The Application of Freedom of Information and Privacy Laws to Non-Public Records

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January 1977

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Washington State Archivist Sidney F. McAlpin's paper on the conflict of "Privacy vs. Right to Know," read at the 39th Annual Conference of the Society of American Archivists in Philadelphia October 1, 1975, provoked such a lively and interested discussion among those who heard it, especially among the several state archivists in the audience, that the Program Committee for the society's 40th annual meeting decided to schedule a follow-up session for one year later. Apparently, it was a wise decision; of the ten concurrent sessions competing for the attention of the more than 700 archivists present at the Washington meeting on September 28, 1976, the "Privacy and the Right to Know: 1976" session attracted an attendance of some 230 persons.

In the first of two substantive papers presented at this encore session, lawyer and former archivist Mary M. Goggin, speaking from her experience as Chief of the Administrative Law Branch, Office of the General Counsel, U.S. Department of Health, Education, and Welfare, outlined some of the administrative problems faced by a federal executive agency in complying with both the Freedom of Information Act of 1967, and the Privacy Act of 1974, the

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restrictive provisions of which are applicable, with certain exemptions, to those records of a federal executive agency which are "maintained in what is referred to as a 'system of records' defined ... [as] a group of records from which the Government retrieves information pertaining to an individual by a personal identifier."4

McAlpin's new contribution, "A Legislative Update: Privacy and the Right to Know," examined the issues specifically "in terms of privacy and access legislation enacted at the state level."5 Briefly tracing the history of such legislation, he focused on some 120 privacy bills recently introduced in the several state legislatures and commented in particular on several which would have created serious difficulties for the archival programs in their respective states had they become law.6

Neither federal agency official Goggin nor archivist McAlpin dealt explicitly with present problems created for the executive agencies of state government by FOI and privacy acts. However, it is recognized as likely that these problems, as they are encountered to some extent in each of the several states where such laws are operative, would be found to differ little, administratively, from those confronted by HEW and, presumably, other federal executive agencies.

Similarly, neither paper made direct reference to the applicability of either the 1967 or the 1974 act to the National Archives. It may be fairly assumed, though, that the former creates relatively little more difficulty for the Archivist of the United States than the State of Washington's Public Disclosure Act of 1973, as amended,7 does for the Washington State Archivist, for whom privacy legislation is seen to pose, presently or potentially, much the greater problem. Moreover, the new federal privacy law, which became operative on September 27, 1975, has virtually no direct applicability to records in the National Archives, as one section of the act exempts those records from all but a few of its minor provisions.8

Both speakers, federal official Goggin and state official McAlpin, recognized the people's right of freedom of access to public information and to
reasonable protection against the unwarranted divulgence of personal information preserved in public records, and neither saw any inherent conflict in carefully drawn federal or state laws designed to regulate public agencies in the preservation of those rights. Both emphasized, however, the potential for conflict in carelessly drafted legislation and the resultant difficulties which indiscriminate or too broadly applicable future statutes, federal or state, might pose for governmental administrative agencies and for governmental archival programs.

Explicitly or implicitly examined in these two thoughtful and informative papers, then, were the present and potential situations insofar as existing or prospective FOI and privacy legislation impinges, or might someday impinge, upon two categories of public officials engaged in the management of records: the government administrator responsible for the interim preservation of, and for administrative access to, those current or semi-current public records created or received by his or her own federal or state agency (or "office of origin"), and the government archivist responsible for the permanent preservation of, and research access to, those non-current public records created or received not by his or her own agency, but by other agencies of federal or state government.

Unexamined, however, were the present or potential impact of access and privacy statutes, either federal or state, upon the great many archivists and manuscripts curators in the nation who are responsible for the records of no public agency. These would include those who, employed by such private institutions as the non-tax-supported college or university, ecclesiastical jurisdiction, or business firm, manage the archives of their own institutions, as well as those who, whether employed by a non-public research institution such as the endowed or privately funded research library or historical society, or by the public (i.e., tax-supported) institution such as the state university or the state-franchised historical society, manage not their own institution's archives but the purchased or donated archives of other private institutions (e.g., the labor union) or historical and literary manuscripts collections consisting of the personal papers of individuals.

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At present, federal laws have not, with the single exception of the "Buckley Amendment" (the Family Educational Rights and Privacy Act of 1974) impinged upon the private institution, nor even upon those collections of private papers which are preserved in a state university or other tax-supported institution. Moreover, few state laws have had more than a minimal impact upon these institutions and collections. The notable exception, of course, would be the short-lived effect of the carelessly drawn State of Washington Public Disclosure Act of 1973, which inadvertently failed to exempt (as "records" of state institutions) the manuscripts collections held by the state's tax-supported colleges and universities, thereby voiding contractual donor restrictions on such collections and consequently jeopardizing the entire collecting programs of those academic institutions. Fortunately, the statute was corrected by amendment in 1975, before too much damage had resulted.

Moreover, there would seem to be little danger that any new or future FOI legislation, enacted by Congress or by a state legislature, would be intentionally applicable to the "private sector," as the whole basic premise of such legislation has always been limited to the public's right to know about the public's business as this is reflected in public records created or received by public officials in the course of transacting that business. In any event, even if such legislation were so sweeping as to be applicable in any degree to non-governmental records, it would represent little threat to the non-governmental archivist or curator beyond that posed by the Washington statute of 1973, simply because most archivists for private institutions (excepting, perhaps only those managing commercial or industrial archives) and virtually all curators of historical or literary collections would be found to share government archivist McAlpin's concern for broadening, encouraging, and facilitating, rather than narrowing and discouraging, research access to those parts of their holdings which are not closed by donor imposed restrictions.

Privacy legislation, however, can be a different matter. Even in the present absence of widespread or stringent statutory restrictions on access
to non-governmental records, many archivists and curators responsible for the management of such records may have long ago elected to comply, in effect, with the spirit and intent of privacy laws. Some, for instance, have taken voluntary action, apart from any donor imposed restriction, to close or to limit access to such "systems of records" as the personally identifiable service case files and job application files which are invariably a substantial part of the donated papers of a former congressman.

But voluntary action in a spirit of concern for the legitimate privacy of persons is one thing, while the strict letter of the law is another, and there looms today a real and present danger that ill conceived, overly broad, or thoughtlessly indiscriminate privacy legislation, enacted in the near future, could indeed have consequences which would be even more serious for the private archivist and for the manuscripts curator than for the government archivist. The latter's holdings, after all, do have important administrative, fiscal, and legal, as well as historical, values. Consequently, even if substantial parts of these holdings were to be closed, in the interests of personal privacy, to all but "authorized" agency officials, government archives would still serve an important function. This is far less true, however, of many non-government archives, and especially of collections of private papers, whose uses are more apt to be those of scholarly research. To prohibit access to these records on the part of individual (i.e., not "authorized") researchers would do a great disservice to scholars as well as to the search for historical truth.

Concern for the protection of legitimate personal privacy is, of course, not new. As McAlpin has noted, "Privacy legislation at the state level does predate the Federal Privacy Act of 1974 and ... the development and expansion of specific exemptions in access statutes represent valid attempts to secure privacy, if only as a secondary and competing interest."11 As pointed out by Goggin, an example of this type of exemption included in a federal statute but typical of many such exclusions found in state codes is that provision in the Freedom of Information Act of 1967 which allows the withholding of records "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."12
But popular interest in privacy has increased at an accelerating rate in recent years, much of it encouraged by such public-spirited organizations as Common Cause, the American Civil Liberties Union, and the Nader groups, and perhaps more of it spurred, albeit unwittingly, by the F.B.I., the C.I.A., and the Orwellian threat of computer technology. McAlpin has counted 120 privacy bills introduced into state legislatures in the past two years. Most of these (39 were enacted into law and 81 were withdrawn or defeated) were reasonably and carefully drawn, limiting their applicability to consumer credit files, criminal justice files, and medical records; to the security of automated data systems; or to prohibitions on the use of Social Security numbers in file index systems. It is inevitable, though, that within the next few years more broadly comprehensive bills will be considered in the several state legislatures and in the Congress.

Created by the Federal Privacy Act of 1974 is a "Privacy Protection Study Commission" of seven persons appointed by the President or by the Congress, whose mandate is to "make a study of the . . . information systems of governmental . . . and private organizations . . . and to recommend to . . . the Congress the extent . . . to which the requirements and principles of [the Privacy Act of 1974] . . . should be applied to the . . . practices of those organizations by legislation . . . " In addition, the Commission is authorized to draft so-called "model legislation" for use by state and local governments in regulating the "collecting, soliciting, processing" and use of private as well as public information systems. Exempted from the Commission's study are only the "information systems maintained by religious organizations." Obviously, the recommendations of the Commission could have, in the near future, a direct and profound impact on the non-governmental archivist, especially were these recommendations to include an extension of the already accepted "Buckley" principle, presently limited to student records, so that it encompasses a much broader range of records held by those private institutions which receive federal aid.

A second possible source of future difficulty for archivists in the private sector could turn out to be the "Confidentiality-Privacy Study" now being
conducted by the innocuous sounding Commission on Federal Paperwork, some of whose staff members have already looked beyond procedures for records management in federal agencies and are presently considering the question of possible Congressional action to protect personal privacy in non-governmental archival holdings.

Thirdly, there remains on the horizon the incipient legislation drafted by Representatives Goldwater and Koch. Introduced into the 94th Congress January 23, 1975, as H.R. 1984, but not yet acted on by the House Judiciary Committee's Subcommittee on Civil and Constitutional Rights, this incongruously numbered bill for a broadly comprehensive law designed to "protect the constitutional right of privacy of individuals concerning whom identifiable information is recorded" would apply its stringent provisions not only to "any unit of any State or local government or other jurisdiction," but also to some private enterprises.

Certainly a strong case can be made, on philosophical grounds, at least, for the inapplicability of most privacy legislation to purchased or donated research materials which, created in and by the private sector, are preserved and used under circumstances and for purposes greatly different from those under which and for which the government agency—or even the university registrar, the credit bureau, the insurance company, and the medical clinic—assembles and compiles personal data in the individually identifiable case files of a records system. A great deal of personal information may be contained, for example, in the incoming and outgoing letters which comprise the correspondence series of a manuscripts collection, and indexed correspondence series might even be construed as constituting what amounts to a "system of records" which enables the retrieval of "information pertaining to an individual by a personal identifier." But the information contained in such letters has not been collected or compiled without the knowledge of, or against the wishes of, a third person "data subject." Nor has it been provided by a correspondent in required exchange for course or consumer credit, insurance coverage, medical treatment, grant funds, or a fellowship. Rather, it is information knowingly given, in the first person, under compulsion of no requirement.

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Moreover, in making such a case, it might even be worth considering the degree to which the laws of private property, assuring to owners a reasonable freedom in determining the uses of their properties, might preclude the application of access-restricting privacy laws to purchased or donated materials which have been deeded to a research institution.

In any event, if the interests of a major segment of the archival profession are to be secured against an unreasonable misapplication of law, either through an uninformed legislative intent or through mere legislative carelessness, then some such case will have to be made, as each occasion arises, before the legislative committees of the several state legislatures which may be expected to consider, in the near future, new or broadened statutes designed to protect personal privacy. Some such case probably should be made, before the Privacy Protection Study Commission, which is already holding public hearings around the country. And some such case may have to be made before hearings of the Commission on Federal Paperwork and the House Judiciary Committee's Subcommittee on Civil and Constitutional Rights.

Most importantly, though, such a case will have to be made, in each or all of these instances, by the archivist for the private institution or by the curator of manuscripts collections. It cannot be expected that the administrator of the state or federal executive agency, or the state archivist or the national archivist, can or will argue the case effectively. For the perspectives, the problems, and the concerns of these bureaucratic and archival officials are, as McAlpin and Goggin have demonstrated, quite different from those of the men and women who manage non-government records.
NOTES


6e.g., Wisconsin Assembly Bills 752, 1517 (1971); Minnesota House Bill 387 (1973).


12Goggin, pp. [3-4]; emphases hers.

