BACKGROUND

On June 25, 2020, Nancy Beaumont reported to the Committee on Public Policy (COPP) that she had received several member enquiries about SAA’s position on the Ahmad v. University of Michigan court case, including one asking if SAA had been invited to sign on to an amicus brief currently under consideration by the Association of Research Libraries (ARL). She requested that COPP discuss the case and advise the SAA Council regarding whether SAA should take a public position.

COPP is submitting this discussion item to help the Council decide whether or not to take a public position regarding the Ahmad v. University of Michigan case.

The case centers around the question of whether personal papers held by the Bentley Library at the University of Michigan are subject to the state’s open records law. The specific collection at issue is the John Tanton papers. Tanton was the founder of the Federation for American Immigration Reform (FAIR), designated a hate group by the Southern Poverty Law Center and widely considered to be the architects of racist immigration policies now being implemented by the Trump administration.

According to the Bentley’s deed of gift for Tanton’s second donation of materials, the materials in his papers that document his work with FAIR and association with other racist groups are closed until 2035. In 2016, attorney Hassan Ahmad filed a Freedom of Information Act request with the University seeking access to the restricted files. The University denied the request as well as a subsequent appeal. Ahmad then sued to open the files. The case was dismissed by the Michigan Court of Claims in 2017 but Ahmad prevailed on appeal in 2019. The case is now before the Michigan Supreme Court.

DISCUSSION

Following our discussion, we recommend that SAA issue no statements and refrain from signing onto any briefs should a formal request come through. We recommend instead that SAA support COPP, the Committee on Public Awareness (COPA), and any other
interested constituent groups in providing information and educational programming about the case.

The University of Michigan’s position is that the Tanton papers are not subject to open records law because they are not records of the University. Ahmad’s position is that any records held by a public institution are public and should be subject to open records law.

This case highlights a number of important archival issues, in particular the longstanding tension between the public records and manuscript traditions in the profession. On the one hand, it’s accepted best practice that archives may agree to restrict materials upon donor request. This is a common element of the negotiation and acquisition process for repositories that collect outside their institution and forces archivists to balance their donors’ rights to privacy with their patrons’ rights to access. On the other hand, public institutions bear an additional legal obligation to citizens to be transparent and provide open access to records.

The members of COPP tend to agree that public institutions are more obligated to provide open access to all records in their care, regardless of whether they are institutional records, by virtue of the fact that they are publicly supported. However, we recognize that this case could set a precedent that hinders a repository’s ability to protect the privacy of less objectionable donors who may need to restrict material for their own protection. COPP also recognizes that the optics of SAA issuing a public statement against an archival repository that, to our knowledge, has acted in good faith according to accepted best practices would be controversial at best.

COPP’s assessment is that any public statement, including signing on to any amicus brief, would put SAA in the position of endorsing one tradition of archival practice over another, thereby alienating a significant portion of the members. While in some cases that may be warranted, in this case we do not see a benefit in SAA taking a position. We recommend instead that SAA support educational programming about the case and encourage professional conversation and debate about these practices more generally. This could take the form of blog posts or a webinar/panel. One potential model for such a panel could be the Pop-Up session presented at the 2015 Annual Meeting, "Records Management, Access, and Born-Digital MPLP: A Conversation about Empowering Archivists and Preventing Crises," which used the controversy at the University of Oregon as a jumping off point to discuss archival praxis without debating or focusing on the Oregon case specifically.

COPP and COPA have already discussed a potential collaboration on a webcast, as well as a blog post or series of blog posts.

COPP’s full email discussion is attached for further examination of the issue.

See questions for discussion below.
QUESTIONS FOR DISCUSSION

- Should SAA issue a public statement regarding the *Ahmad v. University of Michigan* case?
- Should SAA sign on to an *amicus* brief in support of the University of Michigan if invited by the Association of Research Libraries or other groups?
- Does SAA support COPP, COPA, and any other interested constituent group in providing information and sponsoring educational programming inspired by the court case?

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1 Hassan Ahmad’s blog post on the case: [https://www.hmalegal.com/blawg/tantonfoia](https://www.hmalegal.com/blawg/tantonfoia)


Southern Poverty Law Center article about Tanton: [https://www.splcenter.org/fighting-hate/extremist-files/individual/john-tanton](https://www.splcenter.org/fighting-hate/extremist-files/individual/john-tanton)

John Tanton papers finding aid: [https://quod.lib.umich.edu/b/bhlead/umich-bhl-861056?byte=54929345;focusrgn=admininfo;subview=standard;view=reslist](https://quod.lib.umich.edu/b/bhlead/umich-bhl-861056?byte=54929345;focusrgn=admininfo;subview=standard;view=reslist)

Michigan Court of Appeal decision: [https://scholar.google.com/scholar_case?case=3312273491912947918&hl=en&as_sdt=6&as_vis=1&oi=sci holarr](https://scholar.google.com/scholar_case?case=3312273491912947918&hl=en&as_sdt=6&as_vis=1&oi=sci holarr)
COPP Members:

Not to pile on, but.....

As I discussed with Sarah yesterday, in the past few weeks I've received several inquiries about whether SAA has--or intends to have--a position on the Ahmad v. University of Michigan matter. Most of those inquiries stem from a June 12 message from Judy Ruttenberg of the Association of Research Libraries to the [arl-comm-advocacy] listserv. The SAA Executive Committee had a brief exchange about this and I agreed to follow up with IPWG (which is the group that I had thought was most involved with it). And then I remembered that the leaders of IPWG and COPP had engaged in a conversation about it. This is a FOIA matter, not an IP matter.

Because two individuals have forwarded Judy's list message to me, I'm going to feel [somewhat] free to forward it to you. I've snipped an unrelated matter from the end and highlighted in bold mention of SAA.

Dear committee,

Happy Friday. I hope you are all doing well. Following up on the two items remaining from the last meeting, here are the two updates. Please send any questions or comments, and I look forward to our Plan Ahead work on Monday.

1) Potential Amicus Brief on FOIA and Gifts case, University of Michigan
We have spoken with an attorney working with the University of Michigan on a case before the Michigan Supreme Court (Ahmad v. University of Michigan) involving the use of FOIA to circumvent the terms of a deed of gift for papers held at the Bentley Library. The question is whether ARL would like to submit an amicus brief on Michigan's behalf, on its own or with partners.

See:
* "Appeals Court favors release of University of Michigan records of anti-immigrant leader" (Detroit Free Press, July 6, 2019)
* State of Michigan Court of Appeals opinion (June 2019)
* Case before Michigan Supreme Court

Mary Lee and I spoke with one of the attorneys this morning, Adam Unikowsky. The case for submitting an amicus brief is compelling and we wanted to bring this to the committee. According to Adam:
* although it will be legally binding only in Michigan, an adverse (for the University) outcome in this case is likely to be cited by other jurisdictions with similar FOIA and public records statutes. An adverse outcome will also be retroactive and effectively undermine all existing Deeds of Gift with embargo restrictions.
* as a practical matter, if FOIA can circumvent a Deed of Gift in public institutions, donors will be reticent to give such gifts to them, disadvantaging public institutions

The total cost of an amicus brief is estimated at $20,000. If the committee wants to proceed, ARL could approach SAA, BTAA, APLU and others for sign-on and contribution. Adam offered to help us find an author for the brief. The due date (as of right now) is August 24.

Judy Ruttenberg, Senior Director of Scholarship and Policy
Association of Research Libraries

One of the individuals who forwarded this message to me is Peter Hirtle. Peter also forwarded to me yesterday the appeal in the Ahmad case (attached) and the following message: "Here is the appeal in the Ahmad case. As you can see on p. 3, the question under discussion is 'Whether a private citizen's personal papers, that are donated to a public library on the condition that they be temporarily kept closed to public access, are "public records" under FOIA.' I would argue they are not, for precisely the reasons that the appeal plea lays out. I would think that an issue that so clearly touches on the core work of archivists would be something on which SAA would want to opine. But perhaps not. And given the expense involved, we may want to avoid this."

As Sarah and I discussed, it is highly likely that the Council will want COPP to weigh in on this--and that seems appropriate. As of now, we have not received an invitation from ARL to contribute to development of a brief.

Questions? Thoughts?

Best regards -- Nancy

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Nancy Beaumont
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Reply to Group Online  View Thread  Recommend  Forward
As is one of my worst weaknesses, I tend to send emails before proofreading them. I need to clarify and expand this part of my earlier email:

"Many university endowments are already - improperly in my opinion - exempted from state FOI laws. I do not want SAA to sign on to anything that could potentially undermine this."

My point here is that a lot of public universities get away with a lot of shady stuff because public university endowment records and relations with private donors are off limits in many states FOI laws. I don't see any movement on changing this, but I wish there were such a movement. If such a movement existed today, an amicus brief favoring the narrowing of FOIA to exempt privately donated records could possibly undermine such a movement for more transparency in university relations with philanthropy.

If SAA were to say "yes, we take a position that it is legitimate to narrow FOI laws to exempt private donors/donations from public disclosure" in this particular amicus brief, then this has serious implications for things such as the increasing control that right-wing donors like the Koch Foundation play on campus, or the campus divestment movements. These movements are stymied by the lack of transparency around university relationships with private donors.

An SAA amicus brief on behalf of University of Michigan's position arguing against opening this collection could mean that people could say "hey, even archivists think that private donors deserve to do their business in secret" As Anand Giridharadas points out in his book *Winners Take All*, the fact that so many wealthy donors and philanthropists are allowed to conduct their business and philanthropy in private, even in ostensibly public institutions, means that we are witnessing a massive erosion of transparency and accountability as these same individuals exert more control over an institution.
And finally on an optics side - we are in the fight of our lives for the future of GLAM institutions. In a battle between donors versus users, I want us to take the side of users **every single time**, even if it means sometimes a donor is going to take their ball and go home and not donate their records somewhere (or to a private institution).

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Original Message:  
Sent: 6/25/2020 4:39:00 PM  
From: Eira Tansey  
Subject: RE: Ahmad v. University of Michigan

Nancy, am I correct in assuming this would be signing an amicus brief to support U. Michigan's previous claims that the state's FOI laws should not apply to this because it is a private donor matter, and not public records?

If that is the case, let me express my strong opposition to such a move. I cannot possibly express how strongly opposed I am to any actions that support the narrowing of FOIA to exempt universities - who use public resources (through their staff, stacks, property, etc) - from being required to make those collections available to the public.

In fact, this brings to mind the issue of the Harry Ransom Center's purchase of the Gabriel Garcia Marquez papers, and when Texas journalists tried to get the purchase records: [www2.archivists.org/news/2015/...](http://www2.archivists.org/news/2015/...)

Many university endowments are already - improperly in my opinion - exempted from state FOI laws. I do not want SAA to sign on to anything that could potentially undermine this. I see this as a massive conflict between the public records tradition vs the manuscripts tradition. Let RBMS uphold the interests of private manuscripts donors. I'd like us to be the ones who stand on the side of more transparency, even if its inconvenient for donor relations.
SAA Response to Member Request re University of Texas Acquisition of García Márquez Archive | Society of American Archivists

SAA Council Response to Member Request Re University of Texas Acquisition of García Márquez Archive. On November 24, 2014, the Harry Ransom Center at the University of Texas at Austin announced its acquisition of the Gabriel García Márquez archive from the heirs of Mr. García Márquez.

www2.archivists.org

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Tend to agree with Eira on this. While on the one hand I see the point about personal papers vs public records, there is frankly an enormous amount of shenanigans that proceeds from a finding in UM's favor as well. To take the most obvious scenario: Universities and local governments declare the email accounts of top officials to be personal papers and therefore not subject to FOIA. Obviously, this scenario already happens; a ruling for UM on this provides precedent, and in so doing makes life even more difficult for good government folks, records managers, and archivists alike. (This plus the optics issue Eira mentions in her second email.)

Because I do think there is something to the complaint about disadvantaging public universities in donor relations (even if the extent to which it bothers me personally is minimal), my preference would be for SAA not to make a statement at all about this. (Well. My "preference" would be to make a statement affirming FOI laws. But recognizing that SAA has to represent its entire membership, I think staying quiet on this is an adequate compromise.)

Brad
Thanks Nancy, Eira, and Brad,

I think we discussed this topic in the past on the COPP list and on a COPP phone call (or two). I am not sure that SAA could come up with a concrete statement that would satisfy any majority of the membership (see e-mail exchanges of Sept 24-25, 2018 and July 12, 2019 – If anyone needs these, please let me know – I have all of my old e-mail and I can create a document with them all). Indeed, the consensus among us was to sit this one out and not issue an SAA statement. Instead we mentioned working on a blog for I&A.

When it comes down to it, the two competing tensions that are quite strong make this a very tough case... and the one weird complication because of quirks in Michigan with higher education doesn't help matters.

First, On one hand, there are those who hold the basic principle that if the papers are in a public institution they should be made available to the public-Eira clearly stated that moments ago and I believe in the past e-mail exchanges, Kathleen and Eira explained some of the basics of this argument quite well. In short (and admittedly after glossing over a lot of legal machinations to get there), the records should be made available and UM shouldn't hide behind a deed of gift.

On the other hand are those who cite the fact that a deed of gift is a contract that should be honored. Should a deed of gift include a clause for limiting access to materials, access to the materials should be administered per the deed of gift. If deeds of gift related to materials in archives in public universities can be circumvented by FOI, then donors of sensitive materials might choose to deposit their materials to private institution (In Michigan, what is the private institution that compares to the Bentley in terms of prestige... The Henry Ford?.. there isn't much in our state)... Or worse, the donor destroys the materials. This seems to be what ARL is positing in weighing the decision to jump in on an amicus brief.
Another aspect of allowing FOI to circumvent deeds of gift are the unintended consequences that are carried forward based on a decision about a single Class-A Jackass like John Tanton (I think most would agree he is an idiot who does not merit privacy for his jerky ideas). The appellate court found that because the business of the Bentley is preserving and making resources available, any resources for which they do this "business" with is FOI-able, i.e., everything in their holdings. Should FOI be extended to all personal papers housed in public Michigan institutions, then what happens when the information divulged is not about some right-wing ideology, but is about a group of vulnerable individuals who were interviewed by a researcher who donated their papers to the institution. For instance, the several institutions hold the personal research papers of researchers who studied vulnerable populations (abuse victims, indigenous peoples, former members of criminal networks). While the aggregate data in the researchers' papers is open, there are often restrictions for the individual-level data (interviews, surveys, etc.), generally closed for X number of years. In those closed documents, the participants of the study divulge information that could result in retribution should that information get back to the wrong people. Should FOI be relaxed, we would need to recognize that all of those materials would be FOI-able. It is without question that future donations of historically important individual accounts, which are slated to be open down the road when retribution is no longer likely, will never make it into the historical record because we cannot protect them from FOI.

If SAA joins in the amicus brief and opines in favor of UM, we go against the basics of many in our profession who believe in the right of the public to access all materials that are stored in publicly funded buildings and made accessible by publicly funded staff at publicly funded institutions. If we make a show of not joining in the amicus brief, we alienate archivists who, we tend to assume, are acting in the best interests of their researchers when taking materials, even from donors who ascribe access restrictions to the materials. I personally tend to side with archives being allowed to keep some personal papers private per a legally binding deed of gift... for every slimy nefarious person playing fast and loose with public records laws, there is also someone who cannot handle the consequences of telling their story right now, but wants their story heard one day.

Now for the Michigan specifics and what really galls me about the appellate court decision and probably isn't on the radar of most in ARL (nor should it be) and is of no import to this decision. The court's finding are based on laws that apply to "public libraries" regarding information about donors and the details of donations, which is to be made available to the public. But the Bentley in not a "public library" as a "public library" is understood by Michigan statute. Yes, the Bentley is a library at a public university and it is funded by the public and open to the public. But that doesn't make it a "public library" per the laws of the state. Public universities in Michigan are constitutional defined corporate bodies and the governance over the bulk of their operations is carried out by an elected or appointed board of governors with limited intervention from the legislative and executive branches. This includes the operations of their libraries and archives. For the appellate court to apply the standards of "public libraries" to the Bentley was, in my mind, the biggest mistake of the court's findings.

Anyhow, the last part is of no concern for SAA and is merely my hobby horse about the 170-year history of constitutional autonomy for state universities in Michigan.

Thanks everyone for chiming in. Sitting tight seems to be the best course of action,

Bryan
Thanks everyone for your thoughtful commentary on this question. I tend to agree that SAA has no satisfactory course of action here other than to do nothing.

Whichever side SAA were to take, a significant group of archivists would be alienated. In many cases, I wouldn’t be terribly upset about that. But in this case, based on what we know at this point, the folks at the Bentley have abided by long-standing norms and ethics in our profession. The fact that some of us might wish things were different doesn’t mean they aren’t acting in good faith according to how things are now. If SAA were to come out against them, I think it would look really bad. But because SAA is already on the record in support of stronger freedom of information laws and because there’s such sharp disagreement in the profession about how much latitude publicly funded institutions should have to make these kind of agreements with donors, I also don’t think SAA can join this brief.

Nancy and I did briefly discuss the idea of a blog post, or set of blog posts, breaking down the issue. SAA does have an educational mission and if we don’t feel we can advocate on this issue, we can at least educate. Is anyone interested?

~Sarah Quigley, CA
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No need for me to pile on by repeating what others have put forward, but I do concur that this is not a case where SAA can clearly sign on.

The only points I would add are that we do not have an adequate understanding of Michigan law as it currently exists regarding FOI and higher education as well. In New York, there is no question these would be subject to FOIL, but our law is different. If this will be used as an opportunity to educate members, pointing out the variance among state FOI laws, and the need to be aware of them might be useful.

There are inherent tensions surrounding this and other issues that have come up regarding whether or how SAA should be speaking out on issues and what consideration should be given to not offending members, to taking positions based on "the way things are" and to putting forward statements based on archival principles or "doing the right thing." There is considerable inconsistency, weakness or lack of laws, and decades of practice that make it challenging.

If there is an interest in following up on Sarah's suggestion to use this as an education opportunity I am willing to help but not take the lead since I will be rotating off COPP and have a decidedly government records perspective from a state with fairly strong public records practices and laws. But that's your call, Sarah and Sam. I have a couple hundred "get out the vote" postcards to write so I can always focus on that instead!

Kathleen

Kathleen
Hi COPP,

Bryan's point about state institutions using deeds of gift to protect sensitive information related to research studies and vulnerable populations is an interesting one. At the federal level there are several layers of "closed" information that could be levied in the event of a FOIA / MDR. They can infamously portion mark or black out classified or controlled unclassified information but this kind of check is not available to state archives.

Also the topic of what is or what is not a public institution is also very interesting. Would this apply to all publicly funded "libraries" that are also open to the public? Or is the public funding all that is needed to warrant full exposure to FOI laws? I'm specifically thinking of Federally Funding Research and Development centers that operate as separate corporations, are sometimes associated with universities (MIT Lincoln Labs, John Hopkins Applied Physics Lab, Cal Tech JPL, etc.) but are not currently subject to FOIA. I'm not saying I'm on the side of protecting these groups from FOI laws. Personally I think they should be more open. But the definitions in a ruling like this could have wider implications especially for corporations receiving nearly 100% public funding.

One thing that came up with the Judiciary ad-hoc group this week was the idea of having a panel highlighting differing opinions (not as part of a conference necessarily). This would be a fascinating topic for such a discussion. I think SAA should be in a position to encourage debates like this.

In terms of the amicus brief, I agree we should let this play out without taking a side and see what happens.

-Krista

Krista Ferrante
Bryan has also volunteered to help with a blog and I love the idea of a panel. Nick, this could be a really cool opportunity to partner with COPA since y'all are exploring doing more webinars. Thoughts?

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Hi all,

I'm so sorry for my delay chiming in on this; I fell quite behind on email this week! Yes, I think it would be excellent for our committees to collaborate on some form of educational programming relating to this issue. COPA's next meeting is next Wednesday, and I'll bring this up with the team to confirm their interest. I'll get back to you after Wednesday regarding next steps.

Thanks! I hope you all enjoy your holiday weekend.

Nick
I especially like Bryan's quip: "for every slimy nefarious person playing fast and loose with public records laws, there is also someone who cannot handle the consequences of telling their story right now, but wants their story heard one day."

Audra