MODERATION IN EVERYTHING, ACCESS IN NOTHING?: OPINIONS ABOUT ACCESS RESTRICTIONS ON PRIVATE PAPERS

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ABSTRACT: Archivists have written extensively about access issues relating to case files (legal, medical, social work) and confidential information collected by governments. Meanwhile, the profession's official perspective on disclosing private information in "traditional" private papers such as collections of letters has undergone an important but much quieter transformation. According to some recent archival manuals, the release of any incoming letter in a manuscript collection may represent an invasion of privacy, so archivists are told to impose restrictions beyond the wishes of donors. These changes leave theory dangerously out of step with archival reality and raise troubling questions concerning the state of archival ethics.

A quarter century ago Theodore Schellenberg pronounced that "The end of all archival effort is to preserve valuable records and make them available for use. Everything an archivist does is concentrated on this dual objective."[1] Since that time there have been important discussions and changes concerning various aspects of access: legal, intellectual, and physical. While I believe that the profession needs far more thoughtful discussion of intellectual and physical access issues, it is legal access which concerns me here.[2] Of all the changes in legal access matters, archivists have been most eager to explore those related to case files, both private and public; that topic has received extended and generally thoughtful study in the professional literature.[3] Another area of legal access has also received concentrated study: the complex access issues associated with the administration of personal information collected by government and held in public archives.[4] What, however, of the theoretical and practical issues associated with disclosing private information in "traditional" private papers such as collections of letters or business records?

Privacy in such private papers has not exactly been ignored in the archival literature. But I will argue here that the profession's official perspective on access to private papers has become ambiguous, after having undergone an important but quiet transformation in the last decade. Not just the case files of physicians,

social workers, and lawyers—which have always been recognized by archivists as confidential—but every incoming letter in a collection of personal or business papers may represent a threat to privacy according to recent archival manuals. As a result, archivists are being urged increasingly to impose restrictions beyond the wishes of donors. These changes, it seems, leave theory dangerously out of step with archival reality and raise troubling questions concerning the state of archival ethics. Though the tension between access privileges and privacy rights permits no panacea, I will propose that there may be a better way than the one the official manuals suggest.

The evolution of the archivist's attitude toward restrictions within the "historical manuscript tradition" is a complicated one, because of the interplay of several competing trends, and need not be retraced here.[5] Suffice it to say that between the 1920s and the early 1980s manuscripts repositories generally moved away from believing that they stood as "a mere trustee of private property"; and away, therefore, from acting as jealous guardians of the access gate who scrutinized each supplicant researcher to insure that the privacy and reputation of the creators and donors would be protected.[6] Instead, curators came to believe that they were—at the very least—mediators between two equally important and compelling principles. Those principles are, simply, that historical resources ultimately have broad societal value on the one hand, and that the creators or owners of historical resources may have legitimate property and privacy rights which must be respected on the other. The trend, however, has been away from restrictions or qualifications on access and toward greater openness—at least until recently.

An important point to make about the tension between access and property or privacy rights is that manuscript curators in public or quasi-public institutions have to balance the two demands without the benefit (dubious as it may seem sometimes) of the specific legal guidelines which regulate access to private information in government records.[7] The SAA Standards on Access, first published in 1974, make this plain: "Repositories are committed to preserving manuscript and archival material and to making them available for research as soon as possible," but "at the same time, it is recognized that...every private donor has the right to impose reasonable restrictions upon his papers to protect confidentiality for a reasonable period of time."[8] Two of the key words in these guidelines are "private donor." Private donors have rights in their papers which repositories must take into account. As one writer noted in 1975, "Protection of privacy and a deepening desire to know have developed side by side.... The archivist...has become a central element in the conflict. He has had to become simultaneously an advocate and a protector of both sides of a complex and sensitive issue...."[9] The archival profession has long positioned itself as an ally of open access: we accept donor-imposed restrictions only when necessary, and have worked to limit government-imposed restrictions based on "security." At the same time, we as a profession have taken seriously the injunction to protect privacy, by administering laws designed to protect data on individuals gathered by government and protecting the confidentiality inherent in social work, medical, and legal case files. But through the 1970s the balance was tilting toward access. Witness Sue Holbert's 1977 SAA manual on reference and access, which abjured archivists "that the burden of justifying a denial of access would fall on the repository," and suggested that we were more likely to get in trouble

by restricting collections donors wanted open than vice versa. The manual accepted that invasion of privacy may be an issue with case files reflecting confidential relationships (e.g., lawyer-client) and that such files should be restricted by a repository if not restricted by the donor, but it concluded that "the right to information is as valid as the right to privacy" and overall urged greater openness of records rather than greater restriction.[10] Such an interpretation of archival standards and ethics appeared sound up until the middle 1980s.

While Holbert recognized the property and privacy rights of the donor, her concern for third-party material (that is, material sent to the donor/creator by someone else, or created by the donor to document someone else) was confined largely to case files and government records. The SAA Code of Ethics (first published in 1980 and revised in 1992) makes a broader statement about third-party rights: "Archivists respect the privacy of individuals who created, or are the subject of, documentary materials of long-term value, especially those who had no voice in the disposition of the materials."

This broader concern has been amplified by several authoritative sources. David Kepley, writing on Reference and Access in *Managing Archives* (1988), and both Mary Jo Pugh (1992) and Fredric Miller (1990) in their SAA manuals on reference and arrangement, respectively, argue that careful (possibly item-level) review of collections may be necessary but *not* to implement narrowly the donor's restrictions. Instead, they suggest that the archivist has the responsibility for going *beyond* donor-imposed restrictions to protect the privacy rights of those individuals and organizations who sent material to the donor. In making such arguments, these three authors follow the cautions given by Gary and Trudy Huskamp Peterson in the SAA manual *Archives and Manuscripts: Law* (1985): "Donors have been known to be cavalier about the release of information in their papers, particularly information relating to persons other than themselves. *If the donor does not specifically protect the privacy rights of persons named in the donated materials, the archives should to avoid potential lawsuits.*"[11]

Having expanded archivists' responsibilities to include protecting third-party privacy rights by imposing restrictions when donors will not, Peterson and Peterson cite the basic reference book on torts to define broadly an invasion of privacy as "intrusion upon the individual's seclusion or solitude, or into his private affairs," or "public disclosure of embarrassing private facts about the individual." While they note that civil case law has to date recognized privacy only in a narrow range of files—such as legal or medical client case files—they suggest that privacy protection may extend much more generally, to include anything that might cause an individual "injury and embarrassment." The implication of a vast mine field of privacy concerns is taken by Pugh to the logical conclusion that

> Privacy protects not only good reputation, but also any personal information that individuals want to keep from being known. Some people do not care if their age is known; others feel considerable interest in keeping such information to themselves, perhaps with good reason because they have witnessed or experienced age discrimination. The concept of confidentiality refers first to private communications. Confidential communication between two people

> is restricted to them alone, and unauthorized inquiry into the content of the communication is forbidden. Communications resulting from friendship, may not be protected by law, but archivists may need to recognize and protect the confidentiality implied in them.[12]

By this definition, virtually every document not created by the donor of a collection is a potential confidentiality problem, if not a lawsuit waiting to happen.

If we take seriously the argument that curators are responsible for protecting not just privileged case file data and federally classified documents but potentially all correspondence, reports, and minutes of "those who had no voice in the disposition of the materials" in virtually every collection, the ramifications are immense. As a curator who works largely with 20th century personal, organizational, and business collections which not infrequently measure hundreds of cubic feet in size, I consider it a fond delusion to believe that we can realistically find "sensitive" material in large modern manuscript collections, that we can make tenable judgements about whether material represents a potential invasion of privacy, or that (as an alternative) we must self-impose lengthy restrictions on large portions of our collections.

In a thoughtful recent article on access to third-party material in private manuscripts collections, Sara Hodson recognizes that "there is no small irony inherent in the fact that, because of the massive size of many modern collections, we often cannot give them detailed attention, but that particular attention is precisely what we ought to give them because of their currency and the legal issues at stake," and she struggles to suggest methods for narrowing the search for potentially sensitive materials in large collections.[13] The Petersons acknowledge, too, that "it is impossible to review every page of every set of records or personal papers for items that possibly should be restricted. Instead, each archives must decide on some general ground rules that give guidance on when to screen" and at what level.[14]

This would be fine advice, but for the fact that no clearly enunciated basis exists upon which to ground these rules. As the SAA manual on law explains with formidable understatement, "exactly what privacy means is a little hard to define...." The insurmountable barrier is that even if "sensitive" material is located absolutely no reasonable guideline exists for deciding whether or not it warrants restriction by the archivist. Neither the Petersons nor Pugh try to guide archivists toward determining just what constitutes an invasion of privacy in private manuscripts collections.[15] Hodson does try, averring that the archivist should attempt to discover whether the information 1) is public knowledge, 2) "would result in embarrassment or injury" to the individual, or 3) "is in any way consistent with the individual's public persona or known ethos, or whether it is at variance with his or her customs and mores and therefore likely to cause embarrassment if revealed." But these guidelines, as she herself acknowledges, have no more substance than quicksand. Short of asking the individual directly, how is the poor archivist to make these judgements? And if made, how likely are any two archivists to make the same one? Hodson wishes to draw a line between what is truly an invasion of privacy and what may only be the archivist's "own sense of propriety," but surely that is a line impossible to draw.[16]

A striking illustration of the lack of criteria for making judgements as to the sensitivity of third-party material is Hodson's description of material in the

Kinross collection at the Huntington Library. Kinross, a homosexual, was a "confidante for dozens of his friends" who "wrote openly to [him] concerning rather intimate details of their lives" and sexual orientation. Kinross died in 1976, but many of the correspondents may still be alive. Pondering whether to impose institutional restrictions, Hodson has placed in the balance "that it is impossible to determine whether or not Kinross is the sole recipient of such information," that if the letters were to be restricted it would be hard to learn of death dates for most of the correspondents, and that "I have no concrete indication in most instances that the individuals would be embarrassed if their letters were opened for research." Would a decision to restrict this material indicate that the archivist was puritanical, or would it reflect due consideration for the unfortunate reality of the discrimination faced by homosexuals in our society? Would a decision not to restrict the letters indicate a "progressive" archivist, or would it reflect callousness toward those correspondents who have not chosen to make their sexual orientation public? The Petersons aver that a substantial "part of the trick of administering access to records is stating the problem clearly and accurately," but I would argue that having done so with the Kinross letters the answer is no clearer.[17]

Hodson states that even though "letters...are by their very nature private communications,...we would not therefore, in the name of guarding privacy, restrict all letters written by individuals still living."[18] Yet until we have clear and widely accepted distinctions between what should and should not be considered privileged information—and Pugh suggests that even so commonplace a piece of information as a person's age may constitute an invasion of privacy—such a broad restriction seems to be the logical procedure if we accept the goal of protecting third-party privacy rights, for only the dead have no rights to privacy. If we do respond by preventing access to all collections which might contain private information until all parties represented in the papers are dead, how will we explain to our publics and our resource allocators this retrogression to the role of stingy custodians and arbiters of privacy and "legitimate" research?[19] If on the other hand we decide to shoulder the responsibility for screening collections for material which invades the privacy of third parties, then we also invite the legal consequences if despite our efforts material later deemed to be an invasion of privacy is made accessible to a researcher. Surely we need not martyr ourselves on the altar of privacy rights.

There is, after all, an alternative. Many repositories, including mine, do not practice what the manuals and handbooks preach. These institutions have moved away from taking responsibility for determining what material should be restricted and instead place this obligation on the donor. In addition, decisions to grant access to the restricted portions of collections are made by the donor, for the specified duration of the restrictions. It is unclear the extent to which this shift can or will protect repositories from third-party invasion of privacy suits. (Hodson notes that "libraries and archives are not apt to be sued" over invasion of privacy,[20] and Peterson and Peterson offer no indication of just how much of a practical threat such lawsuits might be.) For the record, while the Minnesota Historical Society has been using donor-controlled access restrictions for at least 30 years, and has not engaged in item-level screening or processing for at least that long, no invasion of privacy suit has ever been filed.

Even so, our profession's official manuals warn us against this form of restriction in favor of broader, institution-imposed restrictions. The Petersons do

not object in principle to restrictions which permit individuals approved by the donor to obtain access, but they do object to such contracts because of the cavalier attitude of donors. Pugh and Hodson second this objection, and add that donors might permit unequal access.[21] By giving the donor control over access, access *can* be unequal—the donor is able to grant access to one individual and deny it to another, essentially at the donor's whim. While this unequal access superficially contradicts SAA's access statement, in fact it does not. The "Standards for Access" to Research Materials states that "a repository should not grant privileged or exclusive use of materials to any person or persons...unless required to do so by law, donor, or purchase stipulations." At least one state court has upheld the soundness of such donor-controlled restrictions. This kind of restriction (with no clear end date) was negotiated by the State Historical Society of Wisconsin with Carl and Anne Braden in 1966. When the FBI argued that because the Bradens permitted some researchers to use the papers their right to deny access to others was compromised, the courts disagreed.[22]

On the other hand, a potential advantage to such contracts—which incorporate donor-imposed restrictions specifying that researcher access is by the donor's permission only, as opposed to restrictions which deny all access to the records—is that the donors, by having to respond to researcher access requests, are made partners in the access process. Being partners in the process, they may feel less threatened by it. Our experience at the Minnesota Historical Society is that often this results in the increasingly liberal extension of permission by donors. This may be viewed with some alarm by those who fear cavalier donors will disregard the privacy rights of their correspondents. But are not the donors almost always in the best position to judge the sensitivity of their papers—sensitivity to the donors and to their friends and colleagues? Kinross, presumably, would be the first source to which a curator would go to ask about the propriety of making his incoming letters available were he still alive. But the overriding reason we use such contracts is that the alternatives seem wholly unrealistic, as well as ethically questionable.

To do as the manuals say, and to have the repository take on the responsibility of determining what should be restricted, is to place what would seem to be an impossible burden on repository staff—that of determining just what material does or does not constitute an invasion of privacy or breeches the confidentiality of business information across thousands of collections, hundreds of thousands of folders, and tens of millions of documents. In addition, we risk undermining the confidence of donors in our willingness to abide by contracts if we reserve the right to close collections which they wished to have open. What then, after all, is to prevent us from *lifting* restrictions imposed by the donor if we decide such action would serve the public interest or would keep us from being sued by a researcher?

Indeed, imposition of restrictions by the repository would seem to contradict the SAA Code of Ethics, which states that archivists may suggest to the donor that he/she restrict his/her papers but that "Archivists observe faithfully all agreements made at the time of transfer or acquisition." Anne Kenney, President of SAA, made just this point when testifying before the Senate Governmental Affairs Committee regarding the Thurgood Marshall Papers. The controversy over the Marshall papers is a clear example of the dangers inherent

in the archival profession accepting broad definitions of third party privacy rights and of accepting responsibility for imposing restrictions. Had the donor contract stated simply that the papers would be open upon Marshall's death, instead of being "made available to the public at the discretion of the Library," there might have been less fire directed at the Library. Even so, the Supreme Court justices, represented by Chief Justice William Rhenquist, who wanted the papers restricted despite Marshall's wishes could have cited the SAA law and reference manuals to support their contention of harm and embarrassment caused to them by the donor's "cavalier attitude" toward their privacy. That SAA's president apparently placed the donor's wishes above the embarrassment of third parties is heartening, but reinforces the disparity between archival manuals and archival practice.[23]

In order for a policy of donor-controlled access to have any chance of passing ethical muster, the repository must undertake to explain scrupulously to donors just what donation of their papers means in terms of public access. Philip Mason's 1977 article on the ethics of collecting (sadly, the only article on this topic in the American archival literature to date) argues forcefully that archivists must discuss candidly and honestly with the donor the possible need for restrictions, even going so far as to ask specifically about "sensitive, highly personal, or potentially libelous material." While it may be impossible with large modern collections to review, as Mason wishes, the entire collection with the donor, surely it is both possible and imperative to ensure that the donor understands the ramifications of unrestricted access and the obligation to consider the privacy of his/her correspondents.[24] Such frank discussions with the donor may result in more restricted collections (Hodson argues that this is a course that is likely to "invite trouble"), but may hold the key to a workable and ethical approach for archivists to administer sensitive material. I wonder, in fact, whether manuscripts curators should not have a donor version of the Miranda card, specifying the points which donors must clearly understand before they can be said to have given informed consent to a donation.

Clearly there will be exceptions to this rule. Most obviously, the issue arises of what to do when the donor is not the creator/recipient of the collection, but rather a spouse or descendant, who may know little about the third parties represented in the papers. In such instances it may be unavoidable for curators to become the arbiters of privacy. But they should do so grudgingly, and ideally with a clear institutional policy in place which aims to minimize different restriction decisions based on the different sensitivities of different curators. Indeed, given the difficulty of defining "confidentiality," the wisest course may be to close all or part of any collection which might *conceivably* represent an invasion of privacy until all the correspondents can be assumed reasonably to be dead. Alternatively, the archival profession in the United States should spend some time attempting to formulate concrete and realistic guidelines (or a broad and useful body of case studies) for determining what kind of information would represent an invasion of privacy if opened to researchers while the creators were still living.

The third parties represented in a manuscript collection donated to a repository *may* have legitimate privacy rights. My argument is simply that the archival profession is not (and to the extent possible should not be) in the best position to determine whether those rights would be violated by permitting access to the

donated collection. The donor should have that responsibility, just as he/she has it up until the time the papers are donated. If "the principle of confidentiality is a specific application of the principle of promise-keeping in ethics generally,"[25] that promise was made between the third party and the recipient/donor, and the donor therefore has not only the best knowledge but also the ethical responsibility for determining the wisdom and morality of breaking such a promise. The donor's right to make such decisions is generally accepted not only by the donors but also by the user communities, and this merely reinforces for me the wisdom of leaning further toward donor responsibility for preventing (and permitting) access for a specified period of time and further away from repository responsibility.[26] Will curators be accorded the same support if they are perceived to be restricting extensively collections the donors of which wished to have open to research?

The argument within the archival manuals toward greater imposition of curatorial restrictions on collections of private papers in order to protect the privacy of third parties leaves many questions unanswered. We have not been given concrete evidence of the *actual* legal threat institutions may or may not face either for failing to protect privacy or for unnecessarily restricting records which the donors of those records wished to have open to research. The even murkier ethical question, of how far we should go to protect private communications which are not expressly protected by law (assuming we could identify them to begin with), has also been poorly articulated and the answers ill-defined. Nor have we given focussed attention to the importance of communicating with donors about the ramifications of a donation—either verbally or formally through the deed of gift—at least so far as the placement, control, and administration of restrictions are concerned. Finally, there seems to be a disquieting disjunction between our official manuals and broad archival practice. How many repositories handling 20th century material are doing item- or even folder-level screening on a routine basis?[27] How many impose their own restrictions on otherwise unrestricted series, how often, and using what criteria? And how many have forsaken, as the manuals suggest, contracts which permit donors to control access to their collections for a limited period of time?

It is incumbent upon us as a profession to think more rigorously about legal access issues. But in the meantime, I agree with Hodson that "we must be aware of the right to privacy but not paralyzed with apprehension or indecision as we deal with modern research collections."[28] If we err, let us err on the side of access.

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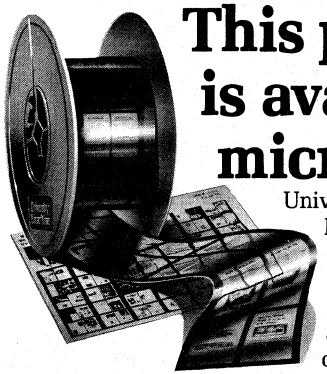
NOTES

1. Theodore Schellenberg, *Modern Archives: Principles and Techniques* (Chicago: University of Chicago Press, 1956), p.224. Thirty years later, *Planning for the Archival Profession* (Chicago: Society of American Archivists, 1986), p. 22, called "the use of archival records...the ultimate purpose of identification and administration."
2. It should not be forgotten that intellectual, legal, and physical access are intertwined; as Elena Danielson has noted, poor intellectual and physical access makes a mockery of legally accessible collections (Elena S. Danielson, "The Ethics of Access," *American Archivist* 52:1 (Winter 1989), 58). Recent archival literature has overflowed with discussions of intellectual access, mostly connected to the impact of the MARC AMC format and its attendant cataloging rules, though there is evidence that the system is not actually improving access. Ann D. Gordon, *Using the Nation's Documentary Heritage: The Report of the Historical Documents Study* (Washington, DC: National Historical Publications and Records Commission, 1992), p. 59, notes that "Only 9 percent of respondents to the survey [of various categories of researchers] selected computer data bases as an important way to find sources." Physical access has received little attention by the profession, although Gordon, p. 46, notes that "about 30 percent of respondents had been barred from collections" which were not yet processed, "and another 20 percent or more had been barred because records were in poor physical condition." Also see Bruce W. Dearstyne, "What is the *Use* of Archives? A Challenge for the Profession," *American Archivist* 50:1 (Winter 1987), 82, who cites laments about unprocessed collections found in the state assessment reports of California, Kentucky, North Carolina, and New York. A recent RLG survey indicates that up to one-third the volume of some repositories' manuscripts holdings are inaccessible to researchers (Fax received 11 September 1992 from William K. Wallach, Bentley Historical Library).
3. For examples of this extensive case file literature, see: Virginia Stewart, "Problems of Confidentiality in the Administration of Personal Case Records," *American Archivist* 37:3 (July 1974), 387-98; David Klaassen, "The Provenance of Social Work Case Records: Implications for Archival Appraisal and Access," *Provenance* 1:1 (Spring 1983), 5-30; David W. Weinberg, "The Other Side of the Human Experience: Providing Access to Social Service Case Study Files," *American Archivist* 53:1 (Winter 1990), 122-29; Brian Bucknall, "The Archivist, the Lawyer, the Clients and their Files," *Archivaria* 33 (Winter 1991-92), 181-87. Volume 18 (Summer 1984) of *Archivaria* was devoted to legal issues, and many of the articles focussed on case files.
4. See for example, Gary M. Peterson and Trudy Huskamp Peterson, *Archives and Manuscripts: Law* (Chicago: Society of American Archivists, 1985), 45-60, 68-71; M.D. Kirby, "Access to Information and Privacy: The Ten Information Commandments," *Archivaria* 23 (Winter 1986-87), 4-15; Roland M. Baumann, "The Administration of Access to Confidential Records in State Archives: Common Practices and the Need for a Model Law," *American Archivist* 49:4 (Fall 1986), 349-70; Heather MacNeil, "Defining the Limits of Freedom of Inquiry: The Ethics of Disclosing Personal Information Held in Government Archives," *Archivaria* 32 (Summer 1992), 138-44 and her *Without Consent: The Ethics of Disclosing Personal Information in Public Archives* (Chicago: Society of American Archivists and Scarecrow Press, 1992).
5. Raymond H. Geselbracht, "The Origins of Restrictions on Access to Personal Papers at the Library of Congress and the National Archives," *American Archivist* 49:2 (Spring 1986), 143-52. A briefer and more focused recitation of this evolution, may be found in David R. Kepley, "Reference Service and Access," *Managing Archives and Archival Institutions*, ed James Bradsher, (Chicago: University of Chicago Press, 1989), pp. 163, 166.
6. Geselbracht, quoting Edgar R. Harlan, curator of the Historical, Memorial and Art Department of Iowa in 1929, 146.
7. Standing between curators of private papers in public archives, and government archivists, are archivists employed in private institutional archives, who generally need be concerned less with societal values placed on historical sources, and more concerned with the property and privacy rights of their parent organization. This is because private records and papers are private property until and unless they are donated to a public institution. This may seem too obvious to mention, but the Historical Documents Study complained that 33% of researchers were prevented from using privately held documents. The report laments that "it is a significant challenge to change attitudes about rights to private property in or exclusive access to historical documents" (Gordon, 40, 46). Indeed, a country which cannot swallow socialized medicine is unlikely to swallow socialized personal correspondence and business records.

8. The SAA "Standards for Access and Appraisal of Gifts," *American Archivist* 37 (January 1974), 154.
9. Robert Rosenthal, "Who Will Be Responsible for Private Papers of Public Officials," *The Scholars' Right to Know Versus the Individual's Right to Privacy: Proceedings of the First Rockefeller Archive Center Conference, December 5, 1975* (New York: Rockefeller Archives Center, 1976), p. 3.
10. Sue Holbert, *Archives and Manuscripts: Reference and Access* (Chicago: Society of American Archivists, 1977), pp. 5-6. Interestingly, Trudy Huskamp Peterson mentions only "medical, sexual, and psychiatric information, information regarding birth legitimacy, economic information..., information on religious affiliation, and information developed or imparted during a client relationship..." as private and in need of restriction in "Privacy and Freedom of Information," *Janus* 2 (1992), 36-37.
11. Kepley, "Reference Service and Access," 167, 171-72; Pugh, 57- 59; Fredric Miller, 32-33, 41; Gary M. Peterson and Trudy Huskamp Peterson, *Archives and Manuscripts: Law* pp. 39-40, 42, 61 (emphasis added). To some extent, these authors also favor item-level review to identify all material in a collection which might pose an invasion of privacy. Item level screening may be a plausible strategy for special collection libraries focusing on 19th century materials or literary collections, but not for repositories collecting 20th century political, business, and organizational records. See K. E. Garay, "Access and Copyright in Literary Collections," *Archivaria* 18 (Summer 1984), 221.
12. Peterson and Peterson, 40, 53; Pugh, 56-57. See also Kepley, 166-67. Sandra Hinchey and Sigrid McCausland, "Access and Reference Services," *Keeping Archives*, ed. Ann Pederson (Sydney: Australian Society of Archivists, 1987), pp. 190-91 also maintain that archives "may also have to restrict access to records they have received which contain...personal information about a person other than the depositor," and that "personal details about a living individual should not be released to researchers unless the individual's permission has been obtained," but they do not give particulars about what "personal information" or "personal details" encompasses. Peterson and Peterson, 40, also note that "business information" is private and may be protected under civil law; their discussion of this subject, however, is exceedingly brief, and leaves unclear such issues as whether the business records donated by a retired executive as part of his personal papers would be subject to a civil lawsuit by the company if made accessible to public.
13. Sara S. Hodson, "Private Lives: Confidentiality in Manuscripts Collections," *RBML* 6:2 (1991), 116-17. Hodson's article is the only one of which I am aware that grapples directly with the tension between open access and the rights of third-parties. That she fails to provide satisfactory answers to the questions she raises is due to no failings of hers but to the failure of the archival profession to issue anything but vague platitudes and directives on what is a complex and potentially serious ethical (and possibly legal) issue.
14. Peterson and Peterson, p. 65.
15. Peterson and Peterson, p. 39. The Petersons do provide extensive guidelines for interpreting and administering the Freedom of Information Act (FOIA), but this Federal law does not apply (with a few exceptions) to personal or organizational records. Their one explicit example of material in a collection of personal papers which should be restricted by the archives if not restricted by the donor is "constituent mail" in a Congressional collection (p. 61). Unfortunately, their description of the series makes it seem that the materials at issue are probably constituent case files which (for reasons too complicated to explain here) may be covered in fact by FOIA.
16. Hodson, 110, 116. This topic has also found its way onto the Archives Listserv, though not in much depth. See, for example, the exchange between Julia O'Keefe and Dean DeBolt, 13 Jan 1993.
17. Hodson, 111; Peterson and Peterson, p. 61. Every repository, certainly, can cite their own examples, though most will be more mundane. At the Minnesota Historical Society recently we received a donation of 19th to mid-20th century family diaries and correspondence from a gentleman who was a descendent of the creators and recipients. While the family contained one "black sheep," he was fully cognizant of the contents of all the letters, and felt that, after all this time they posed no embarrassment to his family. Several months after the donation, the donor's cousin, who was directly descended from one of the letter *writers* in the collection, came to see me, furious that her cousin had donated this "sensitive" material without her consent. She did not want all this material made public, and in fact asked us to give it to her. We refused, politely, and refused as well her request to have the material restricted.

18. Hodson, 110.
19. A striking illustration of the potential impact of repository-imposed restrictions to protect third party privacy rights is the manuscripts collections of the Minnesota Historical Society. Currently only 69 of over 3000 collections are restricted (all under contracts which place access responsibility on the donors)—that is about 2%. Given that approximately half our collections contain material less than 75 years old and most of those contain third party correspondence, the potential retrogression of access is clear.
20. "Standards for Access," 154; Harold L. Miller, "Will Access Restrictions Hold Up in Court? The FBI's Attempt to Use the Braden Papers at the State Historical Society of Wisconsin," *American Archivist* 52:2 (Spring 1989), 181, 186-88; Hodson, p. 117.
21. Peterson and Peterson, paragraph 5, figure 3, p. 28; Pugh, p. 58; Hodson, p. 109. On the other hand, Barbara Reed, "Acquisition and Appraisal," *Keeping Archives*, pp. 104-06, and Holbert, 6-8, find nothing wrong with restrictions which permit donors to control access, so long as such restrictions are not indefinite. Ironically, the acceptance of donor-imposed restrictions on private manuscript collections was challenged from a very different direction within the archival profession as well. Raymond Geselbracht and Megan Floyd Desnoyers have argued that curators have long been too lax in permitting such restrictions to cover entire collections or series when restrictions should really be imposed only at the document level, that it was the responsibility of archivists to review collections at the item level to insure that only those documents which must be restricted under the terms of the donor contract were restricted (Geselbracht, 152, 161; Megan Floyd Desnoyers, "Personal Papers," *Managing Archives*, pp. 84, 89-90). I do not believe that item-level screening is practical, and I wonder whether there is solid evidence to support either Gesselbracht's charge that donor-imposed restrictions too often are indiscriminate and restrict too much or the Peterson's accusation that donors are too often "cavalier" about permitting access to sensitive material.
22. Miller, "Will Access Restrictions Hold Up in Court," 181, 186- 88.
23. Kenney's testimony was summarized on the Archives Listserv by Robert Shuster, 15 June 1993 (8:42am). Also, see the Listserv comments of William Wallach (25 May 1993 [9:16am, 10:29am] and 26 May [2:01pm]). The brief contretemps over the Marshall papers occurred during the late editing stages of this article, and so is not dealt with here in any detail. It should be noted, however, that in addition to the question of third party privacy rights and repository-imposed restrictions, the controversy also focussed on the propriety of a repository's willingness to distinguish "scholars and serious researchers" from others.
24. Philip P. Mason, "The Ethics of Collecting," *Georgia Archive* 5 (Winter 1977), pp. 40-41. Both Dean DeBolt and Robert Shuster made similar arguments on the Archives Listserv during the discussion of the Thurgood Marshall papers (26 May 1993 [12:30pm] and 26 May 1993 [3:59pm], respectively).
25. MacNeil, "Defining the Limits of Freedom of Inquiry," 141.
26. The 1992 report of the Historical Documents Study's survey of a variety of researchers, *Using the Nation's Documentary Heritage*, did not even list "donor imposed restrictions" or "donor controlled access" as an obstacle to access, although it did list restrictions imposed by state privacy laws and by federal secrecy acts. For examples of scholars who accept the need to permit donors to impose restrictions and/or control access, see Norman A. Graebner, "History, Society, and the Right to Privacy," *The Scholar's Right to Know Versus the Individual's Right to Privacy: Proceedings of the First Rockefeller Archive Center Conference, December 5, 1975* p. 21; Joan Hoff Wilson, "Access to Restricted Collections: The Responsibility of Professional Historical Organizations," *American Archivist* 46:4 (Fall 1983), 446.
27. I may be wrong in posing this as a rhetorical question. It may be that institutions following the directives of these imposing sources is the cause of much of the enormous backlog identified by the RLG survey (see note 2).
28. Hodson, 117.



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