IMPLEMENTING DELGAMUUK'W

Biography

Marnie Burnham, is an archivist, National Archives of Canada. She received a B.A. in Anthropology from the University of British Columbia in 1992. After graduation, she worked in administration at the UBC Museum of Anthropology. She earned her Masters degree in Archival Studies from UBC in 1996. Marnie has completed archival projects for a variety of organizations including the Vancouver Holocaust Education Centre and the UBC Archives. Since the spring of 1998, she has been working as an archivist in the Vancouver Office of the Government Archives and Records Disposition Division of the National Archives of Canada.

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It's sort of ominous being the last person at the last session on the last day. I admire your stamina. We've actually got quite a brief presentation. So we are grateful the to U.B.C.I.C. [Union of British Columbia Indian Chiefs] for this opportunity to participate in such an interesting and important discussion.

Issues relating to the collection of information and control of its dissemination must be addressed by all institutions of governance regardless of form, as well as by community-based organizations. Mechanisms developed to control the flow of information are central to the dynamics of social and political power in all aspects of our society. In the case of the federal government, access to information is legislated and monitored through a system of policies and procedures. The perspective we would like to offer you today is that of the National Archives, a federal institution which adheres to federal information control policies and procedures but applying them uniquely in the context of archival records. Policies and procedures relating to the control of historical federal government records have implications for First Nations maintaining copies within their custody. The mission of the National Archives is to preserve the collective memory of the nation, as well as the government of Canada, and to contribute to the protection of rights and the enhancement of a sense of national identity. In the Vancouver office of the Government Archives and Records Disposition Division we maintain the permanent records of the federal government created in B.C. and the Yukon. We oversee all aspects of their care and handling, including the provision of access to researchers. We assist a broad spectrum of researchers, but by far our largest user group is composed of individuals conducting research in pursuance of land claims or traditional use studies. Records most often consulted by these researchers are in Record Groups 10, 22, and 85. These are the records of the Indian and Northern Affairs Canada and all its varied and involving incarnations.

Records generated by this department are subject to the Access to Information Act and the Privacy Act [A.T.I.P.], both of which have implications for the researcher in terms of their ability to access records and access the information contained within those records. I think a good starting point for our discussion is to briefly outline the purposes and paradigms of these two pieces of legislation.

The purpose of the Access to Information Act is to provide an enforceable right to information in records under the control of government institutions in accordance with the principles that government information should be available to the public, that necessary exceptions to this inherent right of access should be limited and specific, and that decisions on the disclosure of government information should be reviewed independently of government. Exceptions to this open access are limited and specific in addressing types of information such as financial and technical information related to a third party, information that impacts upon national security, the competitive negotiating position of the federal government, as well as information that is of a personal nature. The key principle underlying most of the exemption criteria is weighing or balancing the right of access to government information against injury that could ensue from the disclosure of that information.

The purpose of the Privacy Act is to protect the privacy of individuals with respect to the personal information about themselves held by government institutions. It provides individuals with the right of access to the information about themselves collected by the federal government. Underlying the Privacy Act is the general principle that the collection and

use of personal information is essential to the performance of many federal government activities. However, it posits that individuals have the right to have a reasonable expectation of privacy, including a basic right to exercise control over their own personal information. Public confidence in the government's management of personal information is necessary to the public trust and in support of government programs. The concept of personal information within this legislation is broad and defined through example. Essentially, personal information is information about an identifiable individual in records of any form. This includes categories and information such as race, religion, marital status, and education, but it also includes more dynamic concepts such as the opinions, your opinions, or the opinions you have about other people. But in the case where you have an opinion about someone else, that is considered to be their personal information. The actual definition of "personal information" presented in the Privacy Act is complex and extensive and often times takes meaning or dimension only in its direct application to specific instances of personal information.

The Access to Information Act and the Privacy Act have evolved out of the principles of the foundation of our notions about the nature of democratic government. The power to govern is viewed as a privilege delegated by the citizens of Canada. The government must be held to account for this delegated power, therefore it is the right of every citizen to openly scrutinize government activity. Generally it is important to bear in mind that A.T.I.P. functions as a result of very culturally specific ideologies about the nature of government and the necessity for accountability.

An infrastructure of policies and procedures have been developed to support the implementation of access and privacy legislation. At the National Archives the public right of access and the right to personal privacy are balanced in the application of A.T.I.P. legislation to government records in its custody. A brief summary of this process is valuable, as it provides a perspective on how access policy maybe practically implemented. As such, it presents a possible starting point for the development of First Nations community-based access information protocols. Such a discussion is also useful in terms of understanding the context and conditions through which First Nations are given unique access to and copies of government records, as there are legislated implications for the secondary use of photocopied materials which are obtained under such unique access.

At the core of the National Archives' application of A.T.I.P. legislation is the file review process. Once a file has been requested by a researcher, prior to its actual viewing it must undergo a review according to the exemptions set out within the A.T.I.P. legislation. This review process involves an actual perusal of the file by the A.T.I.P. division at the National Archives in order to determine if any information within these documents is exempt for release. At the Vancouver office this activity is actually carried out by Jana [Buhlmann] and myself. If any exemptions are identified within a given file, the exempted information is severed in one of two ways. If the amount of severed information in a single document is significant, the whole document is removed and replaced with a form that describes the document and the exemption employed. If only a small portion of the information requires severing, a photocopy of the original is made and the information is physically removed from the photocopy, once again citing the specific exemption employed. It is severed from the final version of the file. The photocopies are then placed back in the file and the file is provided to the researcher for viewing.

As the National Archives is a research institution, legislative provision has been developed to permit the discretionary disclosure of personal information under certain circumstances for research or statistical purposes. The National Archives has developed guidelines for the release of personal information and the terms under which this release may occur. This is attempting to strike a balance of interest between the protection of an individual's privacy and the preservation of the public's right to access government information. These guidelines are employed during the process of review in tandem with the specific exemptions laid out in A.T.I.P. legislation. So, for example, the discretionary disclosure of personal information may occur if 110 years have elapsed following the birth of an individual to whom the information relates or twenty years has elapsed since their death, if the information was obtained during the taking of a census or survey and ninety years has elapsed, or if -– this is the key one -- information is of such a nature that its disclosure would not constitute an unwarranted invasion of privacy of the individual to whom the information relates. The discretion to differentiate between those types of personal information which would or would not constitute an unwarranted invasion of privacy falls upon our shoulders. We are called upon to make judgments during the evaluation of a file as to whether the information embodied within the records will constitute an invasion of privacy. This is certainly the most difficult and mentally taxing aspect of the protocols developed to implement the A.T.I.P. legislation, and it's a part of our work that we take most seriously.

Unwarranted invasion of privacy is considered to occur when disclosure of personal information would clearly result in harm or injury to the individual to whom it pertains. To assist us in our work and to contribute to some consistency to the review process, an invasion of privacy test has been established to provide guidelines in determining whether the release of information would result in harm or injury to a subject individual. There are four interrelated factors which must be taken into account in the invasion of privacy test. The first one is the expectations of the individual. These expectations pertain to the conditions governing the collection of information and the perceptions of the individual to whom this information relates as to how this information would be used once it's collected. So, for example, when I am filling out my income tax form I am providing them with some pretty personal financial information about how my year went, and when I send it them I really do have the expectation that information will not be shared with researchers. But, for example, if I write a letter of protest to my M.P. about cuts to health care funding, I would hope that she would share it with the general public. Two very different expectations. The second factor is the sensitivity of the information. There is an attempt to determine whether information is highly sensitive or innocuous, or perhaps the passage of time has reduced its sensitivity. Certain types of information are more obviously sensitive, such as medical, criminal, or financial. Your current annual income or the details of ongoing medical treatment are both examples of highly sensitive information. The third factor is the probability of injury. If information is determined to be sensitive, it may or may not be considered injurious in its release. Injury is interpreted as any harm or embarrassment which will have direct negative effects on an individual's career, reputation, financial position, health, or well-being. So, for example, while taking an annual leave is part of your employment history, public knowledge of that fact is not necessarily injurious. The fourth and final aspect would be the context of the file. Information is considered in relation to the rest of the information in all of the documents within the file. While you might be reading a file, at the beginning it may contain elements of an individual's employment history, but as you keep reading the file you may realize the individual has been deceased for more than twenty years thus rendering the information non-injurious.

Within the records relating to Indian and Northern Affairs Canada, this invasion of privacy test provides us with some crucial guidelines. Indian Affairs records differ dramatically from the records created by the rest of the federal government. Given the history of relations between the federal government and the First Nations, these records document most aspects of the lives of aboriginal peoples in Canada. The extent and variety of personal information embodied in these records is unique. The lives of no other demographic of our society are represented in the record in such personal detail, reflecting not only individuals but also the communities from which they come. Generally, we are committed to ensuring that unwarranted invasions of privacy do not occur. The invasion of privacy test is successful in providing us with some helpful guidelines. However, this test is structured around very culturally specific paradigms and applied in a very specific environment. The focus of the context of the information is within the file. Given the enormity of the archives and the bureaucratic complexity of the federal government, the file is the only manageable unit in the evaluation of a particular piece of a personal information. Further, we assess the sensitivity of the information and that assessment is based on our own value system. Finally, as the focus of A.T.I.P. legislation is on the privacy of the individual, the notion of community privacy in the context of information relating to sacred sites or spiritual endeavours is not addressed. However, it's not entirely accurate to state that the privacy of communities is neglected by access and privacy legislation. Bands are treated as third parties, and as such any financial, commercial, scientific, or technical information supplied to a government institution in a confidential manner is treated accordingly. Also, we find that within Indian Affairs records information about the community cannot be separated from information about individual members and, as a result, is protected.

The Privacy Act establishes specific instances in which personal information maybe disclosed. Of the importance to this audience is the disclosure under Section 8.2(k). Paragraph 8.2(k) of the Privacy Act states, "the personal information under the control of a government institution may be disclosed to any institution of aboriginal people, Indian band, government institution or part thereof, or to any person acting on behalf of such an association, band, or institution or part thereof for the purpose of researching or validating the claims, disputes, or grievances of any of the aboriginal peoples of Canada." Personal information may be disclosed under this provision to researchers requesting access on behalf of any association of aboriginal people, Indian band, or government institution for the purposes of researching or validating claims, disputes, or grievances of aboriginal peoples in Canada, provided that the following conditions are met: researchers obtain written accreditation from the responsible officers of that association, band, or institution stating that the researcher's acting on behalf of that organization with respect to a claim dispute or grievance, and the researcher agrees in writing, by completing a research application, not to use the information for any other purpose than for that which access is granted. In developing

protocols regarding access to copies of federal government records which have been copied and provided under section 8.2(k) it's important to note the contractual agreement made between the researcher and the National Archives. The researcher, as well as the body the researcher represents, is responsible for insuring the ongoing security of the personal information within the copy materials. Ultimately, it is up to each nation to develop access protocols which are relevant to their own needs and values. Policies and procedures must be developed to respond to community-specific privacy concerns, as well as internal mechanisms of accountability. These protocols must also address ongoing obligations to other archival institutions regarding copies of their holdings under band control.