

Draft Issue Brief:
Confidentiality of Private Information held in Public Records
(Prepared by the Committee on Advocacy and Public Policy)
June 24, 2015

BACKGROUND / DISCUSSION

This issue brief addresses the following priority within the SAA Public Policy Agenda, as Approved by 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 Advocacy and Public Policy has prepared this issue brief for Council review and approval.

RECOMMENDATION

Privacy is a fundamental right of all Americans. Similarly, access to public records is also a right fundamental to all Americans. To resolve the inherent tension between these two rights SAA recommends that:

- All laws and all policies regarding access to public records should include appropriate language that the right to personal privacy ends upon the death of an individual
- Because of the difficulties that can be encountered in determining if an individual has died, SAA believes that access to public records containing personal information should be made possible through a legally established, date of presumed death. This date should be determined in one of two ways:
 - 100 years after the individual's date of birth
 - 72 years after the date found on an individual record that includes personal information

The Issues:

Privacy is a fundamental right of all Americans. Public agencies, in the course of doing necessary work, collect large quantities of information about the lives of private citizens. For good reason, laws require that this information remain confidential for a period of time. Similarly, and for good reason, some personal information may be deemed more private than other information.

This acknowledged, access to public records is also a fundamental right of all Americans, one which is basic to the democratic process. Thus there exists in public policy a tension between an individual's right to privacy and a citizen's right to inspect the records of the government. Public 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. 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 generally available in a timely manner. Examples include:

- **Death Certificates:** Because of the many financial obligations and inheritance issues that must be resolved at the time of an individual's death, death records are invariably public. In most instances these records include certain highly personal information, such as the cause of death.
- **Voting Registration Records:** The public interest in fair and honest elections is of great importance and thus the rolls of individuals registered to vote are publicly and readily available. In many states these rolls document not only the names and addresses of those registered to vote but also the elections the individual has voted in and party affiliation
- **Professional licensing information.** The public's need to be assured that an individual has obtained a recognized level of proficiency in an area of endeavor licensed by the state, whether it be a doctor or a plumber, requires that such individuals who hold such certificates make them available for public inspection.
- **Educational Achievement Data.** Closely related to practice regarding professional licensing data, matriculation information regarding individuals is generally available to the public, again as a way to verify credentials individuals claim as their own.
- **Personal Licensing Information:** Public safety or health may require that individuals performing certain tasks, such as driving a car or being allowed to carry a concealed firearm, be licensed, and that the public have access to relevant records to assure such licensure has been obtained.

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 of time the needs and interests of researchers, primarily genealogists have been deemed to outweigh the personal privacy concerns of individuals enumerated in the census.

Other types of personal information, such as detailed information relating to a person's education or individual health records are held quite closely. In existing law it is often unclear when, if ever, these educational and health-related privacy rights terminate.

SAA believes that all personal information found in public records can eventually be made public. The individual privacy enjoyed by all Americans is not a perpetual right. In determining when private information may be made public, SAA believes the following factors should be considered:

- In general existing safeguards for the protection of personal information found in public records should not be extended.
- Individual privacy legislation should favor public access over private closure. In situations where there is disagreement over what personal information 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.

- In all cases the right to privacy should end at an individual's death.

Although an individual's right to privacy should end at death, SAA notes that the survivors of someone who has recently died may desire to mourn privately. SAA believes that the privacy rights of the living include the right to mourn in a manner they find desirable, and thus SAA supports the idea that the immediate family of a deceased individual may temporarily close public records, such as autopsy photographs, during a brief period of mourning. SAA notes, however, that this right is subject to the same balancing test as is all privacy concerns, and thus in some cases a court or other appropriate public official may find that a public need for information regarding the circumstances surrounding an individual's death outweighs the family's desire for privacy.

SAA also notes that while 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. Although death records are always public, the lack of a single national death registry can make it very difficult to determine if a particular person has died. Even if such a registry existed, the need to document a large number of individual deaths can be particularly burdensome to researchers involved in quantitative studies who have need to access large numbers of personal files.

Because of the difficulty that can occur in proving an individual or group of individuals 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 and applied to all publicly held records that contain personal information.

The date of presumed death should be determined in one of the two ways:

- 100 years after the individual's date of birth
- 72 years after the date found on an individual record that includes personal information.

A 72 year rule, consistent with that established for personal data collected by the U.S. Decennial Census, creates a reasonable accommodation between an individual's right to privacy and the possible public good that may come about from the use of personal data.