Agenda Item IV.O.

Society of American Archivists
Council Meeting
January 23 – 26, 2013
Chicago, Illinois

Discussion of the Boston College/IRA Oral History Situation
(Prepared by the Government Affairs Working Group)

BACKGROUND

The oral history project in question began in 2001 when an agreement was reached to conduct oral histories regarding the "Troubles in Ireland" with members of both the Irish Republican Army (IRA) and individuals tied to the Loyalist UVF/Red Hand Commandos. The agreement was apparently signed on behalf of Boston College by Robert K. O'Neill, director of the John J. Burns Library, Boston College, and Thomas Hatchey, executive director of the Center for Irish Programs.

This agreement stipulated that confidentiality of the interviews was guaranteed "to the extent of [sic] American law allows and the conditions of the interview and the conditions of its deposit at the Burns Library, including terms of an embargo period."

Subsidiary agreements between the scholars and the interviewees promised self-imposed institutional limitations and assurances of confidentiality. Interviews were to be made public either at the time of the interviewee's death or at some other time specified in the individual agreement. Although to our knowledge the specific agreements signed by the interviewees have not been released, it appears that interviewees were not made aware of the fact that confidentiality was limited by "the extent of American law."

- Ed Moloney, a Northern Ireland journalist, served as director of the project.
- Anthony McIntyre interviewed 26 IRA provisional members
- Wilson McArther interviewed an unspecified number of Loyalist participants.

The project apparently was successfully completed and remained largely unnoticed until 2010, when Ed Moloney published a book, *Voices from the Grave: Two Men's War in Ireland,* based on the oral histories of two, now deceased, interviewees. The book subsequently was made into a documentary that aired on RTE (Radio and Television Ireland) on October 26, 2010. The documentary made widely known both the existence of the oral histories and their pertinence to an ongoing murder investigation regarding Jean McConville.

- McConville was a mother of ten children who disappeared in December 1972. At the time she was alleged to be a police informer. Her family denied the accusations. In 1999 she was declared to be a victim of the IRA. In 2003 her body was discovered.

The "Disappeared Commission" of the Police Service of Northern Ireland (PSNI) had begun an investigation of the abduction and presumed killing of Jean McConville and eight others in December 1972. Given the public revelation of new evidence in the case, PSNI requested access to the interviews under the United States-United Kingdom Mutual Legal Assistance Treaty.

- Acting upon this request, a subpoena was duly served on the John J. Burns Library of Boston College on May 11, 2011.

Boston College resisted the subpoena in court but apparently surrendered the oral histories when they lost their case in federal court. Eventually this included the entire body of oral histories in their possession. At the same time, Anthony McIntyre, who also was subpoenaed, declined to turn over material in his possession regarding these interviews, in particular passages deemed relevant to the McConville investigation.

On September 1, 2011, McIntyre and Moloney sought legal remedies for the situation, asking a Court to "quash the subpoenas" apparently against both McIntyre and Boston College.

On December 16, 2011, McIntyre and Moloney's request was denied in federal district court. The decision was appealed.

On January 23, 2012, Massachusetts Senator John Kerry wrote to Secretary of State Hillary Clinton and Attorney General Eric Holder to express his concern regarding what impact the release of the information sought by the PSNI "may have on the continued success of the Northern Ireland peace process."

In July 2012 the First Circuit Court ordered compliance with the subpoenas.

On October 17, 2012, Justice Breyer stayed the First Circuit Court's order, pending the Supreme Court's ruling on a request by McIntyre and Moloney that the Supreme Court review the case.

The Government Affairs Working Group (GAWG) notes, for the record, that the question of "archival privilege" has been previously raised with the SAA Council. In 1986 the Council declined to take action when it was asked to do so in a case regarding a federal subpoena issued against a closed collection at the Wisconsin Historical Society. A federal district court sustained the legality of that subpoena. (See Harold L. Miller, "Will Access Restrictions Hold Up in Court?" *The American Archivist* 52 [Spring 1989]: 180-190.)

DISCUSSION

On the Merits of the Specific Case:

Boston College appears to have been very clear, when an agreement initially was reached to undertake this project and house the resulting oral histories in the college library, that all promises of confidentiality made to interviewees were subject to US law.

The researchers, apparently acting in the belief that additional assurances of confidentiality made to oral history subjects could be supported in case of legal action, made promises to the oral history participants that went beyond those offered by Boston College.

- These assurances were mistaken, and apparently founded in the researchers' belief in a legal theory of "archival privilege" previously rejected by a federal court.

- In 1986 a federal court was asked to specifically rule on an alleged "archival privilege" of confidentiality. At issue was a subpoena issued against a closed collection at the Wisconsin Historical Society. The Court ruled, *"…the situation before the Court is one where a member of the plaintiff class seeks to insulate otherwise discoverable documents from disclosure simply by virtue of the fact that she has placed them in an archive under an agreement restricting access … In such a case, the access restriction agreement must yield to the judicial process' search for truth.*"[1]

Unsurprisingly, although the Courts in question apparently did not reference the 1986 ruling, both the Federal District Court and the First Circuit Court ruled in favor of the government. Access restrictions in a deed of gift were not sufficient to withstand a court subpoena.

Although it is not relevant to the legal case, Maloney's decision to use two oral histories to publish a book, clearly within the terms of the relevant donor agreements, nevertheless drew unwelcome attention to those and other interviews—a situation that the author might reasonably have expected to occur and might reasonably have been prepared to deal with in a realistic way. It is worth noting in this regard that in 1999 Maloney risked jail time when he refused to reveal sources he possessed regarding the murder of Pat Finucane, an IRA lawyer allegedly killed by Loyalists. Thus he should have been aware of the possibility that authorities would seek information regarding the ongoing murder investigation of Jean McConville, a case discussed in the book and documentary.

- Candidly the legal "troubles" experienced by Maloney and McIntyre did not come about because the PNSI was actively engaged in fishing expeditions regarding murder cases dating back more than 30 years, but rather because Maloney publicized widely the existence of the oral histories through print and broadcast media.

Given these circumstances – and particularly the fact that the project staff, for whatever reason, chose to ignore existing case law and assure participants that a greater level of confidentiality could be given the oral histories than could reasonably be assumed – the

[1] Harold L. Miller "Will Access Restrictions Hold Up in Court? The FBI's Attempt to Use the Braden Papers at the State Historical Society of Wisconsin." *The American Archivist* 52 (Spring 1989): 185.

Government Affairs Working Group suggests that SAA take no position on the case at hand.

On the Broader Subject of a Legally Recognized "Archival Privilege" to Maintain Confidentiality:

The claim that there is a legal privilege to confidentiality that archivists may invoke to gain exemption from a duly authorized court order or other appropriate legal process is a speculative theory that has been rejected previously by a federal court.

The principal justification for this theory seems to be the "need of history" for honest information, and thus the need to shield honest answers from potential legal consequences. Clifford M. Kuhn, a past president of the Oral History Association, has warned that sources "will be far less likely to take part in such activities" if oral history participants cannot be guaranteed confidentiality.

Although Kuhn's statement is undeniably true, it is likely that there will be an even greater chilling effect if archivists and others involved in obtaining historical documentation are perceived as giving legal advice that has little chance of being supported in a court of law. The archivist's responsibility would seem to be to represent the current legal situation to potential donors as best possible, rather than engage in speculation about the law that could easily be seen as self-serving. Potential donors should make informed decisions based on the likely legal ramifications of their actions, not based on legal speculation.

The belief that there should be a privilege of confidentiality requires careful and thorough discussion within the profession. Although there are clearly some members of the profession who believe that such a right should be asserted, there are other individuals who believe that asserting such a right could be interpreted as an unfortunate exercise in absolutism that would be detrimental to the broader public interest. At the very least, such a right would have to be nuanced carefully and placed into a context of mutual rights and responsibilities that others might legitimately assert for the availability and use of archival material under certain circumstances.

Thus, although the Council might encourage professional discussion on the subject of a legally recognized archival privilege of confidentiality, the Government Affairs Working Group believes that the Council should take no position on the matter at this time.

RECOMMENDATION

As noted, GAWG does not think that the Council need take a formal position on either the case at hand or the broader issue of the concept of an archival privilege of privacy. However, should the Council choose to encourage discussion about the concept of archival privilege, GAWG has drafted the following resolution for your consideration as one means of accomplishing that purpose.

DRAFT RESOLUTION

Several SAA members have brought to the attention of the Council an ongoing legal case in which oral histories conducted on the subject of the Irish "Troubles" and housed at Boston College have been subpoenaed by the United States government at the request of the Police Service of Northern Ireland (PSNI) to be used as potential evidence in a murder investigation begun in 1972. Honoring of the subpoena would violate the confidentiality terms agreed upon by those interviewed and the individuals who conducted the interviews.

A federal district court and the First Circuit Court of Appeals have ruled that the subpoena is legal. A request to have the case reviewed by the United States Supreme Court is pending.

Members of the Society have both asked that SAA intervene in the specific case and posed the question of what broader issues are raised by this matter, in particular if there is or should be a legally recognized right of "archival privilege" that would shield archivists and those who donate material to archives from unwelcome legal action.

On the specifics of the case: As best can be determined at this time, the project staff made promises of confidentiality that exceeded those established by higher authorities at Boston College through a written agreement and went beyond reasonable and prudent judgment in that they relied on a legal theory, "archival privilege," that was rejected by a federal court in a case that was reported in the archival literature (see Harold L. Miller "Will Access Restrictions Hold Up in Court?" *The American Archivist* 52 [Spring 1989]: 180-190).

Although the project staff may have believed passionately in such a principle, nevertheless making written promises to possible donors that are not in accord with widely accepted and well-supported legal principles should be discouraged in the strongest possible terms.

The archivist's responsibility is to discuss with potential donors all matters, including legal ones, as best they understand them to exist, not as they might like them to be. Because participants in this matter both exceeded their institutional authority and did not accurately represent to participants current legal understanding regarding privacy, the Society of American Archivists has declined involvement in the case.

On the broader matter of a legally recognized "archival privilege" to confidentiality: The SAA Council encourages a careful and thorough professional discussion of this matter.

The Council recognizes that there are voices who will speak to the existence and the need for such a right, but also those who would say that such a right does not exist, that it is unlikely to be broadly accepted as public policy, and that it is unclear if the fundamental values incorporated in the concept represent sound public policy.

Thus the SAA Council believes that at this time it is inappropriate for the Society to take a formal position on the concept of archival privilege. As already stated, however, the Council welcomes and encourages discussion among SAA members regarding the concept of archival privilege in the hope that such discussion will result in development of a preponderance of professional opinion regarding the matter.