Privacy and Personal Papers

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Balancing the individual's right to privacy with the researcher's right to information can be a problem for manuscript librarians and archivists. The management of personal papers does not allow the curator time for the research necessary to test for sensitivity, yet ethically a professional librarian or archivist may not distinguish between kinds of researchers.

In administering access to records containing personal information, manuscript librarians and archivists must try to balance the right of the individual to privacy and the right of the researcher to information. Much has been written about freedom of access to government records. But are there "rights" of access where personal papers are concerned? It is easy to argue the right to information in government records because of the need of citizens in a free, democratic society to understand, monitor and participate in the workings of government, but this is not so with the papers of an individual. Personal papers are just that — personal, created by an individual in the course of conducting his/her life, and it can be argued that no-one has a right to see another's papers and that researchers are only granted access as a privilege. Freedom of information legislation does not apply to private records.

However there has been a long tradition of personal papers being made available for research, either directly by the creator or by their donation or sale to a repository. It is the commitment of most manuscript librarians and archivists to make such papers as freely available as is consistent with respecting the privacy of individuals and physically preserving the documents.

Just as there is no legal right of access to personal papers, there is also no legislative right to privacy in Australia. In America, on the other hand, the 4th Amendment to the Constitution guarantees citizens the "right... to be secure in their persons, homes, papers and effects against unreasonable searches and seizures".[1] This basic document has recently been supplemented by a specific *Privacy Act* of 1974, as amended. Nevertheless, it is commonly accepted in Australia that people should be free from unwarranted intrusion into their personal lives and that they should have some control over information relating to themselves.

As historical and social science research explores ever more recent events and lives, the protection of sensitive information about individuals

becomes an urgent issue for curators of personal papers. How do we make decisions about access which will satisfy our researching public and yet respect the feelings of the creators of the papers?

To achieve fairness and consistency in making such decisions, guidelines have been devised by various bodies working in this area — for example, the New South Wales Privacy Committee's *Research and confidential data: guidelines for access.* This sets out a series of questions to be considered by the custodian of the records ("the record-keeper") when seeking to balance the conflicting rights of the researcher and the person who is the subject of the papers ("the data subject"). These questions will be examined here in some detail to assess their relevance in making decisions about access to personal papers.

Question 1. *Identifiable data. To what extent does the research necessitate identified/identifiable data?* If identified/identifiable data is required, the Committee suggests that, as far as possible, the record-keeper conduct the research on behalf of the researcher. Where identified/identifiable data is not needed, the data should be de-identified by any suitable means before being supplied to the researcher.[2]

The first suggestion would not be feasible for a library or archives unless the information required was specific and easy to locate. The increasing workload in relation to diminishing resources means that librarians and archivists are able to do less and less research for their clients. They could not take on this additional detailed work; and in any case, most would not see it as their role.

De-identified data my be acceptable to those researchers engaged in broad research relying on statistical analysis. But to what extent are personal papers used for this type of research? The editing out of names and offending parts would often remove the very information, that is, the meaty biographical details on particular people, that researchers of personal papers are usually seeking.

Even if de-identified information was acceptable to the researcher, it would need considerable skill and insight on the part of the librarian or archivist, and an intimate knowledge of the creator of the papers, his/her relationships and activities, to remove enough information to de-identify the materials, without rendering the remainder worthless. Personal papers are, by their very nature, identified. Usually it would not suffice to block out a name or two; often entire paragraphs, letters, pages of diary entries, or more, would need to go. Conversely, the curator with imperfect knowledge of the creator's thoughts and motives, might unwittingly leave an innocuous remark which, to knowing eyes, could be particularly informative.

Question 2. *Has the data subject consented to research access of his records?* The Committee advises that every effort should be made to gain

the data subject's consent to the research use of his/her record. He/she may have imparted the information in the belief that it would not go beyond the immediate recipient.[3]

If the major data subject of a collection of personal papers is the donor or seller of the papers, he/she can authorise access and state any qualifying conditions at the time of transfer to the repository.

However, as the Committee points out, records often identify more than one data subject and the consent of the principal one does not absolve the record-keeper from his/her responsibility to the others. Personal papers, as well as containing information about the creator, contain information about a host of other people — family, associates, correspondents. There is a particular problem if the collection includes correspondence. People disclosing information in letters are normally expecting an audience of one. The manuscript librarian or archivist has an obligation to protect the privacy of those correspondents who have not consented in any way to have their letters enshrined in a public institution and who, indeed, probably do not even know they are there.

For reasons of pure self-interest as well, repositories should accept this responsibility and take steps to protect the privacy of these secondary data subjects. If it is seen that a repository is careless about the feelings of such individuals, its public image may suffer and it may offend or discourage potential donors.

It would, of course, be impossible to contact all data subjects involved in a collection of personal papers and seek consent. A medium-size collection, for example, might well contain over one hundred correspondents. The result would be an administrative nightmare, with subjects wanting differing restrictions, not to mention attempting to reclaim material.

Librarians's and archivists' solution to this problem has generally been not to contact the subjects, but rather to act independently on their behalf and apply restrictions to protect their privacy.

Question 3. *Justification/Benefits. What justification or benefits exist for the research?* The Committee has not yet considered a case where the simple justification for access outweighed all other factors, but it can foresee such a situation in an emergency medical or scientific study.[4]

Everyone feels their research is vital and while social benefit, an advance in historical interpretation, or the like would certainly add weight to the case for access, it is doubtful, where personal papers are concerned, that the justification of research alone would ever over-ride the legitimate need for individual privacy.

Question 4. *Sensitivity. How sensitive is the data involved to the data subject or subjects?* One needs to assess the degree of sensitivity of the data,

and in doing so, to consider the subject's perspective, not just one's own or society's in general.[5]

This task lies at the heart of the privacy/access problem. Decisions on the need for restriction will necessarily be subjective. Each person has his/her own personal boundaries, his/her own view on what should be private and what public.

Types of information commonly regarded as private and which have been accorded protection in privacy legislation in various European countries include religion or philosophy, criminal convictions, trade union membership, racial origins, political opinion, psychiatric condition, mental retardation, spousal relations, state of health or illnesses, offences against public order, intimacy of private life, sexual matters and excessive drinking.[6]

However, there are many other issues people may consider sensitive. Manuscript librarians and archivists can only attempt to place themselves in the position of the data subject and consider what his/her feelings might be, try to assess what community attitude to the data would be, and apply restrictions accordingly. Since this process is so subjective, it is important that:

(i) *an appeal procedure be set up*, so that researchers can ask for the restriction to be reviewed by another officer. A researcher already refused access has recourse to the Privacy Committee which will investigate complaints and mediate, though it has no power to enforce its recommendations. This course was taken in a case concerning access to records of the New Guard in the State Archives of New South Wales. (The result was that the Committee supported the restrictions imposed by the State Archives and recommended access be withheld for the time being.)

(ii) *restrictions be re-evaluated* after some time has passed. Realistically, however, re-evaluation could not be done regularly, but only when a researcher requested a long-restricted collection.

Question 5. *Supervision. What feasible supervision and control is proposed?* The Committee recommends the vetting of publications which are the result of research which has used sensitive identified records in order to ensure that the privacy of data subjects if respected. The researcher is informed of this procedure and agrees to abide by it before he/she is granted access.[7]

This, of course, again brings up the problem discussed in Question 1 above — that identifiable data is most likely what the researcher in personal papers will wish to use in his/her publication. If the identifiable elements were expunged from the manuscript, it would become meaningless.

Vetting, as the Committee recognises, "appears to set up the record-keeper as the final arbiter of what study may be published".[8] Many repositories have accepted collections of personal papers on the condition that manuscripts based on them be submitted to the donor prior to publication. Such conditions have been accepted, since the papers have only been made publicly available by the goodwill of the donors and these donors have an obvious interest in the research results. But it is hard not to regard vetting as censorship; and, while it may be considered acceptable for the donor to protect his/her privacy and interests in this manner, it is doubtful whether a library or archives can ethically do the same.

Some repositories make access to certain sensitive papers subject to the researcher signing an undertaking not to use the material in a way that would cause "pain or embarrassment" to living people. A statement to this effect may be included in the general access form which has to be signed by all researchers, or there may be a special form to be signed for access to particular collections. Access is then allowed and the librarian/archivist relies on the integrity of the researcher to keep the bargain. These undertakings are certainly a way of impressing on the researcher the data subject's right to privacy and are a demonstration of the care the repository takes of this, but it is risky to rely on this voluntary self-regulation in the case of very sensitive papers. An unscrupulous researcher may ignore the conditions to which he/she has agreed and cause great problems for the library or archives.

It seems prudent, therefore, to take the view that if the data is too sensitive to allow the researcher to use it in the way he/she sees fit, then it is really too sensitive to be seen in the first place.

Question 6. *The Researcher. Who is the Researcher?* The Committee appears to suggest that decisions about access to sensitive records could be based on assessment of the worthiness of researchers. Some people requesting access are seen as serious, others are seen as just nosey.[9]

Although librarians or archivists may privately make such judgements about researchers' characters and motives, can they act in this discriminatory manner, particularly if the repository is a publicly-funded one? Discriminating between users would be a rejection of various statements made by professional bodies on the ethics of access — for example:

(i) The American Library Association in a joint statement with the Society of American Archivists, says "It is the responsibility of a library, archives, or manuscript repository to make available original research materials in its possession on equal terms of access."[10]

(ii) The Society of American Archivists' code of ethics enjoins archivists to "explain pertinent restrictions to potential users and apply them equitably."[11]

(iii) The Library Association of Australia states: "Each Australian has an equal right to information regardless of thje way or for what purpose it is used, or his or her economic or social status, educational achievement, geographical location, race, colour or beliefs."[12]

Question 7. *Time. What time has passed since the collection of the data?*[13]

Time often minimizes the sensivity of certain matters. Community attitudes change. For example, convict ancestry is no longer considered shameful by most of the Australian community. Therefore, convict records commonly restricted by repositories up to the 1940s and 50s are now freely available. Rarely would material need to be restricted any longer than the life-time of the data subject or, in some instances, of his/her children.

These guidelines give some help to librarians and archivists in making decisions about access, though clearly some are administratively burdensome or unworkable in the light of present resources.

The New South Wales Privacy Committee stresses the fact that there are no final solutions, that each case has to be considered on its merits.[14] But this does not mean that librarians and archivists should not attempt to regularize their practices. Ruth Simmons, Senior Archivist of Rutgers University, summarises what should be done:

> Each repository should establish formal record-keepering practices, including a published access policy and a set of procedures for access to restricted records, and an appeals procedure for access which has been denied. The repository should keep records on who is allowed to use restricted records and why, and who is denied records and why. Archivists must demonstrate fair, rational, and even-handed application of the policy...[15]

Effective management of access begins, of course, when negotiations are being made with the donors of the papers. It is vital that any restrictions be stated clearly and a time-limit placed upon them. If left open-ended, there will be a perpetual problem with the heirs whose distance from the creator or the gift can militate against responsible control of access. Donors should be asked their opinion as to what restrictions are needed. It is especially useful to seek their opinion on any legal or financial records in the papers as these often cannot be easily assessed by outsiders.

The librarian or archivist should attempt to steer donors away from unnecessary or complicated restrictions and should refuse to accept discriminatory ones.

It is important that every collection received be reviewed for restriction needs, even when the donor is happy to allow free access, since the privacy of others may be involved. The time needed to physically work through each collection to assess the need for restriction is great. It is especially a

problem with the large modern collections. The task is hampered by the fact that the sensitive material in personal papers hardly ever appears as a solid block, but is spread throughout otherwise innocuous material. The papers of modern literary figures, for example, are notorious for the sudden scathing libellous comment in otherwise good-natured letters. The apparent solution is to put a temporary restriction on all unprocessed modern collections, and only begin investigating if a researcher wishes access to one.

It is inevitable that librarians and archivists will displease some researchers and some donors by their decisions regarding the privacy/access question. It seems important, as Simmons has said, to regularise and document our procedures and at least to "demonstrate a pattern of practice which shows care and concern."[16]

FOOTNOTES

1. Quoted in Alan Reitman "Freedom of information and privacy: the civil libertarians's dilemma." *American archivist*, vol 38 no 4, October 1975, p503.
2. New South Wales, Privacy Committee. *Research and confidential data: guidelines for access.* Paper no 35 (2nd revision). [Sydney], Govt Pr, March 1981, p4.
3. Ibid.
4. Ibid, p 5.
5. Ibid, p 6.
6. What counts? *Privacy journal*, vol 10 no 10, August 1980, p2. Quoted in NSW Privacy Committee. *Privacy protection: guidelines or legislation? A response to the Australian Law Reform Commission's discussion papers on privacy.* [Sydney], Govt Pr, November 1980, p21.
7. New South Wales Privacy Committee. *Research and confidential data*, p9.
8. Ibid, p6.
9. Ibid, p7.
10. American Library Association/Society of American Archivists. "Joint statement on access to original materials in libraries, archives, and manuscript repositories." *College and research library news*, no 4, April 1979, p111.
11. Society of American Archivists. "A code of ethics for archivists." *SAA Newsletter*, July 1979, p11.
12. Library Association of Australia. "Information policy statement: the need to know." In LAA *Handbook, 1983.* Sydney, LAA, 1983, p74.
13. New South Wales Privacy Committee. *op cit*, p7.
14. Ibid.
15. Ruth Simmons. "The public's right to know and the individual's right to be private." *Provenance*, vol 1 no 1, Spring 1983, p3.
16. Ibid.