Court Records—Orphans Among Archives

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BECAUSE ours is, and derives from, a government of law, with its accompanying judicial reliance on precedent, the records and papers produced by our courts have always been held in reverence as the "tablets of the law." I suppose many of us have been warned against the disposal or even evaluation of some court record by the admonition, always in hushed tones, that it was a "Court Record." Perhaps with some brashness, we in the Archives Section of the Philadelphia Department of Records decided to include an inventory of court records in the general inventory of the city's records that we made in 1952, even though the court records were not under our jurisdiction under the terms of the city charter. We went further and evaluated them for retention and disposal as we had done with all of the other records, received concurrence in our recommendations from the court's employees as well as highly respected judges — and, of course, nothing happened.

In 1958, however, with the accession to office of an energetic clerk of the Quarter Sessions Court, who was determined to modernize the operation of his office by finding ways to do the job instead of waiting to be prodded and then hiding behind a body of ambiguous statutes, the records job went ahead full throttle. The clerk recognized that he had a records problem, not a legal one, and so asked archivists, not lawyers, to cope with it. We began by bringing the 1952 inventory of his records up to date. We then reviewed our evaluations in consultation with both unit supervisors and the clerks who create and use the records. Always, however, we put the burden on them to justify any recommendations they made that seemed unreasonable to us. Most important, we were supported in this attitude by the clerk himself.

We made our evaluations as we would for records of any type, considering the need of the record in the substantive work of the office. Since the substantive work flows from the criminal law, we consulted with the counsel for the clerk as to what circumstances in

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the law could arise requiring these records and then made our tentative conclusions as to retention value. In other words, we never brought up the subject of statutory requirements until we had an evaluation based on substantive or administrative need. After we had this type of evaluation we inquired whether there were express statutory mandates that unequivocally set minimum retention requirements for specific record classes.

An example, I think, would clarify this point. The long-term value of a bill of indictment, after it performs its immediate constitutional function of informing the accused of the nature and scope of the charges against him, derives from the fact that it can be required if a case should be reopened or if there should be a pardon application for a conviction many years before. I am assuming now, of course, that the appeal process has been resolved by the highest tribunal in the jurisdiction. The Supreme Court of the United States in a recent case reopened a 30-year-old conviction. This is the longest period after which a case has been reopened, although there is no statute limiting the period for reopening a criminal conviction for denial of due process. We set a 50-year retention period for a bill of indictment, which met this substantive requirement and covered the longest period after which there was likely to be an application for pardon. On this basis we were able ultimately to dispose of over 100 years of existing bills of indictment, subject to screening to retain any of archival value. The value of this approach to court records is that, by the time we reach the question of statutory requirements, we have at least allayed any fears that we throw away needed records. Then, if there is no express statutory mandate for the record class — as there rarely is, except for records concerning titles to land — the battle is won. Our schedule set up periods for retention in the administrative area, allowed for transfer to a record center when and if desirable, and then permitted either ultimate disposal or permanent archival retention.

We made no recommendations for microfilming any records. By dealing with the question of microfilming at the point at which it should be done, after evaluation for retention or disposal, we reached the conclusion that no microfilming was necessary. We based this conclusion on the theory that, without fairly active reference requirements, storage is more satisfactory than filming. This premise is qualified when there is a problem of security or great volume. Neither of these aspects was involved here. The clerk felt that storage would provide as much security as he required at present, since the storage area is in a building about a mile from his

current records. Much of the volume of annual accumulation would be offset by the annual disposals as retention periods lapsed. Hence, although about 6,000 cubic feet of records required storage and there would be an annual accumulation of several hundred cubic feet, we felt we had a manageable space situation.

From one point of view, this professional aspect was almost the easiest part of the job. As usual, many of the records had been misfiled; but, because of the huge number of individual documents involved and the long period of time over which this condition had been building up, proper integration of the misfiled material into the files was a sizable job. In the interests of finishing our part of the project within a reasonable time, we simply made an elementary arrangement of this material and then transferred it to the record center to be integrated. This incidentally had the unexpected advantage of forcefully impressing the clerk's new employees in the center with the necessity for maintaining strict control of the records in the center and those sent to the offices for use. During the transfer process we did work in so much of the material as we conveniently could without unduly delaying the transfer. I have alluded several times to record storage. Although space limitations in our own center prevented us from taking into it the large volume of the clerk's records that required storage, we were able as a result of our work to clear enough space belonging to the clerk to provide storage for both the current need and at least 20 years' expansion. Our basic policy is to centralize noncurrent records in one area because of the consequent efficiency and economy of operation, but we decided to set up a center in this area, to be administered by the clerk, rather than hamper the effectiveness of the entire program. By lucky chance the space was in the same building just two floors above our own center; this meant that our experienced people were handy to give the clerk's employees, inexperienced in administering this type of operation, the benefit of our knowledge on a day-to-day basis until they were able to carry out the operation independently. When the installation and transfer were completed, the clerk was pleased with the change from a disorderly, dusty, inaccessible file room to the usual neat, clean, center arrangement.

We treated differently those records we believed to be of archival value. Although we had no jurisdiction over any of the clerk's records, we were the only public agency in the local government that could meet properly the needs of those researchers who would use the records of archival value. Though the clerk might be able to store them properly, he did not have, nor could he or any of his

successors expect to have, employees with specialized education, training, or experience to service them. In addition, if we took custody of these records in our Municipal Archives, they would be centralized with the other local records of archival value. The clerk, understanding this situation, gave us physical custody of the records although they still remained under his jurisdiction. This arrangement was similar to arrangements we had with other departments of the city government whereby we retain only physical custody of their records in either our Record Center or Archives. The important thing is to have the records properly maintained and serviced in a central repository, accessible and convenient to those who wish to use them, *not* those to whom, technically, the records belong. We, on our part, agreed to determine and arrange for processing requirements, paying the cost from our budget.

The immediate, concrete results of the project were highly satisfactory both to the clerk and to us. The clerk realized a space-cost saving of $8,000 annually and an immediate saving, on filing equipment released for further use, of about $2,000. Twenty-two tons of obsolete records were disposed of. The space cleared was sufficient to release two full rooms for use by other city departments as well as to set up the clerk's record center. In addition the clerk was able to renovate his own administrative area, transforming it from cramped quarters to a comfortable work area. We converted a poorly arranged, limited file room to an orderly record center, using less space than had been used formerly to house twice as many records. This was accomplished at a total cost of $3,500 for shelving and storage containers. No additional personnel was required. The same clerks were able to handle the records because of their greater accessibility and a more convenient filing system developed by our Records Management Section. In the administrative area, open-shelf filing, better suited to the new filing arrangement, replaced the "county box," a nineteenth-century file container.

The clerk showed the same interest in a total forms-control program as he had in his record scheduling; he did not allow traditional legal conservatism to prevent him from reviewing for modernization his entire stock of forms. It is not necessary in this paper to describe the comprehensive forms-control job that was done, but all forms were reviewed and if necessary simplified, consolidated, or revised. The two most important records created in the process of criminal law are the bill of indictment and the docket. The form for each was revised. A standard form for the bill was designed, replacing the individual forms used previously for each separate

offense. We abandoned the old prebound ledger-type docket and substituted a tabulating run sheet in post binders. The important thing here is that, as in the case of records disposition, the clerk took the position that he had the right to change procedure without getting a statute passed or obtaining a court rule or even consulting the local bar association. As a matter of good public relations, however, he did keep both the bar association and the judges informed of what he was doing, but he left no doubt in anyone's mind about his exclusive right to determine these matters.

There are several other offices in the local government whose work is interrelated with that of the Clerk's Office. These include the offices of district attorney and the city solicitor, as well as our Tax Board, the last because of some special jurisdiction of our Quarter Sessions Court. The results of our evaluation of the clerk's records and forms led to a further reevaluation of certain records and forms in these related offices. We standardized the forms commonly used and in some cases instituted changes in procedure in order better to integrate related functions. The clerk's copy of his records was established as the record copy and the copies in the other offices as duplicates, so that their retention periods were considerably reduced. This resulted in a sizable disposal of records in these other offices. The clerk's copy had always been considered the record copy and the one required in court, but we were able to persuade the other offices to dispose of their copies only because they now had confidence that they would be able to get what they wanted rapidly. They retained their copies only so long as necessary to serve their immediate administrative needs. Thus, the district attorney retained his copy of the bill of indictment until the trial and appeal period was over instead of retaining it for the same reasons and the same length of time as the clerk. He and other officials had formerly kept their copies to make sure they could get what they wanted as they needed it; now they were confident of being able to use the clerk's official copy if the need for it arose.

We accessioned a choice group of material for the Municipal Archives in accordance with the above-mentioned arrangement. These include a continuous group of dockets ranging from 1752 to 1865, our agreed-upon cutoff date. The Quarter Sessions Court has jurisdiction over all road openings, and thus we got the road petitions dating back to 1682, when William Penn founded the Province. Among these were petitions written by many persons who played significant roles in the development of Pennsylvania and the Nation as well as in local history. These road petitions also reflected the

complete physical development of the City and County of Philadelphia. I think the briefest way to give an idea of the richness and variety of material accessioned is simply to note that the local bar association was able to display a highly successful Law Day exhibit, using entirely records we had accessioned for our Archives. The exhibit traced the entire criminal law process, from arrest to commitment in prison, with each step illustrated by a document that not only made the process clear but also had intrinsic historical interest. The information in this body of records has enabled us to fill gaps in our knowledge of the legal history of the city and county and even to correct what we learned were errors or misconceptions in the best histories on the subject.

We have been describing a comprehensive records management program. What gives this particular project an added dimension, however, is that the records involved were court records and that, even so, we were able to get the authorization to effectuate our recommendations. We reviewed State constitutional and statutory provisions relevant to the clerk's office and satisfied ourselves that, at least to the nonlegal eye, there was nothing in the law to prevent the clerk, with the permission of the court, from treating the records as he saw fit. In fact, the implication seemed to be that he had final responsibility for his records. We submitted a petition to the court requesting approval of the schedule, which we included as an exhibit. The petition also included a joinder bearing the approval of the State Historical and Museum Commission and the State Records Officer, as required by the City-County-State complex of relationships. The petition was granted by the chairman of the Criminal Business Committee of the Board of Judges. This judge, a progressive jurist and judicial administrator, helped us greatly throughout the project, giving freely of his legal counsel and using his influence to aid the project.

The significant aspect of this project with reference to legal obstacles was the denial of their existence, not an attempt to battle with them. So far as we could ascertain there are no express statutory requirements in Pennsylvania for retention of criminal court records except for those affecting interests in land. Although we did not fully search other State and local law, we believe that this probably is the usual situation. We took the position that, in the absence of express limitations on its power, the inherent power of the court to make its own rules and manage its internal business — coupled with the inherent power of the custodian of the records to maintain them in the best manner possible, commensurate with the need for

them flowing from the judicial process — was sufficient to enable the clerk, with court approval, to set up proper and reasonable schedules providing for automatic, continuing disposal. In other words, we threw the burden of proof on those who sought to deny this power. The court agreed with us. We were able to get the job done and the petition granted because the clerk, with the support of the judges, wanted to do it. On the other hand, the custodian of our civil court records took the position that he did not have the authority to do anything without express statutory authorization. Fortunately, with the aid of the above-mentioned judge, we were able to get this express statutory authority for the prothonotary in the last session of the legislature. Although we concur generally with this statute we feel that it has the one basic defect of most legislation dealing with records. It arbitrarily sets a minimum retention period, in this case 25 years. We object to any minimum statutory period. We feel that the retention period should be based solely on the administrative, legal, or archival value of the particular record class. The four-year minimum retention period in our own city charter is the only defect in an otherwise highly satisfactory instrument.

The soundest and most sensible statement I have seen regarding the statutory problems involved in records is that of E. E. Burke in his lead article in the July 1959 issue of the *American Archivist,* in which he asserts that the only legislation required is that necessary for the grant of funds and for defining the authority of the records officer. In reference to his third suggestion, concerning legislative authorization to transfer the custody of court records, our situation did not require this. It was not necessary to authorize transfer, as the clerk merely shifted the records to another area under his own control. Even when we take records into our own Center or Archives, however — and this applies to the court records we have there — they often remain technically under the jurisdiction of the office that created them, while we have merely physical custody. This may appear to be an unsatisfactory arrangement, but during our eight years' experience in maintaining tens of thousands of cubic feet of records, we have never had an instance of challenge to our authority to handle them as we pleased — once we got them. We avoid any interference by taking into the Center only truly noncurrent records. All that this requires is careful evaluation. I think that, if the records officer forcefully makes his position clear before accession and if the records are carefully evaluated to make sure of their noncurrent status, the danger is more apparent than real. Therefore it seems to me more satisfactory to use an arrangement of this type

rather than wait for legislation authorizing transfer. Legislation itself has several dangers. Even if the necessity for it is not alleged simply to put off doing something, it often takes a good deal of time to get the requisite statute drawn up and passed. Second, the law often is not what you want anyway, usually hindering more than helping. Third, and most important, it encourages the responsible officer — and this includes officers in charge of court records as well — to think in terms of legislation when it is not necessary and is even destructive to sound records management.

The conclusion from all this, and I think it applies generally, is that the legal problems surrounding the retention and disposal of court records exist largely in the minds of overcautious custodians of these records or of people who simply are not interested in doing anything and are willing to fight to preserve their right to do nothing. Our argument is that court records should be treated like the records created by any other office. The job can be done for court records, from the creation of the forms to ultimate disposal or archival accession, if those in authority want to get it done. Generally speaking, there is nothing in the law to hinder or prevent it.