Access to Institutional Archives and Manuscript Collections in U.S. Colleges and Universities

MARK A. GREENE
Director, American Heritage Center, University of Wyoming
Vice President/President-Elect, Society of American Archivists (2006–2008)

The Society of American Archivists' major analysis of archival work, *Planning for the Archival Profession,*[1] called "the use of archival records...the ultimate purpose of identification and administration." For archival records to be used, they must be accessible: intellectually, physically, legally, and by institutional policy. My task today is to briefly sketch an outline of the universe of college and university archival holdings, and then discuss the access issues that apply to the various types of material at various types of institutions. I will offer a few of my personal observations in conclusion.

In the United States, we typically speak of colleges and universities together, although they are distinct: colleges typically offer only undergraduate degrees, while universities typically offer graduate degrees; colleges typically emphasize teaching over research for faculty, while universities often emphasize research over teaching; colleges usually are much smaller than universities; colleges are invariably private, while universities can be private or public.[2]

Public schools in the US are quite different from public schools in Great Britain. In the US public means controlled and funded by a government entity, usually a state; the state appropriates funds to run the school and the governing board is either appointed by the governor or elected by the people. In the US a private school means that the college or university is not controlled by a government entity but rather is chartered as an independent institution with a self-perpetuating board of directors. Usually private schools receive only a small part of their financial support from government grants; most is raised through tuition and private philanthropy.

Colleges and universities, whether public or private, can and often do contain two types of repositories, often administered by the same department or division head, though sometimes administratively separate: on the one hand is the university's institutional archives, the records of the school itself; on the other hand are manuscripts collections and other "special" collections, comprised of material created outside the school and subsequently donated to it.

The status of the university, whether private or public, and the type of repository within it, whether institutional archives or manuscript repository, determine the relevance of some access issues; other access issues are universal across schools and repositories. Universal access issues include intellectual and physical access. Intellectual access denotes whether material in a

[1] *Planning for the Archival Profession* (Chicago, 1986), p. 22
[2] To make matters more complicated, "community colleges," yet another subset, which generally offer only two-year associate's degrees, are usually public; while two-year "technical colleges," which teach trades, are usually private. Then there is the fact that universities are usually made up of "colleges"—not the same as the independent schools called colleges but instead groupings of departments around a general discipline, such as Arts and Sciences, Law, Business, Education, etc.

repository is cataloged or otherwise described intellectually so that potential researchers can both identify the material and comprehend its basic provenance and content. In the US, large percentages of collections in colleges and universities are not intellectually accessible, because acquisition efforts far exceed the resources available to describe what is acquired.[3]

Physical access can be divided into three parts: arrangement, condition, and distance. Physical arrangement of collections and record groups in repositories, like intellectual description, lags behind acquisition, and many repositories will not make unprocessed collections available to researchers—this material is said to be in a "backlog." There is no access to approximately one-third of holdings of college and university repositories for this reason, according to a 1998 survey of premier universities.[4] A 1990s survey found that up to 20% of researchers polled indicated they were prevented from accessing material because of its poor physical condition,[5] a figure not likely to have changed significantly in the intervening years, because of a relative dearth of funds for conservation compared to the size of the conservation problem.

Distance is a barrier to access because, despite efforts at digitization which makes material accessible across space on the World Wide Web (Web), the vast majority of archives and manuscripts remain undigitized and accessible only if researchers can physically visit the repository. As travel grants decline and travel costs increase, this barrier becomes more significant. A very small number of university archivists have advocated—and even implemented on a very limited basis—the long-distance loan of collections to overcome this access barrier.[6]

Access issues more particular to repository and collection material can be discussed in six categories, three each for institutional archives and for collecting repositories. Institutional archives exist at most colleges and universities, though the size of the program (staff, budget, and holdings) varies greatly from place to place. (While it is not unusual to find a school with an institutional archives and not a collecting repository, the reverse is rarely true.) At larger universities, formal records management programs also exist, often but not always under the administrative control of the archives. Institutional archives generally have a mandate to select, preserve, and ultimately make accessible the official records of the school.

Official records include the papers and electronic documents of governing boards, administrators, committees, athletic programs, academic units, university hospitals and other auxiliary enterprises, and the like. Such material is transferred to the archives rather than donated, since it is simply changing administration from one university unit to another. Some materials that are not university records are "collected" by institutional archives despite their not truly being collecting repositories.

Most often this collected material includes the records of student organizations and the papers of faculty. In both public and private universities the papers of faculty members in their teaching and research capacity (as opposed to their sometime activity as administrators) are almost

[3] Judith M. Panitch, *Special Collections in ARL Libraries: Results of the 1998 Survey* (ARL, 2001).
[4] Ibid.
[5] Ann D. Gordon, *Using the Nation's Documentary Heritage: The Report of the Historical Documents Study* (Washington, DC: 1992), p. 46.
[6] Timothy L. Ericson and Josuha P. Ranger "The Next Great Idea": Loaning Archival Collections," *Archivaria* 47 (1999): 85-114

universally considered private papers rather than institutional records. As private papers, faculty collections and student organizational records can be subject to donor-imposed restrictions as discussed in more detail later.

Some **institutional records are covered by federal government statute**. Not just public, but any private school that accepts any federal funds, is bound by the Federal Educational Rights and Privacy Act (FERPA), which regulates access to student educational records.[7] This is the most significant federal law affecting university archives, but the Health Insurance Protection and Portability Act (HIPPA) would cover patient records from university hospitals that might be preserved in the archives.[8] Both acts, among other things, largely prevent researcher access to relevant records to protect privacy; such privacy protection in the US almost always ends with an individual's death, which is true for FERPA restrictions but not those of HIPPA.

Access to **institutional archival records is also affected by state laws** (which apply only to the schools within the boundaries of each state); generally, however, these laws apply only to public universities and not to private schools even if those schools receive some state funds. This is because the records of public universities are—unless specifically exempted in statute—governed by public records laws. These laws include, most significantly, definitions of records, freedom of information acts, sunshine acts, and privacy acts. In addition to direct statutory provisions, state record management processes (themselves established by statute) also are used to define access restrictions in particular record groups and series.

For instance, at public universities a combination of statute and records management authority may be used to restrict access to the records of the executive sessions of the meetings of boards of trustees, or to the records of the university's president, for a quarter century or more in order to protect the confidentiality of certain uncensored discussions and private advice. The same is often true of access to the records of state governors and certain other state administrative records, so this is nothing unique to the records of public universities. What is important is that ideally such access restrictions are the result of transparent processes sanctioned by law.

However, as Richard Pearce-Moses explained in our last session, there is a tension in much state law between providing citizens with access to the records of their government and government agencies, and citizen's desire to have personal information about themselves that might be collected and maintained by a government entity restricted from the prying eyes of other citizens, commercial businesses, or even unrelated government units. Thus freedom of information acts permit citizens to see many records generated by a public university, except those that may contain certain specified categories of private information. This does not mean that university archives make most public records freely accessible; many are protected by what Richard calls "practical obscurity," and are released only in response to formal freedom of information requests.

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[7] Mark A. Greene and Christine Weideman, "The Buckley Stops Where? The Ambiguity and Archival Implications of the Family Educational Rights and Privacy Act," Menzi L. Behrnd-Klodt and Peter J. Wosh, eds., *Privacy and Confidentiality Perspectives: Archivists and Archival Records* (SAA, 2005), 181-98.

[8] Barbara L.Craig, "Confidence in Medical and Health Care Records from an Archive Perspective," Menzi L. Behrnd-Klodt and Peter J. Wosh, eds., *Privacy and Confidentiality Perspectives: Archivists and Archival Records* (SAA, 2005), 246-56.

The decision to subtly protect **institutional records** that are technically accessible to the public **falls under the rubric of institutional policy**. Private colleges and universities have a much freer hand to restrict institutional records by internal policy, and administrators (and general counsels) are often inclined to long periods of restriction. While private college and university archivists have their first loyalty to their institutions, it is also the case that schools by their very nature support inquiry and education which is supported by more open access to records. So the archivist at a private institution often legitimately mediates between administrative restriction and historical inquiry which relies on reasonably open access.

So let us turn to the broad area of collected material in university and college repositories. These repositories are often referred to as the manuscript division or collection, or sometimes more generically as special collections (the latter usually used to encompass not only collections of private papers but also rare books, ephemera, and other special formats). "Manuscripts" or "private papers" are used in the US to encompass unpublished materials created or collected by private individuals, families, businesses, or organizations.

As you will learn from Becky Haglund Tousey, some US businesses and other organizations (such as what we call non-profit organizations (which include civic, political, religious, fraternal, and issue-oriented groups) maintain their own institutional archives, but for the most part if the records of such organizations are preserved it is through donation to a university repository or state or local historical society (the latter a category of repository not covered in our presentations)).

Because **collected material** is by definition not public it might be assumed that access is not **affected by state or federal law**. For the most part this is true, but there are exceptions. In public universities in some states the freedom of information laws have been construed to apply even to collected material, under statutory wording that defines public records as material created *or collected* by a public agency.

Such an interpretation precludes imposition of negotiated donor restrictions on private collections, which can pose a barrier to collecting certain types of material—particularly business records, social service agency records, and the papers of members of Congress (in the US, while most of the papers of Presidents (and often governors) are defined as public records, the papers of members of Congress and state legislatures are by tradition private papers). In Minnesota, for example, the main public university had to petition for a specific exclusion to public record laws to permit negotiation of donor imposed restrictions in the university's several collecting repositories.

Other applications of statutes to collected material include HIPPA on medical records (collected, for example, from doctors or from defunct hospitals),[9] lawyer or law firm files containing records covered by attorney-client privilege (enshrined in state statute),[10] certain material in

[9] HIPPA does extend its strictures beyond the grave, but just how far is unclear; Craig, op.cit., argues that patient records through the early 20th century are probably safe to open for research.

[10] Menzi L. Behrnd-Klodt, "Archival Access to Lawyers' Papers: The Effect of Legal Privileges," Menzi L. Behrnd-Klodt and Peter J. Wosh, eds., *Privacy and Confidentiality Perspectives: Archivists and Archival Records* (SAA, 2005), 175-80.

constituent case files in Congressional papers (covered by federal privacy acts), and federally classified documents sometimes found in the papers of Congresspeople and ambassadors.

Much more complex and ambivalent is the application of state privacy torts (civil laws) protecting personal privacy.[11] The tort right to privacy is defined variously from state to state, and usually not very precisely defined. The issue for archivists is the applicability of these laws to archives that make material relating to third parties accessible to researchers. Some types of third-party privacy are broadly recognized by archivists, and protected by institutional policy if not by a donor-imposed restriction: social service case files, for example.

More controversial, and with much less agreement among US archivists, is the potential applicability of privacy torts to archival release of such things as letters to the donor of a set of family or business papers, where the letter writer has had no say in the material having been donated to a repository. Some archivists and curators, myself among them, believe both that the risk of the repository being party to a privacy suit under such circumstances are very small and that we have no firm ethical grounds upon which to restrict material that a donor does not want restricted; [12] other archivists feel just as strongly that we have a professional responsibility to protect all third parties, even to the extent of imposing institutional restrictions on all material relating to living third parties;[13] still others favor a more mixed approach, making such decisions on a collection by collection basis.[14]

However, all archivists and curators who work in collecting repositories agree about scrupulously abiding by **restrictions on collection access negotiated with donors** and written into deeds of gift. We are equally in agreement (although not equally successful in practice) that such restrictions must be clear, temporary, and for a "reasonable" period of time. What is not universally agreed upon is whether it is appropriate for such donor-imposed restrictions to permit the donors themselves to grant or deny access upon petition by individual researchers. Some archivists contend that such a situation results in unequal access; others consider unequal access preferable to the alternative, which is sealing the collection from all research use.

Common lengths for restrictions are: the lifetime of the donor; 25 or 50 years from date of donation; material in the collection less than 25 or 50 years old (meaning more material comes unrestricted every year); 75 to 100 years from date of creation for collections such as social

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[11] Menzi L. Behrnd-Klodt, "The Tort Right of Privacy: What it Means for Archivists…and for Third Parties," Menzi L. Behrnd-Klodt and Peter J. Wosh, eds., *Privacy and Confidentiality Perspectives: Archivists and Archival Records* (SAA, 2005), 53-60 (particularly 58-60).

[12] Mark A. Greene, "Moderation in Everything, Access in Nothing?: Opinions About Access Restrictions on Private Papers," *Archival Issues* 18:1 (1993), 31-41. Part of this argument is practical, that in large modern collections archivists cannot hope to identify all materials that any third party might consider private and that because the concept of privacy rests on social norms and personal sensibilities that differ from place to place and change over time that there is no reasonable way for archivists to know with any reasonable certainty what material is private. Part of this argument is legal, in that, as Behrnd-Klodt has suggested, the more archivists claim the responsibility for protecting third party privacy the more likely they are to be held legally accountable for doing so. The ethical aspect is undetermined: the latest version of the Society of American Archivists' Code of Ethics removed a previous stricture that archivists "respect the privacy of individuals…who had no voice in the disposition of…materials."

[13] Heather MacNeil, "Information Privacy, Liberty, and Democracy," Menzi L. Behrnd-Klodt and Peter J. Wosh, eds., *Privacy and Confidentiality Perspectives: Archivists and Archival Records* (SAA, 2005), 67-81 (particularly fn 26); Marybeth Gaudette, "Playing Fair With the Right to Privacy," *Archival Issues,* 28:1 (2003-2004), pp. 21-34.

[14] Sara S. Hodson, "Private Lives: Confidentiality in Manuscripts Collections," *Rare Books & Manuscripts Librarianship* 6 (1991),

service and legal case files, where it is important to ensure that third parties are deceased.[15] How rare such donor-imposed restrictions are varies from repository to repository; collecting repositories I have been associated with find the percentage to run between 2 and 10%, but in other repositories it may be more, particularly in repositories that specialize in collecting the papers of public officials, political parties, and interest groups.[16]

Some collecting repositories impose access restrictions as a matter of **institutional policy**, when the donor will not. One example that most archivists and curators would agree on would be social service or legal case files abandoned by their creator that have come into the possession of a third party who donates them to a repository. The donor would have no interest in, and no basis upon which to formulate, restrictions, but the repository would probably impose an institutional restriction on access to material in which the client could reasonably be presumed still living. However, the institution may also permit access to researchers who sign a legal agreement to use the collection solely to derive statistical (as opposed to individual or "name-linked") data.[17] However, as noted, the question of whether to impose institutional restrictions on other types of collections, such as family papers or business records, when the creator/donor does not want them, is a matter of some debate.

As Richard Pearce-Moses has noted, archivists have a legal, professional, and ethical responsibility to promote and provide access to records. The SAA Code of Ethics states

> Archivists strive to promote open and equitable access to their services and the records in their care without discrimination or preferential treatment, and in accordance with legal requirements, cultural sensitivities, and institutional policies. Archivists recognize their responsibility to promote the use of records as a fundamental purpose of the keeping of archives.[18]

That this obligation covers institutional archivists of public universities is unarguable; what remains controversial is the extent to which this obligation applies to institutional archivists of private schools and curators of collecting repositories in all forms of colleges and universities.

Some of these archivists, rather than emphasizing the promotion of open access, instead emphasize a further sentence from the code of ethics: "Archivists may place restrictions on access for the protection of privacy or confidentiality of information in the records." Imposing restrictions where neither law nor donor wishes demand, is a danger, I believe. As the code of ethics further holds, archivists "should not allow personal beliefs or perspectives to affect their decisions"; but such personal beliefs or perspectives is exactly what must be relied upon when

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[15] Technically, attorney-client privilege survives the life of the client, but in practice many repositories open such case files when clients can be presumed dead, and to date there have been no legal repercussions (although it is possible that the donor attorney could face professional disciplinary action, I do not know of this ever happening, either).

[16] As a side note, much more common than access restrictions are restrictions on use; fewer donors transfer copyright to the repository, and without such transfer (and even with it for third party material *received* by the donor) research use is generally limited to the fair use exemption of the US copyright act.

[17] Such a provision is not uncommon for institutional records as well, though such policies are usually the result of the archives negotiating with the university's general counsel and institutional research review board (IRRB), the latter existing to protect a wide range of research subjects in projects ranging from medical experiments to psychological tests.

[18] (Online at http://www.archivists.org/governance/handbook/app_ethics.asp; checked 1 March 2007).

archivists take upon themselves the task of identifying private or sensitive material in personal papers and business records.

The increasingly muddled conception and practice of privacy in the US, which Trudy Peterson will discuss in detail, makes balancing access and privacy obligations difficult in all settings, but particularly in settings where there is not clear statutory directive; this is exactly the situation that many college and university archivists find themselves in. I tend to think that the necessity of our wrestling with these difficult and delicate issues is part of what defines us as a profession; in theory we have the intellectual and experiential tools to permit us to make sound decisions, if not always identical across repositories, and to codify these decisions into consistent policy. This is part of the hard job society has given us, and we must do it thoughtfully, in concert with our institutional mandates, and with recognition of the ethical and legal issues involved. Not an easy task, but if it were easy, there would be no need for professionals to do it.