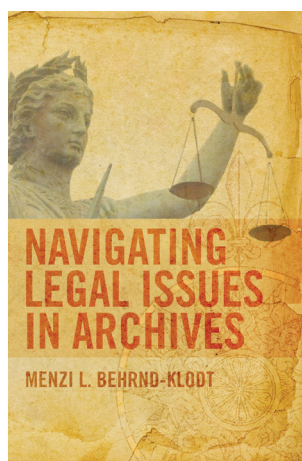


LAW & ETHICS

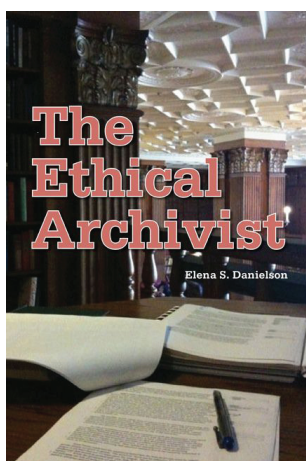


Navigating Legal Issues in Archives

Chapter 21

“Copyright and Related Rights Issues:
Permissions, Releases, Music, and
Moral Rights.”

by Menzi L. Behrnd-Klodt



The Ethical Archivist

Chapter 25

“Case Study: The Cigarette Papers.”

by Elena S. Danielson



Privacy and Confidentiality Perspectives: Archivists and Archival Records

Chapter 10

“Balancing Privacy and Access:
Opening the Mississippi State
Sovereignty Commission Records.”

by Sarah Rowe-Sims, Sandra Boyd,
and H.T. Holmes

Compiled with an Introduction
by Lisa A. Mix

SAA SAMPLER

About the SAA Sampler Series

The SAA Sampler Series features collections of select chapters from authoritative books on archives published by the Society of American Archivists. Produced exclusively electronically, the samplers are designed to give readers an overview of a pertinent topic as well as a taste of the full publications, which are available at www.archivists.org/bookstore. The content has been reproduced as it appeared in layout in the original publications. Pages have two sets of folios. The running head is the page numbering from the actual book. The footers have been added and reflect page numbering for this compilation.

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Introduction to the Law and Ethics Sampler

Lisa A. Mix

This is the first installment in the SAA Sampler Series, which introduces archivists to the best current thinking on pertinent professional topics. In this volume you'll discover three outstanding pieces on legal and ethical issues for archivists—one overview of copyright and two case studies dealing with privacy and access—drawn from three books published by the Society of American Archivists: *Navigating Legal Issues in Archives*, *The Ethical Archivist*, and *Privacy and Confidentiality Perspectives: Archivists and Archival Records*.

All archivists will face legal or ethical concerns throughout their careers. In many cases we are caught unaware, and pressure is escalated by time crunches or demanding patrons. The chapters from the three books represented here aim to equip archivists to handle these sorts of dilemmas as they arise, by presenting practical information drawn from the real-life experiences of archivists.

- 1) **“Copyright and Related Rights Issues: Permissions, Releases, Music, and Moral Rights.” Chapter 21 (pp. 249–264) in *Navigating Legal Issues in Archives* by Menzi L. Behrnd-Klodt. Chicago: Society of American Archivists, 2008.**

Menzi L. Behrnd-Klodt, an attorney and archivist, presents a practical guide to navigating the complex quagmire of the rights issues associated with intellectual property. The chapter was written in 2008, and it is especially timely now in light of recent cases, such as the 2010 case brought against the Smithsonian's National Museum of the American Indian that involved use of copyrighted photographs from a donated collection.¹ This chapter covers matters—such as rights ownership, usage, and permissions—that would later play out in that case and others.

The chapter will be useful to archivists who manage image collections or digital collections, and to those who plan to present online digital surrogates

from their collections. Behrnd-Klodt also offers practical advice for assisting researchers in securing permissions. Even though the onus for seeking and gaining permission is ultimately upon researchers, reference archivists can also spend a great deal of time and effort facilitating this process. And, as the Smithsonian case referenced above illustrates, repositories can be subject to legal action if a creator's rights are not properly protected.

Behrnd-Klodt opens with a discussion of copyright and the permissions process for text, images, and music. Extremely useful are the sample release forms for using images, oral history, and quotations. She includes examples showing different levels of permission, and clearly explains what these differences mean. The chapter ends with an excellent discussion of artists' moral rights, a topic not often covered in the archival literature.

This chapter will guide archivists in negotiating donations of image collections and in facilitating the permissions process for researchers. Perhaps more importantly, as many of us face pressure to "digitize it all and put it online", we need to be mindful of creators' rights as we craft deeds of gift and donor agreements. This chapter is a no-nonsense guide to navigating these tricky waters.

Navigating Legal Issues in Archives, the book from which this chapter is extracted, presents straightforward information for archivists on pertinent legal topics, such as administration, access, privacy, copyright, and permissions. Each chapter begins by posing two questions: Why is this topic important to archivists? Who will find this chapter especially useful? Each question is followed by bulleted lists of answers, so that readers may immediately gauge its relevance to their particular situations.

Navigating Legal Issues is scrupulously documented, with copious endnotes and numerous sources cited. Full of practical information about real-life situations, the book serves as a handbook that archivists will turn to again and again.

2) "Case Study: The Cigarette Papers." Chapter 5 (pp. 165–180) in *The Ethical Archivist* by Elena S. Danielson. Chicago: Society of American Archivists, 2010.

Elena S. Danielson, who holds a PhD from Stanford University and worked for twenty-seven years in the Hoover Institution Archives at Stanford, relates the fascinating story of the "cigarette papers," a cache of documents containing damning evidence against the tobacco industry that came to light

in the 1990s. The case study involves issues of authenticity, ownership, access, privacy, and the public's right to know.

Thousands of pages copied from proprietary documents were smuggled out of a major tobacco company by a whistle-blowing employee and sent anonymously to a researcher and anti-tobacco activist on the faculty of the University of California, San Francisco (UCSF). The faculty member placed the documents in the UCSF Archives, and that is where the story becomes relevant for archivists.²

Danielson interviewed the archivists and librarians, as well as the faculty member, involved in these events in preparing this case study that often reads like a detective story. All parties describe how they faced such challenges as ensuring equality of access, presenting materials in a neutral manner, maintaining individual privacy, handling proprietary data, and preserving academic freedom, while pitted against one of the most powerful industries in the nation.

The events related here placed the archivists and librarians in new roles to which they were not accustomed, forcing them to operate beyond their comfort zones. As Danielson reminds us, the case was controversial within the archives community at the time. The accounts of the staff members' thinking as they developed procedures and balanced conflicting interests makes fascinating and enlightening reading for archivists today.

Danielson concludes her discussion with seven miniature hypothetical case studies based on actual events, demonstrating the types of ethical dilemmas that archivists might face. They present no right or wrong answers, but rather seek to help archivists "develop coping skills" to better equip them to handle such situations.

The Ethical Archivist covers a range of ethical issues that can arise in all aspects of archival work, including acquisition, appraisal, access, and reference. Each chapter concludes with a set of discussion questions designed to get archivists thinking about how to apply the concepts to their daily work, and illustrating that there are often no clear answers.

The book includes an extensive bibliography and several helpful appendices including codes of ethics, sample policies, and a select list of legislation affecting access to private information. Archivists in many types of repositories will find it to be an indispensable reference work.

- 3) “Balancing Privacy and Access: Opening the Mississippi State Sovereignty Commission Records,” by Sarah Rowe-Sims, Sandra Boyd, and H. T. Holmes. Chapter 10 (pp. 159–174) in *Privacy and Confidentiality Perspectives: Archivists and Archival Records*, Menzi L. Behrnd-Klodt and Peter J. Wosh, editors. Chicago: Society of American Archivists, 2005.

Legal and ethical concerns converge in “Balancing Privacy and Access: Opening the Mississippi State Sovereignty Commission Records,” by Sarah Rowe-Sims, Sandra Boyd, and H. T. Holmes of the Mississippi Department of Archives and History. This case study illustrates how archivists navigated complex and challenging situations of balancing privacy and public access in “managing one of the most infamous collections of privacy-sensitive government records of twentieth-century America.” [p. 160]

The study opens with a brief historical sketch of the Mississippi Department of Archives and History (MDAH), and its ethos of open access to public records. This open access policy was tested by the complicated circumstances of the records of the Mississippi State Sovereignty Commission, established in the 1950s as a reaction to the *Brown v. Board of Education* decision in an attempt to assert the state’s rights against a perceived overreaching of federal authority. In effect, the commission functioned as a surveillance agency, gathering intelligence on civil rights activists and “racial agitation”.

The authors present a clear account of the legal actions that resulted in the initial closure, and subsequent mandatory opening, of the commission’s records. Battles between privacy advocates and public access advocates ensued for years. The case study describes the many challenges faced by the archivists in carrying out the mission of the MDAH while dealing with conflicting regulations as well as strong opinions (and high emotions) on both sides of the legal dispute. The narrative also discusses such practical issues as devising procedures for redacting information from and providing access to a voluminous record group on very short notice. The story of how the archivists met these challenges is illustrative and instructional not only for government archivists, but for any archivist whose repository holds a controversial collection.

This article has been reprinted from the book *Privacy and Confidentiality Perspectives: Archivists and Archival Records*, in which Menzi Behrnd-Klodt and Peter J. Wosh assemble a wide-ranging collection of essays and case studies surrounding privacy issues in archives. The editors acknowledge the long-running debate in the archival community on balancing privacy and access,

and strive to present a diversity of viewpoints. They state in the introduction that “comprehensiveness has been sacrificed in the interest of stimulating deeper reflection, provoking discussion, and offering archivists a variety of ways in which to consider their current practices and methodologies.” [p.5]

The book is arranged in four sections: legal perspectives; ethical perspectives; administrative perspectives; and institutional perspectives. The Mississippi State Sovereignty Commission case study originally appeared in the administrative perspectives section.

The chapters in *Privacy and Confidentiality Perspectives* involve a variety of different types of repositories including government, university, religious, and corporate, as well as diverse types of collections including personal, literary, medical, and public. The book contains extensive footnotes, and the appendices home in on specific statutes affecting privacy, such as HIPAA and FERPA. This text will be useful to a wide range of archivists.

* * *

The three essays here guide archivists through a gamut of challenges that we could encounter in our work. Most repositories will deal with rights management at some point in negotiations with donors. Balancing privacy and access is a challenge that almost all of us face on a regular basis. And while we all hope never to experience a baptism by fire such as those described in the two case studies, collections that generate controversy are often those with the highest research impact. Readers of this volume will benefit from the experience and knowledge of the archivists involved in these chapters, thus gaining insight into handling these types of situations in their own repositories.

*Lisa A. Mix is the head of the Medical Center Archives at
New York-Presbyterian/Weill Cornell Medical Center and a member
the Publications Board of the Society of American Archivists.*

Notes

¹ The donor/photographer had not transferred copyright to the Smithsonian, and the user failed to obtain permission from the copyright holder. The photographer sued both the user and the Smithsonian. Peter Hirtle presents a summary of the case and its lessons for archivists at <http://blog.librarylaw.com/librarylaw/2012/02/update-on-a-legal-action-against-a-cultural-institution.html>. Accessed June 9, 2012.

² In the interest of full disclosure, I should mention that I was employed as the manager of Archives & Special Collections at UCSF from 2002 through 2011, well after the events described in this chapter, but I know several of the key players on the UCSF side in the case.



NAVIGATING LEGAL ISSUES IN ARCHIVES

MENZI L. BEHRND-KLODT

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COPYRIGHT AND RELATED RIGHTS ISSUES: PERMISSIONS, RELEASES, MUSIC, AND MORAL RIGHTS

Why is this topic important to archivists?

- Archivists will be better able to understand and assist researchers who seek information and advice about using or publishing from unpublished archival holdings and copyright-protected material other than text, such as photographs, audio-visual content, music, and art works.
- Related rights issues may complicate the efforts of archivists, curators, and others who want to use or exploit their own holdings.

Who will find this chapter especially useful?

- Archivists employed by publishers, museums, art museums, and musical organizations, and related businesses and organizations
- Archivists who manage photographic or digital collections
- Reference archivists who advise researchers on securing copyright permission
- Corporate archivists and records managers whose collections include copyright licenses and permissions and/or whose duties include maintaining corporate records containing information about rights ownership and licensing

Using Copyrighted Text, Images, and Music: The Permissions Process

Archivists may seldom need to secure copyright permission for their own uses, but many of the researchers they assist will. Consequently, understanding the typical copyright permissions process will help archivists better manage archival records in which the archives holds copyrights and allow them to better assist researchers who seek to reproduce or use text, images, and music.¹

In considering using, reproducing, or reprinting material created by others, the initial inquiry typically is whether the material is protected by copyright,² triggering an investigation of the copyright status of the work.³ Public domain works generally may be freely used. If a work is protected by copyright, the user must determine whether the anticipated use is permissible fair use under copyright law.⁴ Researchers may peruse copyright-protected material in the archives, take notes, make single copies for study, and quote unspecified (but not unlimited) amounts of protected content without infringement. When the desired use exceeds the permitted fair use or becomes a commercial use, a wise user seeks permission from the copyright owner.

Determining fair use in advance of a lawsuit is not always clear-cut or easy. In contemplating whether to seek permission, the user's publisher or copyright attorney may be able to advise or the user may evaluate his or her tolerance for risk and potential liability for copyright infringement. Requesting advance written permission is a safe and conservative course of action, particularly if the use will be substantial in terms of amount copied, quantities produced, and visibility, or is commercial in nature, although it may involve royalty or use payments. Securing permission seems simple, but may require perseverance, investigation, time, and money. Permissions or licenses⁵ to use copyrighted work can be obtained by the user directly or through one of many commercial services such as the Copyright Clearance Center.⁶

In order to secure permission, the would-be user should accurately identify the copyright owner. The copyright notice, name of the author and publisher, and title of the work provide the basic information needed concerning recently published works. When works incorporate protected material from several sources, such as contributions to an anthology, recorded music, websites, or multimedia recordings, or if the owner is not readily apparent, a search of the U.S. Copyright Office records may help. For unique and unpublished letters, diaries, or literary manuscripts, the archivist may be able to assist based on the donor agreement and other internal records. If the user cannot identify or locate the copyright owner after a good faith effort, the user's next step is to weigh the risks of using uncleared material. (The risks of copyright infringement may be

reduced to a level acceptable to the user if, for example, the use is noncommercial and the amount used is diminished in scope or duration.)

Once the copyright owner is identified, it is necessary to determine what rights are needed, for example, the right to quote exactly, make copies, or prepare a derivative work. Securing rights for use in a published or performed work typically includes not only the right to reproduce, edit, and modify material, but also use in marketing, promoting, advertising, distributing, and selling the new work. If electronic rights or formats are needed, the user should be sure to secure express permission. The permissions grant should be in writing, clearly specifying what rights are granted, whether the rights are exclusive or nonexclusive,⁷ the scope of the permissible use(s), how long the permission continues, whether fees or royalties are due, and restrictions on the use of the material, and should be signed by the copyright owner.

Permission to Use Photographs; Releases

Obtaining permission to reproduce, publish, and distribute photographs is similar to clearing written text for use, although it may involve clearing several layers of rights and issues that transcend copyright law. The intended use may affect whether rights must be cleared. Printing a photograph without permission in a scholarly work may be fair use or a low risk endeavor while using the same photo in a national television advertisement may not. If the desired photograph is owned by a photographer/copyright owner, obtaining permission in exchange for a usage fee may be simple. Many photographers opt to retain their copyrights, particularly for national advertising, but they may be willing to license their work directly to end users. If a photographer transfers full copyright ownership to the archives together with the photo prints and negatives, the archives then may exercise all of the exclusive rights of copyright, and grant or deny permission to others to reproduce, exploit, or otherwise use the photos, including licensing to third parties for such commercial uses as posters, software, and merchandise.⁸

Obtaining permission from the copyright owner may be but the first step in clearing photos for use. The user must be aware of the content of the photo. Use of photographs of protected works of fine art may require permission from the artist as well as the copyright owner (and occasionally, the art museum holding the art may seek a credit and/or a fee for use of a digital image or transparency). Photos incorporating an identifiable trademark may require permission of the trademark owner for use or reproduction, especially in commerce. Reprinting the likeness of identifiable individuals without permission may invade their

privacy. Celebrities not only zealously guard their images but may insist upon payment of fees and the approval of use of their likenesses to maintain their images and commercial viability. Clearly there are instances where even a legal assessment that a use is fair use under copyright law will bump into a real life need to secure additional permissions, often depending upon the nature of the intended use.

Typically, either a photographer or one who employs the photographer under a work made for hire agreement obtains a release from the photo subject at the time of the photo shoot, but for the uses intended by the photographer or employer. A researcher who subsequently wishes to use the same photo (especially in a commercial use) should know what rights initially were released or granted to whom, for what purposes, and for how long, and whether those rights extend to permit the researcher's use. A release of rights to the photographer may be exclusive to the photographer or limited in subject or time, and are not necessarily transferable to a different use. If not, the researcher may need to secure permission from the photo subjects in order to make a new or another use of the photo. If the photo is in the archives, the archivist may be asked to help identify the copyright owner (e.g., the photographer or employer) and to provide contact information to enable the researcher to determine whether additional releases are required.

Some photos of identifiable persons and places may be used without violation of privacy rights. Those who attend public events are presumed by law to have relinquished some of their privacy rights, as do celebrities, politicians, and civic leaders who are public personalities. Photographs of individuals and crowds in public settings, particularly those who have consented to be photographed, if the photographer was readily visible while shooting, if the scene lent itself to photography, or if there was no reasonable expectation of privacy, may not require a release of rights from each individual shown. Photographs used for news reporting, journalism, or other factual use (as opposed to commercial or for-profit use of the photo) also typically do not require a release. The facts and circumstances of each instance will help determine whether releases are needed.

Below are two examples of releases. The first is an example of a very broad release of all rights to ensure that the copyright owner (the photographer) owns all rights from the subject of a photo commissioned for specified uses. When the copyright owner later donates the photographs to the archives, the donor agreement should transfer the photographer's copyright and to the extent possible, all of the photographer's rights under his or her releases with the photo subjects, such as this one. Doing so will enable the archives to "stand in the

photographer's shoes," in terms of being able to use, grant permission to use, enforce, and protect the copyright in the photos. The second release is one that an outside researcher (or publisher) may use to secure the right to use, quote, or publish various rights from the copyright owner, when the intended use exceeds fair use or is a commercial use. Neither of these releases is provided with the injunction that they must or need not be used; they are provided for information only. Whether and when an archives, researcher, or publisher should use such releases should be decided with legal counsel. (Note that capitalized words and terms used in these examples are defined and assigned the meanings listed in each release.)

In the first release below, note the breadth of the rights obtained through the agreement's language. Both the photograph itself and use of the likeness are secured for the specified use (the "Book") but also broadly to allow the book to be advertised, promoted, displayed, and marketed. Even broader are the rights to use the photograph and likeness: "as well as any future use" to "advertise, promote, display and/or market" other products or services, as well as for public relations purposes and use on websites, "in all media now known or later developed" and in "all trade channels." Clearly, this release sets the stage for future commercial use and exploitation of the photographs and likenesses. The subject of the photograph also agrees not to seek future compensation for use of the photograph, and agrees to specific language ensuring that the photographer is "the sole, exclusive, and perpetual owner" of the photograph with all ownership rights, the right to create derivatives, control, display, use, reproduce, modify, sell, license, or dispose of the photograph, or not use the photograph, all without any right of approval by the subject. These are very broad rights, indeed. Finally, the subject of the photograph agrees not to file any claim against or seek any redress against the photographer or the photographer's business partners or employees, including, significantly, anyone acting on behalf of the photographer, from the use of the photograph and the likeness of the subject of the photograph, all of which further protects the photographer and his or her actions.

The second release below illustrates a document that could be used in any situation, and has been created in this example for a researcher to send to the owner of copyright in materials housed in and donated to an archives, without a transfer of copyright. In this example, the researcher has determined or has been advised by her counsel that her proposed use of excerpts from copyright-protected material housed in the archives exceeds fair use, and she has decided to secure written permission from the copyright owner. The researcher has contacted the copyright owner, communicated her intent, and negotiated the

permissions she needs; this document thus memorializes the agreement between the parties. The archives is not a party to this agreement and may, in fact, never know of its existence.

In this same example, note that in addition to the general statement about the rights that the author wishes to secure, specifically: “various excerpts and quotations from letters in the John Doe papers,” the researcher is careful to clear all that she intends to use by attaching a copy of the actual excerpts and quotations to be used. In addition, for the avoidance of any future doubt, the researcher, Smith, has taken care to reserve her right to edit or modify the excerpts, and to use them in formats other than the printed work. She has not, however, secured broader rights to use the excerpts in any work other than the specified book, perhaps because the copyright owner would have requested additional compensation for such uses. Note, too, that both parties are identified as is their authority to enter into and grant the rights recited in this release. The amount of compensation is recited in the release, further modified by the statement that the copyright owner shall receive nothing additional for the stated use of the excerpts. This is to the benefit of the writer so that if the book becomes a runaway bestseller, no royalties will be paid to the copyright owner. Depending upon the type of work to be published and the amount and significance of the excerpts, such determinations could be significant in the negotiation of rights between copyright owner and writer. This release, too, includes “release and hold harmless” language protecting the researcher/writer from any claim that might be filed by the copyright owner, and by anyone else acting on behalf of the copyright owner, arising from the writer’s use of the excerpts.

RIGHTS LICENSE AND RELEASE – FOR ADULT

[Name of Photographer] (the “Photographer”) creates, markets, uses, sells, and distributes various photographs and images. In connection with [the Photographer’s project or work, e.g., a book on women’s dress designs in the 1960s] (the “Book”), the Photographer desires to photograph you and use your photograph and likeness. Therefore, by signing this document below, you agree to the following exclusive grants to Photographer and its assigns.

You hereby expressly and irrevocably give consent to Photographer to photograph you and grant the right to use your photograph and physical likeness, whether one or more photographs (the “Photograph”) in Photographer’s Book and in connection with any advertising, promoting, displaying, and/or marketing of the Book, as well as any future use of the Photograph to advertise, promote, display and/or market Photographer’s products or services, and for public relations purposes connected with the Book and the Photographer, including without limitation use on Photographer’s website(s). The rights and release created herein shall apply to all media now known or later developed and to all trade channels.

You agree not to seek from Photographer any further payment or consideration of any kind with respect to the use of the Photograph by Photographer, or any other use of the license rights granted by this license and release.

You acknowledge that Photographer is the sole, exclusive and perpetual owner of the Photograph which ownership entitles Photographer, among other things, to exclusive and perpetual:

- a. Ownership of all duplicates or derivatives of any Photograph and any promotional materials;
- b. Right to control, display and use the Photograph and any performance rights embodied therein in any medium, by any means, and for any purpose whatsoever; and
- c. Right to reproduce, modify, distribute, manufacture, advertise, sell, lease, license or otherwise use or dispose of such Photograph.

You hereby waive the opportunity and right to inspect or approve any reproductions of the Photograph or any use to which they may be put. The Photographer has no obligation to use the Photograph.

You hereby agree to release and hold harmless Photographer, its officers, directors, agents and employees, and those acting under Photographer’s authority, against loss from any claim, action or demand that may be brought at any time by you or by anyone acting on your behalf for the purpose of enforcing a claim for damages on account of the use or non-use of the Photograph or likeness, and from all claims and liabilities of any kind arising out of or in connection with the use and reproduction or non-use of the Photograph or the likeness referred to above.

By signing below, you certify and represent that you have read the foregoing and fully understand the meaning and effect thereof. By signing this agreement, you intend to be legally bound by it.

Dated this ____ day of _____, 2007.

Signature: _____ Address: _____

Print Name: _____ City, State, Zip: _____

RELEASE OF RIGHTS

[Name of Researcher, e.g., Mary Smith] (“Smith”), presently a professor at the University of Archivia, is [briefly characterize the nature of the researcher and/or research, e.g., “researching and preparing for publication by Publisher, Inc., a manuscript about the American West”] (the “Book”). In connection with the Book, Prof. Smith wishes to use various excerpts and quotations from letters in the John Doe Papers, whose copyright is owned by Jane White (“White”), including use of the name “Jane White” (collectively, the “Excerpts”), and which presently are housed at the University of Archivia Archives. The Excerpts are attached as five (5) separate pages and made a part of this release. Therefore, by signing this document below, White agrees to the following nonexclusive grants to Smith and her assigns.

In exchange for a one-time payment of \$500.00 to White by Smith, the receipt and sufficiency of which is hereby acknowledged, White expressly gives consent to Smith to use, edit, modify, reproduce, publish, transmit, and otherwise use the Excerpts in and for the Book, including without limitation, use in electronic formats and websites, and to advertise, promote, display, market, and sell the Book. The rights and release created herein shall apply to all media now known or later developed.

White agrees not to seek from Smith any further payment or consideration of any kind with respect to the use of the Excerpts, or any other use of the rights granted by this release.

White acknowledges that Smith has the perpetual right to use, display, reproduce, modify, distribute, advertise, license, or otherwise use the Excerpts in the Book in any medium by any means and for any purpose whatsoever. White hereby waives the opportunity and right to inspect or approve any reproductions of the Excerpts in the Book or any use to which they may be put.

White hereby agrees to release and holds harmless Smith, her assigns, and anyone acting under her authority, against loss from any claim, action or demand that may be brought at any time by White or by anyone acting on White’s behalf for the purpose of enforcing a claim for damages on account of the use of the Excerpts and from all claims and liabilities of any kind arising out of or in connection with the use and reproduction of the Excerpts referred to above.

By signing below, White certifies and represents that she has read the foregoing and fully understands the meaning and effect thereof, and that by signing this agreement, she intends to be legally bound by it.

Dated this ____ day of _____, 2007.

Signature: _____ Address: _____

Print Name: _____ City, State, Zip: _____

Oral History, Videography, and Copyright; Releases of Rights

When researchers want to use, reproduce, or quote from oral or video histories in writings, publications, and websites, similar rights issues arise. An oral or video history interview conducted by or for or donated to an archives contains contributions from both interviewer(s) and interviewee(s) and each participant may own the copyright in his or her recorded words. Ideally, those whose voices are heard on the oral history recording or whose images and likenesses appear on any video recording, have signed a release⁹ or copyright assignment transferring their copyright to the archives.

Following are two sample releases suitable for releasing and/or securing rights. The first release grants and transfers all rights in an oral history recording, including copyright, to the archives that records the interview (or to its parent, whichever institution is authorized to accept gifts and donations). This release secures broad rights for the archives or parent to use (or license) the recording and accompanying documentation, easing administration as the archives or parent need not go back to the interviewer for additional rights in the future. If the archives or parent wishes to acquire more limited rights initially, this broad language may be narrowed. If the interviewer is an employee of the archives or its parent, his or her work product belongs to the employer, and the interviewer need not sign a similar release of his or her rights. However, some state laws do require a specific release of such rights (particularly if likenesses and images are recorded), and if there is uncertainty about the interviewer's employment status, or if the interviewer is a freelancer, consultant, volunteer, or "friend" of the archives, checking state law and, if needed, securing a release of rights from the interviewer is a good idea.

The second release is an example of a document used to secure rights to use a specific quotation from an existing recording in which the archives or parent does not have all rights, and when use of excerpts is in excess of fair use. In this example, the archives or parent or researcher secures permission to use the quotation or excerpts for a variety of purposes. Listing or attaching the actual quotation or excerpt at issue is optional, but it may be a useful addition to ensure that there is no question later about which quotation or excerpt is the subject of the release, and what the release actually granted or permitted.

In any release, it is important that the proper party, the archives or its parent institution, execute the document, and that the desired rights are fully secured. If the archives intends to publish or post a photograph of the interview subject, it should avoid any invasion of privacy or related claim by acquiring in writing the right to use the actual photo (as an object) *and the likeness of the interviewee* (the right to depict the person's image), as well as the right to use the interviewee's name.

Accession No. _____

THE HISTORICAL SOCIETY**1235 Main Street, The City, ST 02367 Tel: (313) 444-4444 Fax: (313) 555-5555****ORAL HISTORY AUDIO-VISUAL RELEASE FORM**I, _____ hereby give, grant, and
Name of Intervieweeassign forever, to The Historical Society, as a donation, all of my right, title,
and interest including copyright, in and to the recorded conversations made by
me and _____, as described below, and to any written
Name of Interviewersummaries, transcripts, or copies thereof and any documentation accompanying
these recordings, for use by The Historical Society in any lawful way including,
without limitation, providing public access, quotation, and publication, except for
the conditions and restrictions specified below, if any:

The recorded material is further described as follows:

Number and Type of Recordings _____

Date(s) Recorded _____

Format(s) _____

Major Topics Discussed:

Signed _____ Date _____
Interviewee

Address _____

Signed _____ Date _____
Interviewer**THE FOREGOING MATERIAL IS ACCEPTED FOR THE
HISTORICAL SOCIETY**

By _____ Date _____

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Permission to Use Music

Those who own copyright in their music also hold the exclusive right to perform, mechanically reproduce, synchronize (use in conjunction with video or film), and print their music, and to control or prevent others from doing so, including the exclusive right to authorize the first recording of the work. Among the six major exceptions to the exclusive rights of copyright, Congress created the compulsory license of music, so that once a song is recorded and released to the public, copyright owners must license others to use the music in exchange for payments set by Congress.¹⁰ Thereafter, anyone may record the composition upon payment to the owners (typically, the music publishers) of a “minimum statutory rate” (the “compulsory rate”) established under section 115 of the U.S. Copyright Act.¹¹

Music publishers and musicians may control their rights themselves, or more typically, register compositions with one of three performing rights societies: the American Society of Composers, Authors, and Publishers (ASCAP), a membership organization for writers and publishers; Broadcast Music, Inc. (BMI), a broadcaster-owned corporation that serves writers and publishers; or the Society of European Stage Authors & Composers, Inc. (SESAC). These three organizations now control and license the performing rights to nearly all of the world’s musical compositions, and anyone wishing to reproduce sound recordings should begin by contacting these organizations. In addition to performance and sound recording rights controlled by ASCAP, BMI, and SESAC, mechanical reproduction licenses to use music in recordings are available through the Harry Fox Agency, Inc. Synchronization licenses to use music in advertising, movies, and television, to display or reprint lyrics, or the right to print sheet music must be obtained directly from the music publishers.¹²

Moral Rights or *Droit Moral*: The Artist’s Attribution and Integrity Rights

The European Concepts

Copyright protects the property rights of the author or creator of the original work, while its related counterpart of *moral rights* or *droit moral* in French and *Urheberpersönlichkeitsrecht* in German,¹³ ensures that authors, artists, and other creators own and can control their personal rights of attribution and integrity in their works. Moral rights were codified in the Berne Convention, the major international copyright treaty, in 1928¹⁴ and derive from European intellectual property law concepts that authors and artists have inalienable,

non-economic personal and reputational rights in their works which warrant protection. The concept of moral rights stands for the notion that creators, as the sole owners of the work during the creative period, have the right to create, modify, or dispose of their creations as they see fit, in order to assure respect for themselves and their output:

Droit moral assumes that every work of art carries with it the distinctive imprint of its creator; hence, the fate of the work and the reputation of the artist are inextricably linked.¹⁵

Authors and artists may protect the integrity of their works and the use of their names, and prevent distortion and misrepresentation of and interference with their works under moral rights concepts. Only the creator may determine what modifications to the work will be allowed, and when, if ever, their creation is ready for publication, sale, or presentation. Even after the work has entered the public realm, its creator still retains certain rights to control its future treatment. Among the specific moral rights which an author or artist may exercise are:

- (1) the right to permit or prevent disclosure or publication of a work and to determine when and where any publication may occur
- (2) the right to withdraw or retract a work after disclosure or publication (including the author's right to secure all remaining copies of a work and prevent additional printings)
- (3) the right to correct a work
- (4) the right to prevent future modification (such as painting over works of fine art, colorizing films, or removing public sculptures from the public view)
- (5) the right to reply to criticism
- (6) the right of attribution¹⁶
- (7) the right of integrity¹⁷

The *right of attribution* encompasses not only the right to claim authorship of one's work, but the ability to prevent misattribution, wrongful attribution, and the omission of the author's name from the work. The author also may prevent another (such as a publisher) from crediting a work to him or her or using his or her name as the author, in the event that the work is distorted, mutilated, or modified in a way that would harm the author's reputation. The author also has the right to publish anonymously or pseudonymously and to void any such promise later.

The *right of integrity* permits an author or artist to prevent alteration or distortion of the work if the result would be harmful to the author's or artist's reputation. The artist who fully exercises this right may limit editing, retouching, colorizing, image cropping, color correction, or other modifications common in publishing. Additionally, the author or artist may permit, prevent, or control public exhibition or presentation of the work, as well as anything else that affects the expression of his or her personality, artistic integrity, and honor.

Integration of Moral Rights Concepts into American Law

Development and integration of moral rights concepts into American law has been slow and limited in comparison to European activity. Since the U.S. adoption of the Berne Convention, however, awareness has grown and many photographers, artists, and authors recognize their moral rights, while many American publishers routinely seek a waiver of moral rights in contracts with content creators. Publication and dissemination of works via electronic media has increased the interest in balancing moral rights ownership between content publishers and content creators.

The California Art Preservation Act (CAPA),¹⁸ enacted in 1979, was among the earliest laws recognizing moral rights in original works of fine art, including attribution and integrity rights. CAPA gave a living artist or the artist's estate for fifty years after the artist's death a right to sue any person "who intentionally defaces, mutilates, alters or destroys" a work of fine art of "recognized quality," including art conservators found to be "grossly negligent" in their duties.¹⁹ The New York Artists Authorship Rights Act²⁰ applied the same concepts to fine art and limited editions of three hundred or fewer.

Visual Artists Rights Act of 1990 (VARA)²¹

Shortly after the ratification of the Berne Convention, the U.S. Congress amended section 106(A) of the Copyright Act of 1976 to add the Visual Artists Rights Act of 1990 (VARA), granting the first federal recognition of the rights of attribution and integrity to authors of "work[s] of visual art." VARA's adoption brought U.S. law into accord with the Berne Convention's requirements, while its explicit preemption of the "equivalent rights" of earlier state statutes may bring the validity of those laws into question, at least as to works of art created after VARA's June 1, 1991 effective date or works protected by federal copyright law. But some rights also may remain under state laws.²²

VARA protects the artist's or creator's rights of attribution and integrity. The artist may claim authorship of his or her work and prevent the use of his or

her name as the author of any work which he or she did not create or if the work is distorted, mutilated, or modified in a way that would be prejudicial to his or her honor or reputation. The artist also may prevent an “intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation,” and “destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work.”²³ The act does not protect against alteration, mutilation, or destruction resulting from negligence, the passage of time or the inherent nature of materials, exhibition,²⁴ or conservation.²⁵ Only the individual artists and creators of a joint work of visual art may exercise these rights, regardless of who actually owns copyright in the work.²⁶

Exercise of rights of attribution allows artists to ensure that their works are properly and correctly attributed, including the use of correct and complete captions and credits.²⁷ The artist may insist that his or her name not be used or associated with a work that the artist did not create or with a work that is modified in a way objectionable to the artist. The rights of integrity allow an artist to protect a work from destruction, unauthorized mutilation, or distortion in a way that would harm the artist’s reputation during the artist’s lifetime.

VARA applies to “works of visual art,” narrowly defined in the law as a (1) painting, (2) drawing, (3) print that exists “in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author,” (4) sculpture “in multiples cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author,” or (5) still photograph that is “produced for exhibition purposes only, in a single copy signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.”²⁸ Outside of the scope of VARA’s protection are all literary and other visual works,²⁹ including reproductions, posters, illustrations, and widely printed or reproduced photographs; works created before VARA’s June 1, 1991 effective date, and all works made for hire.

Moral rights in works of visual art created on or after June 1, 1991 continue for the life of the artist, as opposed to copyright protection which currently lasts for the life of the artist plus seventy years. The heirs of a deceased artist cannot claim a violation of the artist’s moral rights. State laws concerning moral rights may apply to protect works created prior to that date, however, and the termination provisions of section 106 of the Copyright Act will also apply.³⁰

Moral rights may not be transferred under VARA but they may be waived if the artist expressly does so in writing.³¹ A written waiver must specifically identify the work and the uses of the work to which it applies.³² A waiver by one

author of a joint work will waive the moral rights of all other joint owners without their consent.³³ Rights conferred under VARA apply only to an original work of art, not to any copies, nor does the law affect any copyright in the work. A transfer of copyright is not sufficient to waive the artist's moral rights, nor does a waiver of moral rights transfer ownership of copyright or physical ownership of a copy of the work.³⁴ In short, physical ownership rights, copyright, and moral rights are separate concepts and rights that operate independently, may be transferred separately, and may be held by separate owners.

To date, the legal decisions concerning VARA involve large works of visual art that could not be moved without injury or damage, works not of great value created by artists who are not well known, and cases decided to protect development rather than art works.³⁵ Nonetheless, despite the limited effect of moral rights in literary works in the United States, many American publishers ask authors and illustrators to waive their moral rights to avoid later problems that might affect production and marketing schedules. Debate continues, however, about whether such waivers of inalienable rights are effective under state and federal law and what the future of moral rights may mean in the United States.

The Visual Artists' Rights Act of 1990 does not recognize a moral right in motion pictures. In the National Film Preservation Act of 1988 and 1992,³⁶ Congress recognized the need for federal recognition of motion pictures as a significant American art form and created the National Film Registry to maintain and preserve films of cultural, historical, or aesthetic significance, as noted by a seal provided by the Librarian of Congress.

Droit de Suite

Another European concept that has yet to be incorporated into U.S. law is *droit de suite*, a type of property right that allows the artist to benefit from the second and subsequent sales of his or her work. In 2004, the European Parliament set a royalty rate for the second and subsequent sales of art works of four percent of sale prices between \$2,540 and \$42,340, and a declining scale thereafter.³⁷ *Droit de suite* concepts were included in an early version of VARA but were dropped from the bill as enacted. The U.S. Copyright Office reported that insufficient "economic and copyright policy implications" existed to establish this new right,³⁸ and coupled with concerns about the effort required to track sales of art works, Congress rejected this concept.

CHAPTER 21. COPYRIGHT AND RELATED RIGHTS ISSUES: PERMISSIONS, RELEASES, MUSIC, AND MORAL RIGHTS

- 1 With the exception of federal agencies and archives, the archives or its parent likely holds copyright to materials created by the parent (for example, a museum archives holding professional papers of the museum's scientists/employees) as well as to materials acquired by donation with copyright transferred to the archives.
- 2 Copyright law and orphan works issues are discussed in chapter 20.
- 3 For more information, see "How to Investigate the Copyright Status of a Work," Copyright Information Circular 22, U.S. Copyright Office, revised December 2004, available at <http://www.copyright.gov>. The Harry Ransom Humanities Center at the University of Texas at Austin and the Reading University Library jointly compile a searchable online database of copyright contacts for writers, artists, and their copyright holders (WATCH), available as of October 2005 at <http://tyler.hrc.utexas.edu>. See also the discussion of copyright status and public domain issues in chapter 20.
- 4 Deciding whether or not to seek permission to copy or use copyright-protected material should be left to the researcher. Nothing in this discussion is intended or should be construed as recommending that the reader or archivist should make such legal decisions for others or provide legal advice on copyright or fair use. Users should consult an experienced copyright attorney for legal advice.
- 5 The terms *permission* and *license* are used somewhat interchangeably in this chapter, recognizing that a permission is a form of license, often limited in scope or term.
- 6 Among the many sources of information about the permissions process are Richard Stim, *Getting Permission: How to License and Clear Copyrighted Materials Online and Off* (Berkeley, Calif.: Nolo, 2000); and "Permission: What Is It and Why Do I Need It?" and "The Basics of Getting Permission" at http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview, available as of October 2005.
- 7 Users may find that nonexclusive rights to excerpt may be sufficient for use in most written work, but exclusivity of use may become critical for commercial use of music, images, or merchandise rights to prevent others from using the same material in the same way. Exclusivity typically requires higher payments or royalties to offset the licensor's inability to license the material to others for profit, while nonexclusive licenses allow the copyright owner to earn fees through other licensing.
- 8 Depending upon its administrative or management rules, the archives legally may license the use of any materials in which it owns copyright, but photographs typically are in greater commercial demand.
- 9 A release is a voluntary relinquishment, giving up, or surrender to another of some right, interest, or claim, either in actual property or in the ability to take or refrain from taking some action. As a form of a legal agreement or contract, a release should be supported by an exchange of consideration, that is, the party who relinquishes some interest or right typically does so to receive some benefit in return, whether monetary payment or intangible in nature (such as seeing one's name and interview in print), and should be in writing signed by the interviewee or subject of the release. If a minor child is recorded, her or his parent or legal guardian should sign the document. (See the section on acquisition and ownership in chapter 4 for more information about contracts.)
- 10 The six exceptions to the exclusive rights under copyright law are: cable television compulsory licenses require rebroadcast of signals in exchange for payment of set fees; public broadcasting; jukeboxes; digital performance of record albums including webcasting; digital distribution of records (requiring the licensing of downloading of record albums over the Internet, telephone lines, and satellites); and phonorecords of nondramatic musical compositions. The latter are the subject of compulsory mechanical licenses. The music copyright owner must issue a compulsory license only if the song is a non-dramatic musical work previously recorded and publicly distributed, and if the new use is only in a phonorecord and not a fundamental change to the melody or character of the song. Compulsory licenses apply to digital downloads and formats. For more information see Donald S. Passman, *All You Need to Know About the Music Business*, 6th ed., revised and updated (New York: Free Press, 2006).
- 11 Congress periodically increases U.S. statutory compulsory royalty rates. As of January 1, 2006, the royalty rate for the use of songs in physical phonorecords was 9.1¢ for a song of 5 minutes or less and 1.75¢ per minute of playing time or fraction thereof for songs more than 5 minutes, whichever is greater, per copy of each song reproduced and sold. Fees are paid to the copyright owner, music publisher, or agent authorized by contract or statute to collect and distribute these fees. 37 CFR

- § 255.3. This rate applies to all songs reproduced in physical media such as cassettes, tapes, and compact discs, and all digital phonorecord deliveries in the form of permanent downloads made and distributed on or after January 1, 2006, regardless of the date when the license was issued or the recording was first released. 37 CFR § 255.5; “Statutory Rate Increase January 1, 2006,” one-page announcement issued by The Harry Fox Agency, Inc., November 28, 2005.
- 12 The complex business of music publishing, licensing, and permissions is described in Passman, *All You Need to Know About the Music Business*; and by Peter M. Thall, *What They'll Never Tell You About the Music Business: The Myths, the Secrets, the Lies (& a Few Truths)* (New York: Watson-Guptill, 2002).
 - 13 Translated literally as the “author’s right of personality.”
 - 14 See William M. Landes, *What Has the Visual Arts Rights Act of 1990 Accomplished?* (Chicago: University of Chicago Law School, May 2001); John M. Olin Law & Economics Working Paper No. 123 (2nd Series), <http://www.law.uchicago.edu/Lawecon/index.html>.
 - 15 Marie C. Malaro, *A Legal Primer on Managing Museum Collections*, 2nd ed. (Washington, D.C.: Smithsonian Institution Press, 1998), 184, quoting from Ildiko Pogany DeAngelis, Assistant General Counsel of the Smithsonian Institution.
 - 16 “Attribution rights are closely related to laws designed to prevent fraud and deception in the market. Therefore, much of what attribution rights cover is already protected by existing laws” against deceptive advertising and fraud. Landes, *What Has the Visual Arts Rights Act of 1990 Accomplished?* 6.
 - 17 Contract law allows artists some ability to protect their integrity rights by incorporating limitations and controls into sales agreements, although the informal nature of sales of art works and the difficulty of enforcing such provisions can counteract this ability. Landes, *What Has the Visual Arts Rights Act of 1990 Accomplished?* 7.
 - 18 California Civil Code § 987, signed into law on August 1, 1979, with an effective date of 1980. Connecticut, Louisiana, Maine, Massachusetts, Pennsylvania, New Jersey, New York, and Rhode Island also enacted moral rights laws prior to the passage of VARA, protecting attribution and integrity rights. For a comparison of the provisions of VARA and CAPA, see Brooke Oliver, “Walls Come Tumblin’ Down: Balancing Muralists’ Intellectual Property With Building Owners’ Real Property Rights,” 1999, Volume 5, No. 503, <http://www.ibslaw.com>, available as of November 2005.
 - 19 Alan Thaler, “How California’s Art Preservation Act Affects Conservators,” *WAAC Newsletter* 3, no. 3 (September 1981): 2-3, available as of December 2005 at <http://palimpsest.stanford.edu/waac/wn/wn03>.
 - 20 New York Cultural Affairs Law, Section 14.03, 1983.
 - 21 Visual Artists Rights Act of 1990, title VI of the Judicial Improvements Act of 1990, Pub. Law 101-650, 104 Stat. 5089, 5128, enacted December 1, 1990, codified in part in 17 U.S.C. § 106A, et seq.
 - 22 Section 301 of the Copyright Act preempts state or common law rights for works protected by copyright. See Malaro, *A Legal Primer on Managing Museum Collections*, 184–197, especially note 342, page 185; and Landes, *What Has the Visual Arts Rights Act of 1990 Accomplished?* 2, citing *Lubner v. City of Los Angeles*, 45 Cal. App. 4th 525 (1996). *Lubner* suggested that VARA preempted the California law. In *Pavia v. 1120 Ave. of Americas Assocs.*, 901 F. Supp. 620 (S.D.N.Y. 1995), the court noted that the artist’s New York state law claim of ongoing mutilation of a work on display was not preempted by VARA, since VARA does not protect display rights. Rights under VARA last only during the artist’s life, so preemption ceases at the artist’s death, and state laws of defamation, invasion of privacy, contracts, and unfair competition, which are not preempted by VARA, may permit claims. See “Waiver of Moral Rights in Visual Artworks,” Library of Congress, U.S. Copyright Office, 1996, available as of November 2005 at <http://www.copyright.gov/reports/exsum.html>.
 - 23 17 U.S.C. § 106A(a)(1)–(3). The nature of harm to one’s “reputation” is similar to the injuries suffered through defamation, which has been litigated and settled in the United States. The definition of “honor,” has not. The meaning of “work of recognized stature” has been defined in court cases to require only minimal recognition of the work.

The artist’s ability to prevent distortion, mutilation, or other modification of the work under VARA is subject to the Copyright Act, 17 U.S.C. § 113(d), which limits the artist’s right to prevent harm to a work of visual art that was incorporated in or made part of a building if removing the work will cause the destruction, distortion, mutilation, or other modification of the work and if the author consented to the installation of the work in the building either prior to June 1, 1991 or signed an agreement with the owner of the building after that date which specifies that installation of the work may subject the work to destruction, distortion, mutilation, or other modification, by

- reason of its removal. See Landes, *What Has the Visual Arts Rights Act of 1990 Accomplished?* 5.
- 24 See *Ibid.*, 3, citing *Pavia v. 1120 Ave. of Americas Assocs.*, 901 F. Supp. 620 (S.D.N.Y. 1995), for the proposition that an artist could not complain that “a dimly lit exhibition of his work or an inferior quality reproduction of his work in a pamphlet or website violates his integrity or attribution right.”
- 25 17 U.S.C. § 106A(c). Modification of a work of visual art resulting from the passage of time, natural deterioration, inherent nature of materials comprising the object or art work, conservation, and public presentation (including lighting and placement) is not the type of destruction, distortion, mutilation, or other modification that VARA restricts, unless such damage or alteration is caused by gross negligence. Reproduction, depiction, portrayal, or other use of a work also is not unauthorized destruction, distortion, mutilation, or modification.
- 26 17 U.S.C. § 106A(b).
- 27 VARA’s rights of attribution require that museum and exhibit labels on an original work of visual art be accurate and proper.
- 28 17 U.S.C. § 106A.
- 29 Specifically excluded is “any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audio-visual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication,” as well as “any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container,” and any work not subject to copyright protection. 17 U.S.C. § 106A.
- 30 17 U.S.C. § 106A(d).
- 31 17 U.S.C. § 106A(e).
- 32 An example of a broad, general VARA waiver for works of visual art is found in Malaro, *A Legal Primer on Managing Museum Collections*, 197: “The Artist hereby acknowledges the rights of attribution and integrity conferred by Section 106A(a), paragraphs (2) and (3) of Title 17 of the U.S. Code, and any other rights of the same nature granted by U.S. federal, state, or foreign laws, and of his/her own free act hereby waives such rights with respect to the uses specified below by the [XYZ] Museum (or anyone duly authorized by the [XYZ] Museum) for the following work of visual art: Name of work: _____ Specified uses: [Examples: exhibition, installation, conservation, and any other standard museum activities in which the attribution right and/or the integrity rights of the artist might be implicated.]” Such a waiver should be created in duplicate and signed and dated by the artist, and of course, a copy should be kept by the museum or archives and a copy given to the artist.
- 33 17 U.S.C. § 106A(e)(1).
- 34 17 U.S.C. § 106A(e).
- 35 In *Pavia*, the artist’s large bronze sculpture, to which the artist retained title and copyright, was displayed in the Hilton Hotel from 1963 to 1988, when it was removed. Two pieces of the sculpture were stored and two others displayed in a parking garage. The court found that the sculpture was protected by VARA even though it was created before the law’s 1991 effective date, but because the alleged mutilation also occurred before the effective date, the artist could not maintain a claim. *Pavia v. 1120 Ave. of Americas Assocs.*, 901 F. Supp. 620 (S.D.N.Y. 1995). In *Carter v. Helmsley-Spear*, 71 F.3d 77 (2d Cir. 1996) the artists created a huge lobby sculpture from more than fifty tons of recycled materials. The sculpture was never completed and the company managing the building which would house the completed sculpture fell upon hard times and evicted the artists from the premises. The artists sued, fearing that their work would be destroyed. The appellate court found the sculpture to be work for hire not subject to the protections of VARA because the artists had received weekly salaries for three years with taxes deducted, as did employees. In *Sharav v. Rizzoli International Publications*, 51 U.S.P.Q.2d 1097 (S.D.N.Y. 1999), the artist claimed that rights under VARA were infringed by the publisher’s books, but failed to allege intentional distortion, mutilation or other modification of the works that would harm honor or reputation. The court found for the publisher, because the claimed economic harm is not protected under VARA. In *Martin v. City of Indianapolis*, 192 F.3d 608 (7th Cir. 1999), the artist’s large metal sculpture was placed on private land under an agreement with the city of Indianapolis. The city later purchased the land and demolished the sculpture without notice to the artist to move the sculpture, as required by the agreement. The sculpture was found to be a work of “recognized stature,” but the city had not acted willfully; its “bureaucratic failure” was not sufficient to grant enhanced damages under VARA.
- 36 Pub. Law 100-446 and Pub. Law 102-307, 2 U.S.C. §§ 1791-179v.
- 37 European governments have until 2008 to implement these rules, which for the following six years will apply only to the works of living artists. Opponents of the ruling included many well-known

artists who felt the payment structure benefited only the famous at the expense of struggling artists.

- 38 *Droit De Suite: The Artist's Resale Royalty, A Report of the Register of Copyrights* (Washington, D.C.: Government Printing Office, 1992).

The background of the cover is a photograph of a library or study. In the foreground, a wooden desk holds several open books and a blue pen. The middle ground shows more books and a wooden chair. The background features a high ceiling with a complex, geometric, coffered design and ornate wooden columns. The overall lighting is warm and slightly dim, creating a scholarly atmosphere.

The Ethical Archivist

Elena S. Danielson

Case Study: The Cigarette Papers

I would not have continued the fight if I didn't feel strongly about freedom of information.

—Karen Butter¹

THIS CHAPTER ANALYZES A SINGLE CASE STUDY, ONE THAT HAS BEEN REFERRED TO SEVERAL TIMES IN THIS TEXT BECAUSE OF ITS IMPORTANCE. The case is primarily about open and equal access to once-privileged proprietary, internal business archives. In addition, the study cuts across many other fundamental ethical topics: respect for property rights, the acquisition of stolen papers, the authentication of a gift without reliable provenance background, third-party privacy in massive amounts of data, privileged circulation and use records, attorney-client privilege, freedom of information, and the right of citizens to be informed about important public health issues that affect their welfare. The case diagnoses what happens when different ethical imperatives come into conflict and how the professional archivist negotiates these conflicting interests. It demonstrates the way digital technology can be used to great strategic advantage in the process. With its David and Goliath dynamics, it shows how librarians and archivists evaluated risk in the face of a potentially long and expensive lawsuit.

The conflict between tightly restricted, proprietary records and the public's right to vital information exploded in the 1990s during the fiercely

fought “tobacco wars.” The competing demands of private corporations and public health advocates were no longer just abstract ethical dilemmas. Archivists were confronted with controversial issues from the entire range of fundamental archival problems. It would be difficult to formulate a hypothetical case study that more effectively demonstrates the values at stake than the “cigarette papers,” as the case is known. The tobacco wars were most fundamentally about two charged issues: serious health hazards and access to records about them. Fortunately, a series of court decisions around the country, as well as the Multistate Master Settlement Agreement of 1998, delivered to the public massive amounts of research and medical and corporate documentation.² Several books and numerous articles summarize and analyze these mountains of paper.³ The cigarette papers case is emblematic of a host of existing conflicts between privileged information in private business archives and the public interest. Archivists will no doubt continue to find such documentation, often unexpectedly, in the course of their work. Thinking through the issues in advance provides a framework for making rational decisions under pressure.

Archivists played a crucial role in the tobacco controversy at a pivotal moment in 1995. The management of access to documents was a key element in the drama: who gets to see what, and how quickly? The archivists involved were working in an impassioned environment as the press, congressmen, judges, product liability lawyers, defense attorneys, and business executives were vying for advantage in a war with numerous fronts around the country and some billions of dollars at stake. All the players wanted rapid access to information; some wanted exclusive access.

The following narrative provides an overview of the different factors at play in this drama. It leads to a discussion of whether this case can be used as a model, and, if so, under what circumstances.

In 1994, an anonymous whistleblower, who called himself Mr. Butts after a well-known cartoon character, leaked thousands of copies of highly confidential, internal documents from the Brown and Williamson Tobacco Corporation (B&W), the third largest tobacco company in the United States. Various sets of copies were circulated to the media, to Congress, and to academics over the course of several months. The copies were

passed around in a surreptitious manner due to fear of retaliation from B&W—well-justified fear, as it turns out. Eventually, proprietary and privileged information from the previously secret papers, some ostensibly covered by the attorney-client privilege, rapidly became public in three different arenas. On May 7, 1994, journalist Philip J. Hilts published an article in the *New York Times* entitled “Tobacco Company Was Silent on Hazards.” In June 1994, Congressman Henry Waxman opened congressional hearings before the Subcommittee on Health and the Environment, which subpoenaed documents and sworn testimony from B&W executives. As to academia and archives, on May 12, 1994, a box containing about four thousand pages of B&W internal records arrived at the office of Professor Stanton A. Glantz at the University of California medical school in San Francisco (UCSF), where he had been researching the health dangers of smoking. This was apparently a larger set of papers than Hilts had acquired. It is not clear exactly how the copies got from “Mr. Butts” to Professor Glantz, or how many hands they passed through, but word was out.

Glantz had already heard about the papers. After looking through them, he immediately determined that they were authentic, partly because there were several chillingly accurate references to Glantz himself in them. B&W soon confirmed the authenticity of the papers when they demanded their return as stolen property. Upon reading the copies, Glantz recognized trouble. In an interview fifteen years later he recalled thinking about the implications: “This is litigation, and I’m not a litigation guy.”⁴ At the same time, for a public health researcher interested in the medical effects of tobacco, reading the papers was like “an archeologist finding King Tut’s Tomb.” The data filled gaps in his research. Glantz analyzed the “smoking gun” documents for a series of articles on tobacco industry research into the health dangers of their products. While he did not advertise the existence of the materials, word got around fast. A stream of people contacted him about reading the cigarette papers. Glantz was concerned about the dual task of preserving the hotly contested data and providing other researchers with access in an orderly fashion.

In the summer of 1994 he placed the documents as an unrestricted collection in the UCSF library where there was a new archival collecting

focus relating to tobacco use and public health—an initiative called the Tobacco Control Archives. Glantz already had a collection in the UCSF archives. While it is normal procedure for faculty to preserve their research sources in this manner, the transfer was not a simple transaction in this case. Often sensitive materials are held back from the archives, but Glantz had come to respect the librarians' commitment to freedom of information a decade earlier.

In the 1980s, Glantz acquired a pirated copy of an antitobacco film, *Death in the West*. As a result of a tobacco company lawsuit, a court in Britain had ordered the destruction of all copies and out-takes of the footage. Glantz asked his legal counsel at the university how to protect this rare surviving print. This occurred back in the era before copies could be made easily from European audio-visual formats. The attorney suggested placing the video in the library, where it would be both preserved and made accessible. Legal counsel advised that courts are very reluctant to remove materials from libraries. Such decisions could be seen to violate First Amendment protections. "This was my first engagement," said Glantz in the same interview, "with libraries as subversive places." By subversive, he referred to a profession capable of doing "the right thing" in the face of well-financed opposition.

Ten years later, in 1994, as researchers learned about the purloined papers by word of mouth, Glantz was again faced with the same issues he confronted with the pirated film: how both to preserve the materials and provide access. The library and archives again seemed like the most logical place to manage the documentation that arrived anonymously. By then he had supplemented the leaked copies with additional materials that were being released by the tobacco companies in an attempt to defend themselves. When read together with the purloined papers, the voluminous documents produced by the companies fit like jigsaw pieces into the larger picture and were ultimately self-incriminating.

Karen Butter, the director of the UCSF library and archives, accepted the transfer of the cigarette papers to the archives with the usual record transfer forms, but she knew this would be an unusual case and understood the scope of the problem immediately. "We knew we were in for

a battle from the beginning, but I (and Robin Chandler as well) felt this was the right thing to do.”⁵ Her first step was to line up legal support, not just for Glantz, who as a faculty member had a privileged position, but also to protect the ordinary library and archives staff, who might be more vulnerable in a legal battle. “We had many meetings with both the UCSF and UC legal counsel in the process of accepting and making the gifts available,” she explained. Butter, not a contentious person by nature, was very familiar with the American Library Association’s work on freedom of information, and knew the territory. She felt a strong obligation to make the information available. If UCSF did not open this public health information, she believed that it was unlikely anyone else would. At the same time, she opened the collection in a neutral way, without unusual publicity and without any official interpretation from the staff, whatever their personal opinions might be.

The UCSF archivists quickly organized the papers and opened them for public use—a completely normal procedure when donors do not impose restrictions. Given the controversial subject matter, however, opening these papers was a courageous act certain to draw a strong response from B&W. It would inevitably embroil the library and its parent institution in a battle with a powerful adversary—something that risk-averse archivists tend not to do under normal circumstances. Glantz and the archivists were taking on an enemy capable of aggressive tactics, including personal retaliation.⁶ Glantz acknowledges that he feared that the university attorneys might make him “walk the plank”—withdrawing support for access to the cigarette papers.⁷ But the University of California, with its long history of defending academic freedom, was supportive of both Glantz’s research and the unrestricted availability of his sources in the archives. The university took a stand in favor of open and equal access.

B&W executives believed that the papers had been illegally pirated and were essentially stolen property. Under ordinary circumstances, one could easily understand this perspective. In their view, internal corporate records covered by the attorney-client privilege and by trade secret protections had been unlawfully released. Predictably, B&W filed suit against the university to demand the return of the documents. B&W also sent

private investigators into the UCSF reading room to monitor and photograph use of the collection. They demanded access to circulation records to determine who actually used the papers. In the U.S., the American Library Association and the Society of American Archivists have a long tradition of protecting user information. Their advocacy of the free flow of information has not extended to their own circulation records. For the staffers, these intrusions must have been a serious test of their resolve. On May 25, 1995, the California Superior Court for the City and County of San Francisco denied the company's request. B&W also failed in efforts to block the release of documents by Congress and in several court cases around the country. Various courts came to parallel conclusions in favor of the freedom of information. The archivists could continue to provide access to the cigarette papers.

And the demand for this information was huge, certainly beyond the capacity of the UCSF archives reading room. A solution was on the horizon. Scanners were becoming commercially available and the World Wide Web became easily accessible with the emergence of user-friendly, graphical browser technology. The UCSF staff immediately saw the utility of digitizing the cigarette papers and took advantage of the new tool. CDs were made, which helped ensure that the documents' content could not be "returned" to the company. At midnight of June 30–July 1, 1995, within a few months of the favorable court decision, UCSF placed thousands of scanned, indexed, and searchable documents on the Internet for immediate use, free of charge. Glantz and his colleagues published a set of related articles in a dedicated issue of the *Journal of the American Medical Association* (JAMA), which also appeared in July 1995. Like the opening of the archival collection, the publication by JAMA was considered by many to be a courageous act at the time. Conveniently for the users, the documents referenced by Glantz in the articles could be called up in their entirety on the UCSF website for verification and independent interpretation.

Controversial political decisions are typically made in a charged atmosphere at moments of mobilized public opinion, at a time when speed and ease of access to information are vital. In such an environment information that requires a cross-country trip is not "open" even if there is no formal

restriction on use. In this case the website was accessed within minutes of the release. During the first year it was available, researchers from forty-four thousand different addresses viewed approximately half a million pages of documents. The CD-ROM version of the documents was produced for sale at \$250. It sold well, despite the existence of the online version. There must have been some concern that the online version might be dismantled at some point, making a more permanent version desirable. At the same time, the distribution of CD versions made moot any efforts at dismantling the website. The site remained stable and growing. A new chapter in free and equal access opened up.

Karen Butter had to contend with the consequences. This stand for principles came with a price tag. “The legal challenge was very, very time consuming—both in working with our legal counsel, responding to requests from Brown and Williamson and in giving depositions. I would not have continued the fight if I didn’t feel strongly about freedom of information.”

As stated above, Glantz and his collaborators were attacked by the tobacco industry; there were numerous attempts to undermine their careers. They accepted the rough, personal nature of the fight and persevered. Because of the controversy, they had difficulty attracting a commercial book publisher to issue their findings; their book, *The Cigarette Papers*, was published in 1996 by the University of California Press. Archivists ensured that all the documents cited in the book, as well as the text itself, were available online, initially by subscription and later completely open and free of charge.⁸

The cigarette papers contained two levels of documents, one embedded in the other. One level consisted of proprietary scientific research funded and conducted by the cigarette industry into the role of tobacco and its pharmacologically active ingredients. The second level of information consisted of corporate strategies for concealing their own findings. What did the contents of the papers reveal?

According to Glantz’s analysis, the documents reveal an expensively funded campaign to disseminate a false interpretation of medical data. Some would interpret this as a conspiracy to commit fraud. Glantz

cataloged these discrepancies between internal research findings and public corporate statements.⁹ In addition to concealing industry-sponsored scientific research that documented the medical dangers of their product, the company leaders formulated strategies for obfuscating similar reliable evidence emerging from independent research and actively denying the harmful effects of tobacco.

One especially grave allegation concerns the recruitment and subsidy of respected medical experts to support the company's public interpretation of medical evidence. Glantz provides a list of medical consultants, some from prestigious institutions, and the funding they received from B&W—totaling some twenty million dollars from 1972 to 1991.¹⁰ The documents indicated that some of the funding was diverted through third-party organizations to conceal the source. In essence, Glantz accused the tobacco industry of corrupting the search for knowledge.

B&W paid particular attention to refuting evidence of the addictive nature of nicotine in order to defend smoking as a voluntary choice and shift any blame for adverse effects to the victim. For the same reason huge resources were expended to refute the medical evidence that passively inhaling “second hand” environmental smoke can cause fatal disease, even though industry-funded scientists confirmed independent research determining the effect.¹¹

The papers themselves appear to show an awareness of the sensitivity of these materials. Information was deliberately routed through law offices apparently in an effort to protect them from discovery with the shield of the attorney-client privilege.¹² There were instructions for destroying documents.¹³ There may have even been attempts to ship particularly incriminating papers out of the country, beyond the reach of American legal jurisdiction.¹⁴ As to the validity of Glantz's interpretations, readers are free to evaluate these conclusions by referring to the documents themselves.

Did open and equal access to the cigarette papers have an impact? The documents were used, at least as background, in a series of product liability suits and lawsuits by states to recover medical expenses to treat preventable diseases caused by tobacco products. In his foreword to the 1996 volume of Glantz's book, C. Everett Koop, who served as surgeon general from 1981

to 1989, states that the documents revealed a level of scientific information that was not available to him at the time he was charged with protecting the nation's health. Based on these documents, he regretted not taking more decisive actions: "I have often wondered how many people died as a result of the fact that the medical and public health professions were misled by the tobacco industry."¹⁵

The tobacco wars reached the highest levels of government. In 1996, under the Clinton administration, the evidence that nicotine was as addictive as heroin was sufficiently strong to place cigarettes under the jurisdiction of the Food and Drug Administration. In 2000 the Supreme Court withdrew FDA control, only to have the issue revive during the Obama administration in 2009. As the battles continue, the documents are in a stable form, instantly available and searchable. The information has become better understood and widely disseminated. It resulted in local ordinances to restrict smoking in bars, restaurants, and offices. A grass roots movement took shape, first in small communities such as Lodi, California, and then spreading throughout the country. Gradually, smoking tobacco, which had recently been considered socially acceptable and even stylishly attractive, came to be considered offensive and unhealthy and was banned from public spaces. The culture changed. If the papers had remained in Glantz's San Francisco office, results may have been different.

The UCSF archivists have taken the project to the next level, continuing to add materials from a variety of sources as they become available. The Legacy Tobacco Documents Library comprises some ten million documents for a total in the range of fifty million pages. In addition, there is a growing library of videos, including television advertising over the decades. It is quite easy to compare what the industry knew about the health hazards at a given time with the presentation to the public during prime time. The Legacy Tobacco Documents Library remains a heavily used resource years later, and its impact is far reaching. In 2009 Kirsten Gillibrand was appointed senator from New York to replace Hilary Clinton. It became known that Gillibrand had worked as an attorney for the tobacco industry, and a key word search using her former name, Kirsten Rutnik, revealed

numerous references in memos that clarified the level of work she was doing for the tobacco industry.¹⁶

By opening access, the UCSF archivists ensured that hard data has been available during these national debates. Was it legal? In case after case the courts consistently placed freedom of information about a dangerous health hazard above legal technicalities. Important factors weighed in the decisions included (1) the life-and-death nature of the information and the primacy of the public welfare; (2) the availability of a digitized version that constituted a publication protected by the First Amendment; (3) the misuse of attorney-client privilege by the tobacco companies, which drew particular ire from the judges; and (4) the finding that the original documents were not stolen, only copies, so the corporation still had its property.¹⁷ Basically the public's right to know information about its health trumped the corporation's claim to proprietary information. Anything less, according to one judge, would be an "inversion of values."¹⁸ The cover-up of medical research data was judged to be fraud perpetrated by a conspiracy. The judicial branch made the release of the cigarette papers legal, at least *ex post facto*.

Opening the cigarette papers, it is now established, was legal—but was it ethical? After the announcement of online access to the papers in July 1995, the archivists' Internet discussion group (Archives and Archivists Listserv) buzzed with arguments and counterarguments.

The final chapter has not yet been written, but the basic issues can be seen, at least in outline. On the negative side of the balance sheet are many serious concerns that would normally prompt restrictions: Provenance is the cornerstone of archival theory, and the provenance of the material was murky at best when it was first made public. The document copies were clearly pirated by a disgruntled internal employee. They were selectively chosen by someone hostile to the company, exposing the collection to accusations of selection bias. There was no attempt to balance the documentation with materials favorable to the tobacco industry, creating the impression of political advocacy. The information opened by UCSF was clearly proprietary and highly confidential even if it was recorded on copies. A well-known consequence of prematurely opening sensitive material

is that the owners of such potentially controversial documents will take preventive measures such as sanitizing and destroying archives rather than chance exposure. No one denies that the attorney-client privilege was violated. No one denies that the privacy of the named individuals was violated. Copyright and trade secrets were also involved. The UCSF staff is highly trained and very aware of all of these issues. They knew all along that releasing such documentation was not to be done lightly. Factored into their decision was a highly persuasive countervailing argument.

On the positive side of the balance sheet is the gravity of the subject. The American public has a right to know, and in a timely fashion, as policy is being formulated. Freedom of speech is a fundamental condition for a successful democratic process. It is essential to emphasize that the role of the archives is to open for free review information that is needed as the basis of a national discussion. The archivists themselves presented the documents in context but also in a neutral way, free of commentary, editorializing, or advocacy. Even in articles reporting the history of the cigarette papers, the staff remained professional and reported on the access process, leaving the content to the readers to evaluate. This restraint is key to the credibility of their work. It provides the ethical bedrock for access decisions. Access was taken to a new level. The online availability of the papers resembles a publication. Blocking access to the Internet site would be similar to prior restraint in traditional paper publication.

The cigarette papers, now far more than the original set that arrived anonymously in 1994, contain a great deal of data on individuals. UCSF deals with privacy issues on a case-by-case basis. If, for instance, there is a complaint that private data, such as social security numbers, appear online, measures are taken to redact out the personal information as long as it does not compromise the document's integrity.

While the unique aspects of the case are groundbreaking and fascinating in themselves, it is important to remember the mundane details. As innovative as the UCSF staffers were in dealing with the cigarette papers, they adhered to certain basics of archival practice. To begin with, the papers were precisely within the collecting scope and mission of the archives and its parent institution. The research papers are directly related to the scientific

mission of the medical school; the corporate records are useful for the public university's role in promoting good health as a public service. The original deposit was donated by a UCSF faculty member, and collecting faculty papers is a core assignment. Beyond adhering to institutional goals, the staff exercised a high level of professionalism. They correctly appraised the nature of the documents sent anonymously to Glantz. They correctly determined that the content was authentic, even though the provenance was not known until much later. The content was of great importance for the public welfare even though the papers were fragmentary, disorganized, and initially from just one individual company. The staff also appraised the political context of the documents accurately: Congress and the press were already discussing these materials; they had to be made widely available as quickly as possible to support this discussion. The staff was prepared to use newly emerging technical tools to facilitate the process. They firmly believed that the benefits of open access outweighed the costs, but it took strength of character to stay the course. The archivists created a highly innovative access model within a traditional archival framework.

Should this case serve as a precedent and model in similar situations? When egregious practices cross a certain line, the civility of formal ethical standards need not and should not be misused to cover up malfeasance and fraud. Situations arise where the benefit of open access overrides considerations such as attorney-client privilege. Here is where the archival profession needs to do some work with legal experts and ethicists to determine just where to draw the line. The cigarette papers case demonstrates that there are circumstances where open and equal access is the prime consideration. One participant in the Internet discussion group phrased it this way: "archivists should avoid political advocacy as a profession, but we cannot shun the responsibility to promote the public's right to know."¹⁹ The UCSF professionals made an ethical choice that required an awareness of the larger social context of the documents in question and went beyond routine procedures. The decision made a difference in public perception of a social issue at a crucial moment.

The UCSF archivists were able to defend the choice against formidable opposition because of legal and logistical support from their parent institution. It would be naïve to ignore the fact that unswerving support from the University of California legal department was absolutely essential to success. Much as one would like to think that truth always prevails in the end, and that good decisions are always recognized at least eventually, effective ethical choices often also require substantial resources.

Are the tobacco companies the only industry that has systematically covered up vital public health data? Probably not. Archivists and records managers are likely to encounter similar controversial materials. Returning to the central question: should the lessons from the cigarette papers provide a model to evaluate the risks and benefits of freedom of information? In most cases, companies have been able to assert their right to keep internal records private. How grave does the danger have to be to justify opening privileged documents? Usually whistleblowers do not succeed, and often they suffer career setbacks. How certain must the manager be of all the facts before making a decision to go public? How does one guard against false either/or dilemmas? The choices usually fall along a broad spectrum. Making ethical choices requires the ability to see both detail and the big picture, with both a microscope and a telescope. It is not easy to remain objective and find the threshold where the public interest outweighs the company's rights. Several factors came together to make the cigarette papers a major case in support of the free flow of information. Courts decide on very specific cases, and often with inconsistent results. In the conflict between proprietary information and the rights of the public, decisions are also made on a case-by-case basis, and the decisions are heavily dependent on the exact details. Even so, it would help to have more research and discussion on how to achieve a balance of proprietary and public rights to information.

While better parameters would be welcome, in the end, an individual makes a decision, and no textbook can dictate the correct answers. Asked if she would do it again, Karen Butter was unequivocal: yes, of course. Even knowing the consequences, she would do the same thing again.²⁰

Blowing the Whistle

The cigarette papers case began with an employee surreptitiously copying privileged documents from business records and leaking them to the press and other outlets of public information. This case is highly unusual. However, all types of archives have the potential for a collision between the interests of the organization and greater social values. The scenarios sketched below come from seven different types of private and government archives: manuscript, state, foundation, national, corporate, religious, and university archives. Should archivists “blow the whistle” if they are in these situations, and more importantly, how should they cope with the conflict of interests involved?

Attorneys familiar with whistleblower cases stress that successful outcomes are extremely rare. However noble, most employees who accuse their institutions of wrongdoing damage their own careers without remedying the problem they identified. Individual employees facing an ethical quandary have limited access to the full story, and in most cases they do not know the full factual background of the circumstances that trouble them. The lack of complete knowledge makes it easy to attack the credibility of the accuser, no matter how just the cause. In such circumstances it is easy to become emotional about perceived malfeasance or injustice, but that emotion can cloud one’s judgment. Organizations are self-protective of their reputations, and most do not tolerate employees who go to the press with allegations. The legal protections for whistleblowers are an incomplete patchwork of inadequate provisions and typically are not very effective. Some films and fictional accounts have romanticized whistleblowing as a brave and dashing thing to do. The reality is usually far from romantic. For archivists, who have a position of trust and access to proprietary and restricted information, revealing those secrets can be seen as a violation of professional ethics.

On the other hand, a good citizen cannot ignore blatant wrongdoing. Experienced attorneys advise taking the time to learn as many facts of the case as possible in a calm and deliberate manner. They suggest going

through channels in the organization if needed, speaking in confidence, maintaining trust with colleagues, and exploring a variety of remedies. If the situation becomes emotional, one's objectivity can be compromised. Once an employee becomes isolated and perceived as a troublemaker, the career consequences are severe, even if the whistleblower tries to change jobs. The sacrifice may be in vain. Revealing or protesting against an ethical lapse is thus a very serious matter, not to be done on a whim. It is potentially libelous and can have serious consequences. One should not encourage anyone to serve as a whistleblower without a realistic assessment of the situation. To take that step is a very personal decision, one that should be discussed well in advance with family and with legal counsel.

Seven Scenarios

The following case studies, while generalized, are based on actual incidents, typical of the profession, in various types of archival repositories. A code of ethics is helpful, but in addition archivists need to develop coping skills to navigate situations such as these. These cases are meant to provide food for thought, not to provide answers or solutions.

1. Manuscript collection: A manuscript dealer has befriended lonely elderly people, stayed in their homes, and walked off with manuscripts to sell later to others, such as your repository. Can you buy the papers? Do you have an obligation to call the police? Is it theft? Elder abuse? Or none of your business? What if the elderly are not concerned about the missing papers?
2. State archives: You are processing financial records and suspect that a secretary had embezzled funds from the agency that transferred the papers to the state archives. It happened four years ago. Are you obligated to report your suspicions, and to whom? What if it happened ten

years ago? Does the timing matter? Does the amount of money involved matter?

3. Foundation archives: While processing personal papers from a wealthy donor you find evidence of a large financial contribution, tax deductible, to your repository, on the condition that the money be used for acquiring archival materials relating to China. The check was cashed years ago, and no Chinese manuscripts have been purchased. You bring this to your supervisor's attention, and he is unconcerned. Has your ethical obligation been fulfilled by reporting through the chain of command? Do you go over his head? Do you go to the press?
4. National archives: Your supervisor tells you to shred some "duplicate" documents. You suspect they contain evidence of improper use of power to fire a government employee for partisan reasons. Is it best to shred without reading, so it is not your problem? Do you refuse? Are you required to report? What if you are not entirely sure what happened, but are assuming it was improper?
5. Corporate archives: You are a business archivist transferring records that show your company deliberately withheld product liability information from injured consumers. What do you do?
6. Religious archives: Letters in the archives accuse priests of improper and illegal behavior with minors. Do you have an obligation to report to the police?
7. University archives: Your repository has received a large collection without an inventory from an alumnus. In the boxes you find envelopes containing a white powder. What do you do? Just return them? Have them tested? Report to your supervisor? Report to police?

Chapter 5

¹ Karen Butter, personal communication with the author, May 29, 2009.

² From its inception, the Legacy Tobacco Documents Library at the University of California medical school in San Francisco has collected documents that “were made available through litigation brought by the National Association of Attorneys General (NAAG) that resulted in the Master Settlement Agreement (1998)”;³ see http://legacy.library.ucsf.edu/about/about_collections.jsp. The UCSF website has a brief history of the collection: “The MSA settlement mandated that the tobacco companies release their internal company documents to the public by depositing them into a repository in Minnesota as well as creating and maintaining websites containing searchable electronic versions of the documents. The Legacy Tobacco Documents Library preserves and maintains electronic versions of these released documents, making them widely available to researchers and the general public”; see <http://legacy.library.ucsf.edu/help/fq.jsp>. Other online sources, such as the depository in Minnesota and industry websites, may eventually be closed. The LTDL website is considered the most permanent location for the “tobacco papers”; see http://legacy.library.ucsf.edu/about/about_data.jsp. While the initial box from an anonymous source had a puzzling history, all documents and multimedia items that are added to LTDL now have clearly traceable provenance. (All websites accessed June 7, 2009.) The author is grateful to Polina Ilieva for assistance in navigating these websites.

³ Philip J. Hilts, “Tobacco Company Was Silent on Hazards,” *New York Times*, May 7, 1994; Stanton A. Glantz, et al., “Looking Through a Keyhole at the Tobacco Industry: The Brown and Williamson Documents,” *Journal of the American Medical Association* 274, no. 3 (July 1995): 219–24, also related articles in the same issue; Stanton A. Glantz, et al., *The Cigarette Papers* (Berkeley: University of California Press, 1996), also available online at UCSF library website; John Wiener, “The Cigarette Papers,” *Nation*, January 1, 1996, also available at <http://www.pbs.org/wgbh/pages/frontline/smoke/readings/wienerarticle.html> (accessed April 9, 2009); Karen Butter, Robin Chandler, and John Kunze, “The Cigarette Papers: Issues in Publishing Materials in Multiple Formats,” *D-Lib Magazine*, November 1996; Stanton A. Glantz and Edith D. Balbach, *Tobacco War: Inside the California Battles* (Berkeley: University of California Press, 2000); Robin L. Chandler and Susan Storch, “Lighting Up the Internet: The Brown and Williamson Collection,” in Cox and Wallace, *Archives and the Public Good*; A. Landman and Stanton A. Glantz, “Tobacco Industry Efforts to Undermine Policy-Relevant Research,” *American Journal of Public Health* 99, no. 1 (January 2009): 45–58.

- ⁴ Personal communication. Unless otherwise noted, all quotes from Stanley A. Glantz in author's notes from an hour-long telephone interview conducted May 27, 2009.
- ⁵ Personal communication. All quotes from Karen Butter are taken from an email to the author dated May 29, 2009.
- ⁶ For examples of efforts to damage the careers of Glantz and his co-workers see Chandler and Storch, "Lighting Up the Internet," 138. For more on retaliation by the tobacco companies see Landman and Glantz, "Tobacco Industry Efforts to Undermine Policy-Relevant Research."
- ⁷ "Walk the plank" quote in Glantz interview with author, May 27, 2009. See also discussion of university legal department support in Glantz, *Cigarette Papers*, xix.
- ⁸ Chandler and Storch, "Lighting Up the Internet," 147. See also Wiener, "The Cigarette Papers," 5.
- ⁹ Glantz, *Cigarette Papers*, 15–21.
- ¹⁰ Glantz, *Cigarette Papers*, 328–37.
- ¹¹ Glantz, *Cigarette Papers*, 397, 415, 432.
- ¹² Glantz, *Cigarette Papers*, 242.
- ¹³ Glantz, *Cigarette Papers*, 230.
- ¹⁴ Glantz, *Cigarette Papers*, 246.
- ¹⁵ Glantz, *Cigarette Papers*, xiv.
- ¹⁶ Raymond Hernandez and David Kocieniewski, "As New Lawyer, Senator Was Active in Tobacco's Defense," *New York Times*, March 26, 2009, <http://www.nytimes.com/2009/03/27/nyregion/27gillibrand.html> (accessed October 5, 2009).
- ¹⁷ Glantz, *Cigarette Papers*, 6–14.
- ¹⁸ Glantz, *Cigarette Papers*, 14.
- ¹⁹ Butter, Chandler, and Kunze, "The Cigarette Papers: Issues in Publishing Materials in Multiple Formats," 2.
- ²⁰ Karen Butter, personal communication with the author, May 29, 2009.



PRIVACY & CONFIDENTIALITY PERSPECTIVES

ARCHIVISTS & ARCHIVAL RECORDS

Edited by
Menzi L. Behrnd-Klodt & Peter J. Wosh

10 **Balancing Privacy and Access: Opening the Mississippi State Sovereignty Commission Records**

Sarah Rowe-Sims, Sandra Boyd, and H. T. Holmes

I.

A popular government, without popular information, or the means of acquiring it, is but a prologue to a farce or tragedy—or perhaps both. Knowledge will forever govern ignorance, and a people who mean to be their own Governors must arm themselves with the power knowledge gives.

*James Madison*¹

Government archivists play a crucial role maintaining the health and vitality of the nation. As James Madison identified in the quotation above, the cornerstone of democracy is an informed citizenry with access to records of its government. Archives remain central to the democratic process itself. The archivist of the United States, John Carlin, defines the National Archives as

a public trust on which our democracy depends. It enables people to inspect for themselves the record of what government has done. It enables officials and agencies to review their actions and helps citizens hold them accountable. It ensures continuing access to essential evidence that documents the rights of American citizens; the actions of federal officials; the national experience.²

Such a lofty statement is not mere hyperbole, massaging the limp ego of a low-status profession. Carlin recognizes the archivist as an essential component in government infrastructure and the national consciousness.

This article appears courtesy of the Mississippi Department of Archives and History.

With this duty comes an ominous responsibility, which plunges the archivist into the murky waters of privacy and access rights. This study examines how one state archives rose to the challenge, managing one of the most infamous collections of privacy-sensitive government records of twentieth-century America: The Mississippi State Sovereignty Commission Records.

II.

The History and Legal Mandate of the Mississippi Department of Archives and History (MDAH)

MDAH has a long tradition of protecting Mississippi's finite cultural resources. Founded in 1902 as a state agency, it is the second-oldest state archives in the nation.³ The creating legislation did not impose official restrictions on access to the records in MDAH's custody. Dunbar Rowland, the agency's first director, was clearly "more interested in providing access than in restricting any materials."⁴ In an address to the American Historical Association in 1910, Rowland identified as the "greatest drawback to investigation . . . the inaccessibility of public archives due to unnecessary restrictions."⁵ In early MDAH annual reports, Rowland affirmed the agency's "liberal" access policy, stating that "[t]he freest access to documents is allowed to every properly accredited student engaged in serious work."⁶

The Archives and Records Management Act of 1981 and the Mississippi Public Records Act of 1983 defined MDAH's responsibilities more clearly. The 1981 law charged MDAH with the duty to maintain a "program in cooperation with each agency for the selection and preservation of vital records considered essential to the operation of government and to the protection of the rights and privileges of citizens. . . ."⁷ Government records were defined as public property and opened to inspection, with the exception of those specifically exempted by state law, court order, contractual agreement or ". . . those records which it is shown the public interest is best served by not disclosing to the public." In addition, the act stated the MDAH would make records available ". . . at a reasonable time and place under rules and regulations adopted by the Board of Trustees."⁸

The 1983 Public Records Act and its subsequent amendments legally reaffirmed access to government records in Mississippi. The statute declared public records to be open and accessible, except for those records exempted by specific legislation. It further stipulated that nonexempt records contained within exempt records be separated and made available by agencies. In 1996, the act was amended to encompass the new demands of electronic media. This amendment required agencies to ensure access to electronic records, exempting software that was pro-

prietary in nature, that was obtained under a licensing agreement, or that was considered “sensitive.”⁹ It also guarded against proprietary electronic records systems, stressing that agencies must plan for public access in their management of electronic records. The amendment authorized MDAH to assure access, stating that reproduction and storage of records of “enduring value” had to meet archival standards.¹⁰

III.

The “NKVD among the cotton patches”¹¹

In a state whose image has largely been defined by racism, the Mississippi State Sovereignty Commission stands as an especially sinister institution. From 1956 to 1977, this state agency collected information on civil rights activists, acted as a clearinghouse for information on civil rights activities and legislation around the nation, funneled money to pro-segregation organizations, and disseminated right-wing propaganda. Ironically, although its loudest proponents championed themselves as part of a Christian crusade against the insidious “red menace” of communism, the commission more closely resembled Big Brother.

The commission was established in the wake of the 1954 United States Supreme Court decision, *Brown v. Board of Education*,¹² which rejected as unconstitutional the notion of segregated “separate but equal” schools. Like other states below the Mason-Dixon Line, Mississippi passed a slew of legislation to shore up the walls of racial separation. Shrouded in the rhetoric of states’ rights, the act creating the commission provided the agency with broad powers to spearhead the state’s response to *Brown*. The commission’s objective was to “do and perform any and all acts and things deemed necessary and proper to protect the sovereignty of the state of Mississippi, and her sister states” from a perceived encroachment by the federal government.¹³ The governor served as ex-officio chairman and state legislators composed its membership. The agency staff remained small, consisting of several gubernatorial appointees, a director, a public relations director, and a handful of investigators.

As a result of its broadly defined statutory mandate, the commission performed a myriad of duties. Activities loosely comprised three basic functions: investigative, public relations, and advisory. The focus of each varied according to the whim of the governor and the particular skills of his appointees. Perhaps the most infamous function involved investigation. The commission likened itself to the FBI and the armed services intelligence agencies “during times of war seeking out intelligence information about the enemy and what the enemy proposes to do.”¹⁴ Routine work for investigators consisted of traveling around the state compiling

reports on civil rights activities in each county. In addition to its investigators, the commission also used paid informants and private detectives.¹⁵

Actual evidence of “racial agitation” was not necessary to attract the commission’s attention. The rumor mill and race baiters fed the commission, and any person or organization that appeared to transgress the racial lines or espouse a vaguely liberal perspective was a likely target. Following the passage of the Civil Rights Act of 1964,¹⁶ the Voting Rights Act of 1965,¹⁷ and other civil rights legislation, the tone of the reports changed. Reports began to use the term “subversive” rather than “agitator.” The director asserted that the commission was “not a super snooping agency trying to crack down on any Negro who raises his hand.”¹⁸ Investigators were instructed to purge information demonstrating that the commission assisted in preventing voter registration. In reality, the commission continued to fulfill its usual functions, although investigations in the late 1960s began to focus on college campuses and “counter-culture” activities in general.¹⁹

The commission advised state and local government officials, law enforcement personnel and members of the public. To discourage voter registration, the commission routinely advised local governments to fire any employee who attempted to register. Prior to the 1964 Freedom Summer, it conducted “Clinics” to instruct local law enforcement in how to handle the expected “invasion.” With the passage of federal civil rights legislation, the commission focused on ways to circumvent the new regulations.²⁰

Officially, Mississippi sought to present the face of racial harmony to the rest of the world. The commission worked in secret to prevent news of racial violence and intimidation from reaching the press. Its public relations director wrote editorials for local newspapers that debunked national media reports. The agency acted as a clearinghouse for civil rights information, and its Speaker’s Bureau provided advocates who toured the nation presenting Mississippi’s official perspective. The commission facilitated right-wing propaganda activities by funneling state money to such groups as the Citizens’ Council and the Washington, D.C.-based Coordinating Committee for Fundamental American Freedoms.²¹ The commission also donated small amounts of money to African-American individuals and organizations sympathetic to segregation, hoping to attract those they termed the “thinking Negroes of Mississippi.”²²

By the 1970s in Mississippi, support of an openly racist, state-sanctioned commission no longer appeared politically expedient. In April of 1973, Governor William Waller vetoed the Sovereignty Commission’s appropriation and described the agency as “a stigma on the state’s government.”²³ Even before the ink dried on Waller’s veto, public speculation began over the files of the defunct commission. On the first day of the 1977 legislative session, H.B. 276 was introduced to transfer the files

and equipment of the commission to the Department of Public Safety.²⁴ A heated debate ensued in the legislature, as lawmakers introduced other bills designed to dispose of the records in various ways. African-American legislators called for the files to be opened, some legislators argued for a lengthy closure, while others voted for the records literally to be burned.²⁵

The vote to destroy the files prompted a firm response from MDAH. The MDAH board of trustees unanimously passed a resolution at its 28 January 1977 meeting “strongly imploring the legislature” not to destroy the records. The board voted to “immediately advise the appropriate members of the Legislature” of its opposition to the “indiscriminate destruction of the records of the State Sovereignty Commission or any state records.” MDAH also stated that it would willingly take the records “in accordance with any restrictions the Legislature [chose] to place on them.”²⁶

Preservation advocates aired their views at the 18 February 1977 House of Representatives Judiciary “B” Committee hearing. The chair of the MDAH board of trustees, former governor William Winter, argued that “there is too much historical value in these records to destroy them without giving historians some way to interpret this era of our history.” Winter further asserted that destroying the records seemed “inconsistent with the way we do things and smacks of totalitarianism.”²⁷ MDAH director Elbert Hilliard identified precedents for dealing with records of this nature, citing the National Archives’ handling of the records of the United States House Un-American Activities Committee. Hilliard also assured the committee that MDAH had “room to seal and store the records.”²⁸ The result was the enactment on 3 March 1977 of an amended bill to abolish the commission but to seal its records at the archives until 2027.²⁹ The secretary of state’s office immediately transferred nearly 133,000 pages of surviving commission records to MDAH, where they were secured in its vault.³⁰ Because the records were statutorily sealed when the law was enacted, MDAH archivists did not have the opportunity to assess their physical condition or even confirm the contents of the filing cabinets.³¹

IV.

[W]e feel that it would be the bitterest irony to subject the many people whose files are so gathered to a cavalier and uninhibited media spectacular.³²

In January 1977, even as the Mississippi House debated the agency’s fate, the American Civil Liberties Union/Mississippi (ACLU/M) initiated an intense legal battle in the federal courts to open what it dubbed

Mississippi's "spy files." As the case of *American Civil Liberties Union of Mississippi, Inc., et al. v. Cliff Finch Governor of State of Mississippi, et al.*³³ wound its tortuous route through the courts, the central element emerged as a debate between access and privacy protection. For seven and a half years after the lawsuit was filed, various court skirmishes occurred. At one point, the suit was dismissed by the federal district court, only to be reinstated by the Fifth Circuit Court of Appeals. During this initial period, the debate centered on the question of whether the records should remain open or closed. Curiously, the arguments and decisions occurred before any commission records were available for discovery. Both sides argued over records that no one had evaluated.

In October 1984, the plaintiffs were finally granted access to the files for discovery.³⁴ Once the plaintiffs actually read the records, an internal schism developed. As a result, in December 1987, U.S. District Court Judge William H. Barbour, Jr. divided the plaintiff class into two subclasses: access plaintiffs and privacy plaintiffs. Access plaintiffs sought "unlimited public access" to the records, while privacy plaintiffs consisted of those who supported "access to the records for those named in the records, but who further advocate no further access by other parties without the prior consent of each person or persons described in a particular record."³⁵

One of the original plaintiffs, freelance journalist Ken Lawrence of Jackson, who favored full disclosure, summarized the access perspective: "[T]here's nothing that anyone would want to keep secret." He continued, "[T]he need we have to understand the outrageous behavior of the state so much overrides the technical claim of privacy that it doesn't make any sense."³⁶ In contrast, former Tougaloo College professor John Salter, one of the original plaintiffs, who now favored privacy, noted, "[W]e feel that it would be the bitterest irony to subject the many people whose files are so gathered to a cavalier and uninhibited media spectacular."³⁷

On 27 July 1989, the court declared the 1977 act sealing the records unconstitutional and ordered the files to be treated like "any other public record according to state and federal law." The judge also stipulated that any class member could "file with the custodian of the Sovereignty Commission files any rebuttal to any allegation, charges or other information about the class member contained in such files."³⁸ In the ruling, the court strongly defended the importance of disclosure:

To open the files would further the general principle of informed discussion of the actions of government, while to leave the files closed would perpetuate the attempt of the state to escape accountability.

Opening the files would also end public speculation as to the extent of the acts of the Commission, much of which has far exceeded the record.³⁹

The ACLU/M applauded Judge Barbour's ruling, and the state governor and attorney general chose not to challenge the decision.⁴⁰

On the day that the ruling was handed down, MDAH representatives met with the state attorney general to discuss opening the files. After twelve years of litigation, it was evident that the access plaintiffs would allow MDAH little time to prepare. During the discovery process, MDAH archivists assessed both the physical condition of the papers and their processing needs. Faced with an imminent opening, immediate and drastic plans had to be developed for providing access within a matter of a few days. The privacy advocates, however, moved to prevent the opening of the files, and the ruling that opened the files was immediately stayed, pending an appeal to the Fifth Circuit Court of Appeals.⁴¹

The potential impact of the court's ruling that opened the records moved the MDAH board of trustees into action. Since the passage of the closure act, and during the previous twelve years of litigation, MDAH had been asked neither to comment on the issue and/or process nor to provide testimony regarding any archival issues. The near-reality of having to open the records in a very short time served to focus the vision of the department.

The privacy plaintiffs began talking with MDAH staff about how to provide access to the records with personal identifying information redacted. Armed with this information, the privacy plaintiffs worked with some of the access plaintiffs to develop a compromise settlement, which was given to MDAH for comment.

The proposed settlement would have required the MDAH to

Open all Commission records to the public after the records had undergone privacy screening; except that records involving certain classes of persons would be opened without screening:

- deceased persons;
- all public officials of local, state and federal government at the time each record was created;
- all paid informers;
- all verified providers of information to the Commission, excepting those persons who provided information on white supremacist groups.

Notify all class members of their rights, including, but not limited to:

- publication in Mississippi and national newspapers;
- mailing to last known address;
- written notification to all relevant organizations.

The proposed settlement defined “class members” as any individuals who thought their civil rights may have been violated by the commission.⁴²

After reviewing the proposed settlement and carefully considering the situation, the MDAH board of trustees strongly endorsed privacy screening and offered a counter proposal that would require the archives to

Make all Commission records open to the public after the records had undergone privacy screening; except that records involving certain classes of persons would be opened without screening:

deceased persons, provided however that the Department would screen for privacy of family members of deceased persons;
members of the Commission and public employees of the Commission;

All records would be declared open, public records in 2027

Notify class through publication in state and national newspapers

Provide a means for a class member to provide written rebuttal to any records pertaining to him.

To accomplish the privacy screening, the archives proposed converting the records into electronic form and using electronic editing capabilities for rapid privacy screening.⁴³

The possibility of such a settlement failed due to the plaintiffs’ inability to agree on a final plan. But the MDAH board had identified its responsibility to the matter as it then stood, taken a strong stand on the need for privacy protection, and realized that its opinion needed to be heard by the appeals court. Because the state attorney general had declined to enter an appeal on the district court’s ruling, the MDAH board’s position would not be heard in court. As required by state law, the board requested the attorney general’s permission to hire private counsel to represent the department as a privacy advocate.⁴⁴ Three months later, that request was denied.⁴⁵

On 14 September 1990, the Fifth Circuit held that Judge Barbour’s ruling “did not adequately take into consideration privacy interest [*sic*] of persons named in agency files” and directed the district court to “devise a plan” to accommodate privacy interests.⁴⁶ In September 1993, Judge Barbour held an evidentiary hearing to explore the privacy and access issues. Litigants, including representatives from MDAH, outlined their recommendations for opening the files.⁴⁷

Prior to this point, the archives’ role in the case had been solely that of legal custodian of the records. Although MDAH had proven instrumental in saving the records from the funeral pyre, as a state agency it was a defendant in the ACLU litigation. MDAH had never been requested to testify. The hearings now afforded archivists their first

opportunity to outline archival concerns to the court. In formulating its plan, MDAH tempered archival requirements with the court's immediate needs and the strictures of time. MDAH adamantly insisted, however, that the physical and intellectual integrity of the files should be preserved. Rejecting microfilming and photocopying options as economically unfeasible for the long term, MDAH advocated imaging in order to leave the originals untouched and provide an exact, authentic electronic copy coupled with an index. This electronic copy could meet both the court's privacy stipulations by allowing archivists to work on a single "copy" of the document and the access needs of researchers by allowing them to see that same "copy." To further ensure authenticity, MDAH rejected optical character recognition (OCR) technology due to the potential for data manipulation. In addition, the poor quality of the originals and inclusion of much handwritten material made the job beyond the capabilities of the OCR technology available at that time. The involvement of archivists in the trial, presenting archival procedures and concerns, was noticed by the court.

On 31 May 1994, Judge Barbour released a memorandum and opinion order, which declared the records open and established a privacy and disclosure procedure. Now sympathetic to archival concerns, Judge Barbour's goal was to maintain "the original integrity of the files, while balancing the competing interests of the various plaintiffs in privacy and disclosure." He also stressed, however, that "no system of disclosure will be perfect."⁴⁸ MDAH was given the task of implementing the process within a set time frame. The archival process to be used in complying with the court's order was not mandated, but the following steps in the process were stipulated:

Compilation by MDAH of an index of all personal names appearing in the records

Classification by MDAH of each name as either a "victim" of Commission surveillance or a complicit "state actor"

Notification by MDAH to class members that records were available for review

Response by class members

Redaction by MDAH

Opening of redacted records⁴⁹

Although Judge Barbour set a deadline for the completion of this process, he expected that appeals would delay implementation. MDAH was instructed to proceed with the compilation of the index while awaiting the determination of the final redactions that would be made. The privacy plaintiffs appealed the 1994 order, which was upheld by

the Fifth Circuit Court of Appeals. The United States Supreme Court refused to consider the matter. In November 1996, with all avenues of appeal exhausted, the timetable outlined by Judge Barbour's 1994 court order finally went into effect.⁵⁰

Advertisement Period	45 days
Inquiries from interested individuals	90 days
MDAH response to inquiries with copies of records	90 days
Inquirer response to privacy options ("inquiry stage")	30 days
Final preparation prior to public opening	30 days

The appeals afforded MDAH valuable extra time to complete the laborious and tricky task of imaging and indexing the records. At the time that MDAH was ordered to index the records, the agency had no prior experience in dealing with privacy issues of this magnitude. When MDAH became responsible for redacting records to protect personal privacy interests, a total re-engineering of attitude was required.

The resulting changes were most apparent in, and had the most immediate impact on, the indexing and processing of the records. Because an unintentional slip-up on the archivists' part could result in the loss of individual privacy protection, and possibly result in litigation against the agency and its staff, every step of the process was checked, rechecked, and checked again. A team of three archivists was assigned this responsibility, and scanning began. Each scanned image was reviewed by two archivists for accuracy and completeness. Two archivists separately indexed the personal names on each page, and a third archivist checked each page. Ultimately, the index consisted of approximately 300,000 name occurrences comprising approximately 87,000 unique name forms.

The inquiry stage began in January of 1997. MDAH alerted the public by placing advertisements in the local and national press for three successive weeks. These advertisements invited people who believed that their names might appear in the records to write to MDAH. The agency received approximately one thousand initial inquiries within the ninety-day period established by the court, and the MDAH processing team mailed detailed questionnaires to each respondent. This notification procedure also required triple-checking of addresses, mailings, receipts, and requests. Seven hundred completed questionnaires were returned. In the next ninety-day period established by the court, the processing team searched for individuals in the records based on information provided in the questionnaires. Records containing approximately 360 of the individuals' names were located. Again, each search was performed

by one archivist and replicated by a second, with the search results approved by a third archivist. To ensure complete privacy, MDAH redacted all other names in these records before providing copies for the respondents.⁵¹ As before, the redactions were done by one archivist, checked by a second, and reviewed by a third. Production of the respondent review copies followed the same process. At the end of the ninety-day period in August of 1997, MDAH mailed the respondents printouts generated from the image database containing every document in which the requested name appeared, along with instructions on how to declare privacy options.⁵² Most respondents chose full disclosure, but forty-two people selected a privacy option.⁵³ The court reviewed the requested privacy redactions and in each case issued a sealed order determining the final redactions. A number of plaintiffs contested the court's redaction and requested the court to review its decision on their records. The decision by the court to rule individually on each redaction request removed a huge burden from MDAH. Initially, discussions had centered on the archivists redacting names and identifying information. MDAH quickly realized that such a task would be nearly impossible. Many whose names were in the records were still living, and the historical period covered by the records had been scrutinized by historians and others. It would have been too easy to positively identify an individual. MDAH feared resulting litigation from such identifications. From the MDAH perspective, the court was truly wise in requiring the individuals to ask for their own redactions, with a final court review of the request.

On 13 January 1998, Judge Barbour ordered all noncontested commission records to be opened in March. Contested records included those of individuals who had made privacy requests and status challenges. In response to the order, MDAH finalized its system to provide public access to the noncontested records.⁵⁴

On 17 March 1998, twenty-one years after the lawsuit was filed, the bulk of the records of the defunct Mississippi State Sovereignty Commission were made available in electronic format on three computer workstations in the MDAH library. Once again, the production of this redacted version required the three-stage procedure of checking each image and index term. Six percent of the records remained in litigation and stayed closed. There was intense national media attention on opening day, and very few researchers appeared. In the following days and weeks, a large number of individuals, many who had never been in an archives before, came to look at the records. Three staff archivists were assigned to handle the large number of requests mailed in by people who could not visit the archives.

Subsequent releases in July 2000 and January 2001 concluded the opening of the files. These newly opened pages incorporated the court-approved redactions requested by a small number of respondents who, in exercising their court-established rights, chose to have certain identifying information permanently expunged from the records. In addition, the releases included over two thousand pages of rebuttal material submitted by individuals named in the files. In 2002, the proprietary in-house electronic version was converted to an open system to make it Web accessible.⁵⁵

V.

No system of disclosure will be perfect.⁵⁶

The fight to open commission records mirrors the issues inherent in the privacy versus access debate. The commission, a state-funded agency, gathered information on thousands of Mississippi citizens and noncitizens. Investigative reports often contained intimate and slanderous details, many of which were the product of hearsay, concerning individual lives.

This type of information was precisely that which the privacy plaintiffs sought to have restricted. Former activists Edwin King and John Salter clearly had an “unwarranted invasion of personal privacy” in mind when, after reviewing documents in the discovery process, they broke from the ACLU/M access camp and doggedly sued to protect privacy rights. In subsequent arguments, Salter and King firmly denounced the commission’s illegal activity and demanded government accountability. Still, they always promoted the notion of individual privacy rights. Salter and King also sought to protect the privacy of deceased persons and of those parties who would have no reason to believe that their names might be in the files.

Conversely, the access plaintiffs focused on the public’s right to know. The commission’s records clearly document a pivotal period in the state and national history. The civil rights movement was in effect a second American revolution, a reaffirmation of the principles that forged a nation from a colony. In recent years, civil rights historiography has evolved from chronicling great men and big events to providing detailed movement studies. The commission records are of immense historical value in establishing a fuller understanding of the role of ordinary men and women in the civil rights movement. County by county and organization by organization, the commission documented civil rights activities. Furthermore, the files reveal in detail the extent of white resistance, illustrating the white establishment’s deep-seated commitment to the system of racial apartheid. Although, as with any historical source, the dili-

gent historian will use these records with caution, they undoubtedly provide a treasure trove of hitherto unseen information.

In addition to their historical value, the commission's records can also be used to bring justice in cases of civil rights atrocities. In February 1994, after leaked commission documents prompted a third retrial, Byron De La Beckwith was convicted for the 1963 slaying of Medgar Evers, the Mississippi state field secretary for the National Association for the Advancement of Colored People.⁵⁷ On 17 March 1998, MDAH delivered commission documents to the family of Vernon Dahmer, a Hattiesburg businessman and activist who was killed when the Klan firebombed his home in January 1966.⁵⁸ These documents were then used in the subsequent trial and conviction of former Ku Klux Klan grand wizard Sam Bowers in August 1998. Newly released commission documents are also being reviewed in connection with the 1964 murders of civil rights workers James Chaney, Andrew Goodman, and Michael Schwerner in Neshoba County and in the February 1967 murder of Wharlest Jackson in Natchez.⁵⁹

The May 1994 ruling, which established the procedure to open the records, attempted to balance the needs of privacy against the demands of access. In his earlier 1989 ruling, Judge Barbour clearly considered public interest to far outweigh privacy concerns. In overturning the 1989 ruling in 1990, however, the Fifth Circuit Court of Appeals stressed that the "disclosure strand of the privacy interest in turn includes the right to be free from the government disclosing private matters in which it does not have a legitimate proper concern."⁶⁰ Subsequently, while stating in 1994 "that so long as the Commission files remain sealed, there is a continuing violation of the federal constitutional rights of those named in the files," Judge Barbour acknowledged that the rights of victims "would be violated again if information about these victims is disseminated without their knowledge." In his ruling, Judge Barbour thus recognized the impossibility of finding a perfect solution to this dilemma, stating that "no system of disclosure will be perfect."⁶¹

VI.

The "... greatest drawback to investigation" was "the inaccessibility of public archives due to unnecessary restrictions."⁶²

The Mississippi Sovereignty Commission records left an indelible impression on the archivists charged with their maintenance. Processing such an infamous and historically significant collection constituted a grave responsibility. The case also identified the total absence of an agency policy on handling privacy-sensitive records and led to a reappraisal of current agency practices.

As noted above, MDAH's legal mandate is demanding. For the first several years of litigation, after having successfully saved the records from destruction in 1977, MDAH remained passive. With the first ruling, MDAH found itself merely reacting to events. The Sovereignty Commission saga brought into stark focus that passivity is not an option in a modern information-hungry and litigious society. MDAH needed to establish policies and procedures for dealing with privacy-sensitive materials and to step beyond the traditional role as a mere keeper of records. MDAH acknowledged that responsibility in January 1990 when the board of trustees, contrary to the positions taken by the state governor and attorney general, endorsed privacy screening for the commission records.

Development of a program has not been easy. No state statutory authority provides for privacy in public records unless those records are specifically deemed confidential by a state law. MDAH has had to work without specific statutory authority to provide privacy screening, but has also had to meet the requirements of applicable federal law and court decisions regarding privacy protection. Increasingly, the easy availability of personal information in electronic format requires MDAH to be even more diligent to help prevent the use of archival data for identity theft and similar acts.

Accordingly, MDAH established the position of privacy officer to oversee access issues. Initially, many nineteenth- and early twentieth-century records were closed as statutorily confidential or exempt from public disclosure since the passage of the 1983 Mississippi Public Records Act.⁶³ Records such as public hospital admission registers had been available for public research for decades, but our initial reading of the current statutes indicated that closure was required. After the records were closed, researchers were required to obtain a court order for access to these previously open records. MDAH later determined that the legal principle of prior publication applied—that is, all of the records that were publicly available prior to the 1983 Public Records Act had in effect been published. Consequently, MDAH reopened the records.

MDAH also became aware of the need for a state archival program to monitor federal court opinions. For example, the Fifth Circuit Court opinion in *Tarlton v. United States*⁶⁴ that prisoner records may be confidential resulted in a reassessment of MDAH prisoner records and the closure of a number of records series. Again, after a lengthy review, many of these records were reopened, but one series of probation and parole records containing victim statements remains closed.

Currently, the privacy officer identifies existing collections containing privacy-sensitive records and responds to requests for assistance from processing archivists. The privacy officer consults with MDAH's legal

counsel at the Office of the Attorney General to interpret applicable state and federal statutes and case law and to construct access solutions. A general screening policy has been developed that can be modified for specific circumstances. With minimal guidance from the privacy officer, processing archivists are alerted to the type of documents that might require further consideration. Once relevant collections have been earmarked for consideration, the privacy officer either works with the processing archivists or personally conducts a lengthy review of the records. When the privacy officer limits access, finding aids include explanatory statements and the privacy officer remains on-call to assist reference staff. A significant problem remains with the failure of state agencies to design their records to allow the efficient redaction of personal data. Currently, MDAH is prohibited from “determining the nature and form of records” created by other agencies,⁶⁵ and until such time as the archival program can influence recordkeeping practices, long-term privacy protection problems will abound.

To date, the privacy officer’s primary focus has been to review the validity of existing restrictions. Many closed nineteenth- and early twentieth-century government records have now been reopened. There has also been a concerted effort to generally heighten staff awareness of potential privacy and related legal issues. Staff members have attended workshops on copyright and privacy and confidentiality, and the services of a copyright attorney have been retained. In addition, the records scheduling process has been overhauled. Access issues now receive greater emphasis at the time of records scheduling. Vague determinations rarely slip by.

The tasks are colossal and remain far from completion. Many semi-processed collections lie in limbo awaiting a privacy review. Staffing limitations have required the shelving of a systematic approach to access assessment in favor of ad hoc responses to the most pressing needs. In addition, as MDAH prepared for a new building in 2003, energies shifted to preparations for the move. However, despite all of its current inadequacies, the archives recognizes the importance of protecting privacy and the groundwork is in place.

VII.

Any ethical stance constrains someone’s freedom; that does not mean such a stance is unreasonable or unjust. In the end, our acceptance of limitations on the pursuit of knowledge in order to protect a greater common interest is what distinguishes us as moral beings.⁶⁶

Archivists do not exist in a vacuum, but must respond appropriately to the social, cultural, and political environment in which they live and

work. Archivists fulfill a dual role. They provide access to the records that they maintain and they protect the subjects of those records. This duality is stressed in the Code of Ethics for Archivists, which states:

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.

Use is tempered by privacy considerations. The code directs archivists to “. . . weigh the need for openness and the need to respect privacy rights to determine whether the release of the records or information from records would constitute an invasion of privacy.”⁶⁷

Thus, while archivists perform a dual role, they have a single purpose. Access policies should not be viewed as raising the sinister specter of censorship. Access and privacy are not contradictions, but as Heather MacNeil concludes in her study of the ethics of disclosure:

. . . any ethical stance constrains someone's freedom; that does not mean such a stance is unreasonable or unjust. In the end, our acceptance of limitations on the pursuit of knowledge in order to protect a greater common interest is what distinguishes us as moral beings.⁶⁸

Archivists often are wary of establishing draconian restrictions, yet they must manage their collections in an ethical manner. Access policies should be based on legal obligations and require archivists to keep abreast of evolving state and federal laws. Access policies should encompass responsible collection management and reference policies, but not censorship. They afford archivists the opportunity to truly address and respond to the needs of the public. Access policies require dialogue with the public. By explaining the need for such policies, archivists can articulate their professional responsibilities. Furthermore, by being responsive to and communicating with the public, archivists foster a better understanding of the profession. Thus, access policies enable archivists to show that our profession constitutes a crucial element of the national information infrastructure and remains vital to the democratic process. To reassert John Carlin's statement, the opening of the Sovereignty Commission records affirms the archival role in enabling people to see for themselves just what the state government did and allows Mississippi citizens to hold the government accountable. In the final analysis, fulfilling such a noble function is a rare honor.

Chapter 10. Balancing Privacy and Access

1. James Madison, letter to W. T. Barry, 4 August 1822, in *Letters and Other Writings of James Madison*, vol. 3, ed. Philip R. Fendall (Philadelphia: Lippincott, 1865), 276.
2. John W. Carlin, “Strategic Directions for the National Archives and Records Administration,” National Archives and Records Administration, 9 September 1998 available as of 2002 at <http://www.nara.gov/nara/vision/vision.html>.
3. Created on 26 February 1902 by S.B. 26, *Laws of Mississippi*, chapter 52, the department followed by a year the establishment of the Alabama Department of Archives and History.
4. Madel Morgan to Raymond D. Geselbracht, Archivist, Office of the Presidential Libraries, Washington D.C., 26 November 1985, Series 1297: Division Director’s Correspondence, Mississippi Department of Archives and History.
5. Dunbar Rowland, “The Concentration of State and National Archives,” *American Historical Association Annual Report* (1910), 298.
6. Mississippi Department of Archives and History, *Seventh Annual Report of the Director of Archives and History of the State of Mississippi* (1 October 1907–1 October 1908), 20; *Tenth Annual Report* (1 November 1909–3 October 1910), 11.
7. *Mississippi Code Annotated* (1972), Title 25, Chapter 59, Section 17-15.
8. *Ibid.*, 25-59-27.
9. Mississippi Attorney General’s Opinion to W. R. Lewis, 7 December 1995.
10. *Mississippi Code Annotated* (1972), 25-59-29 (*Mississippi Laws*, 1996, Chapter 453, 560–64).
11. Bill Minor, *New Orleans Times-Picayune*, 22 April 1973.
12. 347 U.S. 483 (1954).
13. *General Laws of the State of Mississippi*, 1956, Chapter 365, 520–24.
14. Unsigned Sovereignty Commission speech, filing date 13 July 1958, S.C. Records id. # 7-0-1-56-2-1-1.
15. Erle Johnston, memo, 24 June 1965, S.C. Records id. # 9-31-4-3-1-1-1.
16. 42 U.S.C.A. 2000a-2000a-6.
17. 79 Stat. 437, 42 U.S.C.A. 1973.
18. Johnston, memo S.C. Records, id. # 99-34-0-14-1-1-1.
19. Johnston, memo 8 February 1965, S.C. Records, id. # 99-62-0-33-1-1-1; Johnston, memo, 11 February 1965, S.C. Records, id. # 99-62-0-196-1-1-1.
20. Johnston, memo, 23 June 1964, S.C. Records, id. # 99-36-0-21-1-1-1 to 4-1-1-1. Johnston to Hon. Doty Jackson, 10 February 1966, S.C. Records, id. # 99-62-0-94-1-1-1 to 2-1-1.
21. Johnston, letter to Federation of Constitutional Government, 4 May 1964, S.C. Records, id. # 6-70-0-165-1-1-1; Johnston, speech, Canton Lyons’ Club, 13 May 1964, S.C. Records, id. # 99-62-0-16-3-1-1-1 to 5-1-1-1; *Laws of Mississippi*, Chapter 157, 9 April 1964, 135–36; Johnston, memo, 5 June 1964, S.C. Records, id. # 99-36-0-26-1-1-1; Johnston, memo, Senate and House Appropriations Committee, 25 May 1964, S.C. Records, id. # 99-36-0-38-1-1-1. Report, “Citizen Council Grant,” S.C. Records, id. # 99-30-0-46-1-1-1 to 2-1-1.
22. Johnston, memo to Governor Johnson, 29 March 1965, S.C. Records, id. # 99-34-0-9-1-1-1 to -2-1-1.
23. *Commercial Appeal*, 28 September 1997.
24. *Journal of the House of Representatives of the state of Mississippi at a regular session thereof in the city of Jackson commencing Tuesday, January 4, 1977*, 19.
25. E. Hilliard, letter to MDAH Board, 24 January 1977, Series 1250: Minutes and Related Material, MDAH; *House Journal, Regular Session*, 1977, 19, 121, 82; *Daily News*, 28 January 1977; Erle Johnston, *Mississippi’s Defiant Years, 1953–1973: An Interpretive*

- Documentary with Personal Experiences* (Forest, Miss.: Lake Harbor Publishers, 1990), 379–80; Yasuhiro Katagiri, *The Mississippi State Sovereignty Commission—Civil Rights and State's Rights* (Jackson: University Press of Mississippi, 2001), 415–18.
26. “Department of Archives and History, Minutes of a Meeting of the Board of Trustees, January 28, 1977,” Series 1250, MDAH; *Clarion-Ledger*, 29 January 1977.
 27. *Tupelo Daily Journal*, 17 February 1977.
 28. *Daily News*, 17 February 1977; *Clarion-Ledger*, 17 February 1977, 18 February 1977; Johnston, *Defiant Years*, 381; Katagiri, *Mississippi State Sovereignty Commission—Civil Rights and States' Rights*, note 15, 668; *Tupelo Daily Journal*, 17 February 1977.
 29. *Laws of Mississippi*, 1977, Chapter 320, 447–48.
 30. “Department of Archives and History, Minutes of a Meeting of the Executive Committee Board of Trustees, March 11, 1977,” Series 1250, MDAH; *Laws of Mississippi*, 1977, Chapter 320, 447–48; *Clarion-Ledger*, 22 May 1977. Actually, the total number of pages would not be known for twenty-five years.
 31. Four years later, the 1981 Archives and Records Management Act would give archivists the authority to “inspect closed or restricted records in order to appraise them for archival significance.” Unfortunately, that law could not be applied to the Sovereignty Commission records.
 32. *Clarion-Ledger*, 28 July 1989.
 33. 638 F.2d 1336 (5th Cir. 1981), 31 Fed. R. Srv. 2d (Callaghan) 380.
 34. Calvin Trillin, “State Secrets,” *The New Yorker*, 29 May 1995, 58; *Daily News*, 30 October 1984, 29 November 1984.
 35. *American Civil Liberties Union (“ACLU”) v. Fordice*, 969 F. Supp. 403 (S.D. Miss. 1994).
 36. *Daily News*, 31 December 1990; Civil Action J77-0047 (B), *American Civil Liberties Union (“ACLU”) v. Mabus*, 719 F. Supp. 1345 (S.D. Miss. 1989).
 37. *Clarion-Ledger*, 28 July 1989.
 38. *ACLU v. Mabus*, 719 F. Supp. 1345 (S.D. Miss. 1989).
 39. *Ibid.*
 40. *Clarion-Ledger*, 28 July 1989.
 41. *ACLU v. Mabus*.
 42. Series 1250: Minutes and Related Materials, 1990: Jan 19.
 43. *Ibid.*
 44. *Ibid.*
 45. Series 1254: Executive Directors Correspondence, 1990: 27 April.
 46. *American Civil Liberties Union of Mississippi, Inc. v. State of Mississippi*, 911 F. 2d 1066 (5th Cir. 1990).
 47. *ACLU v. Fordice*, 969 F. Supp. 403 (S.D. Miss. 1994); *Clarion-Ledger*, 4 November 1989, 23 November 1989, 21 September 1993, 24 September 1993, 30 September 1993; *Washington Post*, 6 February 1994.
 48. *ACLU v. Fordice*; Memorandum and Opinion Order, Civil Action No. J77-0047B, filed 31 May 1994.
 49. *ACLU v. Fordice*.
 50. *Clarion-Ledger*, 1 June 1994; Dixon Pyles to Clerk of Fifth Circuit Court of Appeals, 4 November 1994, Sovereignty Commission “Control Folder,” MDAH; John R. Salter to M. Bowers, 28 December 1994, *ibid.*; *American Civil Liberties Union of Mississippi, Inc. v. King*, 84 F. 3d 784 (5th Cir. 1996); *Clarion-Ledger*, 14 June 1996, 16 September 1996, 19 November 1996.
 51. Because the final scope of required redaction was yet to be determined, all other names were redacted.
 52. Inquiry Packet rough draft and notations, Control Folder, MDAH.
 53. *ACLU v. Fordice*.

54. *Clarion-Ledger*, 14 January 1998.
55. The Sovereignty Commission Records On-line are available at <http://www.mdah.state.ms.us>.
56. Quoted from *ACLU v. Fordice*.
57. Evers was leading an integration campaign in Jackson, Mississippi, at the time he was shot and killed outside of his home by a sniper. Byron De La Beckwith died in prison in 2001.
58. Respected grocery store owner, community leader, and activist, Vernon Dahmer offered to pay poll taxes to enable poor people to vote. Following a local radio station broadcast of his offer, Dahmer's Hattiesburg home was firebombed. He succumbed on 10 January 1966, from severe burns.
59. Wharlest Jackson was the treasurer of the Natchez branch of the NAACP. He was killed instantly on 27 February 1967 when a bomb exploded in his car.
60. *ACLU v. Fordice*.
61. *Ibid.*
62. Dunbar Rowland, "The Concentration of State and National Archives," *American Historical Association Annual Report* (1910), 298.
63. *Mississippi Code Annotated* (1972) Section 25-61-1.
64. *Tarleton v. United States*, 430 F.2d 1531 (5th Cir. 1970).
65. *Mississippi Code Annotated* (1972) Section 25-59-16(f).
66. Heather MacNeil, *Without Consent: The Ethics of Disclosing Personal Information in Public Archives* (Metuchen, N.J.: Society of American Archivists and Scarecrow Press, 1992), 172–73.
67. The Council of the Society of American Archivists, "Code of Ethics for Archivists" (Chicago: Society of American Archivists, 1992), 3–4.
68. MacNeil, *Without Consent*, 172–73.