

Ji W. Chang. Providing Access to Archival Collections with Private and Potentially Sensitive Materials. A Master's Paper for the M.S. in L.S degree. December, 2011. 61 pages. Advisor: Matthew Turi

This paper provides a single document identifying characteristics of existing archival collections with privacy and access concerns and the methodologies and justifications used to providing access to these collections. Privacy concerns are those regarding third party subjects. Using the content analysis methodology, documented cases and case studies were analyzed to capture relevant information about the collections studied and to address the questions: (1) Do specific characteristics of collections with private materials make them riskier to disclose? (2) What guidelines and/or justifications are used to make access decisions? (3) What unique methods are used to provide access? This paper may provide a fuller understanding of existing privacy and access concerns in the archives and provide manuscript archivists with basic guidelines in making access decisions to collections with private materials.

Headings:

Manuscripts

Privacy

Access

Third parties

PROVIDING ACCESS TO ARCHIVAL COLLECTIONS WITH PRIVATE AND
POTENTIALLY SENSITIVE INFORMATION

by
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Introduction

Legal and ethical factors often complicate the process of providing access to archival collections that contain private information about third parties. Archival collections across repository types typically contain a wealth of information about individuals or entities that were not involved in the decision to make private documents publically available. A privacy and access concern exists in the archives when collections and documentary items of research value disclose private facts, sensitive matters, or confidential information about these parties. Tension may arise for archivists who are professionally obligated to serve societal information needs through providing access to original materials and to protect third party privacy. Existing laws providing individuals the right to defend privacy rights and prohibiting the disclosure of private and sensitive materials may not substantially protect third party privacy. Despite difficulties brought upon by these factors, archivists are accountable for addressing privacy and access concerns.

Archival collections across repository types typically contain items holding information about individuals or entities that were not involved in the decision to make these items publicly available. These unrepresented individuals are third parties. They can be creators or subjects of the collection. The characteristics of manuscript collections, among others, make them likely to contain personal and identifying information about third parties. For instance, correspondence series of manuscript collections typically contains incoming letters written by people other than the creator of the collection.

Unless the author retains copies of outgoing letters, her letters are likely to be kept by others; her outgoing letters may make her a third party. In addition, correspondence, reports, and documents such as diaries and notebooks by the creating body may additionally include personal information about and references to others.

A variety of laws and legal factors prohibit or may complicate the process of providing access to materials containing private information about third parties. A cluster of United States federal laws allow individuals to redress violations of privacy, although there is no single law explicitly pertaining to violations of privacy in an archive. State laws may explicitly pertain to archives and privacy. In addition, a variety of legislation concerning the disclosure of information within specialized fields such as education and healthcare affect access decisions to archival materials. Understanding and applying legal rights may be complicated as existing laws are broad and ambiguous, and ultimately, legal claims are handled on a case-by-case basis in court.

Archivists are socially obligated to apply ethics to all areas of their practice and to take measures to protect individual privacy rights even in cases where law does not explicitly apply. Third parties typically have no control in opening access to materials related to them. While creators or owners of collections can negotiate conditions of access when donating or selling, in many instances privacy of these third party individuals is not accounted for. Hodson (2004) identifies a classic case of third party confidentiality breach related to manuscript collections, where the recipient of letters sells their papers to a repository without the prior knowledge or approval of the letter writers. In some cases, third parties have no knowledge that documents with personal identifying information about them exist, let alone that they are publically available for review.

Addressing privacy and access concerns in the archives is a complicated matter without easy solutions (Danielson, 2010). Still archivists must address these concerns, fulfilling their professional obligations to provide societal information needs and safeguard the privacy of individuals. Access to collections containing private materials and collections may be permitted openly, or with restrictions, at various levels under various access conditions.

Literature Review

Legal Implications

A number of federal and state laws protect the privacy of individuals and prohibit the disclosure of specific types of information about individuals collected by government agencies, businesses, and institutions. The specific piece(s) of information in archival material protected depends on technical definitions of the regulations. Such laws may provide barriers to access to archives.

The right to privacy. The United States Constitution provides the legal grounds for individuals to defend their right to privacy. The Fourth Amendment, “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures” (U.S. Constitution), can be interpreted to include the prevention of the government from unwarranted intrusion into private concerns (MacNeil, 1992).

The tort theory of law is applicable to defending the personal right of privacy and may be used to redress violations of privacy made in the archives, including the disclosure of private facts in public (Behrnd-Klodt, 2005; Carson, 2007; Lipinski, 2002; MacNeil, 1992). Individuals may claim right to privacy on four grounds: intrusion into

seclusion, public disclosure of private facts, false light, and (mis) appropriation (Lipinski, 2002). The grounds of intrusion into seclusion, involving the prying or intrusion in an area where a person is entitled to privacy, and public disclosure of private facts may most concern the archives (Hodson, 2004). The disclosure of private facts, which may be “highly offensive to a reasonable person” and “not of legitimate concern to the public,” offers an individual the grounds to act legally (Behrnd-Klodt, 2005). The interpretation of the tort theory of law is conducted on a case-by-case level, at the state level (Carson, 2007).

Liability, lawsuits, and the awarding of damages do not necessarily follow an unlawful disclosure of private facts (Behrnd-Klodt, 2005). Hodson (2004) states that existing laws on privacy do not sufficiently protect individuals against improper or unwarranted disclosure of private affairs. In looking at suits filed related to privacy and the archives in the past, plaintiffs rarely have won claims (MacNeil, 1992). In addition, third parties who are not aware that materials with information about them are located in an archive obviously cannot file suit.

The Family Educational Rights and Privacy Act. The Family Educational Rights and Privacy Act of 1974 (FERPA) is a federal law that protects the privacy of student education records. The law applies to all schools that receive funds under an applicable program of the U.S. Department of Education (FERPA, 1974). The law does not provide a formal definition of what constitutes an “education record” but the regulatory context implies that they are records, files, documents, and other materials that contain information directly related to a student and are maintained by an educational

agency or institution, or by a person acting for such agency or institution¹. FERPA's protection ceases upon student's death (FERPA, 1974). Except under certain circumstances, education records held in an archive cannot be legally disclosed.

FERPA, 34 CFR Section 99.31 provides several conditions under which records may be disclosed. They include: "School officials with legitimate educational interest; Other schools to which a student is transferring; Specified officials for audit or evaluation purposes; Appropriate parties in connection with financial aid to a student; Organizations conducting certain studies for or on behalf of the school; Accrediting organizations; To comply with a judicial order or lawfully issued subpoena; Appropriate officials in cases of health and safety emergencies; and State and local authorities, within a juvenile justice system, pursuant to specific State law" (FERPA, 1974). In addition, directory information such as a student's name, address, telephone number, date and place of birth, honors and awards, and dates of attendance may be disclosed (FERPA, 1974).

Logically, academic archives such as university archives seem most likely to hold records; still protected records may also fall into other archival collections (Yaco, 2011). For instance, the personal papers of a former educator in a manuscript library may hold grade books and other files that are education records.

The broad nature of the definition of an education record allows for various interpretations and may create difficulties when making access decisions. Ultimately, archivists are left to make interpretations of which documents in their holding are protected by FERPA (Yaco, 2011). In cases where archivists are not legal experts or have

¹ U.S. Department of Education Website Family, General, Education Rights and Privacy Act
<http://www2.ed.gov/policy/gen/guid/fpco/ferpa/index.html>

no legal counsel to consult, they must make decisions in providing access that might be legally risky.

The Privacy Rule of Health Insurance Portability and Accountability Act.

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) provides standards for the protection of private health information. Specifically, the Privacy Rule of HIPAA (2003) protects confidential information in health records, directly affecting health archivists and often those with health records in their holdings. The rule protects only records created or received by covered entities containing individually identifiable health information from unwarranted disclosure (HIPAA, 2003). HIPAA's protection applies retroactively, protecting the records of the deceased with no expiration date (HIPAA, 2003). Lawrence (2007) asserts that the language of the Privacy Rule is highly technical and dense.

A covered entity may be any "person, business, or agency" that provides, bills or receives payment for medical care and transmits protected health information "already [saved] in electronic storage media" (Lawrence, 2007). These include health care providers such as doctors, clinics, and pharmacies, health plans such as health insurance providers, HMOs, and company health plans and health-care data clearinghouses (U.S. Department of Health & Human Services, 2011).

The Privacy Rule does not apply to familiar categories of documents (e.g. hospital records, physicians' casebooks) just because they contain personal medical information about patients (Lawrence, 2007). Lawrence (2007) asserts that the term is "not a common sense catch-all term for all the people, institutions, agencies, and businesses involved in

health care” (Lawrence, 2007, p. 431.)

HIPAA affects archives despite the fact the majority of libraries and archives, even some specializing in the health care arena, are not considered as covered entities. Covered health records may still fall into archives and archivists and researchers must both take responsibility for their appropriate use (Lawrence, 2007). Yaco (2010) describes the context in which an item from an academic records collection may still be protected under HIPAA— handwritten notes about a student’s mental health of a clinical worker who works for a covered entity. In addition, the Rule defines new standards and expectations for privacy and those managing non-covered archives may decide to impose HIPAA-like policies on their collections (Lawrence, 2007).

Public records and The Freedom of Information Act. The Freedom of Information Act (1966) (FOIA) is a law that ensures public access to government records (Freedom of Information Act, 5 U.S.C. Section 552). FOIA (1966) allows individuals to request for the full or partial disclosure of government records and documents that have been previously unreleased for the purpose of serving the public’s right to knowledge. The public possesses equal access to records of the U.S. government.

However, FOIA provides nine categories of exemptions to the access of federal documents². Documents of the National Archives that contain information falling in one or more of these categories may not be disclosed (5 U.S.C. § 552[b] of FOIA).

² Exemption (b)(1) - National Security Information; Exemption (b)(2) - Internal Personnel Rules and Practices - "High" (b)(2) - Substantial internal matters, disclosure would risk circumvention of a legal requirement - "Low" (b)(2) - Internal matters that are essentially trivial in nature; Exemption (b)(3) - Information exempt under other laws; Exemption (b)(4) - Confidential Business Information; Exemption (b)(5) - Inter or intra agency communication that is subject to deliberative process, litigation, and other privileges; Exemption (b)(6) - Personal Privacy; Exemption (b)(7) - Law Enforcement Records that implicate one of 6 enumerated concerns; Exemption (b)(8) - Financial Institutions; Exemption (b)(9) - Geological Information (5 U.S.C. § 552[b] of FOIA).

Furthermore, laws governing access to public records may be handled at the state level. Each state has its own set of laws and codes for governing access to records, including own interpretations of FOIA.

Additional laws. A list of federal laws that may affect the archives entitled “Selected US Federal Statutes Concerning Privacy” is provided in the appendix of the publication *Privacy & Confidentiality Perspectives: Archivists & Archival Records* by Behrnd-Klodt, M. & Wosh, P (2005)³.

Ethical Obligations of the Archivist

Protection of individual’s privacy, serving societal information needs.

Archivists are professionally obligated to apply ethics to all areas of practice, including safeguarding individual privacy when the law does not protect the disclosure of documents containing private or confidential information (Danielson, 2010). At the same time, archivists are obligated to meet the information needs of society. Archivists then, are responsible for protecting individual privacy, “without engaging unwittingly in censorship” (Hodson, 1991, p. 110). They must ensure that they are “maintaining the confidentiality of records and protecting individual privacy while seeking the most complete openness [of access]” (Schwarz, 1992, p. 179). They often times are left with an ethical dilemma in choosing between protecting an individual’s right to privacy or serving the public’s right to knowledge.

³ Behrnd-Klodt, M. A., & Wosh, P. (Eds.). (2005) *Privacy & Confidentiality Perspectives: Archivists & Archival Records*. Chicago, IL: The Society of American Archivists.

The Society of American Archivists' Code of Ethics for Archivists. A code of ethics may provide a guide for professionals in making ethical decisions in their area of practice (Danielson, 2010). The Society of American Archivists (SAA) provides a Code of Ethics for Archivists⁴ that may serve as a framework for members of the profession when making access decisions. The code states that it is the archivist's duty to protect the privacy rights of donors and individuals or groups who are the subject of records (SAA, 2005). Archivists should "respect all users' right to privacy by maintaining the confidentiality of their research and protecting any personal information collected about them in accordance with the institution's security procedures" (SAA, 2005). They may place restrictions on access for the protection of privacy or confidentiality of information in the records (SAA, 2005). The code asserts that additional, unspecified measures should be taken to protect third parties (SAA, 2005).

Access Policies and Donor Agreements

A repository often times implements a formal access policy to manage access to their holdings (Geselbracht, 1986). Geselbracht (1986) traces the development of access restrictions and procedures employed by the manuscript department and public archives sector of the Library of Congress, the National Archives, and state archives. Two prominent forms of restrictions were imposed through historical manuscript administration: selective access, or the reservation of the donor or representative to approve applications for access, and absolute restrictions on materials for fixed periods of times (Geselbracht, 1986). The public archives sector functions under the principle of providing equal access and does not implement the method of selective access

⁴ Society of American Archivists, Code of Ethics for Archivists <http://www2.archivists.org/standards/code-of-ethics-for-archivists>

(Geselbracht, 1986). Restrictions on access may be donor-imposed and/or repository-imposed.

Donor agreements or deeds of gifts are “covenants that archivists make with donors to exchange restrictions, where the donor requires them, for possession, control, and preservation of the documents” (Geselbracht, 1986, p. 152). Restrictions are often determined upon the original acquisition of collection and formalized by the deed of gift. (Pyatt, 2005; Geselbracht, 1986). Archivists may aim to negotiate agreements where restrictions are held to a minimum, to provide fullest access to information. Still, donors may or may not hold ties to third parties involved in the collection and negotiating with donors does not necessarily address all issues relating to access and third party privacy.

Purpose of Analysis

This paper will serve as a single document that identifies the characteristics of existing archival collections with privacy and access concerns and the methodologies and justifications used in making access decisions for the intended audience of these manuscript collections. It may provide a deeper understanding of existing privacy and access concerns in the archives and provide manuscript archivists with a basic guidelines in making access decisions to collections in their holding. The aim in providing a guidelines is to allow for an increase of collections and materials for access while still protecting the privacy of individuals. Documented cases and case studies have been analyzed using the content analysis method as a qualitative data reduction and sense-making effort from a volume of qualitative materials in an attempt to find patterns and consistencies (Patton, 2002).

Research Questions

The following research questions will be addressed:

- RQ1. Do specific characteristics of collections holding private materials make them riskier to disclose?
- RQ2. What guidelines and/or justifications are used to make access decisions?
- RQ3. What unique methods are used to provide access?

The paper may also serve as an informative source in the arena of privacy and access in the archives at large. Documenting the specific characteristics of private and sensitive materials at the root of the access concern may aid in the formation of a definition(s) for the term “sensitive materials.” Furthermore, findings of the analysis may reveal consistencies in concerns and methodologies used in the arena of privacy and access concerns in the archives.

Methodology

Content Analysis

Each case study, and in several cases the surrounding body of literature, was analyzed to capture relevant information about the collection studied and address each research question. The findings captured through the analysis are presented in two forms, as annotations and as a list of key findings parsed by categories. Both forms may serve as basic guidelines for manuscript archivists in making or understanding access decisions.

Annotations, in “Content Analysis Findings: Part One,” provide characteristics of the collection causing the privacy and access concern, details of the associated privacy

and access concern, and methodologies undertaken to provide access to the collection. Contextual information from the surrounding body of literature and related access policies, finding aids, or processing manual is included, if appropriate, for a fuller understanding of collections and the environment in which access decisions were made.

A list, in “Content Analysis Findings: Part Two,” identifies the key characteristics of collections, concerns, and methodologies according to several categories. These categories were created to allow for a more consistent reporting of the findings.

Case studies include those of manuscript collections as well as academic, government, and health records. As MacNeil (2005) states, “detailed analyses of the nature of the privacy interests inherent in different types of records are urgently required to enable archivists to make more thoughtful and informed judgments about the varying degrees of sensitivity associated with specific records and the types of harm implicated in their disclosure (MacNeil 2005, p. 79). The assortment may further provide different perspectives, information, and solutions to privacy and access concerns in manuscript collections.

Research Questions

RQ1. Do specific characteristics of collections holding private materials make them riskier to disclose? To address Research Question One, annotations have been organized by the case subject’s collection type, as a manuscript collection, or education, government, or health records. Each provides a brief summary of the collection, including at least a descriptive statement about the scope and content of the collection and its initial acquisition information. Each states the privacy and access concern and

describes the characteristics of the materials causing the concern. Additional related contextual information is documented. The concern that record subjects are still living has not been included, as all collections studied, being 20th century collections, faced this concern. The level of research interest in the entire collection is included if it was documented.

Categories. The list presents this information into the categories “Collection Type,” “Materials in Question,” “Material Scope and Content,” and “Research Interest.”

RQ2. What guidelines and/or justifications were used to make access decisions? To address Research Question Two, each annotation specifies the access decision, whether the collection has been closed in its entirety, select material has been restricted, or is open for research. The adherence or influence of any guidelines to make the decision is documented, including legislation prohibiting or promoting the disclosure of certain material, specific institution-based policies, and donor agreements. Any mention of consultation among staff and institutional members as a step used in making decisions has not been documented, as this is usually obvious and required in most decision-making processes of an archive. However, readers should be aware that some case studies might not document all guidelines used.

Categories. Categories include “Access Decision” and “Guidelines.”

RQ3. What unique methods are used to provide access? To address Research Question Three, the annotation will summarize any additional or unique methods implemented to provide access to the materials of concern.

Categories. This has been categorized as “Unique method.”

Sample

Cases in manuscript collections, education, government, and health records have been selected for this study based on availability and relevance to provide a source to aid in the understanding of existing privacy and access concerns documented in archival literature. The analysis may not provide a realistic representation of all existing concerns in the field at large, as all are not documented. Readers should keep in mind that the analysis may be skewed because of the distribution of the sample.

Due to the availability of formal case studies, descriptive instances documented in literature are considered as a “case” and included in the analysis. To qualify, each description must provide an identified collection, its scope and contents, the related privacy and access concern, and the access decision and justification. In the situation where a work of literature documents more than one case, each will be analyzed as a unique entity.

Certain articles presented several cases. From these, only those that qualify as a “case” have been considered for this study. For instance, a single article pertaining to privacy and access concerns related to literary manuscript collections presents a number of specific cases. Three cases presenting unique characteristic, factor, or methodology have been extracted from this case and analyzed as a unique case study.

All case subjects are of 20th century, modern collections.

Selected Case and Case Studies. Selected cases are from case studies and articles of the publications the *American Archivist*, *Archivaria*, *Archival Issues*, *Archival Science*, and the book *Privacy & Confidentiality Perspectives: Archivists & Archival Records*. The majority of the literature has been selected from the Society of American Archivist's Privacy and Confidentiality Roundtable's Privacy and Confidentiality Bibliography, which is a compilation of works relating to privacy and access in the archives. These publications were searched independently to locate additional relevant literature. Selected cases have been classified by collection type: Manuscript Collections, Academic Records, Government Records, and Health Records.

Manuscript collections, papers of high-profile celebrities.

- Case One: Stanley Milgram Papers, 1927-1993(inclusive). From "The Stanley Milgram Papers: A Case Study on Appraisal of and Access to Confidential Data Files," (Kaplan, 1996).
- Case Two: Ted Kaczynski Papers, 1996-. From "Letters to the Unabomber: A Case Study and Some Reflections," (Herreda, 2004).

Manuscript collections, literary papers.

- Case Three: Papers of Christopher Isherwood, 1864-1997. (bulk 1925-1985). From "In secret kept, in silence sealed: privacy in the papers of authors and celebrities," (Hodson, 2004).
- Case Four: Papers of Patrick Balfour, Baron Kinross, 1922-1976. From "In secret kept, in silence sealed: privacy in the papers of authors and celebrities," (Hodson, 2004).
- Case Five: Papers of Kingsley Amis, 1941-1995. From "In secret kept, in silence sealed: privacy in the papers of authors and celebrities," (Hodson, 2004).
- Case Six: Walker Percy Papers, circa 1910-1992. From "Southern Family Honor Tarnished? Issues of Privacy in the Walker Percy and Shelby Foote Papers," (Pyatt, 2005).

Manuscript collections, lawyers' papers.

- Case Seven: John Diefenbaker Fonds, 1815-1979 (inclusive), 1940-1979 (predominant). From "The acquisition of lawyers' private papers," (Whyte, 1984).

Manuscript collections, presidential papers.

- Case Eight: Papers of Franklin D. Roosevelt, 1636-1945. From "The Origins of Restrictions on Access To Personal Papers at the Library of Congress and the National Archives," (Geselbracht, 1986).

Note: The privacy and access concern relating to this collection is not related to the privacy of third parties. However, the study provides guidelines in providing access to collections including screening for privacy concerns that may be of value to this analysis.

Academic records.

- Case Nine: Black Gold Regional Division No. 18 Fonds, 1900-1994. "Little School on the Prairie: School District Records at the Provincial Archives of Alberta," (Cook, 2009).
- Case Ten: Papers of the Norfolk Public Schools, 1922-2008. "Balancing Privacy and Access in School Desegregation Collections: A Case Study," (Yaco, 2011).
- Case Eleven: Pupil Placement Board Records, 1958-1966. "Balancing Privacy and Access in School Desegregation Collections: A Case Study," (Yaco, 2011).
- Case Twelve: Special Collection on the Prince Edward County Virginia School Closing, "Balancing Privacy and Access in School Desegregation Collections: A Case Study," (Yaco, 2011).

Government records.

- Case Thirteen: Stasi Records, 1940s-1980s. From "Privacy Rights and the Rights of Political Victims: Implications of the German Experience," (Danielson, 2004).
- Case Fourteen: Mississippi State Sovereignty Commission Records [electronic resource], 1994-2002, 1956-1973. From "Balancing Privacy and Access: Opening the Mississippi State Sovereignty Commission Records," (Rowe-Sims, 2005).

Health records.

- Case Fifteen: HealthConnect as an exemplar, 2000. “Recordkeeping research tools in a multi-disciplinary context for cross-jurisdictional health records systems,” (Iacovino, 2008).

Content Analysis

Content Analysis Findings: Part One

Manuscript collections, papers of high-profile celebrities

Case One. The Stanley Milgram Papers, 1927-1993 (inclusive). Yale University Library, Manuscript and Archives. Yale University Library’s Manuscripts and Archives acquired the papers of social scientist Stanley Milgram from his wife after he passed. Milgram worked as an assistant professor of psychology at Yale from the early 1960s and is best known for his controversial experiments on human behavior, especially obedience to authority. Many of his experiments used human subjects. The collection consists of his professional papers in various formats including correspondence, research files, writings files, teaching files, and raw data files. The raw data files consist of data collected in the course of his behavioral studies and include personal identifying information. The accumulated data includes lists of subjects, correspondence with subjects, questionnaires and other forms completed by subjects, audio and video recordings of experiments, and transcripts of interviews. Experiments were conducted prior to the establishment of Institutional Review Board and the subjects were not required to sign a release form to this information. The obedience study files on authority generated the most research interest.

The repository worked in conjunction with the Yale Faculty of Arts and Sciences Investigation Committee to make access decisions. Raw data files of all experiments are restricted. It was assumed that subjects of past experiments should be given the same protection that current research subjects receive. Based on the donor agreement, these records are sealed for 75 years from the date of a specific experiment. Researchers may be granted access to restricted materials upon approval from the Committee. Researchers must assure they will protect the identities of persons in the records and submit a research proposal. The committee considered implementing a written waiver binding the researcher to the promise of anonymity, but decided against it since the committee also determines that the value of a research project outweighs the subject's right to privacy.

In addition, files may be sanitized upon user request and payment of a fee. Subject names are removed from paper files through the photo reproduction of original material, removal of private information, and the photo reproduction of the "sanitized" file. Audio recordings may be sanitized as well. Any sanitized file will be maintained as part of the collection and made available for researchers until the restriction is lifted off the original un-sanitized records. The entirety of the restricted data files has not been sanitized due to the extent of the files and the associated costs of redaction. It is assumed that research demand for access will also help with an appraisal of the paper-based data file and after seventy-five years it will have a clear idea of which data files are of interest to scholars.

Case Two. Ted Kaczynski Papers, 1996-. University of Michigan Library, Labadie Collection. The Labadie Collection acquired the papers of Ted Kaczynski, the convicted "Unabomber," from Kaczynski himself. The curator of the Labadie pursued

these materials, believing the collection would fit well with the Labadie Collection. The Labadie maintains a policy of “collecting retrospective as well as contemporary materials that document activists and radical movements throughout the world” (Herreda, 2004, p. 36). The collection consists of correspondence, publications, pamphlets, serials, and clippings sent to Kaczynski, and court documents related to his appeal process.

Correspondents included a variety of people such as academics, professionals, activists, those expressing romantic interest, and other prisoners. The subject matter ranged “from mathematics to the environment, philosophy to physical or mental illness, depression, and family and job issues” (Herreda, 2004, p. 40). The disclosure of the correspondents’ identities was the curator’s biggest concern, because of the high level of public attention Kaczynski drew. The collection generated a high level of research interest.

To provide access to the collection, the curator followed the stipulations of the deed of gift, the policies of other institutions, and the SAA’s “Code of Ethics for Archivists” as guidelines. Kaczynski had requested restrictions on private correspondence, concerned about privacy of his correspondents. The various time spans of restrictions included the year 2020, upon the time of his death, and 20 years following his death. Identifying information (correspondent names, addresses, phone numbers, and at times, place names) from private correspondence was redacted through a sanitization process. Letters written by public figures were not sanitized. The curator states that the process was “very time-consuming,” but the only precise method... found” (Herreda, 2004, p. 42).

Manuscript collections, literary papers

Case Three. Papers of Christopher Isherwood, 1864-1997, (bulk 1925-1985).

The Huntington Library. *Note: The privacy and access concern of this collection is related to materials that were published prior to the Library's acquisition of the original manuscripts.* The Huntington Library purchased the papers of British-American author Christopher Isherwood from Isherwood's heir and long-term partner. The collection includes diaries, drafts of works, correspondence, poems and other literary manuscripts by third parties, photographs, and other material (The Huntington, 2011). The diaries, contained passages potentially embarrassing to those still living.

Some of the original diaries had been previously published, with select passages omitted. The donor and seller of the collection had worked with the publishing editor before publication. However, a footnote with private information was overlooked and published. When an Isherwood family member discovered this information, he threatened legal action. Subsequently, the donor and seller agreed to impose a restriction on the original diaries in the Isherwood Papers. The diaries have been sealed for a time span of thirty years, which was determined based on the ages and likely life span of third parties mentioned in the diaries.

Case Four. Papers of Patrick Balfour, Baron Kinross, 1922-1976. The

Huntington Library. The Huntington Library acquired the papers of travel writer Patrick Balfour, 3rd Baron Kinross, from a British dealer. The papers include manuscripts, correspondence, and other ephemera from a wide span of Lord Kinross' literary career. Various notable persons in the literary field are included in the collection (The Huntington, 2011). The correspondence files contained numerous letters with "intimate,

confessional details” (Hodson, 2004, p. 200), from closeted gay men, many of whom were still living. Disclosing the letters might lead to the outing of these men.

Kinross was deceased at the time of the acquisition, unmarried, and with no descendants, and therefore there was no way to determine whether the matters in the letters were documented in these letters alone or disclosed to others. By the time an access decision was required, the archivist determined enough time had passed since Kinross’ death and that the correspondence could be disclosed without risking privacy. Hodson calls this a “decision-by-default” (Hodson, 2004).

Case Five. Papers of Kingsley Amis, 1941-1995. The Huntington Library. The Huntington Library acquired the Papers of Kingsley Amis in successions, each directly under Amis and his literary agent. The papers include drafts of his works, manuscript pieces by third parties, and correspondence dealing with personal and literary matters (The Huntington, 2011). Amis and another individuals retained ownership of the literary copyright (The Huntington, 2011). In one transfer, Amis requested that certain materials be restricted until his death. Of the items to be sealed, one was the manuscript of an unpublished novel that Amis did not want readers to misinterpret as autobiographical (per his privacy). Other sealed materials included correspondence written to Amis from the poet Philip Larkin that contained frank comments about mutual friends that were still living. Amis did not want these individuals to know what had been written about them until after his own death.

Upon the donor’s request, the Library agreed to seal these items; they were opened when Amis passed away.

The Access Policy of the Huntington Library. The Huntington Library provides selective access to its holdings. The Huntington Library's website provides a general statement regarding access to its collections, "The Library provides access to these materials in its reading rooms, where they may be studied by qualified scholars, known as readers"⁵

Researchers interested in using the Library's holdings must apply to gain reader access. Separate processes exist for faculty members, doctoral students, and independent scholars. All applications require the submission of the personal and professional information of the applicant and details about their proposed research, such as the subject of study and topic of research. The Library's website does not specify if approved readers are required to undergo the application procedure for every unique research visit or project, a specified amount of time, or if the approval gains lifelong membership.

The application for faculty members is the briefest, and requires the aforementioned information. The application for doctoral students requires an additional letter from a dissertation advisor confirming a would-be reader's doctoral candidate status and describing the proposed research and research needs. The application for independent scholars requires a summary of their research project and proposed product, a list of libraries previously consulted, a list of published works, a list of the specific materials in the Huntington's collections desired, the expected amount of time for research, and two letters of reference from scholars.

Case Six. Walker Percy Papers, circa 1910-1992. University of North Carolina at Chapel Hill Library, Southern Historical Collection. The Southern Historical

⁵ (Retrieved August 13, 2011 from <http://www.huntington.org/huntingtonlibrary.aspx?id=584&linkidentifier=id&itemid=584>).

Collection acquired the papers of Walker Percy over the course of several years through negotiations with Percy and his heirs. Percy had passed away during the negotiation period. Upon the initial acquisition, the SHC and the creator Percy created a loan agreement with terms of access. Following Percy's death, his widow and daughter had become the proprietary co-owners of the papers, owning copyright and other intellectual property rights. The Papers contain drafts, typescripts, correspondence from other authors such as Allen Tate, Caroline Gordon, and Shelby Foote, and other material. Matters of concern included the disclosure of the sexual orientation about an identified Percy family member and depression in the family. In addition, correspondence revealed details about third parties. For instance, information in the correspondence from Shelby Foote revealed private matters such as his tendencies towards writer's block, depression, womanizing, and heavy drinking. This collection generated a high level of attention among researchers, and several biographies, social histories, and websites were created using these material. The Percy Family were heavily interested in the use of these papers, concerned about the family's reputation, and ways in which Walker Percy's life and career are portrayed in publications.

To make access decisions, the archivists worked closely with the author, heirs, and their literary agents. They maintained a good relationship with these individuals, sending updated copies of inventory as new items are received and current copies of researcher agreements and use policies.

Examples of the use of the collection: Historian Bertram Wyatt-Brown worked with the collection in writing the *House of Percy*. While the Percy family was concerned about the discussion of a family member's sexuality and in one instance warned Wyatt-

Brown about a possible libel lawsuit, the *House of Percy* did not focus on his sexuality and did not cite any questionable sources. The online “Walker Percy Project – an internet literary center”⁶ was created using materials in the public domain. The site curator requested the use of SHC materials and the SHC staff treated him as it did any other researcher. However, the creator of this website learned that the Percy Family literary agent would have to grant permission to post items from papers online, and chose not to undergo this process. Other materials, not subject to the estate’s review process, were selected to publish on the website.

*The Walker Percy Papers, circa 1910-1992, Finding Aid*⁷. The Walker Percy Papers, circa 1910-1992, currently has access and use restrictions. The finding aid provides researchers with brief statements regarding these restrictions. Materials of a specific series are closed for research, several materials have not yet been processed, and the entire collection is prohibited from copying. For example, the Restrictions to Access element states: “Series VI contains materials closed to research at the request of Mary Bernice Townsend Percy.”⁸ The lengths of the restrictions are not specified.

Manuscript collections, lawyers’ papers

Case Seven. Rt. Hon. John Diefenbaker papers, 1815-1979 (inclusive); 1940-1979 (predominant). University of Saskatchewan and the Public Archives of Canada.

The University of Saskatchewan owns the papers of Rt. Hon. John Diefenbaker. The papers include a series on his law career. The series contains notes on cases, correspondence with clients and witnesses, memoranda, copies of court documents, other

⁶ Walker Percy Project – an internet literary center <http://www.ibiblio.org/wpercy/>

⁷ Retrieved August 12, 2011 from <http://www.lib.unc.edu/mss/inv/p/Percy,Walker.html>

⁸ (Retrieved August 12, 2011 from <http://www.lib.unc.edu/mss/inv/p/Percy,Walker.html>)

vital information concerning the cases in which he was involved, legal diaries, ledgers, correspondence with colleagues and various professional associations, and office "housekeeping" files. Much of the information is protected by the solicitor-client privilege, a confidentiality agreement between the lawyer and the client.

The University worked with the Public Archives of Canada to provide access to the collection. Court documents in the public domain, solicitor's notes, other than those made during interviews with clients, and documents with financial information were determined to be accessible. The Archives removed documentation of solicitor-client communication. Drawing upon various legal regulations, the types of excluded documents include: documents in existence prior to the retention of the lawyer, delivered to him by the client or a third party; documents prepared by the lawyer for the benefit of, and paid for by his client (this would include all drafts and copies); letters sent by a third party to the lawyer concerning the action; and notes made at interviews with the client.

To open the collection for access, the archives sanitized materials with private information. Private information was censored through producing reproductions, removing offending frames, then developing another set of positive copies. The original documents were removed. To access the collection, users are required to sign a form requesting that personal identifiers will not be revealed in published works. It is noted that this methodology is not applicable to all situations because of the costs and labor involved

Manuscript collections, presidential papers

Case Eight. The Papers of Franklin D. Roosevelt, 1636-1945. Franklin D. Roosevelt Presidential Library, the National Archives and Records Administration.

Franklin D. Roosevelt donated his personal papers to the United States government and established the first presidential library, to be administered by the National Archives. The papers consist of a variety of documents that were created while Roosevelt was serving his terms as the President of the United States; materials include official state papers and personal correspondence. During this time period, Presidents' papers were the personal property of the President and were acquired as manuscripts. Roosevelt's papers were the first set of presidential papers that were turned over to a public repository immediately following the president's term. Roosevelt stipulated the conditions that would govern access to the papers in a deed of gift; however, the language of the deed was vague and Roosevelt passed amidst the transfer of the papers. A joint resolution of Congress that accepted the papers and the creation of the library placed the responsibility of prescribing regulations governing the use of the papers on the Archivist of the United States. The contemporary character of the materials and their relation to national events and policies made making access decisions difficult.

Roosevelt's deed of gift stipulated that the papers would be reviewed prior to the transfer for necessary restrictions and that he would provide general categories of restrictions as a guide. A personally designated Committee of Three would conduct the review if he were unable. Roosevelt provided a few examples of the kinds of documents to be regarded as personal and the time span of their restrictions: the average of ten to fifteen years, some fifty years. Roosevelt did not create a full list of restriction categories and overall, the language in the deed of gift was vague. The papers already in the

Roosevelt Library were presumed under the control of the National Archives. Those still in the White House files still required review for restrictions and were presumed to be under the control of the Committee of Three.

Through a number of proposals and debates, Archives and White House leadership determined that the National Archives' access policy would consist of a page-by-page review process that would guide the process of opening the Roosevelt papers. The task of reviewing the documents was extended from the Committee to include several archivists due to the volume of the materials. The bulk of the responsibilities were transferred to the Archivist of the US. Ultimately eight categories were specified: "investigative reports on individuals; applications for positions; documents containing derogatory remarks concerning the character, loyalty, integrity, or ability of individuals; documents containing information concerning individuals; documents containing information concerning personal or family affairs of individuals; documents containing information of a type that could be used in the harassment of living persons or the relatives of recently deceased persons; documents containing information whose release would be prejudicial to national security; and documents containing information whose release would be prejudicial to the maintenance of friendly relations with foreign nations" (Geselbracht, 1986, p.158). In addition, those "of confidential communications addressed to the president" (Geselbracht, 1986, p.158), were to be restricted. As papers of the National Archives, the policy insisted upon equal access to papers. Five years after Roosevelt's death, about eight-five percent of the papers were opened for research. The Franklin D. Roosevelt Library currently houses the papers of Roosevelt and others donated collections.

This method has developed throughout time and the page-by-page review process in accordance to general restriction categories continues as the National Archives' main technique for providing access to presidential papers.

Presidential Records Act of 1978. The Presidential Records Act of 1978 (44 U.S.C. Chapter 22)⁹ governs the official records of Presidents and Vice Presidents created or received after January 20, 1981, including their access. Presidential records are transferred to the National Archives and the people of the United States. The Act formally transfers ownership, possession, and control of Presidential records from the President to the People of the United States (44 U.S.C. § 2202). The Act authorizes the bulk of the responsibilities in the determining restrictions to the Archivist of the United States. The President's right to manage and exercise control over the records are limited to the duration he is in office (44 U.S.C. § 2203). He may dispose of papers that no longer have administrative, historical, informational, or evidentiary value (44 U.S.C. § 2203). The Act specifies that the President will specify the durations of restricted materials, which will not exceed twelve years, prior to the conclusion of his term of office or last consecutive term of office (44 U.S.C. § 2204). Section 2204 Restrictions on Access to Presidential Records provides six categories under which materials are to be restricted.¹⁰

⁹ <http://www.archives.gov/presidential-libraries/laws/1978-act.html>

¹⁰ Restrictions on access to Presidential records (Presidential Records Act of 1978, Section § 2204) (a) Prior to the conclusion of his term of office or last consecutive term of office, as the case may be, the President shall specify durations, not to exceed 12 years, for which access shall be restricted with respect to information, in a Presidential record, within one or more of the following categories: (1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) in fact properly classified pursuant to such Executive order; (2) relating to appointments to Federal office; (3) specifically exempted from disclosure by statute (other than sections 552 and 552b of title 5, United States Code), provided that such statute (A) requires that the material be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of material to be withheld; (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential; (5) confidential communications requesting or submitting advice, between the President and his advisers, or between such advisers; or (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. (b)(1) Any

Executive Orders. President Ronald Reagan established Executive Order 12667¹¹ in January 1989 mandating policies and procedures for the disclosure of Presidential records by the National Archives pursuant to the Presidential Records Act of 1978. Executive Order 13233¹² of President George W. Bush issued November 1, 2001 superseded that of President Reagan. Executive Order 13849¹³ of President Barack Obama issued on January 29, 2009 superseded that of President Bush.

The Freedom of Information Act and presidential records. The Presidential Records Act of 1978 makes Presidential records subject to the Freedom of Information Act five years after the President left office (Duggan, personal communication, 2011). Presidential libraries operating under the National Archives are required to conduct a page-by-page review to locate materials to be restricted under nine categories (Freedom of Information Act, 5 U.S.C. 552 [b]).

Presidential record or reasonably segregable portion thereof containing information within a category restricted by the President under subsection (a) shall be so designated by the Archivist and access thereto shall be restricted until the earlier of-- (A)(i) the date on which the former President waives the restriction on disclosure of such record, or (ii) the expiration of the duration specified under subsection (a) for the category of information on the basis of which access to such record has been restricted; or (B) upon a determination by the Archivist that such record or reasonably segregable portion thereof, or of any significant element or aspect of the information contained in such record or reasonably segregable portion thereof, has been placed in the public domain through publication by the former President, or his agents. (2) Any such record which does not contain information within a category restricted by the President under subsection (a), or contains information within such a category for which the duration of restricted access has expired, shall be exempt from the provisions of subsection (c) until the earlier of-- (A) the date which is 5 years after the date on which the Archivist obtains custody of such record pursuant to section 2203(d)(1); or (B) the date on which the Archivist completes the processing and organization of such records or integral file segment thereof. (3) During the period of restricted access specified pursuant to subsection (b)(1), the determination whether access to a Presidential record or reasonably segregable portion thereof shall be restricted shall be made by the Archivist, in his discretion, after consultation with the former President, and, during such period, such determinations shall not be subject to judicial review, except as provided in subsection (e) of this section. The Archivist shall establish procedures whereby any person denied access to a Presidential record because such record is restricted pursuant to a determination made under this paragraph, may file an administrative appeal of such determination. Such procedures shall provide for a written determination by the Archivist or his designee, within 30 working days after receipt of such an appeal, setting forth the basis for such determination. (c)(1) Subject to the limitations on access imposed pursuant to subsections (a) and (b), Presidential records shall be administered in accordance with section 552 of title 5, United States Code, except that paragraph (b)(5) of that section shall not be available for purposes of withholding any Presidential record, and for the purposes of such section such records shall be deemed to be records of the National Archives and Records Administration. Access to such records shall be granted on nondiscriminatory terms. (2) Nothing in this Act shall be construed to confirm, limit, or expand any constitutionally-based privilege which may be available to an incumbent or former President. (d) Upon the death or disability of a President or former President, any discretion or authority the President or former President may have had under this chapter shall be exercised by the Archivist unless otherwise previously provided by the President or former President in a written notice to the Archivist. (e) The United States District Court for the District of Columbia shall have jurisdiction over any action initiated by the former President asserting that a determination made by the Archivist violates the former President's rights or privileges.

¹¹ Executive Order 12667--Presidential Records <http://www.archives.gov/federal-register/codification/executive-order/12667.html>

¹² Executive Order 13233--Presidential Records <http://www.archives.gov/about/laws/appendix/13233.html>

¹³ Executive Order 13489--Presidential Records <http://www.archives.gov/federal-register/executive-orders/2009-obama.html> - 13489

The Ronald Reagan Presidential Library uses a template with these restriction codes¹⁴ to guide the review process, which is conducted during processing. The Nixon Library is the only Presidential library following a separate review process. National Archives seized the papers of President Nixon, as stipulated by Congress and the passage of the Presidential Recordings & Materials Preservation Act (Duggan, personal communication, 2011).

Academic Records

Case Nine. Black Gold Regional Division No. 18 Fonds, 1900-1994. Provincial Archives of Alberta. The Provincial Archives of Alberta received accessions of the records of the Black Gold Regional Division No. 18 school district from the several donors, the Division itself and various private bodies, over the course of six years. The textual records consisted of daily school registers, budgets, surveys, evaluations, and correspondence. Records created by public bodies are protected under the Canadian Freedom of Information and Protection of Privacy Act (FOIP). Daily school registers contain personal information including student names, birthdates, home addresses,

¹⁴ Freedom of Information Act – [5 U.S.C. 552 (b)] B1. National security classified information [(b)(1) of the FOIA]; B2. Release could disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]; B3. Release would violate a Federal statute [(b)(3) of the FOIA] B4 Release would disclose trade secrets or confidential commercial or financial information [(b)(4) of the FOIA] B6. Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]; B7. Release would disclose information compiled for law enforcement purposes; [(b)(7) of the FOIA]; B7a. Release would disclose information concerning pending or prospective law enforcement proceedings; [(b)(7a) of the FOIA]; B7b. Release of information would deprive a person of a right to a fair trial or an impartial adjudication; [(b)(7b) of the FOIA]; B7c. Release of information could reasonably be expected to constitute an unwarranted invasion of personal privacy; [(b)(7c) of the FOIA]; B7d. Release of information could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source [(b)(7d) of the FOIA]; B7e. Release of information would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law; [(b)(7e) of the FOIA]; B7f. Release of information could reasonably be expected to endanger the life or physical safety of any individual; [(b)(7f) of the FOIA]; B8. Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]; B9. Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]; C. Closed in accordance with restrictions contained in donor's deed of gift.

attendance records, and occasionally remarks on student educational performance and supplemental examination results.

The PAA determined restrictions pursuant to FOIP and only records from private donors are open to the public. Users may make requests for access to restricted records under FOIP.

The Canadian Freedom of Information and Protection of Privacy Act (FOIP) and access to the Black Gold Division No. 18 Fonds. The records of Canadian public bodies are protected under FOIP. In 1998, FOIP legislation expanded to include all records created by educational bodies and in 1999, all records created by local government bodies. According to Section 1(n) of the FOIP, records containing "personal information" must be restricted. "Personal information" refers to information regarding an individual's name, home or business address, home or business telephone number, race, nationality, ethnic origin, political beliefs or associations, age, sex, marital status, fingerprints, biometric information such as blood type, genetic information or inheritable characteristics, educational, financial, employment or criminal history, health and health care history including information pertaining to a physical or mental disability, and an individual's personal views or opinions. These records cannot be disclosed until they are seventy-five years old and no longer subject to FOIP (Section 1[n] of FOIP).

FOIP does not apply to records donated to the PAA by individuals even if a local public body created the records or if the records contain personal information.

Furthermore, pursuant to Section 3 of FOIP, FOIP does not apply to records from educational bodies donated to the PAA prior to 1998 and local government bodies prior

to 1999. The justification for this decision is that since the records were previously open and available while in the custody of the PAA prior to 1998, the information has already been made public and could have been used and disclosed in a variety of ways.

Case Ten. Norfolk Public Schools Desegregation Papers, 1922-2008. Old Dominion University Special Collections. The Norfolk Public School (NPS) administration donated its records documenting its desegregation process to the Old Dominion University Special Collections. The original set of records included various material types such as correspondence, memoranda, depositions, aggregated test data, education records, and public documents such as court records and school board resolutions. Material includes the names, IQs, and commentary on the scholastic achievements of African American children such as the failure to meet academic achievement, grades, and mental acuity. Correspondence files included racist letters from teachers and parents, pro-segregation material written by still living people, including past members of Old Dominion University's Board of Visitors. The collection was not reviewed for confidential material by the NPS administration prior to the donation and it posed various risks. While not specified in the case study, the research and historical value of this collection is high as the records document the desegregation process of schools in Virginia during the Long Civil Rights Movement.

Several items were returned to the donor, and the remaining collection is open to all researchers. The Special Collections researched applicable laws such as Virginia's FOIA and consulted with an attorney to determine how to provide access to the collection. Materials that were considered "student records," "personnel records," or

“school board records” were returned to the NPS. “Student records” are those that individually identified student scholastic or medical records. These do not include student directory information such as name, address, or parent’s name. “School board records” are those documenting executive or closed sessions discussing confidential student, medical, or personnel matters. This methodology for reviewing and identifying materials was stipulated in the deed of gift, and signed by the donor. Other materials, including public records listing names, IQs, and commentary about scholastic achievements, were retained despite the privacy concerns that they raised. Justification includes that FOIA allows public access to materials from state meetings, which are currently open by law. In addition, other repositories such as the National Archives Administration branch in Philadelphia and the Norfolk Public Library have no restrictions on access. Racist letters also remained open, as the law does not protect them.

Researchers are required to sign a non-disclosure agreement to ensure that the university would be protected from any litigation that could arise from the disclosure of student information, and the violation of student privacy and confidentiality. The agreement cites applicable state statutes and stipulates that researchers cannot publish any identifiable information from the collection. In addition, requests to reproduce or publish document images from this collection are more thoroughly scrutinized. The policy allows the university librarian to grant exceptions. These exceptions are not specified in the study.

Case Eleven. Pupil Placement Board Records, 1958-1966. Library of Virginia.

Note: This collection is currently still being processed. The records of the Pupil

Placement Board were transferred to the Library of Virginia (LVA), the repository for the Commonwealth's governmental records, following the board's dissolution. The Pupil Placement Board was a state organization purportedly created in the 1950s to objectively assign African American and White students to schools. However, the actions of the board revealed that its actual intent was to keep public schools racially segregated. Under the Pupil Placement Act, any child new to a district or school was required to apply to the board for placement. The collection contains the board's records, administrative legal files, and student applications, including the documentation of recommendations and actions taken by the state school board. Applications contain personal information about the student and various types of supplemental attachments such as birth certificates, physician's letters and reports, notes from parents, and student records and report cards. Providing access to these records would disclose personal information about students. In addition, materials may be subject to FERPA if they are classified as education records. Materials documenting health information may be subject to HIPAA. While not specified in the study, the research and historical value of this collection is high as the records document the desegregation process of schools in Virginia during the Long Civil Rights Movement.

LVA determined that a selective access process would be used to grant access to the collection. Only approved researchers would be able to access the collection with restrictions. It was determined that the records at the collection level were not "education records" subject to FERPA. The reasoning behind this decision was that that Pupil Placement Board is a school board and not an educational institution. No attorney was consulted in making this decision. The majority of materials disclosing health

information were determined to be commentary, not covered by HIPAA. Examples of such commentary include, “can’t see well,” and “this child is slow” (Yaco, 2010, p. 648). However, several items determined to be “education records” or covered health records such as report cards and physician’s reports are restricted and have been sealed for seventy-five years in accordance with the Virginia Public Records Act.

Researchers must apply to use the collection. The three-page application requires a statement about the purpose of the proposed research, a list of past publications, description of research methodology, and references. Researchers must agree to use the collection for the stated purposes, to not disclose personal information, and safeguard materials from accidental disclosure.

Case Twelve. Prince Edward County Virginia School Closing, American Friends Service Committee Archives. The records of the Emergency Placement Project were transferred to the archives of the American Friends Service Committee (AFSC) as part of the records of the Community Relations program. The records document the closing of Prince Edward County schools as an effort to resist the desegregation process. The Emergency Placement Project of the AFSC placed low-income white students who were affected by the school closing with host families to assist their education. The records contain materials that document the administrative functions of AFSC programs in the county. Records include correspondence, student applications, social worker and teacher reports containing information about personal information about identified students, and publications.

Access to the collection is governed by the AFSC uniform access policy to all collections in their holding and it is open with restrictions. Several folders are restricted for access. Details about the methodology used in determining restrictions were not specified. The archives implements a method of selective access and those unaffiliated with AFSC must apply to use the archival collections. The research application requires references, writing samples, a statement about the purpose of the proposed research, publication plans, and an outline of the research project. The AFSC also asks researchers for the opportunity to review publications based on any of their material. The purpose of the access policy is to “keep individually identifiable information from being published, and... to control who uses its archives” (Yaco, 2010, p. 658), as the archives “contains many politically sensitive records” (Yaco, 2010, p. 658).

Government Records

Case Thirteen. Stasi Records, 1940s-1980s. German national archives. The Stasi Records, the records of the East German State Security Service, a secret police and intelligence organization of the communist German Democratic Republic, came into the possession of the German nation after the fall of the communist regime in Germany. The records document the organization’s actions, some revealing the misdeeds of the German Democratic Republic and include surveillance files holding private information about identified “dissidents,” that could adversely influence the individuals’ professional and personal lives. The retention and opening of the records faced serious opposition and legal challenges from the government. After the fall of the regime, loyalists made attempts to destroy the records, arguing that holding the files would pose a security

threat, as they could be exploited for intelligence purposes. “Dissidents” halted destruction of the records. It was determined at the national level that the records were of historical value and that citizens had a right to view their surveillance files.

The Stasi Records Act was created and implemented to balance the rights to state security, personal privacy, and the right to access information. It granted selective and restricted access to the records. The Act served to: “1. Facilitate individual access to personal data which the State Security Service has stored regarding him, so that he can clarify what influence the State Security Service has had on his personal destiny; 2. Protect the individual from impairment of his right to privacy being caused by use of the personal data stored by the State Security Service; 3. Ensure and promote the historical, political, and juridical reappraisal of the activities of the State Security Service; and 4. Provide public and private bodies with access to the information required to achieve the purposes of this Act” (Danielson, p. 181).

Through the Act, victims could view their own files but not those of others. Victims were granted access to the identity of those who informed on them. Copying of the files was allowed. Much time, effort, and resources of the archives and staff were given to preserve and provide access to these records. Providing access involved the processing of approximately 1.5 million requests to view personal files, background checks, and the piecing together of the shredded records. The author suggests that the Act can serve as a model for providing access to other sensitive government records.

Case Fourteen. Mississippi State Sovereignty Commission Records, 1994-2002
1956-1973. Mississippi Department of Archives and History. The records of the

Mississippi State Sovereignty Commission were transferred to the Mississippi Department of Archives and History (MDAH) and statutorily sealed following the commission's dissolution. The commission, a state agency in service during the Long Civil Rights Movement, existed to protect the "sovereignty of the state... from a perceived encroachment by the federal government" (Rowe-Sims, 2005, p. 161). The commission performed various investigative, public relations, and advisory functions, and "collected information on civil rights activists, acted as a clearinghouse for information on civil rights activists and legislation around the nation, funneled money to pro-segregation organizations, and disseminated right-wing propaganda" (Rowe-Sims, 2005, p. 161). Any person or organization perceived as a threat by the commission was targeted. Surveillance information collected includes intimate and slanderous details, personal information, and hearsay and rumors.

The courts ruled these records to be open like any other set of public records, stating that sealing them would be unconstitutional. Personal identifying information was to be sanitized at request of the victim. The process of opening the records consisted of a series of legal debates over the appropriate level of protection to give records subjects. A group of individuals called "privacy plaintiffs," who initially sought limited access to the records due to privacy concerns, exchanged several proposals with the MDAH to protect private information. The judge in charge stipulated the following privacy and disclosure procedure for the purpose of maintaining the "original integrity of the files, while balancing the competing interests of the various plaintiffs in privacy and disclosure" (Rowe-Sims, 2005, p. 167): "Compilation by MDAH of an index of all personal names appearing in the records; Classification by the MDAH of each name as either a 'victim'

of Commission surveillance or a complicit ‘state actor;’ Notification of the MDAH to class members that records were available for review; Response by class member; Redaction by MDAH; and Opening of redacted records” (Rowe-Sims, 2005, p. 167).

Individuals could request to have certain information permanently removed from the records. In addition, all non-contested records were to be opened. Over twenty years since the records transfer, the bulk of the records were made available in electronic format on designated stations within MDAH facilities. Records were opened in 2001.

Health records, networked

Case Fifteen. HealthConnect an exemplar, Electronic Health Records: Achieving an Effective and Ethical Legal and Record Keeping Framework project, 2000. Australian Research Council. Note: The HealthConnect project involves the complex interplay of several factors. This annotation extracts information explicitly related to privacy concerns. A complete understanding of the project and how it relates to privacy and access concerns of networked health record systems may require a reading of the full article, “Recordkeeping research tools in a multi-disciplinary context for cross-jurisdictional health records systems.”¹⁵

A research project of the Australian Research Council, titled *Electronic Health Records: Achieving an Effective and Ethical Legal and Record Keeping Framework*, brought together experts in recordkeeping, privacy, confidentiality, intellectual property, torts, medical law and ethics to address concerns in a national networked health record initiative. The project acknowledged that an effective networked electronic health system

¹⁵ Iacovino, L., & Reed, B. (2008). Recordkeeping research tools in a multi-disciplinary context for cross-jurisdictional health records systems. *Archival Science*, 8(1), 37-68.

that manages and provides access to patient health records must address privacy concerns and associated legal and ethical issues. The research project analyzed the *HealthConnect* project of the National Electronic Health Records Task Force as a networked electronic health record system exemplar.

It was determined that a variety of legal and ethical factors must be considered when providing access to patient records in a networked system. Research in health confidentiality began with the premise that legal confidentiality in Australia was already strained in relation to health records. The premise arose from a number of unspecified Australian Federal and State laws that mandate the disclosure of medical information. Factors examined by the research team included, “the impact on health privacy of health identifiers; records retained for the life and beyond of the patient and participant consent, in particular, the extent to which the system remained voluntary for both the patient and the practitioner, as consent to collect, use and disclose personal information is a basic privacy principle” (Iacovino, 2008, p. 45). The system must take into account that a networked system will inherently allow third party access to records (e.g. through local and shared networks).

The *HealthConnect* system was not implemented in actuality; however, a “governance template” was created to guide access to private patient records within the proposed system. It was determined that statutory penalties would result if individuals or entities were to misuse any identifier. In addition, the patient will decide who should have access to his/her personal health information. The access linkages to records within the system will be limited. Only those records which the patient has consented disclosure will be accessible. Legislations and codes were consulted, specifically the Electronic Transaction

Act, Evidence Acts (at Federal and State level) and Health Records Acts. HPP 15 of the Health Records and Information Privacy Act 2002 specifically covers an individual's right to express consent to the use of his or her identifier for record linkages.

HealthConnect participants will be obliged to abide by privacy legislation and by specific HealthConnect privacy rules. It was determined that "The National Health Privacy Code will be used when it has been implemented, until then privacy arrangements will be tailored to suit each jurisdiction for each implementation, with a view to working towards a single national set of rules" (Iacovino, 2008, p. 78).

Content Analysis Findings: Part Two

Manuscript collections

Case One: The Stanley Milgram Papers, 1927-1993 (inclusive)

Repository Name: Yale University Library, Manuscripts and Archives department

Repository Type: Manuscript library

Collection Type: Professional manuscripts of social scientist, high-profile celebrity

Material in Question: Raw experimental data files (records, audio tapes, videos)

Material Scope and Content: Some experiments were controversial and/or surreptitious in nature, including those on human behavior. The files contained personal identifying test data about human participants.

Research Interest: High, especially the files related to the experiment on obedience to authority

Access Decision: Selective access, Restrictions

Guidelines: Legal (based on the principle that the identities of current test subjects are legally protected), Donor agreement

Unique Method: Researchers must apply to use collection. Sanitization of identifying data in paper and audio recording forms based on research demand

Case Two: Ted Kaczynski Papers, 1996-

Repository Name: University of Michigan's Special Collections Library, The Labadie Collection

Repository Type: Manuscript library

Collection Type: Modern manuscripts of a convicted criminal, high profile celebrity

Materials in Question: Private correspondence, court documents

Material Scope and Content: Broad scope of correspondents and subject matter of letters.

The correspondents included various types of people, and the subject matter ranged “from mathematics to the environment, philosophy to physical or mental illness, depression, and family and job issues.” Letter writers were identified.

Research Interest: High, additionally a high level of attention from the press

Access Decision: Restricted

Guidelines: Donor agreement, Referral to access policies of unidentified external institutions, SAA Code of Ethics

Unique Method: Sanitization of identifying information in private correspondence (names, addresses, phone numbers, and at times, place names)

Case Three: Papers of Christopher Isherwood, 1864-1997, (bulk 1925-1985)

Repository Name: The Huntington Library

Repository Type: Manuscript library

Collection Type: Modern literary manuscripts, high profile celebrity

Materials in Questions: Diaries

Material Scope and Content: Contained passages potentially embarrassing to those identified and those disclosing the sexuality of closeted gay men

Research Interest: Not specified

Access Decision: Selective access at repository level, Restricted

Guidelines: Legal (adherence to legal threat posed by creator's kin)

Unique Method: None

Case Four: Papers of Patrick Balfour, Baron Kinross, 1922-1976

Repository Name: The Huntington Library

Repository Type: Manuscript library

Collection Type: Modern literary manuscripts, high profile celebrity

Materials in Question: Correspondence

Material Scope and Content: Numerous letters contained intimate, confessional details from closeted gay men

Research Interest: Not specified

Access Decision: Selective access at repository level

Guidelines: None specified

Unique Method: "Decision-by-default"

Case Five: Papers of Kingsley Amis, 1941-1995

Repository Name: The Huntington Library

Repository Type: Manuscript library

Collection Type: Modern literary manuscripts, high profile celebrity

Materials in Question: correspondence and manuscript of unpublished novel

Material Scope and Content: The correspondence contained frank comments about individuals that were still living. The unpublished novel had the potential to be misinterpreted as autobiographical (this privacy concern is related to the creator's own privacy).

Research Interest: Not specified

Access Decision: Selective access at repository level, with restrictions

Guidelines: Donor agreement

Unique Method: None

Case Six: Walker Percy Papers, circa 1910-1992

Repository name: University of North Carolina at Chapel Hill Library, Wilson Library, Southern Historical Collection

Collection Type: Modern literary manuscripts, high profile celebrity

Materials in Question: Drafts, typescripts, and correspondence from other famous authors

Material Scope and Content: Materials revealed private information about the Percy family such as sexual orientation and depression in the family. Correspondence revealed private details about letter writers.

Research Interest: High

Access Decision: Restricted

Guidelines: Donor agreement, archivists continuously worked closely with the author, heirs, and literary agents

Unique Method: None

Case Seven: Rt. Hon. John Diefenbaker, papers, 1815-1979 (inclusive), 1940-1979 (predominant)

Repository Name: University of Saskatchewan and the Public Archives of Canada

Repository Type: Manuscript library and State archives

Collection Type: Lawyers papers

Materials in Question: Law career series (notes on cases, correspondence with clients and witnesses, memoranda, copies of court documents, other vital information concerning the cases in which he was involved, legal diaries, ledgers, correspondence with colleagues and various professional associations, office "housekeeping" files)

Material Scope and Content:

Research Interest: Not specified

Access Decision: Restricted

Guidelines: Legal (solicitor-client privilege)

Unique Method: Sanitization, Users must sign a form requesting that personal identifiers not be revealed in published works

Case Eight: Franklin D. Roosevelt, papers, 1636-1945

Repository Name: National Archives and Records Administration, Franklin D. Roosevelt
Presidential Library

Repository Type: National Archives, United States

Collection Type: Papers of the President of the United States

Materials in Question: The entire collection

Materials Scope and Content: documents created by Roosevelt while serving his term as the President of the United States, including official state papers and personal correspondence. The contemporary character of the materials and their relation to national events and policies made making access decisions difficult. The Roosevelt Papers were the first set of presidential papers that were turned over to a public repository immediately following the president's term. During this time period, Presidents' papers were considered the personal property of the President.

Research Interest: Not specified; may be high because of the nature of the papers

Access Decision: Restricted

Guidelines: Roosevelt's donor agreement; the National Archives' principle of equal access to all

Unique Method: The Archives and White House leadership determined the National Archives access policy consisting of a page-by-page review process according to restriction categories

Academic Records

Case Nine: Black Gold Regional Division No. 18 Fonds, 1900-1994

Repository Name: Provincial Archives of Alberta

Repository Type: State archives, international

Collection Type: Records of a Canadian school district from the district and private donors

Materials in Question: Daily school registers

Material Scope and Content: The registers identify students and include academic information such as grades and remarks on educational performance

Research Interest: Not specified

Access Decision: Restricted

Guidelines: Legal (Canadian Freedom Of Information and Protection of Privacy Act)

Unique Method: Only records from private donors are open to the public; however, researchers may apply for access to restricted records

Case Ten: Norfolk Public Schools Desegregation Papers,

Repository Name: Old Dominion University Special Collections

Repository Type: University archives

Collection Type: Administration records of a public school

Materials in Question: The entire collection of records (various material types such as correspondence, memoranda, depositions, aggregated test data, education records, and public documents such as civic court records, school board resolutions)

Material Scope and Content: Material included identifying information and private/sensitive information such as IQs and commentary on the scholastic achievements of African American children (about mental acuity, the failure to meet academic achievement, and grades). Correspondence files included racist letters from teachers and

parents and pro-segregation material written by still living people, past members of Old Dominion University's Board of Visitors.

Research Interest: Not specified; may be high as the records document the desegregation process

Access Decision: Open

Guidelines: Donor agreement (returned several items to donor) Legal (Virginia FOIA), Procedures of other archival repositories,

Unique Method: Researchers must sign non-disclosure form

Case Eleven: Pupil Placement Board Records, 1958-1966

Repository Name: The Library of Virginia

Repository Type: State archives

Collection Type: Records of state school board

Materials in Question: The entire collection (board's records, administrative legal files, and student applications)

Materials Scope and Content: Because the records are those of a school board, they may be protected by FERPA. In addition, student applications identified students and supplemental attachments (e.g. academic records, birth certificates, physicians' letters, notes from parents) contained private information. Health information may be subject to HIPAA. Many third parties were still living.

Research Interest: Not specified; may be high as the records document the desegregation process

Access Decision: Selective access, Restricted

Guidelines: Legal (FERPA, HIPAA, Virginia Public Records Act)

Unique Method: Researchers must apply to use collection

Case Twelve: Special Collection on the Prince Edward County Virginia School Closing

Repository Name: American Friends Service Committee Archives

Repository Type: Archives of an organization

Collection Type: Administrative records of a student-hosting project that was transferred to a religious organization

Materials in Question: Correspondence, student applications, and social worker and teacher reports

Material Scope and Content: Personal information about identified students

Research Interest: Not specified; may be high as the records document the desegregation process

Access Decision: Selective access, Restricted

Guidelines: None specified

Unique Method: Researchers must apply to use collection; Archives asks researchers for the opportunity to review any publication based on AFSC material

Government Records

Case Fourteen: Stasi Records, 1940s-1980s

Repository Name: German archives

Repository Type: State archives, international

Collection Type: German national archives

Materials in Question: Police files, surveillance records

Material Scope and Content: Personal and defamatory information about identified individuals

Research Interest: High

Access Decision: Selective access, Restricted

Guidelines: As stipulated by the Stasi Record Act

Unique Method: Creation and implementation of the Stasi Record Act

Case Fourteen: Mississippi State Sovereignty Commission Records, 1994-2002, 1956-1973

Repository Name: Mississippi Department of Archives and History

Repository Type: State archives

Collection Type: Records of a state agency

Materials in Question: The records as an entity, especially investigative files

Material Scope and Content: The investigative files consisted of surveillance information of identified citizens. Information includes intimate, slanderous, and personal information, which may or may not be true

Research Interest: High

Access Decision: Restricted (The restrictions have expired, records are currently open)

Guidelines: Legal (adherence to the State of Mississippi court orders)

Unique Method: Includes the permanent sanitization of certain personal information, if requested by record subjects

Health Records, international

Case Fifteen: *HealthConnect* an exemplar from the *Electronic Health Records: Achieving an Effective and Ethical Legal and Record Keeping Framework* project, Australian Research Council, 2002

Repository Name: N/A

Repository Type: N/A

Collection Type: National health records for the proposed networked system

HealthConnect

Material Scope and Content: Patient health care records with personal identifying information

Research Interest: N/A; Use value: High

Access Decision: System was not implemented in actuality; however, a governance template was created to guide access to private patient records

Guidelines: The legislation and codes warranting these steps include Electronic Transaction Act (2002) (with regards to re-authentication of medical records), Evidence Acts (federal and state); Health Records Acts (e.g. HPP 15 of the Health Records and Information Privacy Act 2002 (NSW) specifically covers an individual's express consent to the use of his or her identifier for record linkages Draft National Health Privacy Code NHPP 7 Identifiers). Ethical warrants include bioethics and principle of patient autonomy. This principle states that it is up to the patient to decide who should have access to his/her personal health information.

Conclusion

General Findings

RQ1. Do specific characteristics of collections holding private materials make them riskier to disclose? The characteristics of collections vary at a high level within manuscript collections and across other collection types. As a variety of material was considered risky to disclose, it can be stated that private and sensitive materials are not bound by specific material-types. Private materials in manuscript collections include private correspondence, diaries, literary manuscripts, and professional files. Private materials in academic records include record books, administrative files, and applications. Private materials in government records include files of citizens, and private materials in networked health systems include patient health records.

Because there are no clear consistencies and the sample is not a full representation of all collection types, a clear interpretation of this data cannot be provided. However, the data is presented for readers to make their own interpretations.

RQ2. What guidelines and/or justifications are used for access decisions? A variety of legislation influenced the access decisions including FERPA, HIPPA, the solicitor-client privilege, state public records laws, and the international legislation. Materials were restricted as mandated by law. In the cases of the government records, the judicial system influenced access decisions. The courts mandated public access to these records served to provide societal information needs despite sensitive content and/or identifying information. In several cases where materials were not legally protected from disclosure, laws served as guidelines in making access decisions to collections with

sensitive materials. Of the cases, only one (Case Three: Papers of Christopher Isherwood, 1864-1997, [bulk 1925-1985]) was entirely closed due to a legal threat from the creator's kin.

The analysis reveals difficulties involved in interpreting FERPA and HIPAA due to the ambiguous language of the legislations. In particular, the case studies dealing with US academic records (Case Ten: Norfolk Public Schools, Eleven: Pupil Placement Board Records, and Twelve: Special Collection on Prince Edwards School Closings) documented difficulties in determining what materials should be classified as education records. In these cases, the archivists restricted certain materials but opened the collection for access, with or without the benefit of consulting an attorney or legal team.

RQ3. What unique methods are used to provide access to private materials?

Some collections are protected through selective access. Specifically, The Huntington Library, a manuscript library, and the American Friends Service Committee Archives, an organization's archive, engage in selective access to all collections in their holding by requiring an application process. In several other cases, an application process or submittal of a non-disclosure form was implemented at the collection level. With the majority of the cases, access decisions to private materials were determined upon donation via the deed of gift. Restrictions were both donor and repository imposed. Several donors of manuscript collections expressed concern for the privacy of third parties and required the restriction of certain items with identifying and/or personal information for various reasons (e.g. Case One: Stanley Milgram Papers, Case Two: Ted Kaczynski Papers, the cases of literary manuscript collections). In addition, authors of

literature relating to manuscript collections suggest that archivists should work closely with donors to address access concerns (Hodson, 2004; Pyatt, 2005). Government repositories, working under the principle of equal access, may not participate in the selective access method.

Several manuscript repositories holding collections of high research value participated in sanitizing personal identifying information such as names and other “directory information” so that information in these papers would be accessible to the public. (e.g. Case One: Stanley Milgram Papers, Case Two: Ted Kaczynski Papers. Sometimes private passages of a document were removed. It was stated in several case studies that the sanitization procedure is costly and time-consuming. Among cases analyzed, the use of this method was tied to the high research value of the collection.

Concluding Statement

Danielson (2010) wrote, “Balancing privacy and open access has always been one of several ethical quandaries that are inherent in archival work” (p.184). The findings of the content analysis reveal that access decisions depend on various legal factors and ethical considerations and are heavily dependent on context. The donor agreement created upon acquisition of a collection may allow for easier decision-making when providing access to collections with private materials about third parties because donors may be linked to or are knowledgeable about third party subjects. Restrictions and access agreements can be made at this level. However, donors may not always hold ties with or be concerned about the privacy rights of third parties subjects. Archivists should be fully aware of their professional obligations as well as legislation related to privacy and the

various options available to address privacy and access concerns. In addition, archivists in the US may use international legislation in access to records as guidelines.

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