

THE CURRENT STATE OF PRIVACY IN CANADIAN ARCHIVES

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ABSTRACT

This paper explores the situation of privacy in Canadian archives, focusing on personal records within non-government institutions. It provides a review of Canadian privacy legislations and past discussions in the information management community that have addressed the relationship between archives and privacy. Through investigating the roles held by archivists, researchers, and governments, this paper considers ethics, access, and the utilization of personal information in archival holdings. It is evident that a gap exists within archival conversations pertaining to privacy. This oversight must be addressed by the resurgence of discussion, advocacy for updated legislation, and an inclusion of forward-thinking concepts. This paper encourages archivists to reintroduce themselves as privacy protectors.

INTRODUCTION

As a professional community entrusted with the preservation of the nation's memory for future research, privacy is an important factor for archivists to consider. The arrangement, access, and use of records is a heavily discussed topic amongst the information management community. However, consideration of the privacy of individuals, groups, and organizations within records has not always been the focus of conversation. After conducting a literature review and evaluating Canadian privacy legislation, it is evident that there is a gap in the discussion on the application of privacy legislation in Canadian archives.

This situation is not entirely the fault of archivists as discussions regarding rights of privacy remains an approaching rather than present problem. This is apparent in the slow-moving changes to privacy legislation available in Canada, such as the Personal Information Protection and Electronic Documents Act 2000 (PIPEDA) and the Privacy Act 1985, which

are sorely in need of reform. The current legislation does not address the specific problems faced by archivists when considering privacy. These problems include describing private records that could potentially contain privacy issues, enabling their access, and entrusting researchers with sensitive information. Archives are only mentioned in privacy acts to secure exemption from legislation's rulings, a decision that is based on the perspective that privacy and archives are fundamentally opposed and the main purpose of archives is to provide access to information. This attitude, along with the current legislation, must be challenged as it will not survive the dynamic digital world. Rather than being exempt from privacy conditions, archivists must be active participants in privacy discussions. As a result of Europe's success with the General Data Protection Regulation 2016 (GDPR), privacy discussions will increase and become more prominent internationally, requiring archives to step up and get more involved with government legislations.

Since archivists rely on legislation such as PIPEDA to make decisions about privacy and access to records, they should be an active part of its review. This involvement not only stands to strengthen archival concepts but protect their position within society and demonstrates to the public a respect for privacy of individuals and their records. Although archivists and record managers are sometimes grouped together as information professionals, this specific discussion of privacy is unique to archives. Additionally, record managers are often found within corporations which are required to adhere to strict privacy laws. It is the lack of guidance found in non-government archives which requires the most attention. In response to government records playing a recurring theme throughout our literature review, this paper will attempt to fill the gap within the archival community by primarily addressing personal records.

Privacy is an important human right that allows individuals to have some form of control over how others access information about them and is essential for identity formation. According to Heather MacNeil, privacy "derives from a respect for individual autonomy, expressed as the individuals' freedom from the scrutiny and judgement of others."¹ However, individuals can experience violations to their privacy, particularly when records that contain their personal information are no longer within their control upon donation to an archive, such as an address book or personal journal. MacNeil speaks to how "contemporary concerns over loss of privacy relate for the most part to the amount of information known about an individual, and have emerged in response to situations created by information-gathering practices ignored in traditional interpretations of invasion of privacy."² Archivists need to be aware of privacy requirements and how they relate to archival concepts as the records that will soon be brought into the archives could potentially face issues generated by these practices. Concerns over how personal information is collected and maintained in the active stage of the record's life cycle can impact their integrity upon donation to archival institutions.

¹ Heather MacNeil, *Without Consent: The Ethics of Disclosing Personal Information in Public Archives* (Chicago: Society of American Archivists, 1992), 1, <https://babel.hathitrust.org/cgi/pt?id=mdp.39015025207161&view=1up&seq=7>.

² MacNeil, *Without Consent*, 3.

This paper aims to provide an analysis of the current approach to privacy within the archival community through reviewing literature, government legislation, and influential organizations. It will also explore the relationship privacy shares with ethics and access in the archival world. The role of the archivist versus that of the researcher will be considered, specifically questioning who holds the responsibility of maintaining privacy of the record. Beyond the perception that record creators rescind all rights to the information upon donation, this paper aims to demonstrate the importance of considering the privacy rights of individual donors, and any potential stakeholders that could be implicated in their records. Through evaluating the current state of the relationship between privacy legislation and archives, as well as identifying other contributing factors, the future of privacy within the archival community can be better addressed.

LITERATURE REVIEW

Discussions regarding privacy in the archival community were relatively common with the introduction of the Privacy Act in 1983. Daniel German explores the formation of access to information and privacy legislation and the role played by the Canadian government, the National Archives, and the Privacy Commission between 1983-1993. German specifically examines how the Access to Information Act and the Privacy Act, both introduced in 1985, may interfere with access offered by archives.³ German's prediction on the future of legislation was that it would continue to protect the sensitive information while making all other information easy to access for researchers.⁴ Unfortunately, the article does not dive into the problems of the acts that were identified through German's deep dissection. The article supports that research in the past has focused mainly on government archives, meaning there is a hole when considering the private records of individuals and organizations that do not fall under the government's jurisdiction. This is a point that has guided the discussion of this paper towards non-government records.

MacNeil provides a progressive approach on the issues of privacy in regards to archival work that the professionals in charge of privacy legislation could benefit from today.⁵ MacNeil argues that archivists need to be at the forefront of these discussions due to their unique position and "professional responsibility" of considering "the individual's right to privacy and society's need for knowledge."⁶ She argues that archivists need to "ensure that access to records implicating privacy values is administered in a systematic and equitable manner."⁷ Though published in 1992, her analysis demonstrates the importance of archivists

³ Daniel German, "Access and Privacy Legislation and the National Archives, 1983-1993: A Decade of ATIP," *Archivaria* 39 (1995): 200-202. <https://archivaria.ca/index.php/archivaria/article/view/12089>.

⁴ German, "Access and Privacy Legislation and the National Archives," 211.

⁵ MacNeil, Without Consent.

⁶ MacNeil, Without Consent, 5.

⁷ MacNeil, Without Consent, 6.

possessing a solid grasp of the merits of privacy to society by demonstrating how research conducted by invading personal privacy can harm individuals.⁸

Looking to other countries for privacy guidance, Paul Sillitoe discusses the lack of policy and poorly defined privacy limits holding back archivists in the United Kingdom prior to the twenty-first century. Sillitoe encourages archivists to get involved with crafting legislation so they are not “hapless victims of laws drafted without regard, or even reference, to archive interests.”⁹ His article advocates for archivists to define the limits of privacy with access kept in mind and to determine criteria around access to personal information.¹⁰ Sillitoe places the archivist within policy creation to consider their unique position. The author defines levels of information as: impersonal, personal, sensitive, and confidential to replace timed access periods in order to determine privacy on a case-to-case basis.¹¹ This would increase access on certain material while ensuring the privacy of more sensitive records. The discussion held by Sillitoe in the late 1990s is one which may be useful in determining the role archivists play in present day legislation formation as he offers solutions and encourages the community to act.

With the introduction of PIPEDA in 2000, the discourse continued as fears regarding how privacy legislation could curtail the role of archives and their ability to facilitate research intensified. There is a palpable fear from the archival community and historians that privacy legislation would result in the erosion of records available to preserve and conduct research. Tim Cook demonstrates this anxiety, claiming PIPEDA to be an overreaction with the potential to destroy archives.¹² To the further detriment of archivist and policy professionals, he portrays the introduction of PIPEDA as a conflict that cannot be resolved and pits the two sides against each other, prohibiting any consideration for collaboration.¹³ However, Cook includes an outline of actions taken by archival and historical communities to advocate for their positions.¹⁴ This endeavour not only provides a potential explanation for why archives are exempt from PIPEDA, but also demonstrates how archives did not think privacy was a matter of concern for them.

Undeterred by this panic, discussion of the archivists’ role in regard to privacy abruptly diminishes with the arrival of PIPEDA, seeming to imply that archivists have accepted the situation. Despite the acceleration of technological innovation and increasing use of electronic documents, the discussion regarding privacy in the twenty-first century is sparse and does not reflect the severity of the issues. The archival community does appear to be aware of the lack of attention towards privacy in archives. Jean Dryden and Loryl MacDonald

8 MacNeil, *Without Consent*, 16.

9 Paul J. Sillitoe, “Privacy in a Public Place: Managing Public Access to Personal Information Controlled by Archives Services,” *Journal of the Society of Archivists* 19, no. 1 (1998): 7. <https://doi.org/10.1080/00379819809514418>.

10 Sillitoe, “Privacy in a Public Place,” 7.

11 Sillitoe, “Privacy in a Public Place,” 10.

12 Tim Cook, “Archives and Privacy in a Wired World: The Impact of the Personal Information Act (Bill C-6) on Archives,” *Archivaria* 53 (2002). <https://archivaria-ca.myaccess.library.utoronto.ca/index.php/archivaria/article/view/12839/14060>.

13 Cook, “Archives and Privacy in a Wired World,” 113.

14 Cook, “Archives and Privacy in a Wired World,” 103.

touch on this in their introduction of the *Archivaria* issue dedicated to archives and the law that came twenty-five years after the last analysis under editor Terry Cook. Dryden provides a book review of “Navigating Legal Issues in Archives” by Menzi L. Behrnd-Klodt criticizing the section devoted to privacy and access issues in archives as a superficial analysis that merely provides a list of statutes for archivists to refer to.¹⁵ However, beyond the examples depicted above, Dryden and MacDonald ultimately continue this negligence by failing to include an article that adequately addresses how archives can navigate privacy.¹⁶ William Bonner and Mike Chiasson’s article also highlights that while privacy is important, legislation is often dismissed.¹⁷ This tradition, of continually passing over the chance to provide a critical analysis on the role of privacy in archives, presents a failed opportunity for archivists to lead an approach to properly collecting and preserving sensitive information that could strengthen their holdings and status within the information management community.

With the increasing use of technology to exchange information, archivists appear to have realized the numerous issues confronting storing records, including privacy. Considerations towards privacy are often present in discussions on how electronic records could alter archival approaches to recordkeeping. Amelia Acker and Jed Brubaker discuss the intricacies of archiving social media beyond their physical storage. They call attention to an essential element of social media sites that “rely on networked resources and many creators in order to provide and maintain contextual integrity.”¹⁸ However, Acker and Brubaker fail to consider the privacy implications of archiving such records other than referring to the privacy policies of social media platforms. In attempting to preserve these platforms, archivists risk implicating multiple individuals who are potentially unaware that their information would be managed for such purposes. Joan Elizabeth Kelly and Lucy Rosenbloom speak to the importance of ensuring donors' privacy in digital archives and recognize that personal information has the potential to be misused, but do not provide much information on what this means or how it can be achieved.¹⁹ Moreover, they only consider the donor’s privacy as the sole record creator in these digital archives, thus ignoring any additional individuals who could be implicated through association or as record creators in their own right.

A potential solution for archiving digital records while maintaining privacy is to remove all personal information through de-identification, data aggregation, and anonymization. Pekka Henttonen addresses the issue of privacy within archives and suggests strategies for privacy protection, specifically for digital records. Henttonen recognizes that there are many writings that focus on digital privacy; however, few of these discussions occur within the archival community.²⁰ Pointing to an evidential weakness within archival literature, Henttonen

15 Jean Dryden, “MENZI L. BEHRND-KLODT, Navigating Legal Issues in Archives,” *Archivaria* 69 (2010): 8, <https://archivaria.ca/index.php/archivaria/article/view/13266>.

16 Jean Dryden and Loryl MacDonald, “Archives and the Law,” *Archivaria* 69 (2010): 191, <https://archivaria.ca/index.php/archivaria/article/view/13258>.

17 William Bonner and Mike Chiasson, “If Fair Information Principles Are the Answer, What Was the Question? An Actor-Network Theory Investigation of the Modern Constitution of Privacy,” *Information and Organization* 15, no. 4 (2005): 269. <https://doi.org/10.1016/j.infoandorg.2005.03.001>.

18 Amelia Acker and Jed Brubaker, “Death, Memorialization, and Social Media: A Platform Perspective for Personal Archives,” *Archivaria* 77 (2014): 3-4, <https://archivaria-ca.myaccess.library.utoronto.ca/index.php/archivaria/article/view/13469/14791>.

19 Elizabeth Joan Kelly and Lucy Rosenbloom, “Self Analytics and Personal Digital Archives in University Collections,” *Collection Management* 44, no. 2-4 (2019): 251, <https://doi.org/10.1080/01462679.2019.1587672>.

20 Pekka Henttonen, “Privacy as an Archival Problem and a Solution,” *Archival Science* 17, no. 3 (2017): 286. <http://dx.doi.org.myaccess.library.utoronto.ca/10.1007/s10502-017-9277-0>.

believes that archival and recordkeeping techniques are necessary for privacy protection. Additionally, how society reacts to privacy concerns will be influential on the information received by archives.²¹ With the archivist as the individual who carries information between contexts, Henttonen argues that they have a privacy role; however, privacy theories and definitions are not well defined.²² The five strategies suggested in the article are aimed at archives to effectively transfer information while being mindful of privacy, time, place, and context. These strategies ensure that the processing of personal information is used for the reason it was collected, and that the individual has influence over the usage and destruction of their personal information. Furthermore, the information will be destroyed after its use and anonymizing data will be used to minimize privacy risks.²³ Henttonen goes on to suggest an information safe haven approach which begins once material has reached an archive. This approach encourages archives to have donors identify privacy concerns in their material while ensuring that users are appropriately using information, screening researchers, and having them sign user agreements.²⁴ Henttonen makes it clear that he is aware these strategies remove the “open space” typically encouraged by archives but they do address privacy concerns. He believes that failure to create legal standards of privacy within archives is due to the lack of balance between research and privacy.²⁵ This article presents a conversation surrounding archives, privacy, access, and legislation which must be expanded upon.

However, these techniques challenge the important archival concept of context that relies on preserving the relationships between records. Malcolm Todd calls attention to this and argues that “unless the personal details of the participants are either made explicit when the records are captured or can be linked subsequently, there will be a general effect of decontextualization that will be very detrimental to the value—even as we have seen to the validity—of archival records.”²⁶ Todd demonstrates the need for privacy considerations in the design of technology that could benefit archivists in their goal of preserving digital records. Similarly, Jasmine McNealy speaks to the risks of information aggregation. This technique is used to offer privacy through compiling information but “can lead to erroneous judgements about the subject of the information because aggregation removes the content from which the information originated.”²⁷ This challenges the perspective that information needs to be preserved in order to understand human behaviour, by demonstrating that if information is not preserved properly archivists could risk maintaining an incomplete and potentially harmful record of human nature. These solutions, designed to protect individuals in the collection of their personal information, may work for corporations pressured to protect their

21 Henttonen, “Privacy as an Archival Problem and a Solution,” (2017): 286.

22 Henttonen, “Privacy as an Archival Problem and a Solution,” (2017): 288.

23 Henttonen, “Privacy as an Archival Problem and a Solution,” (2017): 291-93.

24 Henttonen, “Privacy as an Archival Problem and a Solution,” (2017): 294-95.

25 Henttonen, “Privacy as an Archival Problem and a Solution,” (2017): 297.

26 Malcolm Todd, “Power, Identity, Integrity, Authenticity, and the Archives: A Comparative Study of the Application of Archival Methodologies to Contemporary Privacy,” *Archivaria* 61 (2006): 191, <https://archivaria.ca/index.php/archivaria/article/view/12540>.

27 Jasmine McNealy, “The Privacy Implications of Digital Preservation: Social Media Archives and the Social Networks Theory of Privacy,” *Elon Law Review* 3, no. 2 (2012): 159, <https://heinonline-org.myaccess.library.utoronto.ca/HOL/Page?iname=&handle=hein.journals/elonlr3&collection=&page=133&collection=journals>.

clients, but could severely harm records destined for long-term preservation. Archivists need to address this problem head on, through education and taking an active approach in how information is currently managed, to ensure that the records that reach archives remain integral.

Overall, the discussions on privacy in archives has changed throughout the years depending on the status of legislation. It is evident that although several solutions have been presented by well-established academics, the number of problems surrounding privacy have only increased with the introduction of electronic records. By identifying these issues and comparing solutions of past voices, a direction for the future can begin to form. However, the literature is not enough to review and current governing bodies must also be explored.

CANADIAN LEGISLATION REVIEW

The examination of Canada's privacy legislation is necessary to understand where archives fit inside legislation, how they may be influenced, and what changes must occur. Through reviewing the Privacy Act, Access to Information Act, PIPEDA, and Ontario's 2006 Archives and Recordkeeping Act, the current climate of legislation and other governing bodies can be established. When considering why it would be beneficial to apply federal or provincial privacy legislations to archival institutions, the role of the donor must be considered. The record creator or record holder is often the one to make the decision of where their records will be deposited. Specifically considering the case of personal records, this material will likely have information on the person's life, family, and other relations. Rob Fisher identifies the call for privacy or anonymity as "the most forceful manifestation of donor agency."²⁸ This may affect interactions between donors and archives, as donors are concerned for their privacy and hesitate to offer their materials to the archives with the chance of releasing family details or tarnishing reputations. If archives operated under stricter privacy legislations, perhaps more donors would be willing to trust the archives with their material. Richard Valpy argues that Canada's federal legislation "provides little guidance about the actual management of information and records but, rather, concerns itself mainly with how records with enduring value should be preserved and/or made available once they exist."²⁹ He goes on to say that any record legislation, "can only be effective if there is an equally effective management system in place."³⁰ The inclusion of archivists in privacy legislation formation would assist in creating a more effective legislation that can be applicable to archival practices.

Multiple active privacy laws were examined specifically to identify their recognition and inclusion of archives. Both the Privacy Act and Access to Information Act demonstrate a

28 Rob Fisher, "Donors and Donor Agency: Implications for Private Archives Theory and Practice," *Archivaria* 79 (2015): 114. <https://archivaria.ca/index.php/archivaria/article/view/13528>.

29 Richard D. Valpy, "For the Purpose of Accountability: The Need for a Comprehensive Recordkeeping Act," *Archivaria* 88 (2019): 213. <https://archivaria.ca/index.php/archivaria/article/view/13705>.

30 Valpy, "For the Purpose of Accountability: The Need for a Comprehensive Recordkeeping Act," 213.

need for archivists to take an active role in the formation of privacy legislation. The Privacy Act allows for the disclosure of personal information to the Library and Archives of Canada (LAC) for “archival purposes.”³¹ Any government generated personal information under the custody or control of LAC may be used for research or statistical purposes as long as it follows regulations.³² The Privacy Act has requirements regarding personal information, specifically, its theory of “reasonable opportunity” which gives those who may be mentioned in the records a time period to become aware and access the information they are included in.³³ The Access to Information Act exempts any government records that are “library or museum material preserved solely for public reference or exhibition purposes; [and] material placed in the Library and Archives of Canada...by or on behalf of persons or organizations other than government institutions.”³⁴ Fiorella Foscarini recognizes a weak point in privacy legislation in which it “never specifies that archival processing of personal information for preservation purposes is different from the use of it for research or business purposes.”³⁵ This distinction is crucial as it can impact how citizens view archives and potentially prompt distrust regarding the mismanagement of sensitive information in archival records, specifically private records which do not fall under most legislation. The responsibility of the archivist to consider privacy when processing and providing access could be greater defined through a more detailed legislation.

PIPEDA is the federal law for data privacy that governs the collection, use, and disclosure of personal information for private-sector organizations. PIPEDA rarely mentions archives except to exempt them from the disclosure of personal information without consent. However, the exact wording used suggests that those responsible for writing the act were ignorant of archival concepts. PIPEDA states that a disclosure of information is permitted by “an institution whose functions include the conservation of records of historic or archival importance, and the disclosure is made for the purpose of such conservation.”³⁶ The emphasis on conservation is of particular interest as it connotes that the Act only covers information that is held within an archival institution and makes no reference that these records are retained for secondary purposes, such as research. This use of language demonstrates a misunderstanding of the unique position that archives hold by the privacy professionals responsible for shaping PIPEDA. Tim Cook surmises that the people working on PIPEDA did not fully understand the perspectives of historians and archivists, and recognized the involvement of archival groups in attempting to educate privacy professionals on the balance of privacy and a right to inquiry.³⁷ Although PIPEDA assures the archival community that they are exempt from such stipulations, many were concerned over how the Act could change the nature of records available for preservation. Livia Iacovino and Malcom

31 Canada, Minister of Justice, Privacy Act 1985, c. P-21, <https://laws-lois.justice.gc.ca/PDF/P-21.pdf>.

32 Canada, Minister of Justice, Privacy Act 1985, c. P-21.

33 Fiorella Foscarini, “InterPARES 2 and the Records-Related Legislation of the European Union,” *Archivaria* 63, no. 1 (2007): 136. <https://archivaria.ca/index.php/archivaria/article/view/13131>.

34 Canada, Minister of Justice, Access to Information Act 1985, c. A-1, <https://laws-lois.justice.gc.ca/PDF/A-1.pdf>.

35 Foscarini, “InterPARES 2 and the Records-Related Legislation of the European Union,” 133.

36 Canada, Minister of Justice, Personal Information Protection and Electronic Documents Act 2000, c.5, 11. <https://laws-lois.justice.gc.ca/PDF/P-8.6.pdf>.

37 Cook, “Archives and Privacy in a Wired World,” 103.

Todd argue that “without adequate archival exceptions, the Act encourages records destruction and de-identification.”³⁸ However, Ian Forsyth refutes this belief, arguing, “the access to information law has no apparent impact on records.”³⁹ An agreement amongst archivists must be made to better define archival material within PIPEDA.

At the Provincial level, in 2006 the Ontario government put in place the Archives and Recordkeeping Act which outlines how government archives are expected to deal with issues of privacy in the records that they manage. The Act stipulates that archivists are to have access to public records in order for them to fulfill their administrative duties. This includes the access of records that are protected under the Freedom of Information and Protection of Privacy Act 1990, the Municipal Freedom of Information and Protection of Privacy Act 1990 or the Personal Health Information Protection Act 2004.⁴⁰ However, in terms of archivists providing access to researchers, the Archives and Recordkeeping Act ensures that the privacy legislations mentioned above will hold precedence.⁴¹ Most mention of privacy within this act is in relation to access and informing archivists that their work is exempt from any restrictions imposed by privacy legislation in Canada. There is no mention of how an archivist should approach the privacy of personal records.

Archival bodies can also provide archivists with guidance for how to navigate privacy concerns in recordkeeping. For example, the Association of Canadian Archivists (ACA) is a national organization that was created to represent and advocate on behalf of archivists throughout Canada. However, the ACA appears to lack any formal discussion regarding privacy or data protection in the information management profession, whether it applies to individuals or the institutions they run. Within their Code of Ethics and Professional Conduct, the ACA fails to provide any guidance to archivists on how to uphold privacy by barely mentioning privacy except to state their respect for its existence.⁴² Nevertheless, the Association occupies a position within society that allows it to engage on issues of privacy and data protection facing archivists today. This is a position that the ACA should take advantage of as an influential body.

Aside from legislative bodies, it is also necessary to consider standards that govern archival practice. Canadian archivists frequently consult Rules of Archival Description (RAD) when arranging and describing material. RAD presents an additional platform to advocate for privacy within archives. There are several fields in RAD that provoke concerns over privacy. These include: the restrictions on access, use, reproduction, and publication; custodial history within archival description; administrative history and biographical sketch; and scope and content of restricted material.⁴³ To begin with, restrictions on access, use, reproduction

38 Livia Iacovino and Malcolm Todd, “The Long-term Preservation of Identifiable Personal Data: A Comparative Analysis of Privacy Legislation in Australia, Canada, the European Union and the United States,” *Archival Science* 7, no. 1 (2007): 122, <http://dx.doi.org/myaccess.library.utoronto.ca/10.1007/s10502-007-9055-5>.

39 Ian Forsyth, “Access Law and Lost Records: A Commentary on ‘In Search of the Chill,’” *Archivaria* 55 (2003): 23, <https://archivaria.ca/index.php/archivaria/article/view/12403>.

40 Canada. Ontario. Archives and Recordkeeping Act, 2006, c. 34. <https://www.ontario.ca/laws/statute/06a34>.

41 Canada. Ontario. Archives and Recordkeeping Act.

42 “Code of Ethics and Professional Conduct,” Association of Canadian Archivists, last modified October 18, 2017, https://archivists.ca/resources/Documents/Governance%20and%20Structure/aca_code_of_ethics_final_october_2017.pdf.

43 Rules for Archival Description. Ottawa: Bureau, 2008.

and publication are most significant in protecting the privacy of personal records. It is through these fields that archivists have the ability to choose privacy over access and where additional privacy guidelines would be most valuable. Custodial history, biographical sketch, and scope and content are fields where the archivist decides how they describe the group of records. These are also fields that can easily expose details about the record creators and past record keepers. Considering the specific example of personal records, Jennifer Douglas highlights the role of the record creator who is often described in finding aids. Once a record creator transfers their records to an archive, they are trusting the archivist to interpret, organize, and represent their material for future access.⁴⁴ The creator gives the archivist the responsibility of protecting their privacy and the privacy of those within their records. A greater consideration of privacy must be placed when archivists describe material, especially restricted content. Since RAD has not been updated within the last decade, the opportunity for change presents itself within the archival community. An update that gives more attention to privacy is necessary as it would assist in refocusing the issue of privacy protection in archives, as well as in any ethical decision making.

ETHICS AND PRIVACY

Privacy is often found within the discussion of ethics. Eric Ketelaar explores the “layers of protection” that impact privacy.⁴⁵ He identifies them as: legislation, transfer and access conditions provided by donors, regulations surrounding access, and physical measures of privacy protection.⁴⁶ Ketelaar argues that these layers are not enough for privacy in archives. He states that physical measures of privacy protection, which addresses professional ethics, are necessary and must be negotiated between archivists and researchers.⁴⁷ Although Ketelaar provides a Dutch context, his layers of protection can be used to support Canadian archivists who may want to incorporate privacy in legislation formation and address archival concerns.

Mary Neazor looks at ethics for archivists and recordkeepers; specifically, the international codes of ethics that exist around them, their application to real-life scenarios, and how they can develop in the field of information management. She found that in the Society of American Archivists’ (SAA) 1980 Code of Ethics they added an element which stated, “archivists respect the privacy of individuals who created or are the subjects of records and papers, especially those who had no voice in the disposition of the materials.”⁴⁸ Similarly, her research indicated that the Association of Records Managers and Administrators’ (ARMA) 1992 Code of Professional Responsibility stated that information managers must, “affirm that the collection, maintenance, distribution, and use of information about individuals is a

44 Jennifer Douglas, “A Call to Rethink Archival Creation: Exploring Types of Creation in Personal Archives,” *Archival Science* 18, no. 1 (2018): 30 <http://myaccess.library.utoronto.ca/login?url=https://www.proquest.com/2Fdocview/2F1993455591%3Faccountid%3D14771>.

45 Eric Ketelaar, “The Right to Know, the Right to Forget? Personal Information in Public Archives,” *Archives & Manuscripts* 23, no. 1 (1995): 16.

46 Ketelaar, “The Right to Know, the Right to Forget?” 9-11.

47 Ketelaar, “The Right to Know, the Right to Forget?” 12.

48 Mary Neazor, “Recordkeeping Professional Ethics and Their Application,” *Archivaria* 64 (2008): 56. <https://archivaria.ca/index.php/archivaria/article/view/13146>.

privilege in trust: the right to privacy of all individuals must be both promoted and upheld.”⁴⁹

Through Neazor’s investigation of codes, it is evident that privacy is often considered ethical and placed within the responsibility of the record holder. Although published in 2008, the author mainly explores codes from the 1990s which reflects the need for these guidelines to be revisited. Privacy, paired with trust and respect, appears as a right in ethical codes. This proves that there is an opportunity for associations to help in expanding the obligation to privacy outside of ethics.

In agreement with Neazor, Laura Millar considers archivists as the ones who hold responsibility over privacy. Millar states, “most access legislation includes time frames under which access is managed, with the belief that as time passes the importance of protecting privacy diminishes and the value of providing access increases.”⁵⁰ After considering codes of ethics, it must be discussed whether privacy would be better enforced through legislation. Millar does argue that when legislation is not applicable to archives, it is ethics which encourages archivists to decide what privacy considerations are “reasonable” to apply, along with what access is given.⁵¹ Millar’s discussion of ethics in place of legislation puts significant responsibility on the archivist. Alyssa Hamer calls attention to how ethics are often obscured in archives as the decision process of archivists on what records are accessible is traditionally hidden from the public.⁵² Hamer also acknowledges the existence of archival bodies that provide codes of ethics that touch on aspects of privacy in ethics, but reveals that individuals are often left to their own devices in terms of figuring out how to navigate privacy and access.⁵³ Bringing privacy to the forefront of archival discussions only serves to strengthen the profession. Iacovino and Todd suggest that “stronger privacy legislation can...enhance record integrity.”⁵⁴ If the archivist had legislation to follow, they would not have to question such moral and ethical dilemmas as their decision would be supported by law. The enforcement of privacy legislation within archives would eliminate the stresses and doubts archivists may experience when making decisions surrounding privacy.

ACCESS VERSUS PRIVACY

As demonstrated throughout the literature review, archivists tend to consider privacy alongside access. However, this approach often results in negligence towards privacy in preference to the more manageable discussion of access. Henttonen points out this trend and offers an explanation by stating that archives exist “precisely to transfer information in usable and understandable form from one context and point in time to another context and time.”⁵⁵ Additionally, legislation often exempts archives in order to ensure that access is

49 Neazor, “Recordkeeping Professional Ethics and Their Application,” 59.

50 Laura Millar, *Archives: Principles and Practices*, (Chicago: Facet Publishing, 2017), 116.

51 Millar, *Archives: Principles and Practices*, 116.

52 Alyssa Hamer, “Ethics of Archival Practice: New Considerations in the Digital Age,” *Archivaria* 85 (2018): 159, <https://archivaria-ca.myaccess.library.utoronto.ca/index.php/archivaria/article/view/13634/15023>.

53 Hamer, “Ethics of Archival Practice,” 164-165.

54 Iacovino and Todd, “The Long-term Preservation of Identifiable Personal Data,” 111.

55 Henttonen, “Privacy as an Archival Problem and a Solution,” (2017): 289.

provided to record users. Cook expresses the belief that by “protecting privacy and personal information, privacy legislation and advocates seem willing to sacrifice aspects of our culture and history.”⁵⁶ This perspective portrays privacy and access as fundamental opposites that cannot both be satisfied. MacNeil recognizes this oversight, stating that “although archivists do not dispute the significance of privacy interests, they have been more inclined to publicly promote the virtues of access.”⁵⁷ Todd attempts to explain this bias towards access by arguing that without including personal information archives “shall be restricted to fragmentary ‘whisper’ about their stories.”⁵⁸ This fear towards upholding privacy will only serve to delay any positive change that could improve access to records.

Although Todd appears to support the prioritization of access over privacy, he also speaks to the importance of finding a balance in the “trade-off between individual privacy and the collective memory.”⁵⁹ MacNeil also questions the need for knowledge versus the right to privacy and specifically how it arises as an archival problem. She suggests that the problem of access over privacy can be considered through the risk-benefit approach that weighs the value of research with the maintenance of privacy; however, this approach has its flaws.⁶⁰ The main proposition in MacNeil’s article is the establishment of a committee that enforces privacy by reviewing, evaluating, and applying it to research projects done in archives.⁶¹ The suggested guidelines include offering access to restricted records once the researcher has signed a contract ensuring the privacy of those associated with the record will not be violated. Although MacNeil had presented a solution, it is legislation which is necessary to better define where the importance lies between access versus privacy. This change in legislation may alter the relationship between researchers and archivists.

ARCHIVIST VERSUS RESEARCHER

A common solution for navigating privacy concerns, while still allowing research, is to only provide access to the records for scholarly purposes. Douglas explored the roles of the creator, the accumulator, the maintainer, and the user within the archive and how each of these roles can provide their own form of creation.⁶² With the record being the responsibility of multiple individuals, it brings to question who is required to think of privacy and if it is necessary for one to take that responsibility from those who proceed them in the chain of record handling. Specifically, if the archivist makes the decisions which will avoid privacy issues, it would remove the risk and tension present when offering access to material. On the other hand, Ketelaar argues that the archivist should focus on appraisal while it is up to the researcher or the historian to be assisted by ethics in the use of information while

56 Cook, “Archives and Privacy in a Wired World,” 94.

57 MacNeil, *Without Consent*, 148.

58 Todd, “Power, Identity, Integrity, Authenticity, and the Archives,” 200.

59 Todd, “Power, Identity, Integrity, Authenticity, and the Archives,” 205.

60 Heather MacNeil, “Defining the Limits of Freedom of Inquiry: The Ethics of Disclosing Personal Information Held in Government Archives,” *Archivaria* 32 (1991): 139
<https://archivaria.ca/index.php/archivaria/article/view/11765>.

61 MacNeil, “Defining the Limits of Freedom of Inquiry,” 142.

62 Douglas, “A Call to Rethink Archival Creation: Exploring Types of Creation in Personal Archives,” 33.

keeping privacy in mind.⁶³ He continues to state that archivists should be interested in the research occurring within the archive and “weighing up privacy and disclosure.”⁶⁴ The relationship between researchers and archivists must include trust to ensure privacy.

Iacovino and Todd call out the practice in which “third party archival researcher agreements place the onus of respecting personal information on the researcher.”⁶⁵ These agreements require archivists to partake in subjective decision making to determine what is valid in terms of research. Any potential privacy violations of individuals would have little recourse for the victim other than the removal of the researcher from the archive. MacNeil reveals how this practice requires “heavy reliance on researchers’ voluntary self-regulation to ensure the protection of record subjects’ privacy during the research project and for an indefinite period thereafter.”⁶⁶ She argues against this practice claiming that it “does not dispel the ethical ambiguity surrounding the disclosure of personal information to third parties without the consent of the individual concerned.”⁶⁷ MacNeil’s proposed committee to navigate such research claims provides a potential solution that does not solely rely on archivists. It seems necessary that the responsibility of privacy is held by both archivist and researcher. However, legislation offers archivists greater assistance in navigating privacy while expecting less from researchers.

CONCLUSION

This overview excluded several important areas of concern that could serve as topics for future research. The nature of this paper was to call attention to the lack of discussion regarding privacy in archives and shed light on how the information community could attempt to address this oversight. Certain approaches and concepts were purposely omitted as we believe they can not yet be adapted by archives until legislation is strengthened. The solutions presented thus far are valid and prove as a starting point to guide developments. However, the archival community should keep in mind additional concepts while planning for the future. For example, privacy by design, established by the former Information and Privacy Commissioner of Ontario, Ann Cavoukian, is a concept that archivists could significantly benefit from in further securing their digital holdings. With the future being digital, software that is designed around privacy is essential for information institutions to invest in. This approach ensures privacy requirements are considered in the design of databases or collections and can adhere to archival needs that may lessen the concerns archivists have regarding access to records. Legislation to guide the design of software is necessary before archives can properly execute this concept.

⁶³ Ketelaar, “The Right to Know, the Right to Forget?,” 16.

⁶⁴ Ketelaar, “The Right to Know, the Right to Forget?,” 16.

⁶⁵ Iacovino and Todd, “The Long-term Preservation of Identifiable Personal Data,” 110.

⁶⁶ MacNeil, *Without Consent*, 144.

⁶⁷ MacNeil, *Without Consent*, 146.

Additionally, greater attention is required to analyze the concept of consent. Consent is required to use personal information for purposes other than that for which it was initially collected. However, this prerequisite goes against inherent archival concepts in which records are collected for research purposes. This disparity reinforces the perception that archival activities and privacy requirements are fundamentally opposed. Greater transparency is required to ensure both professions are properly represented which serves to improve that quality of records for archives. More recently, the presence of COVID-19 has impacted how archives interact with users and how everyday archival tasks are performed. New interactions between archives and society have already begun to take place which raise privacy concerns.^{68, 69} This further encourages the need for updated legislation.

Through analyzing the current state of the relationship between archives, privacy, and legislation, the information management community will be able to better understand in which direction to advance. It is evident from the literature review that there are gaps in the discussion and archivists need to re-establish their place in legislation formation. The energy of privacy discussion seen in the 1980s and 1990s must be reignited to factor in the new challenges of today brought on by technology. The privacy legislation, which governs the Canadian archival community, appears to be dated and too out of touch to provide bona fide support required by archivists to make informed privacy decisions. Although involvement and education surrounding privacy is needed from Canadian archivists, the government must also provide an opportunity for legislative change. The consideration of ethics, access, and the role of the researcher is also present in the re-establishment of privacy protection. The balance between ethics and legislation must be decided within the information management community to enforce privacy. From this, decisions on the access of records can be made more confidently while keeping donors, archivists, and researchers satisfied. The re-identification of archivists as privacy protectors will increase the status they hold in society with both record creators and record users.

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⁶⁸ Jessica Leigh Hester, "How to Help Librarians and Archivists From Your Living Room," Atlas Obscura, March 23, 2020. <https://www.atlasobscura.com/articles/archives-to-browse-from-home>.

⁶⁹ Desirée Henderson, "Reading Digitized Diaries: Privacy and the Digital Life-Writing Archive," *Auto/Biography Studies* 33, no. 1 (2018): 157-174. <https://www.tandfonline-com.myaccess.library.utoronto.ca/doi/pdf/10.1080/08989575.2018.1389845?needAccess=true>.

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