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THE KEYHOLE

Newsletter of the Privacy & Confidentiality Roundtable, August 2015

Welcome to the 2015 issue of *The Keyhole*!

While it has seemed like a quiet year for the roundtable, there has been a lot going on behind the scenes. Notably, as mentioned on our listserv, SAA Council adopted a revised Public Policy Agenda in May. One of the results is the draft statement on privacy from the Committee on Advocacy and Public Policy (CAPP), which Frank Boles of CAPP circulated to the roundtable in July. We will be discussing this draft at our annual meeting on August 21 in Cleveland, with Jeremy Brett of CAPP leading the discussion. The draft is available here:

<http://www2.archivists.org/groups/privacy-and-confidentiality-roundtable/read-the-draft-saa-statement-on-privacy>

If you are not available to join us on August 21 and want to share your thoughts on the draft, please send them to me at afitch@rockarch.org and I will pass them on to CAPP.

As my year as chair concludes, I want to thank the wonderful members of the Steering Committee and especially incoming chair Valerie Gillispie. Additionally, I'm very grateful to Katharina Hering for writing our feature article on the Privacy Act at 40 and also to Mary Ann Quinn for allowing herself to be drafted as newsletter coordinator in recent days.

Best regards,
Amy Fitch, Chair

Roundtable Annual Meeting Information

Douglas Boyd, director of the University of Kentucky's Louis B. Nunn Center for Oral History, will be our featured speaker. Doug will talk about best practices in oral histories with regard to

sensitive topics and putting content online, and with a focus toward privacy considerations. The roundtable meeting is **Friday, August 21 from 4:30 to 6:00 p.m.** at the Cleveland Convention Center, Room 22.

Roundtable Election Results

Vice Chair/Chair-Elect: **Jeremy Brett**

Steering Committee: **Judith Wiener**

Jeremy and Judy will take office and join the leadership at the conclusion of the annual meeting.

Current Leadership

Chair (2014-2015): Amy Fitch, Rockefeller Archive Center

Vice Chair/Chair-Elect (2015-2015): Valerie Gillispie, Duke University

Immediate Past Chair (2014-2015): Menzi Behrnd-Klodt, Klodt and Associates

Steering Committee Members:

Nancy Kaiser (2013-2015), University of North Carolina at Chapel Hill

Meg Tuomala (2014-2016), Gates Archive

Lorain Wang (2014-2016), Getty Research Institute

Web Liaison (2013-): Anne Graham, Kennesaw State University

Council Liaison (2013-2016): Tim Pyatt, Penn State University

While You're At the Annual Meeting

Check out these privacy-related sessions!

Session 101: Archives Confidential: Enacting Privacy Policies and Requirements in Born-Digital Archives

Thursday, August 20 • 11:00 am - 12:00 pm

Pop-Up 1: Records Management, Access, and Born-Digital MPLP: A Conversation about Empowering Archivists and Preventing Crises

Thursday, August 20 • 4:00 pm - 5:00 pm

Session 402: Walking the Talk: Risks and Opportunities in Online Publication of Oral Histories

Friday, August 21 • 11:30 am - 12:30 pm

Session 606: Privacy v. Access: Legal and Ethical Challenges in High-Profile Collections

Saturday, August 22 • 8:30 am - 9:45 am

Session 702: Controversial Crawling: Documenting University Scandal in Real Time

Saturday, August 22 • 10:00 am - 11:00 am

“We Crossed a Qualitative Threshold and the Privacy Act Hasn’t Helped”

by Katharina Hering

In October 2014, the Center for Privacy and Technology at Georgetown Law Center hosted *The Privacy Act @40: A Celebration and Appraisal on the 40th Anniversary of the Privacy Act and the 1974 Amendments to the Freedom of Information Act.*

The symposium brought together a formidable roster of participants who discussed the histories of the laws and their interpretations, their shortcomings, and possibilities for reform. Attendees included open government advocates and former congressional staffers who had worked on the 1974 FOIA amendments and the Privacy Act, attorneys who had litigated some of the early cases under both statutes, privacy experts, legal scholars, and social scientists. The Honorable Laurence H. Silberman gave the keynote address. By combining the celebration and appraisal of the Privacy Act and the FOIA amendments of 1974, organizers highlighted the fact that the acts were two sides of the same coin: legislation reflecting efforts for government reform in the post-Watergate period, mandating transparency regulations for agencies, and establishing privacy rights for U.S. citizens.

The first panel, on the origins of the legislation, included several key advocates who had lobbied for the passage of the 1974 FOIA amendments as part of the Clearinghouse/Public Citizen Litigation group, as well as Thomas Susman, who had helped develop the 1974 FOIA amendments as counsel in the Senate. The original 1966 FOIA act was poorly drafted, and President Johnson had been reluctant to sign it. While government agencies resisted the original FOIA, a broad coalition of open-government advocates, union lawyers, and journalists initiated the reforms. The amendments helped remove barriers to access to agency records, expedited cases, and broadened the definition of what constituted an agency.

James Rule, sociologist and author of *Privacy in Peril*, discussed the historical and social context of the - movement to protect personal information. Public life in the United States has been marked by cycles of repression and permissiveness. During the Palmer Raids, the McCarthy period, and the Nixon administration, the government targeted civil rights groups and leaders, suspected communists, and anti-war groups, while collecting personal information and compiling lists of “suspects.” Then the Watergate break-in occurred. Amid growing public distrust in the government, Samuel Ervine, “the political anti-matter of the Nixon administration,” introduced the initial privacy bill. The Privacy Act, watered down from its original version, created important rights: U.S. citizens can find out what is in their federal files, challenge the use of the files, and revise inaccurate information. However, the act fails to address the protection of personal information, which is one of the most critical issues citizens face. The quantities of personal data available to federal authorities today were unimaginable in the mid-1970s, as was the government’s ability to track and monitor personal information, all of which are new and alarming developments. “We crossed a qualitative threshold and the Privacy Act hasn’t helped,” says Rule.

The second session addressed the Privacy Act today. Robert Gellman, a privacy expert and congressional staffer, acknowledged the shortcomings of the Privacy Act, while emphasizing that the act was revolutionary at the time. The Fair Information Practices, conceived by Willis

Ware's HEW Committee, proved to be especially influential. The act's biggest impact may have been as records management legislation, since it required federal agencies to create inventories of the systems of records they maintain and to publish notices in the Federal Register for each *system of records*. Jonathan Cantor, Deputy Chief Privacy Officer at the DHS, *emphasized that the act has brought accountability to federal agencies and established the "no disclosure without consent" rule. However, the act fails to address the role of government contractors, as well as data sharing between agencies. Non-U.S. citizens are not covered by the act. (To address this, the DHS issued a privacy policy a few years ago that stipulated that in "mixed systems of records" including U.S. citizens and non-U.S. citizens, personally identifiable information [PII] shall be "subject to the Privacy Act.")* Gellman said that the act's *terminology is outdated and the concept of "systems of records," defined as any database that retrieves information based on a personal identifier, is obsolete. But how can the concept be modernized? The focus should be on the function of the information, rather than on the system itself. Other problems with the Privacy Act are the poorly defined and overly broad "routine use" exceptions and the lack of oversight. What can be done to achieve greater oversight, accountability, and transparency about privacy protection in the age of big data? Deirdre Mulligan of the UC Berkeley School of Information said the focus of the debate and possible reforms should be less on the possession of the data and more on the use of the information, including information collected by private companies, and on the impact these practices have on people. "We need to focus more on people, and not ...on tools."* Several panelists mentioned privacy impact assessments as an important step in shaping reforms. Others suggested the establishment of the office of a "privacy czar" or an independent privacy agency.

The conference brought home the fact that, just as in the 1970s, any reforms of these important federal information laws will have to be based on broad, international coalitions and public movements. Archivists and record managers—unfortunately not included on any of the panels—will be critical allies in this effort.
Conference program and webcast.

UPDATES and ANNOUNCEMENTS

Decisions and Disposition: An Update on the NSA Mass Surveillance Program Records

The final chapter (at least for now) in the discussion about the records of the National Security Agency (NSA) mass surveillance program was written by the National Archives and Records Administration (NARA) and outlined by Paul M. Wester, Jr., NARA's Chief Records Officer for the U.S. Government, in a September 10, 2014, email to Frank J. Boles. Webster noted that of the questions raised by SAA's Committee on Advocacy and Public Policy (CAPP) (which were discussed by Boles at the 2014 annual meeting of the Privacy & Confidentiality Roundtable), he could speak to those involving NARA's oversight in Federal records scheduling and appraisal. He noted that: "Specific to NSA and the records of interest in this case, the CAPP document recommends the appraisal of citizens' data collected by NSA's Mass Surveillance Programs. What may not be understood is that all signals intelligence data collected by NSA has already been scheduled and appraised." Webster also provided background information on NARA's records schedule appraisal and review process and a link to the pertinent records

schedule: http://www.archives.gov/records-mgmt/rcs/schedules/departments/department-of-defense/defense-agencies/rg-0457/n1-457-08-001_sf115.pdf

Finally, Webster wrote: “With these particular records, and data (and there are some distinctions between the two terms in this case), it is important to note that NSA is responsible for compliance with other directives outside the records scheduling and appraisal requirements overseen and administered by NARA. For instance, as noted on the approved schedule, this includes high-level signals intelligence directives for the intelligence community, such as United States Signal Intelligence Directive (USSID) 18.

“Many of the questions in the CAPP paper relate to the management of this data. As mentioned above NARA believes it would be more appropriate for those specific questions raised to be addressed with NSA directly. From a broader archival and records management policy perspective, we can state that these records have been scheduled and appraised as required in the Federal Records Act.”

Submitted by Menzi Behrnd-Klodt

Freedom of Information Act Update

Despite its unanimous approval by the Senate, the FOIA Improvement Act was tabled in December 2014 by Speaker of the House John Boehner and never brought to a vote, causing the bill to die. Meant to streamline processes and improve access to government documents, the bill had broad bipartisan support. The National Security Archive has found that half of government agencies are not complying with President Obama’s 2009 order regarding FOIA requests, which directed FOIA to be “administered with a clear presumption: In the face of doubt, openness prevails.” Failure to comply with this order has led to an increased number of denied requests. The House Oversight and Government Reform Committee planned to hold hearings in June about FOIA obstruction.

Submitted by Valerie Gillispie

Now Online: Back Issues of *Provenance* and *Georgia Archive*

Past issues of *Georgia Archive* (1972–1982) and *Provenance* (1982–2013) are available online: <http://digitalcommons.kennesaw.edu/provenance/>. Browsing the 60 issues spanning 42 years shows advancements in technology, trends, ideas, practices, and theories that are central to the archival profession.

There is a wealth of knowledge published in these journals in the past 42 years that contribute to archival scholarship. Both journals offer insight into how privacy and confidentiality laws and policies have changed, and how archivists have dealt with the issues in various ways. Articles include: Sam Sizer, “The Application of Freedom of Information and Privacy Laws to Non-Public Records,” *Georgia Archive* 5 no. 1 (1977); Bruce F. Adams and Walter Rundell, Jr., “Historians, Archivists, and the Privacy Issue,” *Georgia Archive* 3 no. 1 (1975); James Gregory Bradsher, “Privacy Act Expungements: A Reconsideration,” *Provenance* 6 no. 1 (1988); Ruth

Simmons, "The Public's Right to Know and the Individual's Right to be Private," *Provenance* 1 no. 1 (1983); Diane Shannon, "Privacy Issues Affecting Lesbian and Gay Archival Collections," *Provenance* 12 no. 1 (1994); Michele Christian, "Archivists and the USA PATRIOT Act: Are We Prepared?," *Provenance* 24 no. 1 (2006).

Submitted by Cheryl Oestreicher

This And That

The AALL government relations office recently updated its advocacy one-pager on "Reforms to the Electronic Communications Privacy Act."

<http://aallnet.org/Documents/Government-Relations/Issue-Briefs-and-Reports/2015/ECPAonepager.pdf>

Authors needed: *Privacy Rights in the Digital Era: An Encyclopedia*, a project currently in development by Grey House Publishing, seeks authors interested in writing entries on the various concepts, theories, persons, statutes, and cases involved in the subject of privacy rights. We seek to make this encyclopedia the definitive reference work on the subject of contemporary privacy rights, with over 230 anticipated entries.

This is a great opportunity to publish in a dynamic, high-interest area, for faculty, graduate students, or law students. The publisher will pay royalties for accepted entries. If you are interested, please write Chris Anglim, the general editor of this project, at canglim@udc.edu. He will provide additional information, including the list of entries, deadlines, and word-count limits.

We welcome suggestions on any additional topics that should be included. We also welcome suggestions as to potential writers who might be interested in contributing to this work. We welcome your participation. We hope you will accept our invitation and look forward to hearing from you.

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Recent and Forthcoming Publications

Susan Lawrence has completed her book manuscript, now titled *Privacy and the Past: Research, Law, Archives, Ethics*. It has been through one set of peer reviews and now awaits final approval

and last revisions before it goes into the long production process. Look for it from Rutgers University Press next year! She is extremely grateful to everyone on the Privacy and Confidentiality Roundtable for their help and encouragement.

Rights in the Digital Era, a recent publication in SAA's Trends in Archives Practice series, provides an essential introduction to the law of copyright, privacy, publicity, and trademarks from an archival perspective. Edited by Menzi L. Behrnd-Klodt and Christopher J. Prom and featuring an introduction by Peter B. Hirtle, *Rights in the Digital Era* includes four modules: *Understanding Copyright Law* by Heather Briston, *Balancing Access and Privacy in Manuscript Collections* by Menzi L. Behrnd-Klodt, *Balancing Access and Privacy in the Records of Organizations* by Menzi L. Behrnd-Klodt, and *Managing Rights and Permissions* by Aprille C. McKay. [Print](#) and [PDF](#) versions of the publication are available.

The *Keyhole* newsletter is emailed to all members signed up with the Society of American Archivists Privacy and Confidentiality Roundtable. The newsletter is issued at least once a year, basically whenever there is enough content worth reporting. If you wish to unsubscribe or for comments and questions about the newsletter and roundtable, please contact the chair, Amy Fitch at afitch@rockarch.org.