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## The Ethics of Providing Access

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## **THE ETHICS OF PROVIDING ACCESS**

**Ronald L. Becker**

Archivists today make some of the most difficult ethical and legal decisions at the public service desk. It has always been a difficult process to balance the archivist's legal and ethical obligations to the researcher, to the donors of collections, and to the institution served and, furthermore, to factor in obligations to those who often are not even aware that archives hold materials that impact on their lives. Balancing equality of access for all patrons with institutional needs and requirements is at least as difficult. Despite sincere efforts to limit the acquisition of restricted material, many important and potentially useful collections are restricted. Indeed, some have never been used. Naturally, archivists would like to encourage the use of collections that reveal a wealth of information documenting social, economic, literary, and educational history.

With its "Code of Ethics for Archivists," the Society of American Archivists (SAA) has clarified the areas of concern to consider in trying to resolve the conflicts faced in light of

the law, institutional needs, the highest ethical standards and, of course, the desire to serve which led many archivists into the profession in the first place. It is the responsibility of the individual archivist, the unit in which that archivist works, and the employing institution to use and build upon this code in solving the often complex ethical issues encountered in public service. This article demonstrates how the code, most particularly in those sections which deal with issues relating to access, can be used and amplified to deal with real, true-to-life, practical situations.<sup>1</sup>

#### Privacy and Restricted Information

The code, Section VII, reads: "Archivists respect the privacy of individuals who created, or are the subjects of, documentary materials of long-term value, especially those who had no voice in the disposition of the materials. They neither reveal nor profit from information gained through the work with restricted holdings." SAA's commentary continues, "In the ordinary course of work, archivists encounter sensitive materials and have access to restricted information. In accordance with their institutions' policies, they should not reveal this restricted information, they should not give any researchers special access to it, and they should not use specifically restricted information in their own research. Subject to applicable laws and regulations,

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<sup>1</sup> Society of American Archivists (SAA), "Code of Ethics for Archivists" (Chicago: 1992).

they weigh the need for openness and the need to respect privacy rights to determine whether the release of records or information from records would constitute an invasion of privacy."<sup>2</sup> At Rutgers University, archivists have encountered such conflicts in four areas: case files and similar materials in various manuscript and archival collections; legal files in the archives of organizations, particularly those of labor unions; sensitive materials in the University Archives which document the events and activities of the employing institution; and private correspondence, especially in literary collections.

Case files can be found in a number of different types of organizational and institutional records. At Rutgers, the preponderance of case files are found in its congressional, labor, consumer, and social welfare holdings. The term *case file* is a generic term which covers any file which is kept on an individual or group of individuals for whatever reason the organization assigns. Congressional offices solve problems for their constituents which could range from facilitating the receipt of veteran's benefits, to getting the utility company "off my back," to serious cases of unreported child or spouse abuse. In the international archives of a prominent labor union, the National Maritime Union of America, case files document the improper behavior of members (usually drunkenness, but sometimes more serious behavior) and subsequent "trials" by a union-

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<sup>2</sup> Ibid., [3].

and company-approved court, and their disposition.<sup>3</sup> In the records of social welfare organizations are found detailed files relating to physical and mental development of children, assistance to immigrants, and other materials concerning individuals and families. There are even case files in such unlikely places as the archives of the first consumer product testing organization in the country, Consumers' Research, Inc. After a bitter strike in the 1930s and the resulting formation of Consumer's Union, which soon rivaled and then far surpassed Consumers' Research in influence on the public, Consumers' Research turned far to the Right politically and began to compile files on individuals of what CR termed 'radical' and 'communist' influence on the consumer movement—individuals whom most people would hardly consider in those terms. The practice continued for years and the files are quite substantial.<sup>4</sup>

Because congressional case files are voluminous (a substantial amount of the resources of the Washington offices and nearly one hundred percent of those of the district offices are devoted to casework), somewhat repetitive, and fraught with privacy concerns, Rutgers has been very selective as to which office's casework to accept

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<sup>3</sup> AFL-CIO Archives, National Maritime Union of America, Special Collections and University Archives, Rutgers University Libraries, New Brunswick, N.J.

<sup>4</sup> Gregory L. Williams, *A Guide to the Records of Consumers' Research, Inc.* (New Brunswick, N.J.: Rutgers University Libraries, 1995), 11.

with the archives and how much of it to take. The member of congress will usually have an opinion concerning its disposition. Some have chosen to discard all of these files before the archives are transferred. For better or worse, Rutgers now has several collections complete with samples of case files. Access to these files is restricted, and even when the politician gives permission for their use, access is usually not granted immediately. After all, when one writes to a member of the House or Senate about a personal or family dilemma, it is often done as a last resort and in confidence (even though it is a tacit confidence). Correspondents truly had no voice in the disposition of the materials that convey information about them. Imagine the distress that these individuals and families would feel knowing that their private lives are being made public.

At Rutgers, archivists cope with the inherent conflicts involved in this privacy vs. social history research dilemma by making certain that legitimate research can be carried out using these documents without making the individuals' lives public. An Application to Use Restricted Materials<sup>5</sup> is completed, and if aggregate research information is sought about the casework or a biographer wants to know what kind of casework a politician takes on and how that office resolves conflicts, permission is usually granted. In order to protect the individual's privacy from invasion, the researcher must agree never to reveal names in the file, and no

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<sup>5</sup> Special Collections and University Archives, "Application to Use Restricted Materials," (Rutgers University Libraries, July 1990).

photocopying is allowed. To date, only a handful of requests have come in for case files in congressional collections. One researcher was most interested in the workings of the office of an outspoken congresswoman, and another in the office of a congressman who later became governor. Use should remain low for this type of record at least in the near future. Perhaps another generation of scholars will find a way to make better use of this material after the restriction is lifted seventy-five years from the creation of the record or the known death of the subject of the file (similar to the restriction placed upon student transcripts in the University Archives). This method of making restricted materials available to the public without invading the privacy of the individual covered in the case files is not completely foolproof. A researcher could renege on his contract in the Application to Use Restricted Materials. However, the institution should be covered legally and ethically by executing such a document.

Case files located in labor collections pose a slightly different problem. The National Maritime Union of America (NMU) represents American seamen who by the nature of their work travel throughout the world in cramped quarters over long periods of time. Although the archives consist of all the usual materials (constitutions, contract negotiations and compliance, speeches, organizing documents, company files, reports, photographs, publications, etc.), the largest single portion of the records contains case files dating from the 1940s to the late 1960s. These records derive in most instances from charges of misconduct brought against an individual by his fellow crew members.

The charges, such as drunkenness, not appearing when scheduled to appear on a ship, or refusal to work, were ruled upon by an NMU port trial committee which then assessed punishments in the form of fines, probation, or suspension. The "court" must have been very busy because these records cover over ninety linear feet! There is clearly some potential research material in these records.

Because the NMU port trial committee was not a public criminal judiciary body, the records that it generated cannot be deemed public, and access to them is restricted. As with the congressional case files, a researcher applies to use the restricted materials and agrees not to use personal names. Again, photocopying is forbidden. With the NMU records, permission to use them must also be sought from the union *and* if the individual who is the subject of the case file is living, from that person. A letter is drafted and signed that reads "I understand that \_\_\_\_\_ will be conducting research using the National Maritime Union of America documents in your possession. Since I was an active member of the union in the 1930s and 1940s, some of the document files, particularly the trial committee files, may contain information about my activities relevant to their research. I hereby grant permission for them to examine the restricted trial committee files on me."<sup>6</sup> Needless to say, the researchers were only interested in looking at a few

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<sup>6</sup> Subject of case file to Special Collections and University Archives, Rutgers University Libraries, 4 July 1989, Control File, AFL-CIO Records, National Maritime Union of America.



of the case files. It would take many letters of permission to examine fully a record group consisting of ninety linear feet of case files of mostly living people, and a correspondingly greater time tracking down scores of dead people. Thus, this practice will severely limit the full research use of these files until the twentieth-first century.

Rutgers holds the records of a number of social welfare agencies dating from the eighteenth century and including orphan asylums, children's services, and resettlement societies. One such agency is the Jewish Counseling and Service Agency of Essex County, New Jersey, into which merged the Bureau of Service to the Foreign Born conducted by the Newark Section of the National Council of Jewish Women. The bureau began its efforts in 1917, expanding to a county-wide program in 1940. Through its largely volunteer staff, it provided aid to immigrants and aliens, especially in adjusting to and integrating into life in America, and information and guidance relating to questions of legal status, immigration procedures, and naturalization. The bureau's records include case files on approximately five thousand immigrant individuals and families, including their histories and documentation of bureau efforts on their behalf from 1939 to 1961. The case files are restricted similarly to those in congressional papers, which allow scholarly research to take place without invading the privacy of the individuals and families that are the subjects of the files.

Another agency of note is the Sheltering Arms Children's Service and its antecedent organizations. Rutgers holds the records of these agencies dating from 1852 to 1966. In

addition to the usual reports, correspondence, financial records, minutes, and publications, there are extensive children's information files (1864-1955) and foster home files (1917-1966). The earlier organizational files have received much use. Until very recently, the only use of the case files was done at Sheltering Arms headquarters in New York. All requests are forwarded to Sheltering Arms. If Sheltering Arms approved, the individual file would be photocopied and mailed to their office. Only individual files rather than groups of files have been requested. This implies that only the subjects of the case files, that is, children who had lived in Sheltering Arms or in its foster homes, are asking to see those files. Recently, a social historian asked to see several years of the case files for a comparative study that he is conducting. This was the first real research request for these records and was not covered in the agreement with Sheltering Arms. After a discussion of basic policies allowing access to restricted materials while requiring the researcher to agree in writing never to reveal the identity of individuals and families and prohibiting photocopying, Sheltering Arms readily accepted the conditions and allowed the researcher to use the collection.

The Consumers' Research Archives noted earlier is currently being processed with federal funding assistance and will be opened to the public in December 1994. The organization does not consider the case files created on the consumer movement's left-wing and 'fellow travelers' to be confidential in any way. In fact, they were used in testimony given to the McCarthy hearings in the 1950s. Since the names in the files are well-known, the invasion of privacy

justification takes on a new meaning. It would be awkward to allow access, but not reveal names. Because that part of the collection is closed, there is time to study the need, if any, for restrictions and for the fair application of any that are imposed.

The list of the types of collections that contain case files or similar collections can go on and on. In addition to those outlined, there are records of churches and synagogues, some of which contain membership files that read much like case files, especially where clerical counseling is detailed. Where those files exist, they are restricted. To date, no requests for their use has been filed, but the same principles that have been used for similar situations will in all likelihood be applied wherever possible. As indicated earlier, the SAA code of ethics calls for weighing the need for openness against the need to respect privacy rights and calls for policies such as those at Rutgers. There is no guarantee that a researcher will not violate an agreement, but at least these policies make it possible to meet both needs.

Similar privacy concerns can occur with legal records. Much has been said about the need to preserve the confidential lawyer/client relationship just as there is a need to preserve the clergy/layperson relationship that might be documented in the files of church and synagogue records. Legal records are not found only in the archives of law firms. The trials file (although quasi-legal) in the National Maritime Union of America archives is an example. Another is the records of the legal department of the International Union of Electrical, Salaried, Machine & Furniture Workers

(IUE), yet another large collection currently being processed and made available for public research. The union has been involved in numerous landmark cases since its founding in 1948, including those centering around pregnancy leave/disability and other women's rights issues. Most are very much in the eye of the public, having been tried in the federal courts and the National Labor Relations Board. However, much of the documentation gathered by the legal department resembles the case files discussed previously. Individual grievances, personnel files, and similar "private" materials once again call for ethical judgments in addition to simply "legal" solutions.

At Rutgers, there are also some literary holdings in which access to the correspondence files and possibly to the manuscripts are restricted. As in many correspondence files, the papers of the literary figure tend to contain the letters of the sender to that person rather than the reverse (unless the literary figure kept a copy). Thus literary rights and the right to privacy really belong to the person who wrote the letter, who is not likely even to know that the letter has been donated to a repository. If the letters are personal in nature, restrictions on access might be necessary regardless of the wishes of the donor. Unlike the case files noted earlier, these letters are often of well-known figures. In addition, this material does not lend itself to aggregate studies as does material in case files, and it is much more difficult to justify access ethically and legally without the consent of the writer of the letter.

### Equitable Access

The code, Section VIII, reads: "Archivists answer courteously and with a spirit of helpfulness all reasonable inquiries about their holdings, and encourage use of them to the greatest extent compatible with institutional policies, preservation of holdings, legal considerations, individual rights, donor agreements, and judicious use of archival resources. They explain pertinent restrictions to potential users, and apply them equitably." SAA's commentary continues with "archival materials should be made available for use (whether administrative or research) as soon as possible. To facilitate such use, archivists should discourage the imposition of restrictions by donors. Once conditions of use have been established, archivists should see that all researchers are informed of the materials that are available, and are treated fairly. If some materials are reserved temporarily for use in a special project, other researchers should be informed of these special conditions."<sup>7</sup> The types of repositories and nature of the collections often dictate the way in which the individual archivist deals with ethical considerations involving the use of collections. Clearly, fairness and equality within the institutional framework should be uppermost in the mind of the archivist. To illustrate some of the potential problems and to show how building upon the code of ethics can provide some resolution, consider access to certain

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<sup>7</sup> SAA, "Code of Ethics," [4].

materials in the Rutgers University Archives and in literary collections.

The commentary accompanying Section VIII urges archivists to discourage the imposition of restrictions by donors. The logic behind that reasoning is irrefutable. Unfortunately, there comes a time when certain collections must be taken with restrictions because that is the only way in which they will be donated; and if they are not accepted, irreplaceable primary research documentation could be destroyed. The most extreme example concerns a collection that was accepted by Rutgers several years ago which contains business records dating from the eighteenth to the mid-twentieth century. The last owner of the business was the direct heir of the founders of the company. His children had inherited the archives and had the right to donate the collection to a repository. There is only one catch: the collection is closed to the public until the death of certain other family members who would be extremely upset to learn that the archives had not been destroyed years ago and horrified that anything relating to that family was in a public repository. The donors are adamant about the restriction and maintain the right to remove the collection if it is violated. Recently, the archives received a reference inquiry by mail that could have been answered in great detail with materials from the collection. The researcher had been looking for this information for years. After much agonizing, the answer to the researcher was that there is nothing "currently" available in the collections that would shed light on the inquiry. Clearly, there was no alternative answer given the nature of the restriction.

Fortunately, archivists do not face issues this extreme on a daily basis, but they must be prepared with policies and practices to make every effort to avoid situations where they are not giving available information on an equitable basis to the research community.

If an archivist is operating out of an institutional setting such as a business, religious, organizational, or university archives, the institutional framework will influence the archivist's ability to provide information on an equitable basis. However, by balancing the obligations inherent in the requirements of the parent organization with legal requirements and ethical considerations, the materials within these archives could be utilized by researchers from outside the organization. In an institutional setting, an access policy statement is essential for setting up the parameters of use. The discussions between the archives and the parent institution could help the institution understand how the materials could be used for scholarship and their importance in that role as well as the administrative role that they play in the operation of the institution.

The Rutgers University Archives access policy states that "all of those records required by law to be maintained or publicly available at their inception will be made available immediately. All other institutional records will normally remain closed for a period of 20 years from the date of their creation unless the office of origin has designated a shorter period. The records that are closed for longer periods include Board Committee minutes restricted for 35 years and student and personnel records which are restricted for

75 years. Records created by the Office of University Counsel in its capacity as counsel to the University are privileged and confidential and exempt from access. Other records may be restricted for more than 20 years as determined by the Committee on Archives. During the restricted period, the records will be available only to the office of origin, the staff of the Archives, and officers of the University as necessary. Consideration for access by others will be given when a written request is presented to the University Archivist. A review of that decision may be obtained from the Committee on Archives by submitting a written request for such a review. Both the initial request and the review of the decision must be accompanied by sufficient information as to the intended uses of the records. The University Archivist may impose whatever conditions on the use of the records as he or she deems necessary to preserve the confidentiality of the information contained in such records. This policy will not impinge upon the normal administrative uses of University records."<sup>8</sup> To date, this policy has worked quite well in assuring that university records will be used to their fullest by researchers while protecting the university and obeying the appropriate statutes. The following example illustrates how the University Archives waded through a delicate situation that ultimately met the needs of the university and outside researchers.

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<sup>8</sup> "Access Policy for Archival Records of Rutgers, the State University of New Jersey," December 1992.



In 1935, an instructor in the German Department of the New Jersey College for Women (now Douglass College) at Rutgers University was denied promotion and had his appointment terminated. The instructor, Lienhard Bergel, was an outspoken critic of Nazism and the Hitler regime (the only one in his department). In grievance hearings and in public, he claimed that he was being discharged for his political stance and thus victimized by the pro-Hitler bias of his department and particularly by its chairman, Friedrich Hauptmann. With the subsequent involvement of the press, the American Civil Liberties Union, and a number of student organizations, the case became widely known; and the university found itself having to defend charges of harboring Nazi sentiment and racism. Rutgers President Robert Clothier convened a committee of five trustees to hear the grievance case. After two months of hearing testimony, the committee concluded that the university was justified in its decision to deny the reappointment to Bergel. In addition, Hauptmann was cleared of all charges leveled against him. The report was filed and the case was officially closed. Bergel eventually took a position in the German Department at Queens College of the City University of New York, was tenured, and remained there for approximately forty years. Hauptmann continued to support the Nazi cause and as time went on became somewhat of an embarrassment to the university. Hauptmann abruptly resigned in October 1940, and using funds provided by the German consulate in New York, moved to Germany, joined the Nazi Party in 1941, and was then employed by the German Academy in Slovakia until the end of the war. He was arrested and

interrogated in Austria in 1946, but never prosecuted. He remained in Austria and died there in 1978.

As many years passed and the university grew from small liberal arts colleges to a major state university, the memory of the case faded. However, a student leader from the class of 1935 did not forget and on the fiftieth anniversary of the case in 1985, Alan Silver asked then Rutgers President Edward Bloustein to reopen it and issue an apology to the Bergel family during Professor Bergel's lifetime. After being rebuffed, Silver took his case to the press and soon the affair was being debated throughout the state and the region. Once again, a team was assembled to investigate the case and issue a report. This time the team consisted of three historians who were charged with examining all of the evidence in the University Archives and elsewhere. Over a fifteen-month period, they examined personnel records, the papers of the Rutgers president and Douglass College dean, the records of the special 1935 trustees' grievance committee as well as ACLU records at Princeton, American Association of University Professors records in Washington and the FBI files on Hauptmann and Bergel. In December 1986, they issued their report; and in 1989, they published *The Case of the Nazi Professor* issued by the Rutgers University Press. The report and subsequent book detailed the case and concluded that the original trustee's report was predictable and biased; after all, they were protecting a university which was more on trial than was Instructor Bergel. Many of the allegations made earlier and again in 1985 concerning Hauptmann's spectacular Nazi activities were also over-exaggerated, and

ultimately, the university made its decision not to reappoint Bergel on factors other than Hauptmann's bias. The university was suffering declining enrollments during the Depression and had only room for one junior professor to be reappointed and chose another that it thought was more qualified than Bergel.<sup>9</sup>

While the 1985-1986 investigation was taking place, all of the university records relating to the case were closed to the public. The University Archivist's letter to the community read, "At the request of the President of the University, a special faculty committee has been appointed to conduct an historical assessment of the Bergel/Hauptmann case, and publish its findings. During the Committee's investigation, University records relating to the case will be closed and unavailable for public use, but will be opened again as soon as possible."<sup>10</sup> Only the committee had access to the records which (with the exception of personnel records of living people) had previously been open to the public. The justification for closing the records for this temporary period (sixteen months) was that they needed to be kept together for the committee's use, and to assure the integrity of the contents of the records, thus protecting them from alteration

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<sup>9</sup> David M. Oshinsky, Richard P. McCormick, and Daniel Horn, *The Case of the Nazi Professor* (New Brunswick, N.J.: Rutgers University Press, 1989).

<sup>10</sup> University Archivist to Patrons of Special Collections and University Archives, 16 October 1985, Correspondence File, Special Collections and University Archives, Rutgers University Libraries.

or destruction. The records were again open to the public in their entirety after the issuance of the report.

This procedure was not without some problems. Alan Silver, who initiated the 1985 investigation by contacting the president, and his informal research team which consisted of a historian and a retired chemistry professor, were not given access to the collection during the fifteen-month period of the investigation. In addition to being critical of the report, they lodged informal complaints of not being given equal and fair access to the materials for their investigation during the period of the official investigation. They also felt that once the committee had access to personnel records of living people, their use could no longer be restricted. Although these complaints were not pursued formally, the ethical dilemma is clear. The code states that the archivists "in accordance with their institution's policies...should not give any researchers special access" to restricted information.<sup>11</sup> The key part of that phrase concerns "their institution's policies." If the Hauptmann/Bergel materials were not part of the University Archives, but of the manuscript collections within Special Collections, then both groups of scholars should have been given "equal access"; and neither group should have been given access to the personnel files of living people without their permission. However, because these are the official records of the university, and the university, albeit reluctantly, was conducting an official investigation, it had the right to allow unequal access for its official committee.

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<sup>11</sup> SAA, "Code of Ethics," [3].

In a case such as this, the archivist's duty is clear: follow the mandate of the institution for whose official records the archivist administers.

The preceding example covers only one type of case regarding equal access. Others could relate to the sophistication and background of the researcher. With most acquisitions programs still booming despite recent years of recession, and with greater access to archival collections through on-line subject catalogs and better finding aids, more and more researchers are entering the reading room, many for the first time. In a large university setting such as Rutgers, which only recently loaded its Archives and Manuscripts Control File (AMC) records into its on-line catalog, many researchers are drawn to the collections through the catalog. Of these, a fair percentage have never thought to use manuscript material in their work. The result is an influx of undergraduates and others with little or no experience in archival research, who expect the same kinds of service to which they are accustomed when working with general library materials. Educating these novice researchers in the use of archival resources and encouraging them to exhaust secondary materials first in such a way that they will be confident in using manuscript sources in the future is becoming a routine challenge.

The Society of American Archivists's "Code of Ethics for Archivists" can be used as a starting point to help solve inherent conflicts relating to the provision of access to archival materials. However, there will always be conflicts in all of the areas addressed. As the code states in its concluding paragraph, "Archivists work for the best interests

of their institutions and their profession and endeavor to reconcile any conflicts by encouraging adherence to archival standards and ethics." The commentary continues, "When there are apparent conflicts between such goals and either the policies of some institutions or the practices of some archivists, all interested parties should refer to this code of ethics and the judgment of experienced archivists."<sup>12</sup> Such adherence of conflicting parties to the spirit and provisions of the code would constitute an ideal state. It remains to be seen whether this state will be realized. In actual situations of potential conflict, the experienced archivist will think and act ethically as well as practically and will do everything possible to allow access to historical materials in a consistent and equitable manner.

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<sup>12</sup> SAA, "Code of Ethics," [4].