

Bobbie Shreiner. The Nuances of Privacy Policies Within Three Different Types of Archival Institutions. A Master's Paper for the M.S. in L.S. degree. April 2023. 36 pages. Advisor: Dr. Emily Roscoe.

The ethical and legal issues surrounding privacy, and specifically third-party privacy in an archival setting is a topic that scholars and archivists have considered for decades. Competing interests are involved: a hope for fully open access archives; for researchers to be able to use a repository to its fullest extent and for a repository to build a sense of trust within a community. However, maintaining the privacy of third parties in a document who did not or could not necessarily consent to their private affairs being donated, maintaining the privacy as requested by a donor or the family of a donor or whomever is associated or has the rights to the donated materials is crucial to the integrity of a repository. This content analysis aims to explore third party privacy and overall privacy policies at archival institutions in three categories: state archives, private academic archives, and museums, in addition to an open archive. Here, there will be an analysis of how the laws surrounding privacy come into play, the ethical issues surrounding privacy vs open access, and an observation for best recommendations moving forward.

Headings:

Copyright

Privacy vs Accessibility

THE NUANCES OF PRIVACY POLICIES WITHIN THREE TYPES OF ARCHIVAL  
INSTITUTIONS

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A Master's paper submitted to the faculty of the  
School of Information and Library Science of the  
University of North Carolina at Chapel Hill in  
partial fulfillment of the requirements  
for the degree of Master of Science in  
Library Science.

Chapel Hill, North Carolina  
April 2023

Approved by:

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## Introduction

The often quoted first notion of privacy rights is from the 1890 article "The Right to Privacy (the implicit made explicit)" by Samuel Warren & Louis Brandeis. Brandeis and Warren sought explicit protection of individuals' rights to keep private information safe from public exposure. Since this article, archives and repositories have taken this concept in great importance when creating policies regarding restrictions of materials.

Because the issues and ethics of surrounding privacy rights vs accessibility in an archival setting has been part of the discourse for several decades, as an individual's right to privacy is inherent to whenever personal information is present within a given document. By analyzing how varying institution types are handling third party privacy, I identify opportunities to create a more concise and understandable widespread policy that can be applied to all institutions all the while minimizing takedown requests among other issues.

I looked at state archives, non-publicly funded academic archives, and museums; the characteristics of these latter two institutions does not wholly matter. I looked at the privacy policies for each institution, looking at the appraisal and restriction process as well.

Privacy is something every person deals with, and if it is more streamlined then there would be less take-down notices for archives. A streamlined, standardized policy there would be less violations of privacy. My goal is to analyze these policies in conjunction with existing theory and case studies, and suggest a way in which there could

be a standardization of policy across all institutions. From this, institutions may be required to have at least three concepts within their privacy policy, and there may need to be more research on institutions that do not have a privacy policy. Finally, through assessment of policy, perhaps an unbiased party were to assess an institution with my recommendations in mind, then there is a possibility that policies for some institutions may need to be revised and improved. Notions of privacy are an ever complex subject, but with this proposal perhaps the complexity could be assuaged.

## **Literature Review**

### **Copyright of Donated Materials**

Balancing user privacy rights, as well as copyright owners and users, is a topic of ongoing discussion within archival policy and legal circles. Besek (2003) in her article “Copyright Issues Relevant to the Creation of a Digital Archive: A Preliminary Assessment” goes into detail about copyright laws and practices. It is defined here as a bundle of rights that exist within any original work of authorship held in a tangible medium (Besek, 2003. pg.2). For the purpose of my thesis, I will be focusing on what this means for the archival space. According to Besek, “The purpose of an archive...its subject matter, and the manner in which it will acquire copies, as well as who will have access to the archive, from where, and under what conditions, are all factors critical to determining the copyright implications for works to be included in it” (Besek, 2003, pg.1). The copyright belongs to the creator, and as such it can also be transferred. This mainly comes into play when the author is deceased, and can become more complex when, say for example, a donor donates materials to an archive or museum featuring a letter from someone who is still alive. This could introduce issues about third party privacy, which will be explored further later.

### **The Burden of Determining Restriction**

The question of who should have the burden of determining what should be restricted is twofold. According to Greene in the article “Moderation In Everything, Access In Nothing?: Opinions About Access Restrictions On Private Papers.” There are

some archival manuals instructing archivists to impose restrictions beyond the wishes of donors, (Greene, 1993. pg.33.) which brings up several questions about the ethics being implemented in archives. While it has been frequently stated that archivists have long positioned themselves in favor of open-access, (Greene, 1993, pg.32,) the burden of justifying a restriction may end up falling on the institution. The rule dredges up a form of conflict of interest. While policies are made plain in the SAA Standards on Access that was first published in 1974 - "'Repositories are committed to preserving manuscript and archival material and to making them available for research as soon as possible," (SAA, 1974, pg.154) However, "at the same time, it is recognized that... every private donor has the right to impose reasonable restrictions upon his papers to protect confidentiality for a reasonable period of time." (SAA, 1974, pg.154). While it is inherent that private donors have copyright upon their works, there have been several instances in which a donor will donate materials blindly, not knowing what materials they have, and again will have materials that must take third party privacy into account. By putting the burden of restriction onto the archivist, they may feel pressured to maintain open access, it is a risk to determine what materials do and do not constitute an invasion of privacy across hundreds of materials of varying mediums (Greene, 1993,pg. 36). There are some instances in which an archivist will not adhere to the instructions based on personal ethical morals, or as will be touched upon later, personal opinions that do not properly respect third-parties involved in donation materials.

With the above, it appears that there are occasions in which repositories are putting the burden of privacy requests on the donors, rather than the instructions to do otherwise. This seems to alleviate the stress of having to consider every factor involving



privacy in the appraisal process; to “incorporate donor-imposed restrictions specifying that researcher access is by the donor's permission only, as opposed to restrictions which deny all access to the records - is that the donors, by having to respond to researcher access requests, are made partners in the access process.” (Greene, 1993, pg.36). This provides also a sense of collaboration and control given to donors as well as archivists.

William Prosser, a legal scholar, identified four ways in which the invasion of privacy can occur: (Prosser, 1960).

1. Intrusion upon the individual's seclusion or solitude, or into his private affairs.
2. Public disclosure of embarrassing or private facts about the individual
3. Publicity that places the individual in a false light in the public eye.
4. Appropriation, for another person's advantage, of the individual's name or likeness.

The first two are the most relevant, as intrusion into an individual's private affairs, and public disclosure of embarrassing or private facts about an individual - can occur as a result of a manuscript repository acquiring and making available the personal papers of a living or recently deceased person; as stated by Sara Hodson in her article “In Secret Kept, in Silence Sealed: Privacy in the Papers of Authors and Celebrities.” It is one to consider the assumption that the right to privacy ends in death, as the dead obviously will not be embarrassed by the revelation of personal information; however matters involving family that very well may still be alive must be taken into consideration. Third parties involved in given materials had no voice in deciding the fate of the papers, and are unlikely to have been consulted about any potential sensitivity in the collection. (Hodson, 2004. pg.196).

Every institution has their own individual policies and guidelines for this matter, ranging from full open-access regardless of third party considerations, while others have every letter sealed away from the public. As stated before, many institutions have devised policies that make the burden of privacy and accessibility put upon the donor. Donors often exhibit extraordinary concern about matters of privacy, perhaps in an eagerness to perpetuate or sanitize the good reputation of the creator of the papers. The archivist or curator more typically favors opening the collection and making it freely available to researchers. Once the parties agree on terms of any closure of part or all of a collection, such terms should be written into a deed of gift that is signed by the donor and by a representative of the repository, as a protection for both the repository and the donor. (Hodson, 2004, pg. 206). There have been instances by which donors have attempted to implement selective access. “Donors may wish to limit access in order to reserve an archive for the exclusive use of an authorized biographer, or of those who have demonstrated the proper reverence or respect for the papers' creator, or they may simply wish to wield power over the papers and over applicants for the donors' favor.” (Hodson, 2004, pg.198). However, such selective access infringes upon the archival ethics of the open-access policies for which archives strive for. There have been many instances that exhibit how complex the factors that are go into restrictions can be, such as: despite a donor being very open with the donated materials, the archive had to restrict certain things due to family of an individual mentioned in the material requesting it due to information about the individual being revealed that the family did not want public; an archivist breaking agreements with donors, the archivist opened access to the candid version of oral history transcripts that they had promised the family of the donor would

be restricted during a certain period of time. Donors should also be aware of sensitive materials in collections, and have some degree of input and guidance in donating. More than anything, it would seem that the potential of incidentally revealing private information is more so related to ethics than to legal issues. Hodson elaborated on the burden of restriction in her other article “Private Lives: Confidentiality in Manuscripts Collections.” The burden may end up falling on the researcher, and if this comes to be the case, the more likely party to be sued is a researcher who publishes private information, rather than an institution. Whether for legal or ethical reasons, though, it is prudent for archivists and curators to be aware of privacy rights and issues and alert to the presence of potentially sensitive material in collections. (Hodson, 1991, pg.112).

### **The Problem of Open-Access**

“Playing Fair With The Right to Privacy” by Marybeth Gaudette explains that the legal issue surrounding allowing access for the sole purpose of displaying has not been settled by law, thus leaving it up for interpretation by archivists; due to this lack of legal guidance and with the exception of donor-imposed restrictions in gift deeds may control this, an institution have no legal authorization to restrict the right of access to such materials for the purpose of research. (Gaudette, 2003, pg. 22). The institution can be contractually obligated to restrict access. Institutions routinely receive materials subject to enforceable contractual promises. The issue in this case is how frustratingly vague codes of ethics seem to be. These code of ethics as outlined by Gaudette can all be summarized in the vaguest terms that archivists will protect the privacy of records.

However, to what exactly do these privacy guidelines pertain? To what extent do these restrictions encompass this policy? What exactly does “protect” mean within this context? The same can go for the word “privacy.” What does it mean precisely within this context in conjunction with open-access policies?

There are some cases in which archivists seem to put their personal opinions on open-access over the requests of people involved in materials, such as with the instance of the oral histories stated earlier. Another example is that of a woman who was deeply upset to find out that two of her letters were in the Herstory Archives, which is fully open to the public. She requested that her letters be destroyed. The requests “were countered by a protracted campaign of pleas from the Herstory Archives staff to reconsider her request on the grounds that “shouldn't she continue to feel comfortable about her participation in the Daughters of Bilitis, and about being a part of women's, lesbian, and civil rights history?” (Gaudette, 2003, pg.28). \

This notion has been shared by Judith Schwarz, proposing that archivists and librarians “open the archives and research institutions to the full complexity of people’s lives.” (Schwarz, 1992, pg. 189) as well as Tim Cook who asked ““Is our society so worried about privacy infringement that we are willing to sacrifice our culture in the process?” (Cook, 2002, pg.113). However, Cook makes a point to say that citizens must be allowed the right that their lives are not open for all to see, and does plead with archivists to prioritize collective memory, even if doing so would go against a certain level of privacy demand. Overall, several authors have discussed privacy and open access, such notions were also discussed in Chang 2011; Geselbracht 1986; Greene 2009; Greene 2005; Henttonen, 2017; LeClere, 2019; and MacNeil, 1992, and Menzi 2008.

This range of dates show how this dilemma has been ongoing for decades and we still have not, and very well never be able to, come to a solid conclusion.

### **In The Museum Space**

Museum exhibits display valuable materials, notably of social and historical value. However, there are sensitive materials in many collections. The privacy issues surrounding the curation of historical photographic materials is outlined in Mienieke te Hennepe's "Private portraits or suffering on stage: curating clinical photographic collections in the museum context." While the article focuses on medical photos, the concepts discussed can very well be tied back to the case study in Gaudette 2003, because the recognition of someone in a photograph in a queer context can be seen as outing them. There are also considerations for photographs of violence and oppressive acts. Photographs can be taken for a multitude of reasons, for instance for the purpose of general memory and collective memory, and some other reasons that are deeply personal and not ever meant to be shared with others. The exhibition of photography reframes this.

According to Hennepe (2016). "Current exhibition ethics involve value judgements and considerations about awareness of feelings in public groups." (Paragraph 11,) and more notably "Innovative curatorial practices around 'difficult knowledge' of violence and oppression involve ways of representing the interests and voices of communities in museums or for audiences to consider the ethics of representation and exhibition itself." (Paragraph 12.) This was also discussed in Sonia Yaco's article "Balancing Privacy and Access in School Desegregation Collections: A Case Study." with "Understanding history requires that the public be able to examine actions of

individuals and governments, while a modern society depends on the protection of individual privacy.” (Yaco, 2010, pg.666).

In this context, there is no universally applicable way to reconcile the potential display of sensitive materials with an audience recognition of those materials; ultimately there are no moral absolutes. At the outset, there is danger in using a phrase such as "privacy" in a rigorous analytical setting such as this. This word can mean a lot of different things, and there are fuzzy uses within this literature review and statement of intended research. Even some of the articles in the literature cited use the word "privacy" in ways that are not legally sound. What seems to have been meant by "privacy" and "privacy policies," within the context of this proposed research are actually donor and public expectations about the extent to which a recipient institution will restrict access to certain individuals or make the materials publicly available.

Greene and Gaudette observe confusion and disagreement about what the policy should be, ranging from "make everything open source" to an agreeable restriction that would encourage donation of personal papers in a way that facilitates research but protects privacy expectations. While some authors might seem to think that academics can decide when someone can expect materials to be kept restricted (or "private"), law and contract might govern, not academia's sense of entitlement.

### **Research Questions**

1. From a representative selection of institutions, how many even give information about their third party privacy policies? Do their policies tend to contain certain language? Are some more clear than others?

2. What are the details of policies surrounding third party privacy in university archives? In State Archives? In museums? How are they similar and how do they differ?
3. To what extent do these policies reference state and/or national law related to privacy?
4. How are different states handling third party privacy?
5. What mechanisms are in place to assess if archives are properly abiding by third party privacy laws/policies?
6. What are the ethical issues surrounding the abiding, or possible rejection of these policies?
7. Where do these ethical issues rest in the bigger picture and future of archiving materials?

## **Methodology**

I conducted a qualitative content analysis of privacy policy statements designed and implemented by state archives, American non-publicly funded university archives and museums. This approach allowed me to compare the characteristics of privacy statements from a significant number of archival institutions, and from there I created a general picture of current practice and create recommendations of best future practice in regards to protecting privacy, for use by future researchers and archives wishing to create or reevaluate and rewrite their own policies.

For a list of institutions I contacted, see Appendix I. The template for my email is as follows:

*Good Morning,*

*My name is Bobbie Shreiner and I am a graduate student at the University of North Carolina at Chapel Hill in the School of Information and Library Science. I am currently working*

*on my Master's paper, which is a content analysis of third-party privacy policies in archival and museum spaces. I found your institution alongside my professor and advisor Dr. Emily Roscoe, cc'ed here.*

*I've looked at your institution's website but could not find any posted policies regarding third-party privacy. Third party privacy here means privacy granted to individuals whose potentially sensitive information is a part of materials donated to an institution, but they are not the individual who initially donated the materials.*

*If your policies are publicly shareable, I would be grateful if you could provide your repository's policy with me. If needed, I'd be happy to provide additional information regarding my research.*

*Thank you,*

*- Bobbie Shreiner*

In the possibility that I may need to elaborate on what is meant by third-party privacy, this email, or some variation of it, will be sent upon a request for clarification from the institution I am inquiring to.

*Hello,*

*My research is about the privacy regarding materials in the archive itself. In terms of third party privacy, here means privacy granted to individuals whose potentially sensitive information is a part of materials donated to an institution, but they are not the individual who initially donated the materials.*

*If possible, if these sorts of policies are applicable, I would also like to see any privacy policy you have for donations in general as this could be helpful in my research. Privacy is a difficult area as you know, and any privacy policy language is much appreciated! Thank you for your time.*

*- Bobbie Shreiner*



## **Positionality/Researcher Role**

I collected privacy policy statements from archives' websites, and gained information after emailing the institution if the policy is not available online. I coded the content to determine overall themes, then analyzed the codes to determine important similarities and differences between privacy policy statements.

As for my positionality, I currently work in a library at an academic institution - the University of North Carolina at Chapel Hill - however the school is publicly funded and therefore not part of the criteria needed for my research.

I have also volunteered at a museum, the Ava Gardner Museum in Smithfield, North Carolina, where I worked on a project to digitize photographs and newspaper clippings about the actress for an online archiving procedure, as well as for a promotional material related project for a Turner Classic Movies Film Festival. I am, to some degree, aware of the complexity associated with privacy and donated materials. Further, my work in both of these institutions has made me aware of the necessity of policies, particularly where it concerns accepting materials that may contain sensitive information.

## **Sample/Research Participants**

Because I am trying to get a sense of the entire United States, for this research, I studied the policy webpages for the state archives, non-publicly funded academic archives and museums in ten states. From a list of the private universities, I selected ten from various areas across the United States. From there by default I chose the state archive from those states, and I selected ten museums that I believed would most likely have third-party privacy policies based upon the subject matter the museum focused on.

## **Data Collections Methods**

In order to determine which statements to take on for my research, I will use a combination of sampling approaches. To make my data more manageable, I will selected a private university at random from ten different states, then by default I will select the State Archive for each of those states, and for the museums I selected museums within those states that would most likely have distinct privacy policies, like one involving photographic portraiture of some kind. After forming my list, I visited the websites of each institution and searched for their privacy policy statements. If it is not accessible online, I made note of the absence, and attempted to reach out to the institution via an email.

I believe that this sampling technique provided me with a sufficient representation of privacy policy statements, and allowed me to do so in a way that is unbiased. However, because this method is limited to only non-publicly funded universities, potentially valuable comparisons of publicly funded university archival privacy policies to non-publicly funded university archival policies was not possible. I believe these decisions are justified, however, given the relatively small scope of my study. There was no tenable way to ensure a representative sample of archives except by sampling more relevant institutions within every state which is simply not feasible.

## **Data Analysis Methods**

Due to the fact that I gathered archival privacy statements from webpages, as well as reached out to the archival institutions, I used an existing data source for this study.

The benefits of taking statements from the pages is that the statements will be obtained

quite easily. Additionally, the fact of noting whether or not a policy statement is published online is valuable in and of itself, as an online statement is more accessible to the public and thus helps to some degree help donors understand what the purpose of the archive is, and may encourage donors to impose restrictions beforehand.

However, each state has different details to privacy laws, and I cannot look at the statements of every single archival institution. This is beyond the scope of my project.

After collecting my data, I used content coding and analysis for my interpretation method. Coding the privacy policy statements for overarching themes and differences appearing within the sample provided a simple way to parse the data. However, because I am the sole researcher, I coded the data once, and thus the validity of the code will have its limitations. This criticism also applies to analysis of the code. My method of coding involved reading each policy multiple times. First, I read for understanding, as well to familiarize myself with the policies. Then I read the policies a second time in an attempt to develop a thematic code that is descriptive of the policies' contents. When I noticed the same language, then I coded it as seeing it specific to donors, archivists, and so on. There is personal information that is pretty basic like one's name, but there is also even more personal information that may be deemed as being unsuitable for public knowledge. I noted any commonalities, how institutions have possibly varying definitions and specificity on what is deemed private or sensitive information. Afterwards, I analyzed the code's application across my sample, looking for patterns and important differences. This involved quantifying the codes into percentages so as to discern any predominant themes or interesting outliers. I also compared these results with existing theory.

## **Ethical Considerations and Quality of Research**

I strove to be as transparent about my own relationship to the subject matter as possible. I was clear, and thorough in my descriptions of my process and my methods. I defended my analysis and interpretations through quoting directly and at length from my sample, documenting any changes to my process as they happen as thoroughly as possible, and recount any problems with the data. An appendix is included at the end which will contain my list of institutions in their entirety, as well as examples of my coding, in such a way that any researchers of the future can compare my findings to the raw data I have.

Because I am the sole researcher, there may be some ethical concerns of bias. However, it is justifiable because, as stated before, my project does not allow for more resources than what I already have.

## **Resources**

I used several organizational tools to manage materials, including my papers, notes, and files. For example, I used Zotero, the citation manager, to organize my papers and Google Drive served as a secure storage platform where I stored my notes and drafts. Finally, I maintained backups on a USB drive.

All the organizational and time-management tools I intend to use are free for me to use. I should be able to conduct my research and write my thesis with my personal Laptop.

## **Impact, Limitations, and Conclusions**

Privacy is something every person deals with, and if it is more streamlined then there would be less take-down notices for archives. Though if there were to ever be a

streamlined, standardized policy there would be less violations of privacy. There is a possibility that museum managers, archivists, members of historical societies, among others within these types of institutions may be interested in learning of how policies may differ, how some states are going above and beyond to protect privacy, and how their institutions may benefit from adopting certain aspects of other privacy policies for their own institutions. In addition to this, it would be a great opportunity to study how policy and practice align.

In regards to limitations, I could not analyze all fifty states because that was simply not feasible within my timeline. By looking at various states across the nation, I was able to analyze the comparison in a concise way, as for example there are some states where the state archive acts as a historical museum as well as basically a dumping ground for all historical objects that are deemed worthy of being preserved. The constraints on time and resources limit my ability to enlist other researchers to help me develop my code, but I still feel confident that I developed the best course of action for me to answer my research questions.

## **Findings**

Initially, I was unable to find any notion of third party privacy policies being displayed anywhere on any of the sites I explored. I emailed the institutions on my list (Appendix.) After my information gathering period, a total of eighteen institutions answered my email requests - nine state archives, seven university archives, and only two museums/misc archives - leaving twelve institutions that did not answer. Overall, 90% of the state archives answered, 70% of the universities answered, and finally only 20% of

the museums/misc archives answered. Which, given the size of my sample, these percentages are simple. No institution from Tennessee answered. It may be possible to speculate that some of these museums avoid controversy by not being responsive to public requests for policies. Perhaps they do have one and are simply not sharing it, or they do not have one at all. Several institutions stated they did not have a third-party privacy policy, including the North Carolina State Archive. Some institutions asked me to elaborate on what was meant by third-party privacy, and once further explanation was sent, some responded and some did not.

The state archives predominantly stated they followed state public records law, and that includes privacy but it is not wholly what this research pertains to. Conflating the two is interesting, as it speaks to the seemingly endless discussion surrounding such policies and their implementation discussed in the literature review. It may very well be the case that defining or rather separating third-party privacy from the general definition of material donation policies in the State Archival is not applicable due to the nature of the institution. Others mentioned donor agreements, and it is crucial to question if they are equal or not to explicit third-party privacy policies.

It was extremely difficult to receive any response from the museums that I had contacted. Most museums did not answer. One asked me to elaborate and once an explanation was given there was no response in return. Another simply said they could not help me. No institution from the state of Tennessee answered me.

### **Coding Example**

<b>Term</b>	<b>Definition</b>	<b>Example</b>
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<p><b>Access/Accessibility &amp; Openness</b></p>	<p>Generally speaking, archives have the presumption that all records preserved by the institution are public record and therefore do not have any restrictions imposed upon them. They would be openly accessible by users.</p>	<ul style="list-style-type: none"> <li>● “The PIA makes records open for research with certain exceptions”</li> <li>● “The Secretary shall not impose restrictions on the use of records that are defined by law as public records or as records open to public inspection.”</li> <li>● “all documents will be presumed to be open to the public unless the agency holding them can prove otherwise.”</li> <li>● “We seek to keep archival material as open as possible to the public, in conversation with the donor.”</li> </ul>
<p><b>Restriction</b></p>	<p>Restrictions are primarily individual. When individuals donate materials to archives, they must reach donor agreement in the process.</p>	<ul style="list-style-type: none"> <li>● “Donors should be prepared to execute a contract of gift conveying physical and intellectual rights in the materials... The collections become the property of the state and are available for use by the public in the Search Room of the State Archives. Possible Restrictions Placed by Donors: The Archives is willing to accept reasonable, time-limited restrictions on access to donated papers.”</li> <li>● “If there is potentially confidential information, the requester can agree to have the confidential information redacted and/or removed in order to access the</li> </ul>

		<p>unrestricted parts of a record.”</p> <ul style="list-style-type: none"> <li>● “The Secretary shall observe any rights, limitations, or restrictions imposed by law relating to the use of records.”</li> <li>● “The University Archivist shall determine which such materials shall be permanently retained by the Archives, shall grant and limit access to the collections and shall establish and administer other public service policies and procedures as necessary.”</li> </ul>
<p><b>Redaction</b></p>	<p>Often it is the case that when a requestor asks for access to a record, someone in charge of the record - a clerk of some kind - will look over the record for any sensitive information that may need to be redacted before giving the record to the requestor.</p>	<ul style="list-style-type: none"> <li>● “If there is potentially confidential information, the requester can agree to have the confidential information redacted and/or removed in order to access the unrestricted parts of a record.”</li> <li>● “What happens when records require redaction? Staff will photocopy the records, then redact those records (i.e. remove or block out restricted information). Staff will only redact information that is restricted under law. We make researchers aware about the types of information that will be redacted from the specific records being requested.”</li> <li>● “the agency shall redact</li> </ul>



		<p>from the record the information which is not subject to access, and the response shall grant access to the information which is subject to access.”</p> <ul style="list-style-type: none"> <li>● “If any documents are deemed classified by the relevant agency's FOIA officer, the Gelman Library will relinquish the documents to the agency, but will submit an FOIA request to get a copy of the documents with the classified content redacted.</li> </ul>
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## Discussion & Analysis

The state archives stated that they adhered to state laws regarding public record. Some policies contained particular restrictions on physically fragile records that could not be accessed due to their fragility. While within most of the state laws it was noted that information that constitutes a “invasion of privacy” was never to be disclosed - but it was not defined as to what exactly that means which leads to a lot of gray area. The Illinois State Archive, however, did explicitly state that they did not collect any non-state government materials.

How are we defining sensitive information? Generally, there is information that is automatically restricted or redacted from materials across the sample; such as:

- Social security numbers
- E-mail addresses
- Home addresses, phone numbers, social security numbers, and personal family information of government employees and officials

- Physical and mental health information
  - However, in some states there is a process where one can in fact request to access these records. (New York Public Record Law)
- Account numbers
- Driver's license numbers
- Names of juvenile offenders
- Private information about an individual

The last point is what is of the most interest, how is the law defining this? The private information about an individual is an incredibly vague notion, as is what constitutes an invasion of privacy. For example, one's home address is public information when it comes to voter registration and public real property recording. To many citizens, one's home address being public record may be considered an invasion of privacy. Some did explicitly define what could constitute an invasion of privacy, which are listed as follows:

- Disclosure of employment, medical, or credit histories or personal references of applicants for employment
- Disclosure of medical or personal records of clients or patients in medical facilities
- Disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject of that information

Those three listed were deemed examples, and are not an all encompassing definition. In addition, as mentioned, The New York State archives explicitly defines a way of potentially accessing patient records. It is that all requests for access to patient

records received by the State Archives are forwarded to the New York State Office of Mental Health (OMH), which reviews and approves or disapproves such requests. Illinois also permanently closed Mental Health patient records unless by court order, in which there is an additional process to that. If anything regarding mental health records was mentioned for the other states, it was not made explicit within the public record law, which for the scope of my project is what I retained myself to analyzing.

There comes a question of what authority do people have over memory, as in what rights do individuals have over what is remembered about them, about what is collected in an archive? In Markovitz (2001) it is stated that “If public memory thus serves not only to recall the past but also to legitimate the present, it needs to be selective: preserve those memories most flattering to current users and reject those most prone to cause them embarrassment. Law seems a likely candidate to help in this selection process. It is an expert both on matters of the past and on issues of legitimacy.” Certainly, this can be applied to state laws regarding an invasion of privacy, and one can suppose now that the reason for this somewhat vague notion of what an invasion of privacy constitutes is for the purpose of individuals to interpret it as needed. Notions of restriction were often stated to be governed by deed of gift, and requests for restriction were often said to be handled on a case-by-case basis.

How we define privacy, and how we define confidentiality, how we define personally identifiable or identifying information is one of the biggest everlasting conundrums of archiving. It is litigated all the time, when a user asks for redactions in court records as name may be given a pseudonym, and there is no explanation about why or how that determination or conclusion comes to be. There is no way to interpret that for

the next time. This is the path archivists must follow or there may be the potential to be sued under a tort claim, pertaining to breaching a duty of care which is a nebulous concept to consider, it is flexible to fit cases and does not have a lot of solidity because of precisely that.

Privacy is not usually defined in isolation, does one have privacy or not and what does that mean? It is usually measured in light of competing interests - including the first amendment, which encourages the free flow of information in particular held by a state entity. It is hard to define, and it is always being contested. So as for third party privacy, if information or materials have been shared with someone else unless there is an explicit contract - as in with restrictions set by donors - it becomes free to share.

And for the most part, archivists are not lawyers, and all they can say is that they comply with the law. They are reared in the culture surrounding making information available, that is after all our entire *raison-d'être*. They want transparency in government so that the citizens can oversee and decide if things are going as they should be and that generally is what archivists lean into, and anything else is considered censorship. Fully available information is important for getting a full picture of history. For many of these cases of sensitive information, archivists want to be seen as neutral, but this inherently cannot be the case. By following the law, state archivists make it so they don't need to have a judgment call, for the most part. They are, actually, making judgment calls in light of the language of the law.

For materials donated to University Archives, they predominantly adhered to already existing state laws. They also tended to warn that the disclosure of materials that have been restricted may result in legal ramifications. One archive noted they adhere to

FERPA - the Family Educational Rights and Privacy Act, which is a Federal law that protects the privacy of student education records. Others put the burden of determining restriction onto the University Archivist, who is stated to grant and limit access to the materials in the collection, and is responsible for establishing and administering other public service policies and procedures as necessary. It is usually the case that people who donate materials relinquish all rights when donating, and if restrictions are to be made, they must be made by the donor prior to the final process of donation. In addition to this, while in most cases restricted materials are just that - restricted - there are some cases in which a user can request by written appeal to the Director of the University Archivist, or another authority if this is the case at other universities not discussed here. The notion of “historical value” is subjective, and more so pertains to appraisal praxis and appraisal policies overall, which while crucial to the archiving process, is not the focus and will not be dwelled upon further.

There are some materials entering a university archive that will automatically have restrictions, some of which will be eventually lifted, others will not. One particular university made it very explicit that records the disclosure of which might expose the university to legal liability will be restricted, one can presume permanently. It should be noted that this is the same university that stated that a written request to access restricted materials could be done. The implication behind this restriction factor is very telling of a university’s priorities. Certainly, a university would like to uphold a good reputation, but it is outright dubious to have such a clause for restriction. It implies that the university is hiding a crime or some other wrong that may have been inflicted upon the people in the university system.

Finally, as for the museums, while one museum had the same general policy of donors relinquishing their rights to materials unless materials were set to be restricted beforehand, the response from the Lesbian Herstory Archives had a more personal response. While they do not have a formal third-party privacy policy, it was made explicit that individual donors have individual privacy restrictions when it comes to accessing their special collection materials or the use of their intellectual property; if any ambiguity was present, then the archivists would err on the side of protecting the privacy of the individual. In addition to this, archivists at the Lesbian Herstory Archives made it clear that they would assist the researcher or user with connecting with the owner of the intellectual property (which includes the personal papers, etc) whenever possible; which was an approach not mentioned anywhere else in my research.

As had been discussed in the literature review, the Lesbian Herstory Archives has had issues in the past regarding protecting privacy. Compelling is the example of a woman's request for her letters to be destroyed was being met with pushback from the archivists at the time. Certainly because of this, one can speculate that archivists are thoroughly trained on notions of privacy protection in order to avoid a repeat situation. If the scope of my project had allowed for it, then asking the Lesbian Herstory Archives what had changed since their previous notable issue had occurred would have given a more thorough understanding of the response I received.

## Recommendations

Many states had a particular person in a position of power over determining restriction, whether that be a Secretary or a Clerk, and one can assume they are an expert on the state law, or work closely with experts on state law.

I believe this position would translate well to museums, independent archives, and even university archives. As part of the appraisal process, one member, or perhaps even a small team if it is a larger institution with more funding, would have a final look over the materials to determine if restrictions must be made outside of the scope of donor restrictions, as in regards to the privacy law. This person or persons would be a legal expert.

For even smaller institutions who have even less funding, perhaps there could be more programs like Documentary Heritage & Preservation Services for New York (DHPSNY), which is a program that provides free assessment for cultural heritage institutions; and this can be applied more broadly for smaller, more independent archives and privately-owned museums overall. These clerks, secretaries, other teams and organizations would work closely with the institution, helping them with developing comprehensive archival programming from administration to collections management and care. They would analyze how the institution is run, who the staff is, what their policies and procedures are that are already set in place, particularly focusing on collections management and privacy policies at the forefront. The way this would work overall is the same as how it already works with DHPSNY: the whole program would be funded by the state, and would be open, accessible and free to anyone with a public facing collection. Everyone applies to the organization directly. A panel consisting of the advisory committee reviews each application, some of the components they are looking

for in applications include the ability to commit to and follow through on the recommendations from the report and financial trustworthiness, etc.

As Victor Borden discusses in “The Accountability/Improvement Paradox.” Archival institutions hold a responsibility to hold themselves to standards of competence and morality (Borden, 2010). However, it is the case here that while Borden takes on a one-size-fits-all approach to assessment. Here, law-complying recommendations are tailored to the capabilities of the archive that is being assessed, just the same as the law is flexible. There is also the fact to keep in mind that there are many cases in which an archival institution may want to improve, but simply does not have the money to do so, and must reach out to other institutions for help in managing their collections, or simply comply to the already existing state law instead of formulating their own. Although, this may be seen as an oversimplified and idealized concept of assessment and policy creation. As this case study has seen, the law is not that cut-and-dry when it comes to privacy.

## **Conclusion**

In retrospect, a more concise analysis would have involved studying the policies of state history museums as well. I regret trying to pick niche museums to whom I thought would have such policies. I also should have searched for more open archives, because the single archive within my museum category feels out of place. I am more than aware that the scope of my research is more or less incomplete, particularly in regards to the State Archives. Looking at laws beyond the public record law was beyond the scope of my project, but it would have given me a more thorough and concise understanding of the law in regards to restrictions, privacy and exceptions to such privacy laws.



This research has clearly demonstrated that there simply will never be a solid answer to how to process third-party privacy. Users put their trust in archives; and while archivists are constantly stuck in this push-pull of accessibility and restriction, it is ultimately the law that is the final judge on this matter; and archiving policies must work alongside it in order to undertake their goals.

### **Acknowledgements**

I would like to thank my advisor Dr. Emily Roscoe for guiding me through this process, Dr. Casey Rawson for giving us the education and help needed to get started in her Research Methods course, and finally I would like to thank every institution who responded to my inquiries.

## **Appendix**

### **State Archives**

- California
- District of Columbia
- Illinois
- Massachusetts
- Nebraska
- New York
- North Carolina
- Pennsylvania
- Texas

### **Universities**

- Amherst College, Massachusetts
- Bellevue University, Nebraska
- Cornell University, New York
- Duke University, North Carolina
- George Washington University, District of Columbia
- Rice University, Texas
- University of Pennsylvania, Pennsylvania

### **Museums/Archives**

- Ava Gardner Museum, North Carolina
- Lesbian Herstory Archive, New York

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