Letter to the Editor

A Commentary on Patrizia Gentile's "Resisted Access? National Security, the *Access to Information Act*, and Queer(ing) Archives"

Dear Editor:

The Fall 2009 issue of *Archivaria* included an article by Dr. Patrizia Gentile, entitled "Resisted Access? National Security, the *Access to Information Act*, and Queer(ing) Archives," in which Dr. Gentile examines the *Access to Information Act* in the light of her own archival research into gay history. In doing so, Dr. Gentile suggests that the exemptions from release found in the *Access to Information Act* may be used to unfairly impede research, effectively preventing a full and thorough understanding of the security service's past and possibly even future treatment of gay and lesbian Canadians.

Since Dr. Gentile's article makes frequent reference to her research, which was carried out in the mid- to late-1990s at the then-National Archives of Canada, and she states "[a]n analysis … illuminates how the Act, LAC, and ATIP officers themselves played a critical role in the researching and writing …" of her book (p. 146), in the spirit of full disclosure I must state that in the time in question I was employed by the National Archives as an ATIP (Access to Information and Privacy) officer, and that while I do not believe I ever met with her, I do remember her name and believe that it is possible that I worked on some of her requests to access archival records. In addition, she also cited an article of mine from *Archivaria*, dealing with the application of the *Access to Information Act* at the National Archives.

In my own article I conceded that the legislation was imperfect and that its application to archival records could, at times, be difficult, and were that Dr. Gentile's position, there would be little reason to comment on this paper, except to say that yes, I agree. Unfortunately, in her discourse she raises a red flag of warning, seeming to imply that the legislation poses particular problems for researchers into queer history, problems which she has based at least in part upon a misunderstanding of the application of the *Access to Information Act*.

On page 147, in describing section 13 of the Access *to Information Act*, Dr. Gentile states that "[a]s one of the sections quoted by ATIP officers when restricting our access to documents … this exemption marked queers as both

national and international threats. Queers were (and continue to be) discursively constructed as potentially dangerous to national security because historically they have been painted as Communist sympathizers and social threats to heterosexual hegemony." I will not argue as to the merits of the security investigations into homosexuals, except to quote Larry Hannant: "According to one RCMP officer homosexuals were regarded as risks … because they could be subject to blackmail. But given the RCMP's postwar hatred of and determined campaign against homosexuals, it is difficult to believe that using security screening to identify and fire homosexuals did not represent a moral crusade."[1] Having quoted Hannant, however, I must also state that Dr. Gentile's construction that using section 13 to impede her access to the records identifies queers as threats to national security indicates a severe misunderstanding of this, and potentially other sections of this legislation.

Section 13 of the *Access to Information Act* is used to exempt from release information obtained in confidence from another government, whether a foreign nation or a Canadian province/territory or municipality. The exemption is applied as a class, which is to say that if something has been received in confidence it cannot be released unless the originating government agrees to its release or it is demonstrated that they themselves had previously released it. As a class exemption, the content of the information thus exempt may indeed be related to threats to national security, but it may also be fairly innocuous information that the originating government has stated they supplied in confidence and do not wish to be bothered with reassessing as to its inherent sensitivity. Applying section 13 to information received in confidence from another government cannot, in any way, shape, or form, indicate that the subject of the information, if it even deals with an individual, is by virtue of the use of this exemption a security threat or risk. Just as an example of its application, imagine that the municipality where you reside applies to the Federal government for funding for a new highway, and that as part of the application they indicate that they might wish to obtain your property but ask to keep that confidential as it might affect the purchase price. The information is provided in confidence and so if someone submits a request under the *Access to Information Act* the information would be exempt from release subject to section 13 – because it was received in confidence, not because you or anyone else mentioned in the documents is believed to be a threat to national security.

Unfortunately Dr. Gentile further demonstrates a misunderstanding of the application of the *Access to Information Act* in her discussion of section 69. This section deals with records whose release might reveal the content of Cabinet discussions. This is not an exemption to release; rather this type of infor-

1 Larry Hannant, *The Infernal Machine: Investigating the Loyalty of Canada's Citizens* (Toronto, 1995), pp. 159–60.

mation is excluded from consideration under the *Access to Information Act* for twenty years after the creation of the record. Once again this is a class application and the content of the information is not considered, merely its context.

Of greater interest is section 15(1) which actually deals with exempting from release information which could, among other things, hamper the detection or prevention of subversive activities. Included in the wide variety of information which might be withheld under this section is information related to investigative techniques, information which could reveal the confidential source of information, or even in some cases the context of some information, if that context could reveal some intellectual linkages pursued by the security forces. In describing the application of this section, Dr. Gentile also makes a side note (p. 148) concerning the files collected from the former RCMP Security Service, suggesting that the presence of files dealing with various groups "… provide a clear idea as to which segments of the population are considered as subversive in the eyes of the state" (although her inclusion of the FLQ in this listing, as though we should be surprised that they were considered subversive, is at best a little odd), without indicating that an equally valid suggestion might be that the records held by an archives might also reflect the interests of the archivists responsible for making the selection of records for archival retention. Whether or not this is the case, the role of the archivist or archives as gatekeeper should never be overlooked in any comments on what the contents of fonds or collection represent. In any event, Dr. Gentile's position is that the application and use of this section "… functions to uphold the historical and discursive constructions of queers as dangerous and threatening to national security simply by restricting access to documents that reveal security practices taken against them" (p. 149). Or in other words, if you protect investigative techniques or sources you establish queers as threats to national security, a syllogism whose flawed links do not really need to be further explored.

Without going further into the Act's various exemptions, it must be recognized that there are mechanisms for appeal, and that the Office of the Information Commissioner and the Federal Courts play a part in any issues related to the application of this legislation. It should also be mentioned that subsequent to the research done in the 1990s by Dr. Gentile, a new element has been added to the question of the improper application of the *Access to Information Act* – section 67.1. This section was added in 1999 through a Private Member's Bill and states:

67.1 (1) No person shall, with intent to deny a right of access under this Act,
(*a*) destroy, mutilate or alter a record;
(*b*) falsify a record or make a false record;
(*c*) conceal a record; or
(*d*) direct, propose, counsel or cause any person in any manner to do anything mentioned in any of paragraphs (*a*) to (*c*).
(2) Every person who contravenes subsection (1) is guilty of

> (*a*) an indictable offence and liable to imprisonment for a term not exceeding two years or to a fine not exceeding $10,000, or to both; or
> (*b*) an offence punishable on summary conviction and liable to imprisonment for a term not exceeding six months or to a fine not exceeding $5,000, or to both.[2]

The application of this section to any question of improperly withholding access is something which Dr. Gentile should have considered carefully, particularly when taken into context with the last area she examines immediately prior to her conclusion – the effects of 9/11.

According to Dr. Gentile, new anti-terrorism laws have once again placed the queer community under threat from ham-handed security forces. I do not feel qualified to comment upon these concerns, except to indicate that based upon the concerns raised in her discussion of the *Access to Information Act* and its application to archival records I am insufficiently convinced as to the existence of a further threat in the *Anti-Terrorism Act*, and perhaps, from my point of view, that is the most serious flaw of this paper – by exhibiting such a serious misunderstanding of something I do know about, I am loath to accept her concerns about something I do not.

In any event Dr. Gentile has raised some interesting questions, and if I find her understanding of the *Access to Information Act* flawed, her citations can direct the interested researcher to more information on different avenues for queer history and research. What more can any researcher ask than to have provoked more research?

Daniel German
Library and Archives Canada

2 Canada, *Access to Information Act*, R.S. 1985, c.A-1, http://laws.justice.gc.ca/eng/A-1/index.html (accessed 12 February 2010).