

# **Attitudes and Access in the United States of America**

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Access to records and personal papers in the United States reflects the tension between two deeply held beliefs in the American public. First, the public distrusts government generally, and the Federal government in particular. Consequently, the public wants access to information about what the government is doing. Second, the public believes it has a large zone of privacy around private life; paradoxically, sometimes the public thinks that the government—even though the public is suspicious of the government—has the obligation to protect an individual's right to privacy. The tension between these two views, and their impact across all the types of records and personal papers held in archives, leads to inconsistent patterns of access.

In this paper I will look at the types of institutions in the United States and the access to their archives. Then I will look at the central issue of privacy, which affects all types of archival institutions. Third I will list a few commonly accepted principles for the administration of access. Finally, I will make a few observations about the general state of access in the United States today.

## **TYPES OF INSTITUTIONS AND THE ACCESS TO THEIR ARCHIVES**

### **Records of Governments**

To start with the government, distrust of government is not a new attitude in the United States. After all, most settlers who came to colonial America distrusted and were opposed to the policies of the governments they left behind. The framers of the U.S. constitution intentionally limited the powers of the central government. Over the last half century, one manifestation of this concern about what the government is doing has been the passage of national and state freedom of information acts that enshrine the right of the public to have access to government records. All the freedom of information acts (FOIA) are different, one from another. Just as the Federal government cannot tell Texas what to do with its state records, neither can Texas tell Iowa what to do with its records. You have to know what governmental jurisdiction controls the records in which you are interested in order to determine what rights of access you have under that jurisdiction's FOIA.

Most freedom of information acts are not comprehensive; that is, they do not cover all the records of all the parts of the government. The U.S. Freedom of Information Act (FOIA),<sup>1</sup> first enacted in 1966 and then given teeth in 1974, covers the executive branch agencies of the federal government; it does not cover the courts or the Congress or the President's immediate office. (Later the Presidential Records Act was passed, providing rules for access to the

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<sup>1</sup> For the US Federal Freedom of Information Act in Japanese, see <http://www.gwu.edu/~nsarchiv/nsa/foia-japanese.htm>

records of former but not sitting Presidents.<sup>2)</sup> Since the 1970s, the coverage of the federal act has eroded, with parts of some agencies, notably the Central Intelligence Agency, getting Congress to exempt them from the act.

Coverage by a freedom of information act is not the only important factor in determining access to records of government agencies. The effectiveness of the freedom of information acts also depends on the regulations that the government establishes to administer it, the actual administration in the agencies, and the court cases and subsequent rulings that clarify what the law means.

Enforcement, both within the agencies themselves to act within the time frames established by the law and then by the courts to require disclosure, is a major issue.<sup>3</sup> Timely response to FOIA requests has been a problem from the first day the federal FOIA was enacted and has been a problem ever since. Stories of piles of unanswered FOIA requests in the Federal Bureau of Investigation (FBI) are modern legends. One part of the problem is the volume of requests and the unwillingness of the agencies to invest enough staffing in the FOIA offices to make the backlogs disappear. Another cause of delays is the requirement to release portions of a document if those portions will still be understandable (in other words, if you have to delete so much of the document that the information that can be released is meaningless, you do not have to delete). Deletion (or, as it is usually termed, “redaction”) requires the agency to actually read the document to determine what can and cannot be released, thereby slowing the whole process.

What can a requester do to get a response in a reasonable amount of time? Freedom of information acts provide a person with the right to sue if he has had no response in a fixed period of time. Most individuals, however, ask themselves, “Do I want to spend the money on an attorney to try to get the government to divulge what I want?” Suing to get an answer is really a remedy used only by businesses or organizations or by persons who act as their own attorneys.<sup>4</sup>

The severity with which courts treat the FOIA cases brought before them also presents a mixed picture. Some jurisdictions are known to be more favorable to the government and some are more favorable to the person suing for information. It is fair to say, however, that all courts have become more conservative in the years after the attacks on 9/11 and the situation is surely not easing. Consequently, turning to the courts to enforce time frames for responses or to overturn an agency’s decision to withhold information is frequently not successful.

In addition to freedom of information acts, many other laws contain provisions that control access to specific types of government records at the federal or state level. Just tracking these various provisions is a major occupation for government records managers. Some of these acts open records; for example, “sunshine” acts that require certain government meetings to be public are quite common in governments in the United States, with the result that the records of those meetings are also public. Most of these control laws, however, close

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<sup>2</sup> Presidential Records Act of 1978, 44 United States Code 2201-2207.

<sup>3</sup> The Federal FOIA covers the current and semicurrent records still in the custody of the agencies, as well as the agency records accessioned into the U.S. National Archives. The enforcement issue is principally over current and semicurrent records, not with records in the Archives, except for records that carry a national security classification that the National Archives cannot remove without agency authorization.

<sup>4</sup> Organizations as well as individuals can make FOIA requests. Individuals do not need to be US citizens to use the act.

records.<sup>5</sup> The most important legislation enactments on access to records--other than the freedom of information acts--are the privacy acts that close records except in specific instances for specific people for specific purposes.

Privacy acts are a part of the suite of legal acts that are common to both state and federal governments. While these began as single legislative acts, privacy now has been legislated in many separate laws for specific types of information, from medical information to credit information. States, which in the US typically hold the majority of the data on individuals, have been in the forefront of adopting these measures. State archives all have to deal with the provisions of the state privacy acts unless archival records are specifically exempted. The US National Archives is exempt from the provision of the Federal Privacy Act<sup>6</sup> that requires notification of individuals before information relating to the individual is released by the Federal government (the Archives is, however, covered by the provision of the federal Freedom of Information Act that protects information related to personal privacy).

The major impact of freedom of information and privacy legislation has been on the government agencies and their records in active or semi-active use. Government archives usually apply a narrower set of the restrictions legislated by freedom of information acts; these include the protection of personal privacy; the protection of business interests; the protection of certain government interests, including investigative information; and in the federal government the protection of information that would damage national security or foreign relations.<sup>7</sup> Several of these major categories of restrictions reflect the interests of records creators external to the government—businesses, religious institutions, non-governmental organizations (NGOs), colleges and universities, private citizens—whose information is found in the government records and who also have their own records that they seek to protect.

Let's look briefly at several of the most prominent non-government records creators and access to their archival records.

### **Records of Businesses**

The world of business records has changed mightily since the passage of the Sarbanes-Oxley Act in 2002<sup>8</sup> in the wake of various corporate failures and scandals. The act applies to all publicly traded companies, both US companies and foreign companies trading in the US; it defines which of the corporate records are to be retained and how long, and applies specifically to electronic records as well as other formats. Records are to be retained for “not less than 5 years” to permit review by auditors and the government; the law establishes penalties for failure to comply. This act had a major impact on contemporary corporate record keeping, but it did not provide direct public access or have any requirement that corporate records be retained for archival purposes after the legally established period of retention expires. Access by the public to the archives of a corporation is controlled entirely

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<sup>5</sup> See, for example, the discussion of the Health Insurance portability and Accountability Act, below.

<sup>6</sup> The federal Privacy Act, 5 U.S.C. 552a as amended, applies only to the records of the agencies in the executive branch of the Federal government. It does not apply to all records nationwide.

<sup>7</sup> The standards by which information and the records that contain that information is determined to be classified or unclassified is beyond the scope of this paper. It is, in short, a determination made by the agency that created or obtained the information, which may or may not be the agency that created the document; only the creating agency for the information can lift the classification on it. The National Archives must work with the creators to get the classifications lifted but cannot lift classifications unilaterally except in very narrow instances.

<sup>8</sup> Sarbanes-Oxley Act of 2002 (Pub. L. No. 107-204, 116 Stat. 745), also known as the Public Company Accounting Reform and Investor Protection Act of 2002 and commonly called SOX.

by the corporation; records are simply a form of corporate property to be managed as the corporation chooses. While some corporations in the United States maintain corporate archives with access for the public and while others donate their archival records to business archives centers at historical societies or universities, it is a tiny minority of businesses that either retain or provide access to their archives. The result of the Sarbanes-Oxley Act may be that businesses are now more likely to destroy their records as soon as the mandated retention period expires rather than to transfer them to an archives where they would be available for discovery by future litigants.

Another major Federal law that affects private business is the Health Insurance Portability and Accountability Act of 1996 (HIPAA)<sup>9</sup>. Covering health care providers and related businesses, it establishes a privacy rule to cover all identifiable information on a patient.<sup>10</sup> Patients have the right to have access to the information on themselves; distribution of private health information is controlled; and penalties are legislated for the inappropriate use of the private information. Like the Sarbanes-Oxley Act, HIPAA does not directly affect the archival records of the healthcare institution, but many questions remain about access to records of HIPAA-covered institutions, including information on deceased individuals, after their records are transferred to an archives.<sup>11</sup>

### **Records of Religious Bodies**

Religious bodies, which in the United States are non-governmental by definition, also maintain extensive records that are the property of the body. Most major faiths have one or more archives, either for the denomination as a whole or for significant individual churches within the denomination. Some of these archives are open to public access, at least for parts of the records, while other church archives are primarily for members of the faith and still others are largely closed except for the continuing business use of the church.

### **Records of Non-governmental Organizations**

A major aspect of US life is the existence of a great number of non-governmental organizations (NGOs), ranging from the Boy Scouts of America to Human Rights Watch. Again, like the churches, their records are wholly their property. Some NGOs donate their records to historical societies or university manuscript collections; only a few NGOs maintain their own archival repositories. Depending on the type of NGO, their records may have serious access issues. An investigative human rights organization like Human Rights Watch needs to protect its records of investigations, especially its sources, from harm. Many organizations protect from public access their lists of members or contributors; most protect for significant periods of time any minutes of executive sessions of boards of directors (minutes of non-executive sessions are often open).

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<sup>9</sup> Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191.

<sup>10</sup> HIPAA also covers government health care providers, but its original intent was to regulate private industry.

<sup>11</sup> One county in Iowa originally blocked research access to 19<sup>th</sup> century records of a public institution because the institution was still in existence and its current records were covered by HIPAA provisions. Access eventually was granted, but the episode raises serious questions about the impact of the act on research. See Susan Lawrence, "Access Anxiety: HIPAA and Historical Research," *Journal of the History of Medicine and Allied Sciences*, fall 2007, advance access web version published January 4, 2007, <http://jamas.oxfordjournals.org/cgi/reprint>.

## Records of Colleges and Universities

Colleges and universities have mixed controls over access to their records. If a college or university takes money from the Federal government, certain records are controlled by Federal regulations, both regulations that protect the privacy of students<sup>12</sup> and regulations that require public accounting of the use of the federal funds. Similarly, if the college or university is part of a state educational system, the state's freedom of information act may apply to the basic records of the university's administration. And, in universities, there is a constant question about what of the materials created and received by the individual professor are his or hers to control and which are properly the university's records. Most colleges and universities now have archives, and these are normally open, at least in large part, for public access.

## Personal Papers

Finally, there are the questions of access to the personal papers that are deposited in manuscript collections throughout the country. Because these are the personal property of the individual (or his or her heirs), they are deposited under a wide variety of conditions, from total closure for a period of years to total openness and everything in between. While all repositories try to encourage the maximum openness, they will normally agree that a limited amount of material may be closed for a limited period of time.<sup>13</sup> The restricted material occasionally relates to business matters in which the donor was involved, but it is much more common to find a donor restricting items relating to his spouse or children, to close friends, or to prominent living persons. Some donations also include personal financial and health-related documents with restrictions on use.

## PRIVACY CONCEPTS AND ARCHIVAL INSTITUTIONS

Let us now look at the question of what is privacy in the age of MySpace and YouTube.

The US Constitution does not explicitly state that there is a constitutionally protected right to privacy, but many of the provisions of the Bill of Rights (the first ten amendments to the Constitution) do safeguard privacy. U.S. commentators traditionally trace the recognition of privacy as a distinct and independent right to a law review article written in 1890.<sup>14</sup> In it the authors defined privacy, in its simplest terms, as the right of an individual to be let alone, to live a life free from unwarranted publicity. The violation or invasion of privacy can lead to a legal action in the United States. Torts (legal wrongs) centering on questions of privacy include the unwarranted intrusion upon the individual's seclusion or solitude or into his private affairs, the public disclosure of embarrassing private facts about the individual, publicity that places the individual in a false light in the public eye, and the appropriation of the individual's name or likeness. Litigation in the United States involving questions of privacy is quite common.

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<sup>12</sup> Family Educational Right to Privacy Act (Buckley Amendment of 1974), 20 USC S.1232g, commonly called FERPA.

<sup>13</sup> The Society of American Archivists has two brochures that explain the basics of donation for future donors. In the brochure there is a brief discussion of restrictions. See <http://www.archivists.org/publications/donating-familyrecs.asp>; <http://www.archivists.org/publications/donating-orgrecs.asp>.

<sup>14</sup> Samuel Warren and Louis Brandeis, "The Right to Privacy," 4 *Harvard Law Review* 193 (1890).

While the exact nature of privacy continues to be strenuously debated in the United States, there are a few points on which most people, including lawyers and archivists, would agree. First, medical and psychiatric files relating to a living individual are usually withheld from public access by privacy considerations. President George W. Bush, for example, is quoted as saying, "There's nothing more private than your own health records."<sup>15</sup> Second, documents that contain information as a result of a client relationship (for example, doctor-patient, lawyer-client, clergyman-penitent) are normally withheld because of privacy. However, there is normally no privacy right for the dead, unless the information about the deceased would in itself invade the privacy of the living person; the most usual example is a medical record that shows the deceased carrying an inheritable disease and there are living children who may have inherited it. Incidents in which computerized data on individuals, including Social Security numbers or other personal identification and medical and credit and banking information, has been accidentally lost or accidentally made public are a recurring feature of life in the United States. This has thrust on the public a new understanding of how much data on individuals is held by governments and businesses.

At bottom, the issue of privacy and documents is the living individual's ability to control dissemination of personal, intimate details of his life.<sup>16</sup> In the United States, a significant shift is occurring in what information people wish to share about themselves. The explosion of personal information posted on the electronic sites such as MySpace and YouTube is stunning. In most instances, the person is posting information about himself or herself, and it is not clear that the person would be happy if someone else, particularly a government or corporation, published the identical information. I may post the fact that I am gay or adopted or have AIDS, but you may not. Whether the truly incredible spread of personal details in the electronic world will lead to the public revising its view of what information others can make available about them remains to be seen. But until the generally accepted view of privacy changes, archivists and manuscript curators will still be cautious about making available certain kinds of documents on living persons.

## ADMINISTRATION OF ACCESS IN ARCHIVES

Now let us turn briefly to the administration of access. As access policies are applied, several basic principles are usually observed in US archives and manuscript repositories.

1. *Principle of equal access.* When access rules are established for categories of requesters, the access rules apply equally to all persons within that category. For example, a person has a right to see medical information on himself that is not available to other persons; a victim of a crime has certain rights to see information on the case that would not be available to the scholarly researcher; an individual can see his personnel file and others cannot. That does not mean that each member of the same category will get access to the same records, but it does mean their requests will all be handled by the same process. An access policy requires a matrix approach: who can see what under what circumstances. Categories of persons should have equal

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<sup>15</sup> "Warning Over Privacy of U.S. Health Network," *New York Times*, 2007-02-18, p. 16.

<sup>16</sup> In the United States Federal Freedom of Information Act applications, corporations or organizations do not have privacy rights; privacy is a right for an individual human being. The one exception to this is where a small business and an individual are identical. Institutions do, of course, have a right to be left alone to pursue their business, but this is not a privacy right per se.

access; however, what documents one person can see may--and probably will--differ from the specific documents another person can see at the same time.

2. *Principle of permanent public release.* A document that is released to one member of the general public for research is open to all members of the general public that subsequently ask to see that item. The general public, in this sense, includes academic researchers.
3. *Principle of ultimate release after the passage of time.* The passage of time obviates the need for access restrictions. Ultimately today's most sensitive information can be made available to the public. The real question is the length of time a document must be restricted in an archives, not whether it can ever be opened.
4. *Principle of publication of the access policy.* The general access policy is published so that persons seeking access will know what general rules apply to their requests. Any changes to the policy are also published.

## GENERAL OBSERVATIONS

What in the end can we say about access to records and personal papers in archives in the United States? Let me make five observations.

1. There is a gulf in public attitudes between access to records of government and access to records of non-government entities and persons. The public has little patience with barriers to access on government records, unless the information contained in them is personal information with a privacy interest. On the other hand, the public is generally content to allow institutions and individuals to control the access to their institutional records and personal papers.
2. The events of 9/11 have made people more willing to accept restrictions on government records in the name of national security. Governments at all levels are using national security to withhold more and more records.
3. Businesses, churches, colleges and universities, and non-governmental organizations, while subject to some legislation that requires records to be open for at least some uses, tend to withhold from public access for significant periods of time any records that may affect the commercial or financial viability of the entity or the competitive position of the institution or organization. All organizations protect their personnel records from disclosure. Many organizations have quasi-law enforcement functions or investigative activities, ranging from the reviews of candidates for positions to procedures for the work of university security forces; these are also withheld from access for long periods of time.
4. Individuals donating personal papers usually protect the privacy of living individuals during their lifetimes. This protection often takes the form of the donor instructing the archives, through his or her deed of gift, to protect the privacy of persons identified in the donated materials.

5. The notion of personal privacy is changing, but the crux of privacy remains that the living individual can disclose information about himself that other persons or institutions must withhold from the public unless the person gives permission for it to be released. There is rarely a privacy right in information about the dead.

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Archives provide the knowledge base crucial to solid scholarly research. Access to records is a key issue to scholars because without access there can be no analysis and therefore no understanding of the evidence that the records contain of the operations of an institution or the information about persons, places, things, and phenomena that are contained in records and personal papers.

Access to current and semicurrent records provides a means for the public to hold institutions, in particular government agencies, accountable for their actions. Whether trying to understand what decisions are made to build a new highway or how a corporation is operating, records provide the crucial information for oversight and control.

Access is profoundly affected by contemporary cultural and political contexts of the country in which the records are located and by the international influences of war, commerce, and communications. Archivists in the United States are committed to protecting those records that truly need to be protected and to providing access to all those that can appropriately be open to research use. In this age of war and discontent, access policy will continue to be pulled between the distrust of government with its concomitant demand for openness and the demand that personal privacy be protected. Managing access to records in this milieu is the modern archival challenge.