"Public Records"—Who Knows What They Are?

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National Archives

OUR Society of American Archivists, now almost a quarter-century old, is privileged to meet for the first time, thanks to our worthy hosts, in this city of rich historical tradition — the birthplace and early home of our national Government, the city where the two great cornerstone documents of our democracy were drafted and where our first public records as a nation were created.

This meeting also, I must remind you, marks an important archival anniversary, for, just three days from now, on October 10, exactly a quarter-century will have passed since the first Archivist of the United States was appointed and the National Archives began its existence as a working organization with its new building almost ready to receive the records created by our nation in the 160 years since the first Continental Congress met here in Philadelphia. I do not know how we allowed this anniversary to creep up on us without elaborate plans for its celebration. I have no thought of trying to make up for this omission, but I hope the theme I have chosen to explore with you in a way ties together place and occasion.

The term "public records" expresses a concept central to archival work in all English-speaking countries. Because the term is limited in its usage to these same countries, its history, fortunately, is to be found wholly within the English language. I shall leave to one side the closely related term "archives," with its much longer history and wider international usage, and shall hope that someone else will wrestle with that term at a time not too far in the future. The fact that we can ignore it almost completely seems to demonstrate that in the English language the word "archives" has never really been at home. It has no place in the legal language of Britain, where it might be expected to be prominent. It was practically never used in everyday speech and writing, and, indeed, was little used even by

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literary men before historians and archivists brought it forward in nineteenth-century writings. I cannot say whether this was only a sort of professional affectation on their part in the main or whether the term "archives" really became needed for the first time in the language because of the increasing ambiguity of the term "public records," but I suggest the latter interpretation as a possibility.

If some of you who are in charge of manuscript accumulations of private nature feel that a discussion of public records may not concern you directly, I suggest that in all logic what is not public is private. Neither one can be defined until the other can be confined. Actually, most institutions, whether called manuscript depositories or archives, in our country and in others, have both public and private records in custody, and it seems desirable for a number of reasons to know which is which. What is public plus what is private presumably make up a whole, and I would emphasize that it is this whole which our Society, I believe, was established to protect and for which it should properly feel itself responsible.

Is there a sharp, clearly recognizable boundary between public and private? Is there overlapping between the two? Must we recognize a shaded area, a sort of quasi-land? If, for example, quasi-public corporations really exist, they presumably create quasi-public records. Is this matter so important as to call for a boundary survey, or study by a joint commission, or do we seem to make too much of it? Within the Society, if it tends to divide us, we are making too much of it for the reason that the whole is our province. If we seek mainly to understand it, we can hardly overemphasize its importance both in theory and in practice.

The matter is, in my opinion, of great practical importance for a number of reasons. Administrative heads of Government agencies and agency records personnel who serve them must know the boundaries of the public records for which they are held responsible. These records are subject to certain laws. Public records, for example, can be disposed of only through following procedure established by law. Others presumably can be chucked into the waste basket, abandoned, taken home, given away, or left to the janitor. Severe criminal penalties usually exist for the official who mutilates, defaces, alters, or withholds and suppresses public records in his custody, or for the private person who, having access to public records, similarly treats them. Neither is likely to be judged guilty unless he knew them to be public records. Similarly, in connection with efforts to replevin public records that somehow have escaped from public custody, uncertainty exists on both sides because of conflicting views

and definitions of public records. Definition of the term is basic in the whole issue of the people's access to public records for public or private purposes, an issue being vigorously pressed in the current "right to know" movement. Finally, because public records traditionally have a sort of special status as evidence, there is the question of which can be certified and accepted as such in courts of law. The archivist, when he inherits custody from the administrator, inherits also all these practical questions of boundary. It is not too much to say that in all of these areas at present there is doubt and confusion; and there are growing demands for clarification that already in both the Federal Government and in some States have expressed themselves in demands for positive statutory legislation.[1]

What will be the role of record managers, archivists, and manuscript custodians in this situation? Are we as confused as all the others? Shall we be unable to contribute because we are unable to settle these questions among ourselves and, instead, separate into different camps? Is this a cornerstone concept of our profession that can be established as a surveyor establishes a cornerstone, from which other surveys may be extended in confidence? Or is it a shifting concept? Is it possibly a term that means different things to different people? Is it perhaps a term that is being made to serve too many different purposes? In guiding and advising the administrator, and occasionally the legislator, what do we say "public records" are? Do we know? If not, who does?

It may be appropriate in considering this term that we recall

[1] Much of the present pressure for clarification comes from those supporting "freedom of information" or so-called "right to know" legislation, which aims to broaden the right of access by citizens to government records of all kinds by broadening the definition of "public records." This assumes that the adjective "public" will be interpreted as *open* to the public as well as *owned* by the public. See books by two well-known leaders in this movement: Harold L. Cross, *The People's Right to Know; Legal Access to Public Records and Proceedings* (New York, 1953), and James R. Wiggins, *Freedom or Secrecy* (New York, 1956), and Cross' "Cumulative Supplement #1" to his book, recently published by the American Society of Newspaper Editors. The latter society's "Freedom of Information Committee" reports, published regularly in its annual *Problems of Journalism,* offer a convenient source for keeping up with activities and legislation in this area. See also Albert G. Pickerell, "Secrecy and the Access to Administrative Records," in *California Law Review,* 44:305-320 (1956). This movement has met with considerable success on the State level. On the Federal level, the extensive hearings of the special House subcommittee under the chairmanship of Rep. John E. Moss of California, continuing since 1955, have attracted much attention and were responsible for the passing of Public Law 619 of the 85th Congress, approved August 12, 1958, amending the so-called housekeeping statute of 1789 to prohibit its use and citation as authority for withholding records from the public. Archivists have tended to remain on the sidelines in this battle, although obviously they are caught squarely in the middle between opposing forces and opposing interpretations.

Alice's encounter with a certain self-satisfied individual sitting on a wall.

"When *I* use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean — neither more nor less."

"The question is," said Alice, "whether you *can* make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master — that's all." [2]

"The question is," I am tempted to reply, since Alice was too modest, "whether we can be wholly masters of words that come down to us freighted with meanings from the past and that have had direction and force of their own for centuries." Such words can trip us up; can even, I suspect, trip up a profession. Let us be sure we are not, like the pompous Humpty Dumpty, heading for a great fall.

Our practical friend may observe at this point that we are becoming unduly excited. "Why don't you start by looking at your statutes? For the practicing government archivist, it should be very simple. Public records are what the laws of his government say they are." He is right, of course. The archivist should be well aware of these laws and respect them; and one of his duties and responsibilities is to teach others to respect them. Every new recruit to the profession, obviously, should be taught the legal definitions as soon as he enters on duty.

But what legal definitions? A quick survey of our State legislation reveals (1) that few States have what might be called general statutes defining public records, (2) that these statutes, where they do exist, are indeed so general that extensive interpretation is needed to give them practical effect, and (3) that there is considerable disagreement among them, a situation disconcerting to anyone who believes that public records would, or should, be about the same in all the States.[3]

Massachusetts has the most often copied definition, adopted in 1897 when that State was in the vanguard in matters archival, in-

[2] This well-known quotation will be found in *Through the Looking Glass,* ch. 6.

[3] A more careful analysis is needed than was possible for this paper, although I am sure the generalizations would not be altered. Even with State laws and codes conveniently available on open shelves, as in the Law Division of the Library of Congress, such analysis is time-consuming, nor was it possible to follow the laws of recent sessions in all States right up to date. The survey of definitions of "public records" in State legislation in appendixes 2 and 3 of Cross, *The People's Right to Know,* was most helpful and suggestive as a starting point. It ignores some definitions not relating to the problem of access, but it is a worthy example of the broader study that archivists should make for themselves.

cluding legislation. This law states that in construing all statutes, unless a contrary intention clearly appears,

> "Public records" shall mean any written or printed book or paper, any map or plan of the commonwealth, or of any county, district, city or town which is the property thereof and in or on which an entry has been made or is required to be made by law, or which any officer or employee of the commonwealth or of a county, district, city or town, has received or is required to receive for filing. . . .[4]

The words "the property thereof" give the impression that in this definition public ownership was conceived to be a consideration in determining what public records were. Farther along in the 1897 act, however, is a paragraph stating that this definition is not to apply to the records of the General Court or to declarations, affidavits, and other papers filed by claimants in the office of the commissioner of State aid and pensions. Surely these latter if not public records were still not private records. The law does not tell us what we may call them. It appears, though, that in making these exceptions, the legislature had reverted to the idea that public records could be only those open to consultation by the public. Here we have a confusion of concepts in the same law — a persistent confusion in the statutes of other States, leading at times to unintended results.

New Jersey, Delaware, Maryland, Texas, and Kansas have definitions so similar to that of Massachusetts as to indicate a common origin. Delaware has added the word "document" to books, papers, and maps.[5] The Kansas law, dating from about 1945, reflects its modernity by expanding the catalog to include "documents, correspondence, papers, maps, drawings, charts, indexes, plans, memoranda, sound recordings, motion pictures or other photographic records," and modifies the whole by adding a new phrase, "originals or copies." [6] No one worried about copies until the second quarter of the twentieth century. Texas, not to be outdone by Kansas, added to the lengthening list "newspapers" and "magazines," [7] and one suspects that this attempt to define records by cataloging them is getting somewhat out of hand.

[4] Pt. I, title 1, ch. 4, sec. 7 of *Annotated Laws of Massachusetts* (vol. 1, recompiled, 1953) and amendments noted in 1958 supplement to the recompiled volumes.

[5] Title 29, ch. 33, par. 3327(d) of *Delaware Code Annotated* (1953).

[6] ". . . which are the property of any department, officer, board, commission or agency of the state." Ch. 74, art. 35, par. 3501 of *General Statutes of Kansas Annotated, 1949* (Franklin Corrick, comp., Topeka, 1950).

[7] Art. 5441a(2) of *Vernon's Texas Civil Statutes Annotated* (vol. 16, 1958 ed.). This article, passed in 1947, established the Records Administration Division of the Texas Library and Historical Commission.

One is ready to commend the simple wording of the North Carolina statute:

> Public records comprise all written or printed books, papers, letters, documents and maps made and received in pursuance of law by the public officers of the State and its counties, municipalities and other subdivisions of government in the transaction of the public business.[8]

The phrase "made and received in pursuance of law," if strictly interpreted, could be a disconcerting provision and unduly restrictive, but the North Carolina archivists can be trusted, if left to themselves, to take a broad point of view. Maryland, however, comes right out with stronger restrictive language in her definition — "which is required by law to be preserved, filed, or recorded." There could be a vast quantity of records in the custody of Maryland agencies that are not "public records" if this is the test.[9]

Five western States — California, Idaho, Montana, Oregon, and Utah — have a very different definition, which seems to have originated with Oregon in 1862. The term "public writings" rather than "public records" is used. Writings are of two kinds, "public" and "private," say all these laws; and "public writings" are divided into two categories: (1) "the written acts or records of the acts of the sovereign authority, of official bodies and tribunals, and of public officers, legislative, judicial, and executive, whether of this state, of the United States, of a sister state, or of a foreign country," and (2) "public records kept in this state of private writings." Thus we still have "public records" in the definition, whatever "public records kept . . . of private writings" may be. It turns out on further examination that they are documents of private origin that are received and recorded or filed in public offices, as in offices of registers of deeds or in the courts.[10] An archivist would have to study the origin, spread, and judicial interpretations of these definitions before they would be entirely intelligible to him, and it is doubtful that they would contribute to clarification of his custodial

[8] Ch. 132, par. 1 of *General Statutes of North Carolina,* vol. 3B (1958 Replacement Volume), p. 344.

[9] Art. 54, sec. 50, *Annotated Code of Maryland* (1957 ed.).

[10] These laws can be most conveniently compared in Cross, *op. cit.,* appendix 2, p. 328-329 and 334-336. Also see his discussion, p. 39. Some study by an archivist of the origin and interpretation of these laws might prove rewarding. They excite interest because of their prior origin and complete divorce from later definitions arising in the East. Also why "writings" rather than "records," and has use of "writings" altered the judicial interpretation significantly? This definition appears to have originated in the "Code of Civil Procedure" that was submitted to the Oregon Assembly in 1862 by a commission headed by Matthew P. Deady. The Code was passed with few changes, Oct. 11, 1862, and was published in *The Organic and Other General Laws of Oregon . . . 1845-1864* (Portland, 1866), p. 134-440.

responsibilities. They were probably written by lawyers in connection with the admission of writings in evidence and long before an archivist was abroad in those lands.

Probably the most carefully considered and most interesting of all definitions and in many ways the best — certainly it deserves to be studied by all States considering legislation in this field — is that appearing in the Louisiana Public Records Act of 1940. Section 1 states:

> That all records, writings, accounts, letters and letter books, maps, drawings, memoranda and papers, and all copies or duplicates thereof, and all photographs or other similar reproductions of the same, having been used, being in use, or prepared for the use in the conduct, transaction or performance of any business, transaction, work, duty or function, conducted, transacted or performed by or under the authority of the Constitution or the laws of the State of Louisiana, or the ordinances or mandates or orders of any municipal or parish government or officer, or any board or commission or office established or set up by the Constitution or the laws of the State of Louisiana, or concerning or relating to the receipt or payment of any money received or paid by or under the authority of the Constitution or the laws of the State of Louisiana, be and the same are hereby declared to be public records, subject to the provisions of this Act, except as hereinafter provided.[11]

The exceptions, stated in sections 2 and 3, are that (1) records relating to matters under investigation by or under the authority of the legislature are not to be considered public records until "such case, cause, charge or investigation has been finally disposed of," and (2) records held by any sheriff, district attorney, police officer, or investigating agency of the State as evidence for prosecution in a criminal action are not public records "until after such public records have been used in open court or the criminal charge has been finally disposed of." We thus have an example of an otherwise admirable act betraying confusion when confronted with the issue of what public records are to be open to the public and stating, in effect, in section 3 that certain public records are not public records.[12] This idea that records do not become "public records" until the transactions are terminated, which is frequently encountered in common law definitions, I have not seen expressed elsewhere in statute law.[13]

[11] The act of 1940 plus amendments in 1942 and 1946 was reenacted as Title 44, secs. 1-39, *Louisiana Revised Statutes*. The entire act deserves close study.

[12] *Ibid.*, secs. 2 and 3.

[13] Also deserving of notice is the most recent definition of "records," which is to be found in sec. 149.40 of an act approved July 18, 1959, making the Ohio Historical Society the archives administration authority for that State. This reads: "Any . . . document, device, or item created or received by or coming under the jurisdiction of

Our few general definitions, so-called, thus sometimes turn out to be not so general as pretended. More frequently the definitions, although still general in language, are found in laws for special purposes, for example, establishing a records commission, controlling disposal of records, or governing access to them. These definitions are usually, by such language as "in construing the provisions of this section," limited in application to the acts in which they appear, or the courts are likely so to interpret them if such language is lacking. Some States have several different definitions in different acts for different purposes.[14] Needless to say these definitions often have little in common, but the confusion is confounded when a State copies unthinkingly for one purpose a definition used in another State for a different purpose.

That archivists have had anything to say about these definitions except in acts establishing historical or archival agencies or in records disposal legislation is not evident. In his presidential address to this Society 21 years ago, A. L. Newsome made a memorable plea for uniform State archival legislation, including a clear definition of public records. He spoke then of legal definitions that had been attempted in 15 States, with emphasis on the "attempted." I cannot see that there has been much improvement since then or that the "Proposed Uniform State Records Act," which a committee of this Society framed in 1939, has had any real influence. I would suggest in any case that the committee's definition of public records, and indeed the whole act, now require a good deal of restudy.[15]

any public office of the State or its political subdivisions which serves to document the organization, functions, policies, or other activities of the office, or which contains historical information, is a record within the meaning of sections 149.31 to 149.42, inclusive, of the Revised Code. When such records are of long term or permanent administrative, legal, fiscal, or historical value they shall be deemed to be archives within the meaning of these sections." This is the first statute that has come to my attention that defines "archives" as that part of the official records that has long term or permanent value. I am indebted to Bruce Harding, Ohio State Archivist, for a copy of this act, which becomes effective Oct. 19, 1959.

[14] Idaho, for example, follows the Oregon definition of "public writings" in that part of its code dealing with evidence (Title 9, par. 311), and follows the Massachusetts type of definition in another part (sec. 67-2031). The latter, however, is only "as used in this act," which is an act passed in 1941 giving the State Board of Examiners duties relating to the custody and disposal of public records.

[15] Albert Ray Newsome, "Uniform State Archival Legislation," in *American Archivist,* 2:1-16 (Jan. 1939). Newsome was chairman of the Society's committee, which reported its draft act at the Annapolis meeting of the Society in the fall of 1939. It was accepted by the Society and referred to the National Conference of Commissioners on Uniform State Laws. The draft act was printed in *American Archivist,* 3:107-115 (Apr. 1940). Sec. 1 suggests the following definition: "Public records comprise all written or printed books, papers, letters, documents, maps, and plans and all motion pictures, other photographs, sound recordings, and other records, in whatsoever form, made or received in

When one cannot find a definition adequate for all purposes, he is led to speculate whether a definition would be really desirable or, in fact, really possible. One begins to understand and appreciate a certain reluctance that exists to legislate in the field of generalities, and the resistance of the legal profession to such legislation. Is the concept of public records so general in nature that attempts at positive statutory definition would be not only inadequate but possibly harmful? Is it a concept better left to judicial interpretation so that it can be applied more flexibly in the light of the specific circumstances of the case?

Our knowing legal friend says we are now on the right path. How did the States get along until the twentieth century, and the Federal Government too? [16] How do a majority of the States with no definition of "public records" still get along? It is because the term "public records" has been known to the law for hundreds of years. Its origin goes back into the remote origins of the common law of England. Archivists may want a definition, but lawyers and judges need none. By turning to their voluminous *Reports* they can find cases aplenty in which great legal minds of other years have defined "public records." Not only are these precedents drawn upon in States where no statutory definitions exist, but they color the construction of the statutory law, warping it at times to such an extent as to modify and even nullify legislative intent. And, if a statutory definition exists only in some law governing disposal, for instance, the common-law precedents would still govern for all other purposes. Positive law may be a starting place in searching for definitions, but it does not carry one far in an area where the com-

pursuance of state law or in connection with the transaction of public business by an agency of the state and preserved or required to be preserved by that agency for record purposes. The body of public records accumulated by an agency of the state and preserved in official custody by that agency or its legal successor constitute the archives of that agency." This definition directly influenced the definition of "public records" adopted in the Federal disposal act of 1943. Also compare the North Carolina definition cited above, which Newsome probably wrote or certainly influenced.

[16] The first definition of "records" in Federal statutes was that in the Federal disposal act of 1943 (57 *Stat.* 380). It is impractical in this paper to go into the whole area of administrative rules and regulations relating to records, some of which attempted definitions. The most important of these in recent years is in the *Attorney General's Manual on the Administrative Procedure Act,* 1947, p. 24-25. The term used in the act under the head "Public Records" (sec. 3c) is "matters of official record." The interpretation to be given this section according to the Attorney General's manual follows the precedents set by court decisions defining "public records" that will be described in the next few pages of this article. The manual states, for instance: "The great mass of material relating to the internal operation of an agency is not a matter of official record. For example, intra-agency memoranda and reports of investigations are, in general, not matters of official record."

mon law has controlled so long and so completely. Ask the judges. Go to their decisions.

This is not an easy assignment for the archivist. Beginning with the standard multivolumed legal compendiums like *Corpus Juris, Corpus Juris Secundum, American Jurisprudence,* and *Words and Phrases,* and their supplements, he is soon immersed in page after page of definitions as embodied in decisions of yesteryear. If, bewildered by the seeming conflicts (for one decision seems often to be just the opposite of another), he feels the need of more understanding of the background circumstances in specific cases, he must consult the reports of the cases themselves. He finds himself now in a vaster wonderland. How many cases there were in these tens of thousands of volumes of *Reports* that involved in one way or another the definition of public records — in more aspects than he ever knew existed! He shudders to think what would be involved were he to consult the original case records themselves, yet he wonders at the accuracy of the reporters' neat summaries, especially if he has himself had court experience with some case that involved the concept of public records under circumstances so complex that he was not sure the points were understood by even the principals and their lawyers or the judge. It would be good training and sobering training for any young archivist to spend some time on such research.

Like most lawyers working on a case, I moved as rapidly as possible through this wilderness, having in mind the deadline set by this occasion. I remained long enough to become thoroughly confused, and to wonder why we ever really entrusted important legal matters to lawyers or risked judges' decisions. As I pondered these decisions further, however, they began at last to fall into a sort of pattern, which at risk of oversimplification I shall try to present.

As far as I went, I found no decisions wherein "public records" were defined simply as records belonging to the public in the same sense as public lands, public roads, public parks — as a part of the public property, as it were. This concept, so natural to archivists who think of themselves as the custodians of this rather special kind of public property, seems hardly to have caught the law's attention. Judicial interpretations appear always to be more limited and restricted. These narrower concepts can be classified. At least four groupings loom large.

A first category is represented in the following judicial language, often encountered with minor variations, but here quoted from a 1922 decision of the Supreme Court of Florida:

A public record is a written memorial, made by a public officer authorized to make it. It is required by law to be kept, or necessary to be kept, in the discharge of a duty imposed by law, or directed by law to serve as a written memorial of something written, said or done.[17]

So widespread is this language that it must be rooted in very ancient precedents. It seems to apply only to records created in an office by public officials and to ignore completely all papers or documents received in an office from the outside. This concept leads to decisions such as this:

Reports of private individuals to government officials, even pursuant to statute, correspondence of officials in matters relating to private affairs of citizens, although in connection with public business and memoranda of public officers for their own convenience are not public documents or records, unless made so by statute; not every document on file with a public officer or every memorandum made by an officer being a public document.[18]

Or, to quote from another decision:

A public record is a written memorial made by a public officer, which he must be authorized by law to make, and copies of letters written by a forest supervisor, a memorandum made by the district ranger in connection with an application for grazing permit, and a copy of a notice to the applicant are not public records, but merely incidental to the administration of the affairs of the office.[19]

There is a second line of definitions within this same first category that is a step broader. It is well expressed in a frequently cited California case, where the judge wrote:

A written record of transactions of a public officer in his office, which is a convenient and appropriate method of discharging his duties, and is kept by him as such, whether required by express provision of law or not, is admissible as a "public record." [20]

This view is amplified in the language of a 1947 Wisconsin Supreme Court decision wherein it is stated:

It is the rule independently of statute that public records include not only papers specifically required to be kept by a public officer but all written memorials made by a public officer within his authority where such writings constitute

[17] *Amos* v. *Gunn,* 84 Fla. 285 (or 94 So. 615); also *Robinson* v. *Fishback,* 175 Ind. 132 (or 93 N. E. 666).

[18] *People ex. rel. Stenstrom* v. *Harnett,* 226 N. Y. S. 338 and 341 (or 131 Misc. 75).

[19] *Steiner* v. *McMillan* (Supreme Court of Montana, 1921), 59 Mont. 30 (or 195 Pac. 836-7); also *Larson* v. *Clough,* 55 N. D. 634 (or 214 N. W. 904-5).

[20] *People* v. *Purcell,* 22 Cal. App. 2d. 126 (or 70 Pac. 2d, 706-8); also *State* v. *Ewert,* 52 S. D. 619 (or 219 N. W. 817).

a convenient, appropriate, or customary method of discharging the duties of office.[21]

In these modern days when statutes are no longer so specific as in earlier days about just what records must be kept in a given area of administration, it would seem that this broader view must gain ground. That it is doing so is merely an unverified impression. Most of these definitions were pronounced in cases involving the admissibility of documents as "public records," the latter, of course, having a special legal standing as evidence.

A second category of restrictive definition, probably second too in the frequency with which it is encountered, is that which restricts the meaning of "public records" to those that are open generally to public inspection and use. In the words of one judge who wrote simpler English than some of his colleagues, "A record is not a public one unless it can be inspected by any person interested." [22] On this basis the records of the New York City police department were adjudged not to be "public records," inasmuch as records of "the police and law departments" were specifically excepted in the paragraph of the City Charter of 1936 that opened the city's records generally to public inspection.[23] On this basis also, other records closed by statute, or even by regulations authorized by statute, would not be considered "public records." Unless there is some question as to the boundary set by the statute these cases would not get into court for interpretation, but governmental records deemed not "public records" by this definition would be, of course, large in quantity and various in category.

This particular definition is by no means limited, however, to records closed to the public by specific law or regulation, for between records so closed and records normally open is a large twilight zone where the administrator has discretion; and, if his decision is challenged, the judge searches the precedents and decides as they seem

[21] *International Union etc.* v. *Gooding,* 251 Wis. 362 (or 29 N. W. 2d 730).

[22] *Keefe* v. *Donnell,* 92 Me. 151 (or 42A. 345).

[23] Greater New York Charter, par. 1545; *Hale* v. *City of New York,* 296 N. Y. S. 443-4 (or 251 App. Div., 826). More often, with respect to police and law enforcement records, the custodians are not specifically forbidden to grant access or furnish information, but are authorized to give out such information as they wish or consider not harmful. Taxpayers or others, however, cannot usually compel access, which latter right is often considered to be a requisite if the records are to be considered public records in this sense. "Inspection as a matter of courtesy should not be confused with inspection as a matter of right," said the Superior Court of Rhode Island in a 1931 case where a reporter was denied access to records even though he proved they had often been opened to inspection by others (*Copeland* v. *Moulton,* 8 R. I. Resc. 97). Many similar decisions could be cited.

to apply in the particular circumstances. Typical of such decisions is the following:

A writing filed in a public office making charges against a public officer is not always a public record to which any citizen may have access at pleasure. To declare such to be the law would be to say that any communication attacking the character of a public officer being required by the board of directors to which he is amenable would thereby become a public record, and be open to the idle curiosity of all persons. Such a paper, in the absence of a positive statute making it part of a public record, could not be declared a part thereof.[24]

Perhaps the discretion of the judge in this twilight area is best summed up by a 1927 New York decision:

Whether or not records are strictly public records is often expressly declared by statute. In the absence of statute, the nature and purpose of the record, and, possibly custom and usage, must be the guides in determining the class to which it belongs.[25]

A third category of restrictive judicial definitions limits application of the term "public records" to those records that document completed action. In statutory law this view was well expressed in the provisos of the Louisiana Public Records Act of 1940, previously quoted, stating the act should not apply to records relating to cases, causes, charges, or investigations not "finally disposed of." [26] Obviously access by the public was also an issue here, and it usually is in this type of decision. The record was still in the making, so to speak. Its final form and content would not be decided until it was closed. Judges usually decide this kind of question on the basis of common-law precedent and even go further in that they may require that there be formal acceptance or approval of a document before it becomes part of the "public records," thus:

Estimates, plans, drawings, maps, and other data prepared by the assistants and subordinates of the city engineer of the city and county of San Francisco, to be submitted to him for his approval, in connection with the construction of a municipal water supply system . . . are not, before such approval by the engineer "public records" open to inspection by any citizen. . . .[27]

This requirement of formal approval can sometimes be extended so far that records to which formal approval is never granted (as, for example, applications for grazing leases that are denied) would not be considered "public records." This is expressing a philosophy, often encountered, that negative decisions need not be made a matter

[24] *Colman* v. *Orr,* 71 Cal. 43 (11 Pac. 814-5).
[25] *People ex. rel. Stenstrom* v. *Harnett,* 226 N. Y. S. 338 (or 131 Misc. 75).
[26] See *ante,* p. 9.
[27] *Coldwell* v. *Board of Public Works,* 187 Cal. 510 (or 202 Pac. 879).

of record.[28] If carried to a logical conclusion this notion might seemingly exclude from "public records" bills that were never enacted into law or treaties that were never ratified. An archivist might well ask where one would justifiably draw the dividing line.

A final type of limiting definition encountered in court decisions is to the effect that indexes and other finding aids are not part of the "public records." "The proper office of the index is merely to point to the record," is the simple way it is expressed in one decision.[29] To complicate the picture a little further, however, another decision voices the judgment: "Where a statute does require an index, it is as much a part of the record as the record indexed." [30]

The pattern I have tried to give you is surely much oversimplified. Often, two or more of these classes of restrictive definition will be drawn upon at once to strengthen the decision. One thing is clear — to the law there are no definite boundaries between "public records" and "private records." The same piece of paper is a "public record" under certain conditions and not under others. It is a "public record" to one judge but not to another. It is a "public record" in one State but not in an adjacent State. The archivist responsible for custody consequently gets little help from statutes, rules, and regulations, or from decisions of the courts.

An obvious question arises. If the legal interpretations of the term "public records" are inevitably so restrictive, why not use such substitute terms as "public writings," if we do not like "records," or "official records," if we feel "public" is more objectionable, or "official writings," or just "records"? These have been tried, but their use appears to make no difference. In the end all are drawn into the orbit of the older and more established term. The judges

[28] An interesting example might be the journals of the Continental Congress, kept by Charles Thomson, Secretary. He gave no place in his record to motions that were rejected, nor did he report debates. Only actions taken, transactions approved, and decisions that were to be put into effect, since only these counted, needed to be recorded according to this view.

Problems also arise under the "closed transaction" philosophy when no decision is ever reached, or the matter, in other words, remains indefinitely in a state of suspense. Someone may merely forget to close the case or it may be in the interest of someone to hold it open. Under the Louisiana statute cited, for example, which seems liberal and reasonable on the surface, there was in 1956 a demand to open the records of a completed investigation of charges of police corruption in New Orleans. The demand was denied in the courts because, although the case was officially closed, the criminal charge was not considered "finally disposed of." (*State of Louisiana ex. rel. Chaplin et al* v. *Dayfries, Supt. of Police et al.* No. 347-002 in Civil District Court, Orleans Parish, Div. A. Reported in *Problems of Journalism, 1957*, p. 276.)

[29] *Bishop* v. *Schneider,* 46 Mo. 474 (or 2 *Am. Reports,* 533); also *Green* v. *Garrington,* 16 Ohio 549 (or 91 *Am. Decisions* 103, and discussion 108).

[30] *Clinchfield Coal Corp.* v. *Steinman,* 213 *Federal Reporter* 557.

in western States that have the term "public writings" in their statutes, in the search for precedents, seem to draw upon these interpretations of "public records" that are to be found in the older jurisdictions as the nearest equivalent, and tend thus to equate the two. As for "records" alone, inasmuch as private records are not the subject of these definitions, the adjective "public" will almost certainly be read into the statute by the courts and interpreted in the traditional ways.

Why do the interpretations of the law always seem to be narrower than the archivist would have them? They lie in the background history of the term itself. We might have known that in the end we would have to go to the historians for an understanding of the situation. It is simply that originally both the noun "records" and the adjective "public" had much narrower meaning than they have today, and the common-law precedents, which are still so powerful, were established when these narrower meanings governed.

The verb "to record," as defined by Dr. Samuel Johnson in 1755, had only one very simple meaning: "To register anything so that its memory may not be lost." His definition for the noun is likewise simple: "register; authentik memorial." [31] All through early English history the word held closely to its original meaning, that of a writing deliberately made for recall purposes, or "record" purposes, as we would say today.[32] These writings were made for the most part on rolls (enrollment), in blank books, known usually as registers (registration), or in other special books of entry, such as account books. Documents received were not records unless they were copied on the rolls or in the books, when they were "recorded" or "on record." Documents thus admitted to the record had special legal standing thenceforth, while documents not so recorded were mere exhibits and had to be especially proved anew each time to be noticed judicially. One made a careful distinction between the record and the paper recorded.[33]

[31] *A Dictionary of the English Language* (London, 1755). See also the definitions in N. Bailey, *An Universal Etymological English Dictionary* (13th ed., London, 1749). Compare the many and complex definitions of "record" in dictionaries today.

[32] The English word was derived from the Latin verb *"recordari"* (noun, *recordum*), which meant to remember, to recall (literally, to recall by heart or "learn by heart"), and was commonly used in this sense in England in the 1300's. The transformations and additions in meaning in succeeding centuries can be conveniently traced in the many quotations to be found in the *Oxford English Dictionary*, 8:265-267 (Oxford, 1933).

[33] We are describing here, of course, the records of the common-law "Courts of Record," for, according to the law dictionaries, "*Records* are restrained to such Courts only, and do not extend to the Rolls of inferior Courts, the Registries of Proceedings whereof are not properly called *Records*." The language is practically the same in

As business increased in the courts and in other offices of His Majesty's Government, it appeared that the actual copying of all these petitions, affidavits, and other original papers became an almost impossible task. A long-established record system was breaking down. So there was a great compromise. The receipt of the document, briefly described, was noted on the record, and the original itself was preserved and filed "as of record." In this way certain separate original papers came to be considered as part of the records and were preserved as such. But ordinary incoming papers were not part of the formal records.[34] These legal distinctions are very important. They governed in England for centuries and had a tendency to govern beyond the legal world. They carried over into law and administration in the United States; and, although they have been discarded generally in ordinary administrative offices, they still exist in courts; and they exercise, I believe, an important, if not controlling, influence on the legal mind in its thinking about the term "records."

What were the ordinary, loose, incoming papers, received in an office called if not "records"? They were just "papers," or "documents," or "files." "Documents" were at first a special class of papers intended to prove something, in line with the derivation from the Latin verb *docere* ("to show"), but looser usage gradually prevailed until the term was common for all the accumulating papers in an office that supplemented the records.[35] "Files" are merely "papers" or "documents" in order. As early as 1670, in his *Glossographia; or a Dictionary Interpreting the Hard Words,* Thomas Blount defined file as "a thread or wyer whereon Writs or other Exhibits in Courts are fastened for the more safe keeping of them," and Johnson, almost a century later, defined it as "a line on

Giles Jacobs, *A New Law Dictionary* . . . (London, 1729), Dr. John Cowel, *A Law Dictionary* . . . (London, 1727), and in others of the time, for they all seem to go back through Blackstone to Sir Edward Coke, the fountainhead of so much English legal terminology. The County Courts, Hundred Courts, and Courts Baron were not Courts of Record. Only the King's Courts had that status, including "the King in Council" and "the King in Parliament"; their records only were "records" to the law and it was only their status as evidence that motivated these definitions. See F. S. Thomas, *Hand-book to the Public Records,* p. ix-xi (London, 1853), and R. B. Wernham, "The Public Records in the Sixteenth and Seventeenth Centuries," in *English Historical Scholarship in the Sixteenth and Seventeenth Centuries* (London and New York, 1956).

[34] Thomas, *op. cit.,* p. xii-xiii, and law dictionaries. There is a tendency in modern studies of the records by archivists and historians to confuse the picture with use of terms in the modern sense. The further one can go back in contemporary sources, the clearer the meanings seem to become. Unfortunately there was not time for the purposes of this paper to examine actual reports of cases.

[35] Some loose papers were called "instruments" if they were one of a number of different legal papers intended to initiate, effect, or accomplish some legal action.

which papers are strung to keep them in order." [36] This sense of order is always found associated with the word. Usually the order is simply chronological as received, but Johnson prints a quotation from Francis Bacon in which the latter advocates that an hour be set aside each day to rank the petitions received "into several files, according to the subject matters," so that we may be sure that "classified files" go back at least to Elizabethan days.[37]

Thus we might suggest that in England, in earlier times at least, the "records" plus the "files" made up the body of written material in an office of government, which we tend to call its "archives." Although the eminent British archivist and former Deputy Keeper of the Public Records, Sir Hilary Jenkinson, may insist that the terms "records" and "archives" are at present used interchangeably in England (in arguing against a recent American tendency to define "archives" as something less than "records" in the sense that they are only those records that have permanent value), he probably would agree that they were not always synonymous and that in fact "records" was the more limited term.[38] The absence in English law of any term meaning the whole body of writings in the custody of the Government may be suggested as one reason why so many Government archives turned up in private custody in England (in contrast to European countries under the civil law where the term "archives" had strong standing and sharper definition). There never existed in terminology or in law or in the official mind a clear-cut boundary between the Government's papers and private papers. The law was careful only about "records" in the narrower sense — and we in this country have inherited this vagueness and uncertainty.

But it is the adjective "public" that has made this concept of "public records" still narrower in its background. We have sensed this all through the court interpretations, and we are about ready to

[36] *Dictionary* (London, 1755). Johnson gives an example: *"to file a bill* is to offer it in its order to the notice of the judge."

[37] *Ibid.*

[38] *Guide to the Public Records, Part 1: Introductory* (London, 1949), p. 1, and "Modern Archives, Some Reflexions" in *Journal of the Society of Archivists,* 1:148, especially note 2 (Apr. 1957). Ernst Posner first called my attention to the frequency with which the phrase "records and papers," or some equivalent, is to be found in the source literature of the time, both in England and in the Colonies. For instance, upon the building of the fourth state house in Virginia in 1685 the House of Burgesses insisted on a special room for the secretary, properly protected, "for ye placing ye Records, and other papers in," and, after the capitol in Williamsburg had burned in 1747, a committee of the House of Burgesses considered a bill for the erection of a building especially for the "Preservation of the Public Records and Papers of this Colony." For these references, and others not quoted, I am indebted to a term paper prepared by Edna Jenson on "The Record Making Practices of Colonial Virginia."

agree with Humpty Dumpty that adjectives are the easiest of all words to make do what you want them to do. The first and oldest and the only meaning of "public" current in England until almost the nineteenth century is in the sense of being open, accessible, patent, and available to everyone, as in such parallel terms as public meetings, public worship, public auctions, or a public house, with public rooms, serving public meals at a public table. In our own country in earlier days, we would have been confronted too with public wash basins, public towels and even public combs, as we are today with public telephones, public carriers, and public utilities. All of these are privately owned, if ownership is involved, and are public only in the sense that they are expected to be available to all the people. It was in this sense that the term "public records" was used in England when common-law precedents were being established.[39]

The second meaning is in the sense of being owned or supported by the people forming the body politic. Thus we have the terms public treasury, public debt, public charge, public lands, public roads, public works, public office, and many others. The real confusion comes with terms of a third kind beginning with "public," that can be and are used — and therefore can be interpreted — either way. The term "public building," for example, could mean a building either open to the public or owned by the public, but it is more likely to be used now in the second sense, and this second usage was common in the United States by the 1790's, when there was much discussion concerning the public buildings in the new Federal District.[40] One is uncertain, without further study, of what is meant in colonial statutes by such terms as "public landings," "public warehouses," or "public ferries," although such terms used

[39] My discussion of the word "public" in this section of the paper is based on the treatment given this word and related words and phrases in the *Oxford English Dictionary* (1933 ed.), especially 8:1558-1561, for the English usage, and in the *Dictionary of American English on Historical Principles* (Chicago, 1942), 3:1849-1853, for the American usage, plus many examples of usage that I have collected myself in the past year. Both dictionaries are replete with revealing quotations from contemporary writings.

[40] See letters and documents in Saul K. Padover, ed., *Thomas Jefferson and the National Capital* (Washington, 1946). Examples are in Washington's letters to Jefferson, Mar. 16, Mar. 31, and Aug. 29, all in 1791 (p. 50, 55, and 68). Jefferson first refers to the "Commissioners for the public buildings" in a letter of Aug. 22, 1791, to the Treasurer of Maryland (p. 64), and the phrase is afterwards used commonly. An Act passed Mar. 3, 1791, relating to the permanent seat of Government provides that the "public buildings" shall be located on the Maryland side of the Potomac (1 Stat. 215). But Jefferson had used the phrase "public buildings" as early as 1779 in connection with their construction in the new State capital of Richmond (J. P. Boyd, ed., *The Papers of Thomas Jefferson,* 3:18).

today would probably refer to publicly owned facilities.[41] The term "public schools" is an interesting example of how in England the older meaning — that is, of being open to public use for a fee — has been retained, but in the United States "public schools" mean those publicly owned and publicly operated as well.[42] The law today is in constant hot water in certain areas because of the double meaning of the term "public." An example of interest to our Society is in connection with the term "public library." Are the Morgan Library in New York City and the Filson Club Library in Louisville, Kentucky, public libraries? They claimed tax exemption on that basis. They won their cases by showing that their holdings and facilities are open to the public — in other words, by going back to the older interpretation. More power to them, but I still say the courts are confused. Possibly the courts should go the whole way and rule that the manuscript holdings of these institutions are "public papers" to the extent that they are open to the public.[43] The term "public records" is caught up in the same confusion in popular usage today, but in the law courts the precedents are so heavily weighted on the side of the old meaning that one must hesitate and consider well before taking a case involving custody of public records into the courts.

I should like to see much closer research given to the meaning of this adjective "public," in the records and writings not only of the early years of the Federal period but the late colonial period. How could "public" mean belonging to the public until the people were sovereign or felt themselves so? In England, even though the government had evolved into a limited or constitutional monarchy, everything was theoretically the King's. The whole government had

[41] Public ferries and public warehouses were in colonial times privately owned but licensed and controlled usually by the colonial governments. I assumed at first that public landings were publicly owned, but it appears that they were on private lands and so were the first roads to them. They were in the nature of rights-of-way over private lands to permit settlers in the interior access to the water highways. It is easy to be misled by reading the later meaning into the term as used in colonial times.

[42] Again, "public schools" are met with frequently in colonial legislation, but always, apparently, with the English sense of the term intended. In 1636, for example, the Massachusetts Court voted for "erecting a public schooll or Colledge in Cambridge," thus founding Harvard (quoted in *Dictionary of American English,* p. 1852, with other examples). Public schools in the American sense were at first often called "free public schools" in the United States. The word "free" was then dropped and the adjective "public" called upon to do double duty, as it so often is.

[43] *People ex. rel. Pierpont Morgan Library* v. *Miller et al.,* (1941) 29 N. Y. S. 2d. 445 (or 177 Misc. 144), and *Filson Club Quarterly,* 31:55 (1957). See also *Kerr et al.* v. *Enoch Pratt Free Library of Baltimore City et al.,* 54 F. Supp. 514 (1944) and 149 F. 2d. 212-16 (1945), and Earl C. Borgeson, "Libraries of Non-Tax Supported Institutions," in *Library Trends,* 6:496-502 (Apr. 1958).

simply expanded from the King's Court, and the records of government were His Majesty's records just as those creating them were His Majesty's servants. The judicial records of the King's courts — dealing, as they did, with the people's rights, properties, and obligations, and being the records of judicial determinations after investigation and proofs — were considered of the highest importance and authority.[44] They were referred to as the "perpetual evidences of the people" in the petition of the Commons to Edward III that he "ordain by statute that search and exemplification may be made for all persons of any record which in any manner concerns them, as well what makes against the King as against others." [45] This petition Edward III granted in 1373, thus making the records of the King's courts "public records"; and this became henceforth one of the great rights of the English people. But let us still understand that this right and any later extensions of it were only by sovereign grace and favor. They were "public records" by right of access, but they never could be public records by right of ownership. "Common" rather than "public" would in England have been the term used for proprietorship or use by the commonality, but any such proprietorship or other right would still have derived from the King as sovereign.

Change in content or meaning of the adjective "public," there-

[44] It must be understood that the law on the statute books in early England was but a very small part of the law people lived under, and that the common law regulating their daily life and their property holdings was embodied in these public records which thus had to be available to the people or, rather, to their agents, the lawyers. The "public records" were the equivalent of statutes in other countries. Statutory law in England needed only to deal with special events and circumstances important to the realm — some special tax for an emergency, some special concession, some adjustment to special circumstances. It represented only superstructure and patching to the common law foundation. The old precedents were never too old — in fact, the more ancient, the more authoritative, since the common law, being the ideal law, was unchanging and perfect. It is true judicial decisions only approached the elucidation of the ideal, but an interpretation that had persisted since the days of Edward I was obviously a closer reflection of eternal truth and carried the greater weight. The control of these "public records" was in the hands of the lawyers and judges, who were the priests of the common law. They established their own definitions. If Parliament ever thought to control or replace this law by statute law, it gave up the attempt about the fifteenth century. The King gave up in the seventeenth century, but he had lost the initiative when in 1373 he had granted the people the right of access to the records of his courts. It was by using the rights established by precedent and recorded in the "public records" as leverage constantly exerted through their legal system that the people won increasing control and, eventually, practical if not theoretical sovereignty in England. One has to understand all this, I feel, to understand what the "public records" meant in England.

[45] Edward III, no. 43. Published in original French in *Rotuli Parliamentorum,* 2:314 (6 vols., London, 1777). The quotation is from the English translation in F. S. Thomas, *Hand-book to the Public Records,* p. xii (1853). Legislation then was in the form of a petition to the King to which he had given assent.

fore, could be significant in charting the change of the public mind in the Colonies as to the location of sovereignty, whether in a monarch or in the people. Certainly, before the Revolution was over, the adjective "public" was doing new duty in America. We have "public accounts," the "public service," "public concerns," "public property," "public despatches," and a host of other such phrases.[46] Washington, writing from Mount Vernon on the first day of the year 1784 to his recording secretary, Richard Varick, acknowledges the safe receipt of the "public and other papers" which Washington had left at Army headquarters for Varick to pack up and send to him at Mount Vernon.[47] These were, of course, the headquarters papers of his Revolutionary command, for which the Continental Congress then could provide no better home. Two years earlier the great man already had been approached by the ever-present and ever-zealous historian, represented in this case by the Rev. William Gordon, who solicited access to these records for his proposed history of the American Revolution. Washington had replied that he regarded his papers as Commander in Chief "as a species of Public Property, sacred in my hands." He would comply with Gordon's request with pleasure, he added, "When the Congress then shall open their registers, and say it is proper for the Servants of the public to do so." [48]

Without amassing additional illustrative quotations at this time, I suggest that here in Philadelphia and elsewhere in the new States, where the people now were sovereign, the concept of "public records" was being given new meaning. Let us search for the evidence as it is revealed in the writings of the Revolutionary statesmen and the architects of the new Republic as these writings are now being published in full and in context for the first time. I suggest further that this new concept may have been exported, perhaps unconsciously, to France, where it may have been responsible in part for

[46] These terms are frequently encountered in Washington's *Writings* (Fitzpatrick ed.), Jefferson's *Papers* (Boyd ed.), and the *Journals of the Continental Congress* (Library of Congress ed., 34 vols.). A further survey of the employment of such terms in these years, not only in the Continental service but in the Colonies as they are transformed into States, seems to me desirable in order to trace the appearance of new content in the adjective "public."

[47] *Writings* (Fitzpatrick ed.), 27:289. Several months earlier Washington had written to Daniel Parker to procure on the "public account" a number of articles, including six trunks for transporting his "Books of record and Papers with safety" from Newburgh to Mt. Vernon (*Ibid.*, 27:20-21).

[48] *Ibid.*, 25:288. In 1798 Washington wrote to Secretary of War McHenry that he was devoting all his leisure time "to the arrangement and overhaul of my voluminous Public Papers, Civil and Military, that, they may go into secure deposits, and hereafter, into hands, that may be able to seperate the grain from the chaff" (26:373).

the wholly new attitude toward archives displayed by the Revolutionary leaders, who, in establishing the National Archives of France, decreed that the records should belong to the people.[49] I suggest also that the American concept of "public records" may, somewhat later and through various channels, have reached England and, slowly of course, worked a change in the concept of "public records" held by the administrator and the scholar.[50] That held by judge and barrister probably has not noticeably altered even today. However narrow the interpretation of the term may still have been when the Public Record Office was established in 1838, it had been broadened by 1853. In that year, when the first *Hand-book to the Public Records* was published, its author, Thomas Francis Sheppard, who had served prominently in the office from its beginning, stated that public records "in fact comprise all documents of every description which belong to Her Majesty in right of her Crown." [51]

Meanwhile, on this side of the Atlantic, the founders of our Re-

[49] Further research is needed on this point, which I make here only as a suggestion. Positive documentary proof may be difficult to produce. The new attitude referred to was expressed chiefly in the law of June 25, 1794 (Messidor 7, of the year II). See Ernst Posner, "Some Aspects of Archival Development Since the French Revolution," in *American Archivist,* 3:161-163 (July 1940), for a brief statement of French archival innovations of the Revolution and their influence. The view that archives belong to the citizens and should be open to them goes along, of course, with all the other concepts associated with popular sovereignty. One can only suggest that hundreds of French army officers, from Lafayette down, working with American officers and soldiers, had become schooled in republicanism, and were familiar with the concept of public property. The immense influence of Thomas Paine and his writings and of Jefferson and his views needs only to be suggested. There were scores of lesser channels, including French travelers like Brissot de Warville. See B. Faÿ, *The Revolutionary Spirit in France and America* (London, 1928), esp. p. 253-276, and the recent impressive volume by R. R. Palmer of Princeton, entitled the *Age of the Democratic Revolution: A Political History of Europe and America, 1760-1800* (Princeton, 1959), esp. ch. 9.

[50] The best discussion of the change in the meaning of this term is to be found on p. 8-15 of the *Committee on Departmental Records Report,* Sir James Grigg, Chairman, presented to Parliament in July, 1954 (Cmd. 9163. 88 p.). I find myself questioning the Committee's interpretations at many points, however. I think that both administrators and archivists from 1800 on tended to take the broader view of "public records," and that their problem between 1838 and 1852 was to make the Public Records Act of 1838, which was both confused and ambiguous, work in practice as both wanted it to work and at the same time ensure themselves against being tripped by any who might advance the narrower interpretation in their own interests. They were well aware of what they were doing, and were also very successful, although they may not have realized theirs was a battle between the older English interpretation of "public records" and the broader popular-sovereignty interpretation of the same term, the latter less recognizable of course because masked under some such language as "belonging to Her Majesty."

[51] *Op. cit.,* p. xiii. This language echoed that used in the Order in Council in 1852, which placed "all Records belonging to Her Majesty" under the charge and superintendence of the Master of the Rolls and so made them subject to the provisions of the Public Records Act of 1838.

public, who had given new meaning to the word "public," and had created the first "public records" on the national level, passed from the scene. The common law, against which they were often rebellious because it seemed to preserve so much that was inappropriate to a democracy, regained its influence in our legal system in the first half of the nineteenth century, under the leadership of Chancellor James Kent and Justice Joseph Story.[52] The common-law interpretations of "public records" were taken over uncritically and without challenge, until, as in England, historians and archivists entered upon the scene. They had the choice of reinterpreting this stubborn old term or of substituting the more professional term "archives" to describe the body of records for which they professionally were responsible. They are still trying to choose.

Perhaps we should have turned in the first place to the historian for light. Like the psychiatrist, who, in theory at least, probes our individual past, so the historian probes our group past to help us understand how, unwittingly, we got into the state we are in. Sometimes, if not always, by clearing away the fog, he helps us to see what should be done about it.

Our question is still not answered. Who knows what "public records" are? I can tell you only who actually are responsible for what they are, and who, therefore, ought to know. This responsibility is dual. I name first the administrator in his role as the creator of the body of documentation of the agency or activity that he administers, and second the archivist, who tends and prunes this body of documentation and preserves and lives with and services daily that part which is of permanent value.

Charles Thomson, for example, decided what the records of the Continental Congress would be. As the Secretary of that body for the 15 years of its existence, he created "the birth-records of a nation." [53] He was his own records manager, his own organization and methods man, his own assistant secretary for administration, and his own archivist, these other positions as modern specialties being then all comprehended within the title of Secretary. In general we probably would agree that Thomson served the infant nation conscientiously and well in his complicated role. How different it *might* have been!

Our Federal records act and some of our State acts place the

[52] Discussions of the history of the common law in America are in Richard B. Morris, *Studies in the History of American Law, passim* (New York, 1930); and Merle Curti, *The Growth of American Thought,* p. 237-238 (2d. ed., 1951).

[53] The phrase is used in the sketch of Thomson by E. C. Burnett in the *Dictionary of American Biography,* 18:481-482.

responsibility for the creation of proper "public records" exactly where it must be — upon the heads of administrative agencies and departments. I have no doubt whatsoever that archivists in the role of records managers have an important advisory responsibility in this area. The administrative heads will need to lean upon them and draw upon their knowledge and experience. To fulfill properly this role we need to know what "public records" ought to be. What does the administrator need? What must the Government as a whole have? What does the law want? What does the public expect its "public records" to be?

We do not find the chemist consulting a lawyer as to the nature of that with which he works. The physician does not ask the lawyer about the nature of disease. Instead, the law normally turns to experts for guidance when it enters such fields of specialization. Let the law continue, as it will, to exercise controls in the matter of "public records" as evidence. But as to the nature and bounds of "public records," who then knows?

I think the archivist best knows. He lives and works with the records systems of the past. He expects to take over and administer those of the present and the future. He is in the best position to advise the administrators, in their role as creators of the "public records," as to what they ought to be.

In this paper I have tried only to clear away the brush and brambles that were in our way. Let us proceed soon to locate the cornerstones and mark the boundaries.

Not Yet Has the Time Arrived

The responsibility of the work, and the yet imperfect and crude state of the facts and data are my excuse for having thus far delayed my report so far beyond the usual time.

In this case, while I have endeavored and desired to be quick and prompt, yet I had rather be accurate and useful, if in my power, than meet the requirements of the department in having my report published in the "reports."

Not yet, indeed, has the time arrived to write this history.

The facts, or rather reports of facts, are in a confused and imperfect state.

— Report of the Sioux Agent, Thomas J. Galbraith, 1862 (printed as a part of *H. Ex. Doc.* 68, 37th Cong., 3d sess.).