

# Caught in the Middle: Access to State Government Records in the United States

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*Abstract: Government archivists must balance two key factors that influence access to records in their custody. On one hand, archivists are committed to providing access to government records as a core principle of a democratic government. At the same time, they must respect the rights of privacy of individuals whose lives may be documented in intimate detail in those records. They must assess both the potential benefits and damages if records are released, as well as the potential benefits and damages if the records remain restricted.*

What is the value of archives if not to provide access to information? Why spend time and effort collecting and organizing records if no one will ever use them? Access to information is a cornerstone of the archival profession. At the same time, archivists recognize and respect individuals' and corporations' rights to privacy, as well as legal restrictions on access to records in their custody. The irony for *public* archives is that, at least in English, the word public embraces two contradictory senses: the records are public, in the sense that they are of the people, but they are not necessarily public, as some are confidential.

This paper will look at some of the issues of access to government information primarily at the state level. While each state takes a somewhat different approach to access to government records, the states' laws and regulations are more similar than different. I do not distinguish much between records held by government archivists and other government officials. In many cases, an official serves as an archivist, even if the office bears a different name. For example, the Secretary of State holds many permanent records, as do county recorders and city clerks.

Michael Kinsley, a political commentator and op-ed columnist for the *Washington Post*, opined that "American democracy is a conspiracy of special interests against the general interest, but every special interest thinks that it is the general interest."<sup>1</sup> I believe his observation is very relevant to access to government records. Some groups will fight for access, others may argue for restricted access, but both sides believe that their approach is in the best interest of the nation.<sup>2</sup>

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<sup>1</sup> *The Washington Post*, 20 February 2005, p. B7. Online at <http://www.washingtonpost.com/wp-dyn/articles/A36625-2005Feb18.html> (checked 28 February 2007).

<sup>2</sup> Journalists, in particular, pursue their profession as a noble cause. The fourth estate demands access to government records to fulfill its role to balance the powers of the government, the church, and the masses. In fact, journalists and news organizations are responsible for many of the lawsuits seeking access to government records.

Because of these competing interests, policy on access to government information evolved in an incremental, rather than a systematic, manner. As a result, the legal principles of access are often confusing and sometimes contradictory. Archivists with government records are often caught in the middle.

## Public Records

Having worked quite a bit with electronic records in recent years, I think that one of archivists' favorite past-times is to debate the question, "What is a record?" Is the draft of a document a record or is only the final, complete version a record? Is a record evidence of a transaction that has been executed or can any document be a record? The question is worth consideration, and I think it is important for archivists to have a rich, rigorous understanding of the concept that is at the very core of the profession.

At the same time, the question is largely moot for those working with government records in the United States. Statutes define *public* record.<sup>3</sup> These records fall into a number of broad categories. Records filed for public notice, such as deeds and liens in county courthouses. Programmatic records, ranging from executive-level policy documents and records regulating an agency's principle activities, such as licensing or administering regulations. Routine, administrative records, such as personnel and purchasing records, kept in any large organization. And the papers of elected and appointed officials.<sup>4</sup>

## The Principle of Access

The right of access to and inspection of public records is established by common law.<sup>5,6</sup> Further, most states have statutory provisions providing for access, often referred to generically as

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<sup>3</sup> "Records' includes all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them." 44 Unites States Code (USC) 3301. Most states use similar language. For example, Arizona's statutory definition is virtually identical to the federal definition.

<sup>4</sup> This list is not comprehensive. Court records, include both case files. They also may contains private records introduced as evidence at trial, which courts may seal to restrict access. As investigative and law enforcement records are routinely kept confidential to protect both the investigative process and any subsequent prosecution, they are largely outside the scope of this paper.

<sup>5</sup> "The right of access to, and inspection of, public records is not entirely a matter of statute. The right exists at common law, and, in the absence of a controlling statute, such right is still governed by common law." (76 CJS 60). The CJS is an authoritative summary of legislation and case law in the United States. *Corpus Juris Secundum: A Contemporary Statement of American Law as Derived from Reported Cases and Legislation* (West Publishing, 1994). Lawrence J. Culligan, Editor-in-Chief, and Anthony V. Amodio, Managing Editor. Records.

<sup>6</sup> "A record is one required by law to be kept in the discharge of a duty imposed by law, or directed by law to serve as a memorial and evidence of something written, said, or done, or a written memorial made by a public officer authorized to perform that function, or a writing filed in a public office." Records (76 CJS 2).

sunshine laws,<sup>7</sup> open records laws, and freedom of information laws. Regardless of what archival theory may say about the nature of a record, federal and state laws explicitly define what is a *public* record.

These laws ensure that citizens have the information they need to hold government officials accountable. Access to government information is a fundamental principle of democracy. As expressed by United States President James Madison, “A popular government without popular information or the means of acquiring it is but a prologue to a farce or a tragedy, or perhaps both.”<sup>8</sup> Although the law may provide for exceptions, the spirit of the law is clear: the public should have access to government records.<sup>9</sup>

In spite of these noble ideals of access to public access to records, access was not always easy. Before freedom of information acts were made law, individuals often had to demonstrate a need to examine public records. “FOIA established a ‘right to know’ standard for access, instead of a ‘need to know,’ and shifted the burden of proof from the individual to the government agency seeking to deny access.”<sup>10</sup>

## Legal Aspects of Access

Given that modern records laws generally promote access, restricting access requires separate, specific legislation.<sup>11</sup> Access to public records may be restricted for many legitimate reasons. As these exemptions are scattered in dozens — sometimes hundreds — of different statutes, I cannot begin to cover all the possibilities.<sup>12</sup> Instead, I’ll suggest two driving forces behind these laws: protecting the government’s interests and individuals’ right of privacy.

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<sup>7</sup> No doubt “sunshine laws” comes from Justice Louis Brandeis, who wrote “Publicity is justly commended for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.” *Other People’s Money* (1914). Cited in Fred R. Shapiro, *The Oxford Dictionary of American Legal Quotations* (Oxford University Press, 1993), p. 296.

<sup>8</sup> Madison to W.T. Barry, August 4, 1822. *The Mind of the Founder: Sources of the Political Thought of James Madison*, p. 437, ed. Marvin Meyers, Indianapolis (1973). Cited from Bartleby.com (<http://www.bartleby.com/66/40/37340.html>, checked 25 February 2007).

<sup>9</sup> Further, courts generally do not worry much about whether or not documentary information held by an agency or official is technically a record, but whether the documents relate to the activities of an agency or official.

<sup>10</sup> Linda D. Koontz, *Freedom of Information Act: Preliminary Analysis of Processing Trends Shows Importance of Improvement Plans* . . . (US Government Accountability Office, 2006; online at <http://purl.access.gpo.gov/GPO/LPS73079>, checked 19 February 2007).

<sup>11</sup> “Statutes providing for the confidentiality of records are in derogation of the common law right to inspect documents, and must be strictly construed.” *Records* (76 CJS 74).

<sup>12</sup> The Uniform Information Practices Code, developed by the National Conference of Commissioners on Uniform State Laws, identifies twelve broad categories of information that are not subject to disclosure. “(1) Information compiled for law enforcement purposes if disclosure would: (i) materially impair the effectiveness of an ongoing investigation, criminal intelligence operation, or law enforcement proceeding, (ii) identify a confidential information, (iii) reveal confidential investigative techniques or procedures, including criminal intelligence activity, or (iv) endanger the life of an individual; (2) inter-agency or intra-agency advisory, consultative, or deliberative material (other than factual information) if: (i) communicated for the purpose of decision making, and (ii) disclosure would substantially inhibit the flow of ideas within an agency or impair the agency’s decision-making process; (3) material prepared in anticipation of litigation which would not be available to a party in litigation with the agency under the rules of pretrial discovery for actions in the [designate appropriate court] of this State; (4) materials used to administer a licensing, employment, or academic examination if disclosure would compromise the fairness or objectivity of the examination process; (5) information which, if disclosed, would frustrate government procurement or give an advantage to any person proposing to enter into a contract or agreement with an agency; (6) information identifying real property

## ***Protecting the Government's Interests***

In some instances, unfettered access would put the government at a clear disadvantage in conducting business. State procurement is an obvious example; open access might lead to price gouging. Often this routine information is accessible when the activity is complete to ensure accountability after the fact. Some states provide an exemption for information that relates to the deliberation of policy. Ready access could have a chilling effect on employees' frank, internal debate to fully understand an issue, and you can imagine that many would want to see these records. Although these records may be restricted while held by the agency, they may become accessible after they are transferred to the archives.

Another less immediately obvious example is an Arizona law that provides that an officer may decline to release information that relates to the location of archaeological discoveries.<sup>13</sup> Arizona doesn't want to help thieves find valuable artifacts for sale on the black market.

After the terrorist attacks of September 11, 2001 some records previously open were closed on grounds of homeland security. Although national security is generally considered a federal issue, state and local governments often restrict access to records that previously would not have been considered sensitive. After the attacks, closing access to descriptions and blueprints of waterworks, pipelines, chemical supply depots, and other "records of concern" seemed to make sense. Unfortunately, these records may be restricted more from a sense of paranoia than reason.<sup>14</sup>

## ***Privacy***

Because government records contain so much personal information, one of the biggest challenges is protecting people's privacy. In the not-too-distant past, access to confidential information was considered reasonably restricted by the effort necessary to get at that information. A trip to the county seat or state capital, manually searching records under the watchful eye of a clerk, and laboriously copying information by hand afforded the records practical obscurity.<sup>15</sup> Today, government records are routinely made available on the World

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under consideration for public acquisition of rights to the property; or information not otherwise available under the law of this State pertaining to real property under consideration for public acquisition before making a purchase agreement; (7) administrative or technical information, including software, operating protocols, employee manuals or other information, the disclosure of which would jeopardize the security of a record-keeping system; (8) proprietary information, including computer programs and software and other types of information manufactured or marketed by persons under exclusive legal right, owned by the agency or entrusted to it; (9) trade secrets of confidential commercial and financial information obtained, upon request, from a person; (10) library, archival, or museum materials contributed by private persons to the extent of any lawful limitation imposed upon the material; (11) information that is expressly made non-disclosable under federal or state law or protected by rules of evidence; or (12) an individually identifiable record not disclosable under Article 3." *Uniform Laws Annotated* 2-103 (Thompson-West, 2002).

<sup>13</sup> Arizona Revised Statutes (ARS) 39-125.

<sup>14</sup> In early 2007, journalists and volunteers requested copies of the Comprehensive Emergency Response Plan for their communities. These plans are intended to ensure every community has plan to respond to industrial accidents, such as chemical spills. The plan is to be made public so that people in the community know how to respond. One official in Iowa commented, "We need more awareness on what to do during an incident for the safety of everyone." However, twenty percent of requests for the plan were denied. One reporter was denied the plan because even though she didn't fit the profile of a terrorist, she might be. "Officials in counties withhold documents," *Arizona Republic* 11 March 2007, p. B1, B8.

<sup>15</sup> The term 'practical obscurity' first appears in *U.S. Dept. of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989). Considering the application of FOIA exemption 7(c) to a rap sheet, the court held that where the subject of a rap

Wide Web. Computers can compile small bits of personally identifying information from many, scattered sources to build a complete profile suitable for identity theft. A name might be tied to a phone number here, an address there, and a birth date elsewhere. Add in a mother's maiden name from a genealogy database, and you have just about everything you need to hijack an unwitting individual's life.

The right of privacy is "the right of an individual to be let alone, to live a life of seclusion, to be free from unwarranted publicity."<sup>16</sup> The right of privacy is intended to protect the feelings and sensibilities of individuals by restricting the details of their lives from undesirable or unwarranted publicity.<sup>17</sup>

Some courts recognize a common law right to privacy. However, because some courts do not recognize that right under common law, most — if not all — states have statutes limiting access to some personal, private information. For example, many states protect the confidentiality of the personal information of law enforcement officers to protect them from acts of retribution.<sup>18</sup> Often these restrictions to protect privacy are scattered in dozens — sometimes hundreds — of statutes, rather than in a single statute. The rise of identity theft is motivating some states to consolidate restrictions on personal information in public records.<sup>19</sup>

The right of privacy is not absolute. It must be balanced against other individuals' interests<sup>20</sup> and is generally subordinate to the public's right to information.<sup>21</sup> In one notable case, the Port Authority of New York restricted access to transcripts of calls made to emergency services from individuals trapped in the World Trade Center just before they collapsed. The Port Authority withheld the transcripts on privacy grounds because release of these individuals' final words could cause the victims' relatives undue, unwarranted distress — the very feelings and sensibilities at the heart of privacy. Ultimately, a court overturned the decision, and the Authority released the records.<sup>22</sup>

The rights of privacy and personal interest may be in conflict. Adoption records are closed in most states, making it difficult or impossible for adopted children to find their birth parents.

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sheet is a private citizen and the information is in the Government's control as a compilation, rather than as a record of what the Government is up to, the privacy interest in maintaining the rap sheet's 'practical obscurity' is always at its apex while the FOIA-based public interest in disclosure is at its nadir. Thus, as a categorical matter, rap sheets are excluded from disclosure by the exemption in such circumstances. Ken Withers to the author, 9 December 2003. Cited in Richard Pearce-Moses, *A Glossary of Archival and Records Terminology* (Society of American Archivists, 2005).

<sup>16</sup> Right of Privacy and Publicity (77 CJS 1).

<sup>17</sup> Right of Privacy and Publicity (77 CJS 3).

<sup>18</sup> "Any person who is employed by a state or local government entity " to knowingly release the home address or home telephone number of a peace officer, a justice, a judge, a commissioner, a public defender, a prosecutor or a code enforcement officer with the intent to hinder an investigation, cause physical injury to a peace officer, justice, judge, commissioner, public defender, prosecutor or code enforcement officer . . . ." ARS §39-123.

<sup>19</sup> The Federal Privacy Act (5 USC 552A) provides general protection of personal information at a federal level. The Although the Uniform Information Practices Act cited above serves as a model for states, only Hawai'i has adopted it since it was adopted in 1980.

<sup>20</sup> Right of Privacy and Publicity (77 CJS 5).

<sup>21</sup> Right of Privacy and Publicity (77 CJS 7).

<sup>22</sup> Samantha Levine, "Terror on Tape: 'We're trapped'," *U.S. News & World Report* 135:7 (8 September 2003), p18.

Whose interests are paramount? Those of the mother, who may want to keep a chapter in her life closed, or the child who may be looking for medical history to help diagnose a life-threatening condition?

A number of sovereign groups have asked archivists to restrict access to records. These groups are asserting cultural property rights, a nascent intellectual property right based on the idea that “a society, especially that of indigenous peoples, has the authority to control the use of its traditional heritage.”<sup>23, 24</sup> In April 2006 a group of nineteen Native American and non-Native American archivists, librarians, museum curators, historians, and anthropologists met to develop protocols, which describe “best professional practices for culturally responsive care and use of American Indian archival material held by non-tribal organizations.”<sup>25</sup> For example, archivists are asked to restrict access to certain culturally sensitive materials, such as photographs of sacred dances and objects and to consult with tribes to determine what materials are sensitive. One might consider this example an extension of privacy to an entire cultural community.

### **Practical Application of the Law**

Most records laws typically begin by noting that “ ‘records’ includes *all* books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics.” I emphasize the word “all” because it encompasses a *lot* of material. This simple question has significant implications when one reads statutes providing for inspection of public records. For example, Arizona’s statute reads, “Public records and other matters in the custody of any officer shall be open to inspection by any person at all times during office hours.”<sup>26</sup> Given the workloads in government agencies, the theory of access is often at odds with the practice of complying with requests.

Courts have routinely held that access to records is subject to reasonable rules and regulations to avoid disruption of regular business.<sup>27</sup> However, the agency and the individual or organization making the request may have different ideas as to what they consider to be an unreasonable disruption.<sup>28</sup>

In some instances, records are closed by statute; for example, most states provide very limited access to birth and death records. However in many cases — possibly most cases — laws restrict access to *information*, not to *records*. Still, custodians often restrict access to records en

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<sup>23</sup> *A Glossary of Archival and Records Terminology*.

<sup>24</sup> One of the first of such requests came from Australian Aboriginals and Torres Strait Islanders. See *Aboriginal and Torres Strait Islander Protocols for Libraries, Archives, and Information Services* (1994; online at <http://www.cdu.edu.au/library/protocol.html>, checked 28 February 2007).

<sup>25</sup> *Protocols for Native American Archival Materials* (First Archivists Circle, 2006; online at <http://www2.nau.edu/libnap/index.html>, checked 28 February 2007).

<sup>26</sup> ARS 39-121.

<sup>27</sup> Records (66 ASJ §14). Like the CJS, *American Jurisprudence* is an authoritative summary of the law in the United States. *American Jurisprudence: A Modern Comprehensive Text Statement of American Law* – 2nd ed. (Lawyers Co-operative Publishing and Bancroft-Whitney, 1973).

<sup>28</sup> Often question of disrupting agency business grew out of requests for copies of all in a series; for example, a mortgage company requesting copies of the entire deed record from an office that was accustomed to supplying copies one or two at a time.

masse, as that approach is certainly easier than redacting confidential information from records.<sup>29</sup> However, courts have generally held that records custodians must make the records available in redacted form.

Frequently the issue is one of the manner of access, rather than the right to inspect. A substantial body of case law relates to individuals who ask records custodians for a summary or special compilation, such as a custom query from a database. Courts generally deny such requests; records custodians must provide access to the records they hold, but are not obliged to create new records.

One important but difficult group of records involves those of elected officials, especially the governor and members of state legislatures. The boundary between their public and private lives is often blurred, making it hard to classify some of their records. Arizona law, for instance, requires the governor to keep “A register of all appointments made by him, with date of commission, names of the appointee and predecessor.”<sup>30</sup> It shouldn’t be surprising that the governor’s calendar might also include private appointments, ranging from personal lunch dates to hair cuts. Are their speeches made to public groups while in office a public record? Politicians have reasonable and legitimate interests in retaining possession of their private papers; often they want to deposit them at their alma mater or they may want to restrict access to them altogether. At the same time, the law requires that their public records be transferred to the archives.

## **Non-Records**

As I noted earlier, one of archivists’ favorite pastimes seems to be debating, “What is a record?” I want to return briefly to a slight variant of the question, “What is a *public* record?” Some materials may be exempt from open records laws simply because they are not public records.

First, the mere fact that a document is in a public building does not make it a public record.<sup>31</sup> An individual’s private work diary kept as an aid-to-memory and not shared with anyone else may be considered a personal, not a public, record.

Second, some people question if email and other electronic communications such as instant messaging are public records and subject to open records laws.<sup>32</sup> Although most open records laws include provisions for “electronic format” or the more general “in any format,” others argue that because email is informal, like a phone call, there is a presumption of privacy. In a recent

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<sup>29</sup> The process of redacting information can be time consuming and expensive, and agencies – not the individual making the request – must bear any costs beyond basic copying.

<sup>30</sup> ARS 41-102.

<sup>31</sup> “The mere fact that a record is in the possession of a public officer or agency does not mean that it is subject to [a statute providing for inspection of public records].” *Records* (76 CJS 99).

<sup>32</sup> Pam Greenberg, “Electronic Communications: Are They Public Records?,” *NCLS LegisBriefs* 12:39 (October 2004), p. 1. As of 2004, only five states have explicit statutes addressing whether officials’ email are public records, although a few other states have court precedence or policies addressing the issue.

Arizona case, the court found that a former county manager's email messages sent using the county's email system were not public records because they were not work related.<sup>33</sup>

## A Balancing Act

The challenge for public officials and archivists who hold public records is to understand the complex, often contradictory legal environment governing what information is held confidential and what information may be made accessible. They must also think of potential consequences of releasing sensitive information.

Needless to say, public officials may restrict access for less than ideal reasons. George Orwell's novel *1984* explores the possible ramifications of one of his more famous quotes, "Who controls the past, controls the future: who controls the present controls the past."<sup>34</sup> No doubt many public officials may resist release of records that are embarrassing or that demonstrate poor performance or illegal acts. Many officials and employees treat their records as private property rather than as a public trust. And here is where I clearly distinguish between government archivists and others in government service.

Archivists have more than a legal responsibility to provide access to records, they have a professional, ethical responsibility to do so. At the same time, as public officials archivists have the responsibility to protect the best interests of the state and to avoid damage to an individual.<sup>35</sup> The Society of American Archivists' Code of Ethics states that archivists should provide open and equitable access, although it does allow for restrictions to protect privacy or confidentiality.<sup>36</sup>

Archivists are often caught on the horns of a dilemma: access can have both benefits and costs, and the same is true of restrictions on information. I believe that an important part of the archivist's job is to find creative solutions that address these conflicting requirements. Can they

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<sup>33</sup> "Public employees' 'personal' e-mail not public record," *Reporters Committee for Freedom of the Press*, 15 August 2006 (online at <http://www.rcfp.org/news/2006/0815-foi-public.html>, checked 27 February 2007). "A three-judge panel, relying on a previous decision by the Arizona Supreme Court, ruled Aug. 4 that in order for an e-mail message to be deemed public, it must not only be created by a government employee on a government computer, but it 'must also have some relation the official duties of the public officer that holds the record.' ¶ 'We see no such relation between [the employee's] purely personal e-mails and his official duties,' Chief Judge John Pelander wrote for the panel, reversing a trial judge's earlier ruling ordering the release of all the public employee's e-mail messages."

To stress the courts' lack of consensus on this point, the original decision favored the plaintiff, the appeals court reversed the original decision. The case is being appealed to the state Supreme Court.

<sup>34</sup> (Signet Classics, reissued 1977), p. 35.

<sup>35</sup> "While access and disclosure is the strong policy of the law, the law also recognizes that an unlimited right of inspection might lead to substantial and irreparable private or public harm; thus, where the countervailing interests of confidentiality, privacy or the best interests of the state should be appropriately invoked to prevent inspection, we hold that the officer or custodian may refuse inspection." 146 Ariz. 487 (Carlson v. Pima).

<sup>36</sup> "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. Archivists may place restrictions on access for the protection of privacy or confidentiality of information in the records." (Online at [http://www.archivists.org/governance/handbook/app\\_ethics.asp](http://www.archivists.org/governance/handbook/app_ethics.asp); checked 1 March 2007).

find some way to provide access to records, while respecting other obligations for confidentiality or restricted access, and in an ethical manner?

Often, archivists are in a position to mediate. They are a neutral third party. While neither party is obliged to accept an archivist's mediation, informal negotiations may be very effective.

What is the patron asking for? Patrons looking for specific information often ask for one type of record, when there may be a better source for the information. One of the skills of effective reference service is to discover the question behind the question. This approach may help solve some issues. Direct the patron to a collection that contains the information — maybe better information — in a source with fewer restrictions.

If a patron needs information that can only reasonably be found in a collection with many restrictions, it is our duty to provide the information within legal limits. Again, what is the question behind the question? Does the patron need access to all the collection, or selected portions? In some instances, it may be possible to hold back only those records with restricted information. While archivists and records custodians may not be required to create summaries or new compilations of records, in some instances, it may take less time to do that than to redact the information. Some patrons will want access to the records themselves. However, many patrons would be happy to have someone else help with their research.

Archivists may avoid problems of access and confidentiality in how they provide access to materials. They can continue the practice of practical obscurity. Archivists are under great pressure to put their collections on the web to increase access, especially in states as large as Arizona where distance is a significant barrier to access. This goal is a laudable, but not obligatory. If a collection contains sensitive information, archivists should hesitate before putting it online or they should redact sensitive information first.

Some government records may contain very private information. Often individuals turn to the governor, to legislators, and other officials for help when facing personal crises. Their letters often contain extraordinarily private information, including details about their health and finances. No doubt, these records could be restricted on the grounds of privacy. But if restricted, archivists should ask if these records — which are tangential to government activities — should be acquired at all. Unfortunately, these records are frequently mixed in with others that should be preserved and accessible. Although contemporary archival practice avoids working at the item level, series with such sensitive information demand careful review.

Archivists very much want to acquire the papers of elected officials. If the records are clearly private, an archives may restrict access (“seal”) the records for a period of time.<sup>37</sup> If the records are public, an archives may not have this option. Given that these records are on the boundary between public records and personal papers archivists may — within the limits of law and ethics,

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<sup>37</sup> This restriction parallels the federal Presidential Records Act (44 USC 2201–2207), which restricts access for twelve years. Note that the carefully negotiated balance between Congress and the Executive branch of government reached when the bill was crafted in 1978 was significantly changed when President George W. Bush issued Executive Order 13233 on 1 November 2001.

of course — want to tip the scales a bit, deciding for personal papers so that they can be sealed. However, any restrictions are likely to be controversial.<sup>38</sup>

Culturally sensitive materials are another area where archivists may exercise balance. Honoring requests to restrict materials on the basis of cultural property rights is, no doubt, very controversial. Although museums have federal law giving them authority to restrict access to artifacts of cultural patrimony, that law does not include archival collections.<sup>39</sup> Here again, practical obscurity for at least the most sensitive materials may be a good compromise. Archivists might allow the materials to be accessed in the archives, but not online.

Many Native Americans are concerned about access to documentary materials because they feel that the records are biased and inaccurate. Those records tell the story of their people from an alien point of view. That perspective may be colored by an unhidden agenda of nineteenth century anthropologists looking at “primitive” cultures or by Christian missionaries out to convert the “heathen.” Archivists should work with native and indigenous people to ensure that the records are presented in context and that descriptions of those materials respect and give equal voice to the people documented in those records.

Archivists can — and should — inform patrons of the existence of records, but that can be done in a way that protects the sensitive information. The model here is a Vaughn Index, which describes restricted documents without disclosing them.<sup>40</sup> These finding aids can — and should — be online so that individuals with legitimate rights to access know where to find them.

Finally, archivists must look to the promise of electronic records. When records are born digital and are well formed with rich markup, it should be easier to redact sensitive information automatically. Even now, we can use technology; electronic calendars can filter out private information (such as haircuts) so that the archives can be supplied with a copy that includes only the official, public record. We should be investigating the use of natural language processing tools to help us spot sensitive information for manual review.



In conclusion, I want to note that archivists working with public records face particular challenges. Corporations and private individuals are under no obligation to make their records

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<sup>38</sup> For example, restrictions that Vermont Governor Howard Dean placed on some of his records became a political issue when he ran for president in 2004. “Former Vermont Gov. and presidential candidate Howard Dean was legally justified in sealing more than 93 boxes of gubernatorial records before leaving office in 2003, the state Supreme Court ruled unanimously Friday. ¶ In reversing a 2004 trial court ruling, the high court concluded that shielding more than 550,000 pages which Dean deemed ‘sensitive’ and ‘privileged’ is allowed under the state’s Archives Act which trumps the state’s public records law with regard to gubernatorial records and allows for restricted access under ‘special terms or conditions of law restricting their use.’” “High court says Howard Dean’s sealing of records is legal,” *The Reporters Committee for Freedom of the Press*, 8 November 2005 (<http://www.rcfp.org/news/2005/1108-foi-highco.html>, checked 28 February 2007).

<sup>39</sup> 25 USC 32 (Native American Graves Protection and Repatriation Act). “Provides for the return of certain sacred and ceremonial objects held by museums and other repositories to the Native American peoples from which they were originally acquired.” (*A Glossary of Archival and Records Terminology*.)

<sup>40</sup> “A Vaughn index is a system of itemizing and indexing that correlates each of the government’s justifications for its refusal to disclose the documents with the actual parts of the documents at issue. It is a compromise between item-by-item description and a blanket assertion of privilege. Vaughn indices are descriptions of withheld documents.” AJS, Freedom of Information Act 527.

generally accessible to the public. Archivists in collecting archives may have the benefit of working with donors to craft a deed that addresses privacy rights and other sensitive issues.

To the contrary, government archivists are expected to provide access to their holdings. In general, they restrict access only when clearly required by law. Even then, they must find some way to provide access to the records, if not the restricted information. And they must often make a risky decision to restrict access to protect individuals or the state from harm.