analysis revealed that the start year of a series significantly predicted series accession status, $B = 0.02$, $SE = 0.002$, $p < 0.001$, $Exp(B) = 1.016$. In other words, every one-year increase in start date predicted approximately a one-fold increase in the likelihood that a given series had restrictions placed on its access. This implies that the later in time a series started, the more likely it was to be restricted. This analysis also revealed that the end year of a series also significantly predicted series access status, $B = 0.03$, $SE = 0.004$, $p < 0.001$, $Exp(B) = 1.033$. In other words, every one-year increase in series end date predicted approximately a one-fold increase in the likelihood that a given series had restrictions placed on its access. This implies that the later in time a series ended, the more likely it was to be restricted.

Second, I examined the relationship between the age of series (that is, the length of time that a given series was or has been active) and the likelihood of whether or not it is open/restricted. To do this, I conducted a binary logistic regression using access status as a binary outcome (a given series was coded as either open or restricted) and age of the series as a predictor variable, with start and end years as control variables. This analysis revealed that the age of the series significantly predicted access status, $B = -0.007$, $SE = 0.002$, $p < 0.001$, $Exp(B) = 0.993$. In other words, every one-year increase in age predicted approximately a one-fold increase in the likelihood that a given series did not have restrictions placed on its access. This implies that the greater the age of a series, the less likely it was to be restricted. To further contextualize this finding, I conducted a chi-square analysis to determine the accession

status of series among specific age groups. I categorized the series into four groups: those between 0 and 20 years old ($n = 525$), 21 and 50 years old ($n = 354$), 51 and 100 years old ($n = 197$), and 101 and 143 years old ($n = 75$). Of the series between 0 and 20 years old, 73.7 percent ($n = 387$) had restrictions placed on them, 69.2 percent ($n = 254$) of those between 21 and 50 years old had restrictions placed on them, 61.4 percent ($n = 121$) of those between 51 and 100 years old had restrictions placed on them, and 57.3 percent ($n = 43$) of those between 101 and 143 years old had restrictions placed on them.

Discussion of Findings

My first finding from these analyses indicated that about 70 percent of all archival records series described in the Archives of Manitoba's Keystone database are wholly subject to FIPPA. In other words, for the majority (i.e. about 70 percent) of archival records examined here, the series itself has not yet been opened for immediate access, and does not contain any records accessions that have been opened for immediate access. Records series subject to FIPPA cut across all record creating departments – or “records authorities” – described in the Keystone database, with the series of several creating departments being entirely subject to the act. This does not mean that the majority of records series are entirely inaccessible, “closed,” or “restricted” *per se*. Rather, it means their consultation requires a formal application to an access review by the government agency responsible for their creation. This process amounts to a *de facto* restriction – or limitation – on access, in that the review curtails an immediate disclosure of records. The length of time taken, amount of fees levied, number of procedural steps required, and level of administrative adversarialism confronted throughout a review can serve to increase the severity of this *de facto* restriction in the eyes of an archival user. That such *de facto*

restrictions impact user sentiment – and presumably experience – related to archival research finds expression in the information rights discourse examined at the beginning of this chapter.

Notably, for many records series, a mandatory access review under FIPPA remains an important means of ensuring the protection and non-disclosure of private and other legitimately confidential forms of information. However, the question of what constitutes legitimately confidential information becomes more complex when looking at archival records. The reason for this increased complexity lies in part with the propensity of archives to be socially perceived, and largely exist, as rarefied and valuable agents of corporate/social/communal memory for long periods of time. Though justifiably falling under the protective measures put in place by information rights law, the government and others also often position Manitoba's government archives discursively as the "unique and priceless gift of one generation of Manitobans to another."³⁰ This to say that archives carry long-term social significance as a means of linking past action to present and future consideration. Although the potential of this material to carry wide-ranging public value does not necessarily increase over time, the public interest in archives should begin to eclipse certain imperatives enshrined in information rights that ensure confidentiality. This represents the essence of the passage of time principle, the application of which in the Archives of Manitoba I have sought to analyze in my study's second research question.

My first finding from these analyses indicated that approximately 70 percent of all records series described in the Archives of Manitoba's Keystone database are wholly subject to FIPPA. Alternatively, about 30 percent of the series described in Keystone are either wholly or partially (here I am speaking about certain accessions attached to series) open for immediate

³⁰ S.M. 2001, c. 35, Introduction

access to researchers. Like series that are wholly subject to FIPPA, open series are represented across a broad range of the Manitoba government's creating departments, or "authorities." More importantly for the present study, my findings related to my second research question suggest that a relationship exists between the *age* of a given series and the access status of that series. Here the given start date of a series determines how likely it is to be open for immediate access: the older the series, the more likely it is to be open.

However, as demonstrated by my chi-square analysis, the passage of time principle has not been applied systematically to open all records series (or certain accessions attached thereto) containing records of an advanced age; nor are older archival series the only ones to have had their contents released. This latter confound can be explained by departments releasing records series either as a measure of their disposition schedule or retroactively upon request. However, the first confound is more difficult to explain. Looking at results rendered from my chi-square analysis, the two oldest classifications of records series – those containing records created between 51 and 100 years ago and records created between 101 and 143 years ago – still carry significant *de facto* restriction on their access. Of records created between 51 and 100 years ago, 61.4 percent remain in a state of *de facto* restriction. Of records created between 101 and 143 years ago, 57.3 percent remain in a state of *de facto* restriction. This represents a significant portion of Manitoba's government archival holdings that, despite their advanced age, may not be consulted without application to a review under FIPPA.

Therefore, to some extent at least, the passage of time principle appears to be operating within the Archives of Manitoba. However, its application does not appear to have a systematic focus, with significant amounts of very old archival records remaining under the jurisdiction of FIPPA and requiring for their consultation an application for access review that might result in

excessive delays, costly search fees, excessive procedural stress (on both applicant and access coordinator), and a sense of public disenchantment with the archival institution and the laws that govern access to its holdings. Researchers may readily accept the necessity of an access review in order to consult records created in 1990, and might justifiably query the legitimacy of having to apply for access to records created in 1960, 1940, or 1920. That being said, it is perhaps not hard to see why they would react with resentment when asked to file a request to see archival records created in 1900 or 1880. To quote Peter Bower, former Archivist of Manitoba, “privacy is a fundamental right but not an absolute right.”³¹ This definition of privacy rights might be extended to all forms of confidential information protected under information rights law.

Yet, a systematic implementation of proactive release that codifies elements of the passage of time principle to make government archival records immediately available upon request is no small feat. Rarely have such comprehensive measures been taken to ensure that the public interest in government archives finds complementary voice alongside its interest in confidentiality protection.

My statistical examination of records is not without limitations. My analyses included records series that have been described in the Archives of Manitoba’s Keystone database. Of course, there are many more records in the Archives of Manitoba that are not listed in the Keystone database – and therefore were not included in my analyses. On the one hand, it is possible that there would be results different from those described in my analyses if all records series in the Archives of Manitoba were included in these analyses. On the other hand, these analyses did still include a substantial number of records that are likely representative of the whole of the Archives of Manitoba’s collection – the parts likely represent the whole. However,

³¹ Peter Bower, quoted in Nicholls, “ ‘Guide’ vs ‘Gatekeeper’,” 116.

it would still be prudent for researchers to conduct similar analyses that encompass a larger subset of the Archives of Manitoba's collection; this would address the (unlikely) possibility that the Archives of Manitoba's Keystone database is not wholly representative of all Archives of Manitoba records series.

Second, in conducting my analyses, I only took the "age" of a records series into account. It could be that there are other factors contributing to whether or not a records series is open or restricted – such as the medium of the record (e.g., text, audio, video, photo) or the length of the record. However, because I was interested in examining the implications of the passage of time principle specifically, examining these other factors was beyond the scope of this project. Future researchers should take a wider range of factors into account when examining the accession status of records series.

Finally, this analysis does not account for the specific reasons *why* certain records series might be restricted. Hence, it is possible that at least some of these "restricted" records series are not open to public access for good reason; potential justifications were not taken into account in my analyses. That being said, this is a good place for Manitoba's access regime to start to evaluate how archival records are made accessible and how they might become more easily available to researchers. With this in mind, the final section of this chapter will examine the comprehensive declassification and "block review" programs implemented in archives in the United Kingdom, the United States and at Library and Archives Canada, suggesting how one or more of these models might be put into practice at the Archives of Manitoba.

Progressive Declassification in the National Archives (of the United Kingdom), US National Archives and Records Administration, and Library and Archives of Canada

Today's archives, in their role as recipient and steward of an information network's archival record, maintain responsibility for establishing the conditions, systems, and services

with which to ensure the long-term preservation and accessibility of records captured on all varieties of media formats. This work involves designing and maintaining temperature and humidity controlled vaults, creating strategies for the preservation of born-digital records, implementing accessioning protocols to take legal, physical, and intellectual control over records transfers, and developing and testing risk management strategies to mitigate loss in the event of a crisis. This role is not a new one, but with the advent of digital communications technology and the increasing complexity of information control in general, the essential custodial functions that define archival practice have become progressively more sophisticated, both contextually and professionally. Taking into account the complicated and visible role played by archivists and recordkeeping professionals in Canada, making archives accessible for researchers has never been more vital, nor has it been more complicated. As we saw in the preceding chapter, archival clients expect more access to government information in the twenty-first century, not less. Despite this, access coordinators and archivists - indeed, all members working throughout a given access regime - are occupied with diverse portfolios of work that can often make the tedious and complicated process of declassification seemingly impracticable, especially when envisioned on a grand scale.

Difficulties notwithstanding, certain large government archival institutions have sought to declassify records based on a systematic application of the passage of time principle. The National Archives (of United Kingdom) (TNA) presents a good example of this approach. In line with the *Public Records Act*, proclaimed in 1958 (amended in 1967), and the more recent *Freedom of Information Act* (proclaimed in 2000), TNA is currently in the process of rolling out a program of declassification premised on the famous “20 year rule” (formerly the 30 year rule)

governing both records disposition and access.³² As per the *Public Records Act*, records coming into the custody of TNA become “open” automatically as a feature of their transfer, with the exception of certain types of sensitive information requiring greater protection.³³ The utility of the British declassification system rests with its systematic approach to opening records. Here, the act of transferring records from a records agency to the National Archives prompts an automatic access review of the records transfer itself. That is, the creating agency, working with archival staff responsible for accessioning the records and in reference to all appropriate legislation governing the records, makes a determination as to the accession’s post-transfer access status. This scheme for proactively opening records prior to their transfer has the benefit of making an overarching determination as to records’ access status before a researcher is likely to consult them in the archives. This initial declassification step applies to all records regardless of age.

As an additional means to bolster access to archival material, TNA – and especially with regard to records with local significance – records entering the archives are made open for immediate access 20 years after creation. In theory, this provision applies to all records (including cabinet confidences) unless it can be proven that a greater public security interest rests in their remaining closed.³⁴

In its application of the passage of time, the British declassification system provides a model example. By placing a blanket moratorium on all but the most sensitive information

³² “20-year rule,” The National Archives, accessed May 21, 2018.
<http://www.nationalarchives.gov.uk/about/our-role/plans-policies-performance-and-projects/our-projects/20-year-rule/>

³³ “Public Records Act,” The National Archives, accessed May 21, 2018.
<http://www.nationalarchives.gov.uk/information-management/legislation/public-records-act/pr-faqs/>

³⁴ “The Cabinet Papers – Meetings and Papers,” The National Archives, Accessed May 21, 2018.
<http://www.nationalarchives.gov.uk/cabinetpapers/cabinet-gov/meetings-papers.htm>

resources held in archival custody, it ensures that (i) records become available at a rate commensurate with their potential to serve the public interest in archives while (ii) relieving the administrative burden related to disclosure review.

The National Archives and Records Administration (NARA) in the US presents a second model for proactive declassification that, while requiring more administrative coordination, allows for blanket disclosure based on public interest. To facilitate requirements for declassification issued in Executive order 13526, NARA established the National Declassification Center in 2009. The center's stated mission is to "align people, processes, and technologies to advance the declassification and public release of historically valuable permanent records while maintaining national security."³⁵

The NDC operates as a centralized review agency for the disclosure and declassification of archival records and provides a broad range of programs responsive to public interest in government archives. The American FOIA designates that records might be restricted by way of statute, Executive Order, or by a records creating agency, so long as all agency-designated restrictions comply with provisions outlined in the FOIA.³⁶ As a primary function, NDC agents respond to access requests made by the public in relation to records in the NARA custody. However, they also support more proactive declassification efforts. The NDC also supports more progressive declassification programs, such as automatic declassification. In this program, records become available immediately upon entry into the National Archives based on their age. Based on Executive Order 13526, which "requires the automatic declassification of records of

³⁵ "NARA and Declassification," National Archives and Records Administration, Accessed on May 23, 2018, <https://www.archives.gov/declassification/ndc/about-ndc>.

³⁶ "NARA and Declassification – General Information about Restricted Records," National Archives and Records Administration, Accessed on May 23, 2018, <https://www.archives.gov/declassification/ndc/restricted-records.html>.

permanent historical value that are more than 25 years old,” records become declassified automatically, so long as reappraisal decisions made by NARA archivists have flagged them for indefinite retention in the archives.³⁷ However, certain types of information defined in the US FOI Act (primarily records containing personal information, or information sensitive to national security concerns) may be flagged for exemption.³⁸ The ingenuity of this particular model rests on the automatic nature of release, which, in applying the passage of time principle (and setting the moratorium at 25 years under which FOI requests must be filed to gain access to records) privileges the public’s interest in archival information above official secrecy and administrative process. The process is additionally beneficial in that it places the onus on the creating agency to apply for an exemption to the automatic release for records known to hold sensitive information, thus ensuring that archival staff are not bogged down with making access determinations on records for which they are not the expert authority.

While NARA’s automatic declassification program provides an excellent model for ensuring that contemporary records become accessible according to defined timelines, it does not provide a solution for the declassification of far older records already sitting in archival custody. Library and Archives Canada’s now long standing Block Review program does put forth a solution to this problem - a problem existing in many government archival repositories, including the Archives of Manitoba.

As with the Manitoba context, the majority of records accessioned by Library and Archives Canada remain closed until a review is conducted under the Access to Information and Privacy Acts. Hence, in most cases, gaining “access [to archival material] is a reactive rather

³⁷ “NARA and Declassification – Exemptions from Automatic Declassification,” National Archives and Records Administration, Accessed on June 12, 2018, <https://www.archives.gov/declassification/isca/auto-declass-exemptions.html>.

³⁸ Ibid.

than a proactive process.” Once a review is prompted through the filing of an access request by a member of the public, and files are opened, they remain open for consultation. As discussed by Paulette Dozois, senior archivist at LAC, very little effort had been made by LAC’s ATIP office to proactively review materials due to the review burden created by official ATIP requests.³⁹ In order to alleviate this burden and in recognizing the vast amounts of old archival material remaining under *de facto* restriction, LAC created the Block Review Program.⁴⁰ The program sought to identify blocks of records whose age and “non-sensitive” contents might render them easily declassified. Once blocks (or series) of contextually related records are identified, a process of targeted review is undertaken with access determinations made regarding a sample of the block finding application throughout the record block writ large. Officially the program is defined as a "Systematic risk-based review of blocks of government records":

It is completed by reviewing, using various sampling techniques and percentages, large groups of archival records. The Block Review methodology involves identifying, assessing and then reviewing representative parts of the records population. The findings of the sampled review are then applied to the entire block.⁴¹

As part of the block review methodology, older archival materials (generally records 30 years and older) stemming from federal departments with significant research demand are targeted for release. LAC’s Block Review Program works in direct partnership with and benefits from the support of information management professionals attached to the creating departments whose records are under review.

³⁹ Paulette Dozois, “Making Archives Available: Library and Archives Block Review Project,” paper presented to the annual conference of the Association of Canadian Archivists, Regina, Saskatchewan, 3 June, 2015.

⁴⁰ Ibid.

⁴¹ Ibid.

The targeted, risk based approach adopted by LAC to declassify and release archival materials that have already been accessioned into its custody serves to provide retroactive access on a wide scale to records that, because of the passage of time principle, carry greater research value than confidentiality risk. Such a program might represent the most feasible approach for declassification at the Archives of Manitoba in that its methodology and funding structure can be determined internally, or by the archives. The LAC approach to proactive release carries the added benefit of relying on existing partnerships between the archives and its various records creating/information management sectors. The adoption of a block review program at AM would require no change to existing legislation, and would allow large segments of archival records – 70 percent of which are not currently open for immediate access – to be released based on a strategic, efficient approach that limits potential risk by targeting older blocks of records, whose confidentiality has eroded with the passage of time.

Conclusion

Archives today are struggling to adhere to their mandate to provide the fullest possible access to the documentary materials in their care. Resource shortfalls, administrative complexity, cultural pressure, professional isolationism and a host of other factors contribute to this situation. However, at the root of the issue is, rather ironically, the legal statutes (and by extension the administrative systems, procedures, protocols, and structures) that seek to guarantee public access to information. They provide possibly the most concrete barrier to the open, fulsome disclosure of archival records. This thesis has sought to examine the administrative, historical, intellectual, professional, and legal contexts – each imbricated with the other – that undergird and influence the present state of archival access. It has sought to use the province of Manitoba and its archival legacy as an avenue toward understanding how the larger contextual factors impact upon access through information rights law. Admittedly, this represents a very small step toward gaining a greater understanding of how, why, and to what effect information rights law and its broad contextual factors impact upon archival access. Further exploration should be undertaken on archives and access through the administrative regimes that underwrite both. Scholarly work focusing on access regimes currently operating in Canada and across international jurisdictions might, when synthesized, allow members of the archival and information professions to better understand how both legal and administrative mechanisms impact upon archival access on the macro scale. Such a body of knowledge would also allow archival institutions to study the larger access to information scene as a means to address potential issues they see in their own access regimes.

As shown in previous chapters, government archives do not operate in a vacuum. Rather, they rely on a complex distributed network of functions, activities, decision-making centres,

legal instruments, and public interest in order to fulfill its various obligations to stakeholders across the client-public service spectrum. Likewise, archival institutions – whether situated in a government context or not – are shaped by the larger intellectual, ideological, socio-cultural, and political forces operating throughout time. This is to say that archives and the measures created to facilitate access to them exist as historically contingent artifacts, imprinted with the shifting attitudes, preferences, biases, and beliefs that define the communities that build and sustain them, whether those communities represent communities of cultural, social, political, or professional affiliation. Accordingly, this thesis has argued that any attempt to understand how access to archives (especially government archives) must take into account the historical relationship operating between an archival institution and the forces that impact upon its ability and/or willingness to deliver access to archival records.

Equally, this thesis has sought to illustrate the importance of examining public attitudes toward access to archives as an essential measure of how a particular access regime is working to fulfill its mandate. Additionally, it has demonstrated how statistical analyses might be employed to gain a better understanding of how and to what extent archival records become readily available to researchers without recourse to an access request, which can itself represent a *de facto* restriction on access.

Although access legislation and the complex access regimes that work to facilitate disclosure to government information and to the archival records representing its corporate memory present more or less accepted structures for access, they should not be considered the absolute means by which *archival* records become available for consultation. As explained in previous chapters, the passage of time (i.e., a record or records series age) should be taken into account when archival records are being considered for disclosure. FIPPA (as it exists in

Manitoba) makes several provisions for opening archival materials based on their age and the content-based restrictions. This study has shown that, while such provisions may exist in the act, declassification may not be actively pursued by the access regime generally, or by the responsible archival institution more specifically. While several factors may be responsible for this depending on the access regime and an archival program's ability to influence the distribution and use of resources (both human and monetary), this thesis has shown that, in the Manitoba context at least, records that should be – by law and logic – open, have not yet been released for access.

That highly valuable and generally (indeed, officially) innocuous archival records have yet to be released at the Archives of Manitoba is perhaps not surprising. Further studies focused on interrogating access to archives in other jurisdictions will provide more concrete knowledge as to the prevalence of this unfortunate phenomenon, but until such a body of data is constructed, archives, including the Archives of Manitoba, should look to the pioneering programs implemented by the UK National Archives, the US National Archives and Records Administration, and Library and Archives Canada to proactively release records on a systematic basis that would be more aligned with current archival mandates and the public interest it seeks to serve.

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