

**Society of American Archivists
Council Conference Call
February 6, 2017
2:00 – 3:30 pm EST**

**Issue Brief: Confidentiality of Private Information Held in
Records of the Federal Government’s Executive Agencies
(Prepared by SAA Committee on Public Policy)**

BACKGROUND / DISCUSSION

This issue brief addresses the following priority within the SAA Public Policy Agenda, as approved by the Council in May 2015: “To ensure the protection of citizens’ rights as well as the individual’s right to privacy, SAA will consistently take into account privacy concerns in certain categories of archival records.”

The Committee on and Public Policy (COPP) has prepared this issue brief for Council review and approval.

Member comment on the proposed direction and content of the brief was sought at four roundtable meetings during the 2015 SAA Annual Meeting, including those of the Issues and Advocacy; Privacy and Confidentiality; Science, Technology, and Health Care; and Congressional Papers roundtables. Written comments subsequently were received from members of these groups via the roundtable lists. Comments also were sought from the Council of State Archivists (CoSA) and the National Association of Government Archives and Records Administrators (NAGARA).

Both the Congressional Papers Roundtable and NAGARA expressed their strongly held opinions that privacy rules as discussed in this document, while appropriately applied to the federal executive branch, do not easily generalize to congressional papers or to several unique issues of privacy found in state and local governments. In 2015, the Council requested clarification and changes to address these concerns. Acting on this advice, COPP limited the scope of the brief to records created by the executive branch agencies of the federal government. Based on feedback from the November 2016 Council meeting, COPP further revised the brief to address concerns raised regarding freedom of information and survivors’ right to privacy. These revisions are indicated in the proposed brief below by underline (for additions) and strikethrough (for deletions).

RECOMMENDATION

THAT the following issue brief on “Confidentiality of Private Information Held in Records Created by the Federal Government’s Executive Agencies” be adopted.

Issue Brief: Confidentiality of Private Information Held in Records of the Federal Government’s Executive Agencies

Privacy is a fundamental right that is enjoyed by all. Similarly access to public records created by the federal government’s executive agencies is a fundamental right that is necessary to all within a democratic government. To resolve the inherent tension between these two rights, SAA recommends that:

- All laws and policies regarding access to public records created by executive agencies containing Personally Identifiable Information (PII) should include appropriate language that ~~the right to personal privacy ends upon the death of an individual~~ the right to privacy generally ends with death (although family members may, in some circumstances, retain the right of survivors’ privacy).
- Because of the difficulties that can be encountered in determining if an individual has died, access to public records containing PII should be made possible through a legally established date of presumed death. This date should be ~~72~~ no more than 100 years after the date found on an individual record that includes personal information.
- This general recommendation should not be understood to recommend closing records containing personal information available for public use through more liberal access laws or through specific exemptions to existing law, such as the “safe harbor” exemptions found within the Health Insurance Portability and Accountability Act (HIPAA). Nor should this general recommendation be understood to interfere with legitimate needs for information for reasons of public safety. The standard proposed here is the maximum reasonable period that SAA believes is necessary to protect personal privacy. ~~It does not imply that s~~ Shorter periods of closure, where they exist or may be proposed, are ~~unwise~~ encouraged.
- This recommendation applies only to records created by or submitted to the executive branch of the federal government in the normal course of business, or to non-federal records over which federal law has placed specific restrictions on access for reasons of privacy. Although this may have implications for other types of public records that are closed for reasons of privacy, public records held outside of executive agencies of the federal government, records that are public property through a deed of gift (such as gifts to archival agencies), or records that are in the possession of non-federal governmental agencies or quasi-public bodies are not included in this recommendation.

THE ISSUES

Privacy is a fundamental right. The executive branch of the federal government, in the course of doing necessary work, collects large quantities of information about the lives of private citizens. For many good reasons, laws require that this information remain confidential for a period of

~~time. For the same reasons, federal law also requires that certain records gathered by private organizations, such as certain medical or educational records, be closed to the general public.~~

This acknowledged, access to public records is also a fundamental right. Federal policymakers have long had to balance the individual's right to privacy against a broader good that may be accomplished by sharing certain types of personal information, as well as the need to require that certain personal records be kept private regardless of which agency gathers them. This has resulted in a peculiar and sometimes contradictory patchwork of laws regarding access to private information found in public records.

American law has long made some personal information easily available in a timely manner. Federal law also allows certain otherwise closed PII to be made available to appropriate personnel for reasons of public safety.

Some types of personal information, such as that compiled in the decennial census, have been deemed confidential for a fixed period of time. For example, since 1978 individual data gathered in each decennial census is closed to the public for 72 years. After that period the needs and interests of researchers have been deemed to outweigh the personal privacy concerns of individuals enumerated in the census. The 72-year time frame was selected at that time because it correlated with life expectancy. Additionally, the courts have upheld that the Federal Bureau of Investigation (FBI) may use a 100-year rule in making its privacy protection; the FBI assumes that an individual is alive unless his or her birth date is more than 100 years ago. This also aligns with current practice regarding alien files (A-Files), which are maintained by the United States Immigration and Naturalization Service for 100 years after an individual's date of birth before being transferred to the National Archives.

Other types of personal information, such as detailed information relating to a person's education or individual health records, may be closed by federal law to the public for a longer period. In existing federal law it is often unclear when, if ever, these education- and health-related privacy rights terminate. SAA notes that the recommendations made in this document suggest that certain existing federal privacy restrictions, such as those found in HIPAA, should be shortened. SAA emphasizes the aspirational nature of this recommendation.

SAA believes that all personal information found in public records created by executive offices of the federal government can eventually be made public. Individual privacy is not a perpetual right. In determining when private information may be made public, SAA supports the following statements:

- Existing federal safeguards for the protection of PII found in public records should not be ~~extended~~ lengthened.
- ~~Federal individual privacy legislation should favor public access over private closure of public records. In situations where there is disagreement over what PII should or should not be private, the burden of evidence should be placed on those who advocate for privacy, rather than those who advocate for open records. Federal laws and policies related to public records should explicitly state that any closures due to an individual's privacy interest will be lifted upon the death of that individual.~~

- Whenever possible federal law should create a mechanism so that an appropriate waiver agreement or a consent of subject agreement may make records closed for reasons of privacy open to research at the earliest possible date.
- Access to public records containing PII should be made possible through a legally established date of presumed death. This date should be 100 years after the date found on an individual record that includes personal information.

Although an individual's right to privacy ends at death, SAA notes that the survivors of someone who has died ~~recently may desire to mourn privately~~ retain interest in their own privacy, and therefore the privacy rights of survivors must also be taken into account. Examples include sensitive health (especially genetic) information and a family's right to control over the death images. Thus SAA supports the idea that the immediate family of a deceased individual may request that relevant federal records be temporarily closed during a brief period of mourning. But this right is subject to the same balancing test as are all privacy concerns, and occasionally a public need for information regarding the circumstances surrounding an individual's death will outweigh ~~a family's desire for privacy~~ the survivors' rights. Survivors' rights should be limited to immediate family members (i.e., parents, spouse, or children) of an individual.

~~SAA also notes that the recommendations made in this document suggest that certain existing federal privacy restrictions, most obviously those found in HIPAA, should be shortened. SAA recognizes the aspirational character of this recommendation. While recommending this goal, SAA recognizes the need for all individuals who currently have access to records closed under HIPAA to comply with the law as it is written and currently interpreted.~~

Although the idea that privacy ends with an individual's death is not a particularly radical one, implementation of the concept is complicated by the need to document an individual's death. Because of the difficulty that can occur in proving that an individual has died, SAA believes that, in addition to allowing access to personal records when death can be documented, a uniform date of presumed death should be established in federal law. The date of presumed death should be ~~72~~ 100 years after the date found on an individual record that includes PII.

A ~~72-~~ 100-year rule, consistent with that established for personal data collected by the ~~U.S. Decennial Census~~ FBI, creates a reasonable compromise between an individual's right to privacy, the amount of time and effort that may be necessary to document the death of an individual or a group of individuals, and the public good that may come from the use of personal data.

ADDITIONAL RESOURCES

Behrnd-Klodt, Menzi L. and Peter J. Wosh, Editors. *Privacy and Confidentiality Perspectives: Archivists and Archival Records*. Society of American Archivists, 2005.

<http://saa.archivists.org/store/privacy-confidentiality-perspectives-archivists-archival-records/246/>

Privacy and Confidentiality Bibliography, Society of American Archivists.

<http://privacybiblio.pbworks.com/w/page/18593383/FrontPage> (accessed ~~12/15/15~~ 12/20/16).

Support Statement: This issue brief supports SAA's Public Policy Agenda by providing members and other prospective audiences with SAA's considered opinion on

the topic of privacy in public records, supporting a delicate balance between personal privacy and public access.

Impact on Strategic Priorities: Addresses Goal 1: Advocating for Archives and Archivists, Strategy 1.2. Educate and influence decision makers about the importance of archives and archivists, and 1.3. Provide leadership in ensuring the completeness, diversity, and accessibility of the historical record.

Fiscal Impact: Approval of the issue brief does not commit SAA to expend funds on any particular advocacy effort at this time.