The Administration of Access to Confidential Records in State Archives: Common Practices and the Need for a Model Law

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Abstract: According to the "Archivist's Code," issued in 1955 by the Archivist of the United States, the archivist is to promote "access to records to the fullest extent consistent with the public interest," always observing proper restrictions on the use of records and working for the increase and diffusion of knowledge. The author examines the several approaches and practices used by fourteen state archival programs to administer access to restricted records. Included are in-depth studies of Indiana and Michigan. Utilizing the results of this survey and building upon the studies of Virginia Stewart and others, the author proposes that archivists/records administrators become more active on the access question and that they better appreciate the program objectives to be achieved when addressing access administration. The Georgia Records Act is offered as a basis for the development by NAGARA and SAA of a comprehensive model law and a more systematic understanding of the administration of access to public records.

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This article was written as a product of the author's participation in the Research Fellowship Program for Study of Modern Archives administered by the Bentley Historical Library, University of Michigan, and funded in 1985 by the Andrew W. Mellon Foundation and the Earhart Foundation of Ann Arbor. The author gratefully acknowledges the encouragement and suggestions of Richard Cox, Larry Hackman, Alice Robbin, and Donna Munger — as well as Francis X. Blouin, Jr., and William K. Wallach of the Bentley staff. Special thanks to my colleagues from the fourteen states who cooperated and responded so well to my many inquiries.

THIRTY YEARS AGO T. R. Schellenberg observed that future archivists' work would be determined by the character of the historical materials, in particular their volume, organic character, and diverse form and content.[1] More recently, F. Gerald Ham, in his widely read "Archival Strategies for the Post-Custodial Era," prescribed two additional postulates: the work of the archivist is determined by the "nature of the material" and "we are what we accession and process." Ham claimed, furthermore, that in this "computer age," archivists are conditioned by their environment. "Our work," he wrote, "is also determined by the way our society records, uses, stores, and disposes of information."[2]

The administration of access to confidential or restricted records is a special challenge in a modern, pluralistic society. The use of data banks, information programming, and legislated openness and privacy have ushered in a new era of archival access issues. While the concepts of confidentiality and restricted access are not new, the need for archivists to fashion strategies to protect personal privacy in the records they acquire is new. More than ever they are obligated to balance access to records on the one hand against protection of individual rights and interests on the other. Unless state archivists more actively manage the archival record and work with records creators, these matters will become even more vexing during the remainder of this century.[3] At a time of potential government abuse in the form of excessive restrictions, records administrators can no longer be indifferent to access issues.

The literature on access to public records and records containing confidential and personally identifiable information is relatively thin. The works of Virginia R. Stewart, Margaret L. Hedstrom, Alice Robbin, Gary M. and Trudy H. Peterson, and the SAA Task Force on Goals and Priorities (GAP) are key contributions to our general understanding of this subject.[4] This article builds on the work of these authors, analyzes several access strategies currently employed, and proposes a need for a model to administer access to confidential records. Although this study is based in part on the findings of a survey of fourteen state archival programs and on a reading of the extant literature on public

[1]T.R. Schellenberg, "The Future of the Archival Profession," *American Archivist* 22 (Winter 1959): 53.

[2]F. Gerald Ham, "Archival Strategies for the Post-Custodial Era," *American Archivist* 44 (Summer 1981): 207.

[3]For background on these larger issues, see Alice Robbin, "State Archives and Issues of Personal Privacy: Policies and Practices," *American Archivist* 49 (Spring 1986): 163–75. This article reports the results of a 1982 survey of 47 state archivists who responded to a variety of questions on the public policy issues of personal privacy and access to restricted records for social research. Also see Alice Robbin, "A Phenomenology of Decisionmaking: Implementing Information Policy in State Health and Welfare Agencies," (Ph.D. diss., University of Wisconsin, 1984), chapt. 1; G.J. Parr, "Case Records as Sources for Social History, *Archivaria* 4 (Summer 1977): 128–29; and Trudy Huskamp Peterson, "After Five Years: An Assessment of the Amended U.S. Freedom of Information Act," *American Archivist* 43 (Spring 1980): 161–68.

[4]Virginia R. Stewart, "Problems of Confidentiality in the Administration of Personal Case Records," *American Archivist* 37 (Summer 1974): 387–98; Margaret L. Hedstrom, "Computers, Privacy, and Research Access to Confidential Information," *Midwestern Archivist* 6, no. 1 (1981): 5–18; Alice Robbin, "Ambiguity, Value Choice, and Administrative Discretion When Policy and Practice Diverge in Public Organizations: A Case Study in Conflict Over Privacy and Research Access Rights," mimeographed (October 1982); Robbin, "State Archives and Issues of Personal Privacy"; Robbin, "Phenomenology of Decisionmaking"; Gary M. Peterson and Trudy Huskamp Peterson, *Archives and Manuscripts: Law* (Chicago: Society of American Archivists, 1985), especially chapts. 3–4; and *Planning for the Archival Profession: A Report of the SAA Task Force on Goals and Priorities* (Chicago: Society of American Archivists, 1986). I would like to acknowledge Robbin's willingness to share several unpublished works.

records, it is hoped that it will benefit archivists working with nonpublic records.[5]

The Post-Schellenberg Era, 1966–1986

For the purpose of this study, access is defined as the authority/right of a researcher (outside of government creators/receivers) to obtain information from or to do research in archival materials in the custody of an archives.[6] Administering access is an essential archival function. Several broad program objectives are achieved by ensuring adequate access and confidentiality in a state archival program. In general they are as follows:

(1) to create a favorable climate for maximum access;
(2) to protect the privacy rights of individuals;
(3) to meet administrative needs and address political considerations;
(4) to maintain stable, workable relationships with agencies/departments;
(5) to obtain or acquire records (restricted) on a systematic basis; and
(6) to support a documentation strategy that identifies records of a sensitive nature.

Program managers can weigh these objectives differently or even operate with a different list of objectives.

Unfortunately, despite considerable writings on access, state archivists must operate in largely uncharted territory when striving to mute the potential conflict between the right of access and the right of privacy.[7] As a representative from one state repository declared in 1979, "no statute has yet emerged that properly safeguards at once" all the necessary considerations.[8] In "a review of the laws of the fifty states on privacy, confidentiality, and open records laws on access to confidential health and social service records," Robbin recently found varying degrees of "ambivalence or uncertainty associated with implementing privacy and access laws and administrative rules." She also reported that nearly one-half of the archivists surveyed were unfamiliar with laws dealing with access.[9]

Despite appeals by the archival profession that state archivists adopt standards for administering access to

[5]Cf., Sam Sizer, "The Application of Freedom of Information and Privacy Laws to Non-Public Records," *Georgia Archive* 5 (1977): 75–83.

[6]The article is primarily concerned with records in the custody of a state archives, and not of the creating agency.

[7]For example, T.R. Schellenberg offers only a modest statement on policies governing access in *Modern Archives: Principles and Techniques* (Chicago: University of Chicago, 1956), 225–31. He essentially ignores the subject in "The Future of the Archival Profession," 49–58. More than a decade earlier Margaret Norton offered only one paragraph on the problems of administering access to public records in her 1944 presidential address to the Society of American Archivists ("Some Legal Aspects of Archives," *American Archivist* 8 [January 1945]: 1-11). Nor was it a subject considered by Ernst Posner in *American State Archives* (Chicago: University of Chicago Press, 1964). More recently, the ICA/UNESCO has been involved in or has supported numerous publications on access. Some of these titles are listed in Appendix II, "Concise Bibliography," in Michael Duchein, *Obstacles to the Access, Use and Transfer of Information from Archives: A RAMP Study* (Paris: UNESCO, 1983). See also "Code of Ethics for Archivists," *American Archivist* 43 (Fall 1980): 414–15; and "Standards for Access to Research Materials in Archival and Manuscript Repositories," reprinted in *Archives and Manuscripts: Reference and Access*, by Sue E. Holbert (Chicago: Society of American Archivists, 1977), 28-29.

[8]Larry E. Tise, introduction to position paper by Thornton W. Mitchell, "Public Access to Public Records," *Carolina Comment* 27 (March 1979): 1. For the profession's failure to address these issues, see Hedstrom, "Computers, Privacy, and Research Access," 6; and David Klaassen, "The Provenance of Social Work Case Records: Implications for Archival Appraisal and Access," *Provenance* 1 (Spring 1983): 5–39.

[9]Robbin, "State Archives and Issues of Personal Privacy," 163, 167–68.

materials in state archives, progress has been slow and uneven. The subject of access has gained prominence with archivists only since the passage of the Freedom of Information Act (FOIA) in 1966. During the last twenty years public access to public records has been assured and broadened by law; access is no longer considered a privilege or service demanded by a few. Nevertheless, the federal FOIA as amended and some state freedom of information acts exempt certain records. The number and importance of these exemptions vary from state to state. The records exempted from public inspection range from those containing modest historical documentation (e.g., state income tax returns) to records with accepted rights of individual privacy (e.g., adoptions, original birth and death records). In addition, vague open records legislation and the varying definitions of public records in general statutes temper inspections or examinations of records.[10]

The National Archives and Records Administration operates under a federal records statute and an independent act, as amended. Federal records may not be destroyed without the approval of the Archivist of the United States (44 U.S.C. 33). The Freedom of Information Act of 1966 and its amendments of 1974, 1976, and 1978 provide that an individual can request that records containing inaccurate or misleading information be amended by correcting or expunging the information. Federal privacy legislation is comprised of a series of independent acts "lying wholly outside the records statutes."[11] The National Archives, therefore, is left with no specific role to play when the originating agency legally controls the records. Because each agency administers the act independently, the federal government has become so steeped in specific rules and regulations that it is almost impossible for program specialists to keep up with the current regulations and administrative interpretations.[12] The full impact on access administration of the FOIA legislation and the subsequent 1980 Paperwork Reduction Act (P.L. 96-511), which places additional requirements on researchers, is still unknown and unassessed.[13]

No doubt, the states will want to avoid a similar myriad of laws and regulations, as well as the conflicting interpretations of the more than 150 federal laws covering records access. The emerging trend in federal policy is less sympathetic to the principles of free

[10]Trudy Huskamp Peterson, "The National Archives: Substance and Shadows, 1965–1980," in *Guardian of Heritage: Essays on the History of the National Archives*, ed. Timothy Walch (Washington: NARA, 1985), 69–72; Michael Duchein, *Obstacles to the Access, Use and Transfer of Information from Archives*, 7–14; Peterson and Peterson, *Law*, 38–44, 99; Mitchell, "Public Access to Public Records," 2–16; telephone interview with David Levine, 3 January 1986, and David Levine to Baumann, 8 January and 13 February 1986, Bentley Research Project File, Division of Archives and Manuscripts, Pennsylvania Historical and Museum Commission (hereafter cited as Bentley File, PHMC). Two recent court cases in Ohio supported the public's right to know: *Dayton Newspapers* v. *Dayton* (1976): 45 Ohio St. 2d 107, pp. 107–12; *The State, ex rel. Dispatch Printing Co.*, v. *Wells* (1985) in Supreme Court—File 4726, decided 7 August 1985. The Ohio Supreme Court concluded that "records should be available to the public *unless* the custodian of such records can show a legal prohibition to disclosure" and thus the "burden of proof" rests with the custodian and not the researcher. See also case law cited below in note 69.

[11]Peterson and Peterson, *Law*, 45.

[12]Ibid., chapt. 1; also, see William H. Harader, "Need to Know: An Attitude on Public Access," *Government Publications Review* 10 (1983): 441–48.

[13]"Less Information By and About the U.S. Government. . . .," statement of the American Library Association, reprinted in *Special Libraries* 76 (Spring 1985): 138–55. See also the *Report* of the Committee on the Records of Government (Washington, D.C., 1985), 34–36; and James Gregory Bradsher, "Researchers, Archivists, and the Access Challenge of the FBI Records in the National Archives," *Midwestern Archivist*, 11 (Fall 1986), forthcoming.

access to information, as advocated by archivists and records administrators. This trend at the federal level—impediments to access or the appearance to countervene the spirit of the Freedom of Information Act—has already begun to creep into state government. A recent study of the open meeting requirements of "sunshine" laws in the fifty states suggests there are efforts to close decision-making at public institutions. In many states general statutes narrowly define both what records are public and what records are required to be created.[14] Consequently, it is more important than ever for state archivists and records managers to ensure a climate in which public access to state government records is manageable, fair, equal, and not susceptible to unwarranted restrictions or limitations.

In 1974 Virginia R. Stewart alerted the profession to the need to develop a policy statement "covering acquisition, custody, and access to case records from a theoretical and legal perspective" and offered possible procedures governing research use. Such an access policy for researchers included four elements: (1) filling out an application, (2) accepting disclosure standards, (3) subjecting oneself to review of all notes and publications, and (4) agreeing to "hold harmless and indemnify" the archives against any loss or damage arising out of use of the records.[15] These guidelines, for which no call was made to have the policy formulation sanctioned by law, have not been widely followed in the archival profession.

Margaret Hedstrom, in "Computers, Privacy, and Research Access to Confidential Information," found uncertainty among archivists on access issues. She reiterated the need "to define a conceptual approach to the issue of privacy which will transcend the ambiguity of the archivist's role and provide the basis for a more active role in shaping privacy legislation and making restricted information available for research in a form that does not threaten anyone's privacy." Going beyond Stewart, Hedstrom successfully advanced several practical technical methods for handling confidential information in machine-readable format and reconceptualized the differences between administrative and research uses of the records, first outlined in 1977 by the Privacy Protection Study Commission.[16] She reconfirmed that creating agencies were not always providing for research access to confidential information and reported that even legitimate research projects, by individuals or research teams, often were not possible.[17] Hedstrom argued that many of the legal and ethical questions associated with confidential information can be resolved, however, if archivists/records administrators either "develop different regulations for its administrative and research uses," or seek omnibus or special provisions in law, which permit scholarly or statistical use of confidential records.[18] Finally,

[14]Peterson and Peterson, *Law*, 16–17, 43, 99–100; Harader, "Need to Know," 445–46; Robert L. Jacobson, "Trustees Group Weighs Plan to Press for Closed Meetings," *Chronicle of Higher Education* (10 October 1984): 18; and George Bain, "State Archival Law: A Content Analysis," *American Archivist* 46 (Spring 1983): 158–73.

[15]Stewart, "Problems of Confidentiality," 387ff.

[16]Hedstrom, "Computers, Privacy, and Research Access," 6, 11. See "Privacy Protection Study Commission, *Personal Privacy in an Information Society* (Washington, D.C.: Government Printing Office, 1977): 570–81.

[17]See Klaassen, "Provenance of Social Work Case Records," 17–21; Anderson, "Public Welfare Case Records," 171ff.

[18]Hedstrom, "Computers, Privacy, and Research Access," 11. In Pennsylvania this distinction was accomplished with the Mental Health Procedures Act (9 July 1976, P.L. 817, No. 143), as amended (26

Hedstrom concluded that the judicious application of access contracts between users and agencies "is dependent upon further clarification of administrative procedures and basic ethical and legal issues."[19] State archivists have been slow to heed Hedstrom's advice or to clarify these procedures or issues.

Recent surveys of state archival programs by Kathy Roe Coker, Alice Robbin, and R. Joseph Anderson[20] reveal that most problems related to federal privacy legislation have not yet been repeated at the state level.[21] These writers, like Hedstrom, primarily examined reference practices and often offered practical approaches to accessioning and access administration. Except for Robbin, they did not advance legislative strategies or propose model laws.

Robbin's 1982 study, the most complete survey of the privacy-access debate, blames the dearth of activity on the public policy issues of personal privacy and access to restricted records on the lack of political activism among archivists and institutional constraints on archival decision-making. Robbin noted that "the originating agency usually played a decisive role in determining access." She discovered that most archivists, although reluctant to be involved, have no difficulty in making decisions or in "balancing the competing values of privacy rights and access." Because the political culture and socialization process emphasize the principal value of privacy, Robbin concluded that archivists resolve the competing demands by not questioning this value structure.[22]

This study confirms Robbin's other findings regarding access. First, because records retention is a political process and the privacy-access dilemma is linked to the structural location of the archives within state government, archivists must be prepared to organize and mobilize external constituency support in order to change the statutory authority of the archives. Second, state archivists have not developed policies and practices to handle personal privacy and access to restricted records. Third, if "archival policies and practices are the result of the incremental development of a wide array of formal and informal political and administrative relationships for reconciling competing interests," archivists are "relatively uninformed about the statutory environment in which they operate." The majority of archivists, in Robbin's view, have allowed other state authorities (e.g., attorney general's office and originating agencies) to assume this responsibility.[23]

November 1978, P.L. 1362, No. 324). Omnibus legislation also exists in Michigan, New York, and in a number of other states surveyed. According to David Klaassen, "the individuality of the records poses a challenge as well as an opportunity to researchers" ("The Provenance of Social Work Case Records," 18).

[19]Hedstrom, "Computers, Privacy, and Research Access," 17.

[20]Kathy Roe Coker, "Confidentiality of Records and Access: A Survey of State Archival Institutions," *ARMA Records Management Quarterly* 16 (July 1982): 22–31; Alice Robbin, "Public Archives and the Political Dimensions of Privacy and Research Access Rights," mimeographed (Madison: University of Wisconsin Data and Program Library Service, 1982); R. Joseph Anderson, "Public Welfare Case Records: A Study of Archival Practices," *American Archivist* 43 (Spring 1980): 169–79.

[21]In 1981 Ham wrote that "to protect privacy many state legislatures have recently passed laws mandating the destruction of significant parts of potentially valuable archival records" ("Archival Strategies for the Post-Custodial Era," 209). Except for one or two records series here and there, this survey did not confirm that records were being systematically destroyed in the fourteen states. John J. Newman to Baumann, 5 March 1986; David J. Johnson to Baumann, 20 February 1986; Duane Swanson to Baumann, 18 February 1986; David Levine to Baumann, 13 February 1986; and Michael J. Fox to Baumann, 20 February 1986, all in Bentley File, PHMC.

[22]Robbin, "State Archives and Issues of Personal Privacy," 168, 170–71, 175.

[23]Ibid., 164, 168, 175; quoted material on page 164.

A state's authority on access to records is not always clearly mandated in legislation. The disclosure of information to the Archivist of the United States is permitted in order to determine if the record's historical value warrants its continued preservation by NARA. In contrast, two-thirds of the states lack a broad privacy law; others have laws that fail to distinguish between confidential and nonconfidential records. There is also a need to distinguish between administrative records and public records. In addition, statutes governing a certain category of records (e.g., mental health records) may address the administrative needs of agencies but fail to clarify the conditions of use for records transferred to the state archives.[24] Finally, state right-to-know laws may or may not cover legislative, judicial, and gubernatorial records and may or may not cover the records of the political subdivisions such as municipalities and counties.[25]

The 1985 State Survey: Results

In keeping with the expressed recommendations of the GAP report, a survey was conducted in 1985 to determine how state archival programs administered access to confidential records and the extent to which their actions were formalized by legislation or approved internal procedures. The study did not focus on specific restriction categories, such as privacy, business information, personnel information, investigative, statutory, and other directed restrictions. Neither did it investigate why records are restricted because definitions of privacy and freedom of information laws vary from state to state.[26] Beyond a desire to identify a set of workable access policies and procedures that could be used by Pennsylvania to administer the use of restricted records, I held modest preconceived preferences on what strategy or approach to follow.

The fourteen states surveyed were Alabama, California, Georgia, Illinois, Indiana, Kentucky, Michigan, Minnesota, New York, North Carolina, Ohio, Pennsylvania, Utah, and Wisconsin. These states provide a representative sample of program size and holdings and offer a variety of legislative/operational approaches to the administration of access. It was neither desirable nor manageable to survey all fifty states.

The target respondent was the designated archivist or senior staff member in each state responsible for developing responses to access issues. No formal survey instrument was prepared or utilized; rather, information was collected through letters and telephone interviews. All of the states provided written information. State laws were reviewed firsthand only after practices were studied and evaluated. There were frequent follow-ups with the participants on specific matters, and archivists were given an opportunity to review the conclusions about their state. Finally, on-site interviews were conducted at the Indiana and Michigan state archives to ascertain the standard operating practices.

The results of the survey are summarized in Table 1. All states had some type of right-to-know legislation; only

[24]In Pennsylvania's mental health statutes (50 P.S. Section 711) and accompanying regulations (55 Pa. Code Section 7100. 111.1 *et. seq.*), 9 *Pennsylvania Bulletin*, 319 (27 January 1979) no reference is made about administering access to confidential records once they leave the agency and are transferred to the state archives. As a consequence of this study, this point is presently being addressed.

[25]Bain, "State Archival Law," 159, 169–73; Peterson and Peterson, *Law*, 45, 99–100; and Anderson, "Public Welfare Case Records," 171–75.

[26]*Planning for the Archival Profession*, 25-27; Peterson and Peterson, *Law*, 39–40ff, 60, 99–100.

Table 1

Summary of State Open Records and Privacy Laws and Access Policies

	Existing Legislation			Access Policies							
	Right-to-know legislation	Privacy legislation	Legislated access/ Individual legislation for categories of records	Designated access period	Contracted access	Legislation and contracts	Approved or written in-house policy/ procedures	Limited policies	Agency approval required	Archives approval only	Special committee
Alabama	X		X					X	X		
California	X	X	X			X[2]		X	X		X
Georgia	X		X	X				X	X		
Illinois	X		X	X			X	X	X		X[3]
Indiana	X	X	X	X	X		X		X		
Kentucky	X		X	X[1]			X		X		
Michigan	X		X		X	X	X		X		
Minnesota	X	X	X	X	X	X[2]	X			X	
New York	X	X	X		X		X		X		
North Carolina	X		X					X		X	
Ohio	X	X	X			X[2]	X			X	
Pennsylvania	X		X					X		X	
Utah	X	X	X				X		X		X
Wisconsin	X		X				X		X		

[1]Kentucky has a fifty-year rule on access.
[2]Contracts or agreements are developed with an agency on an informal basis and in most cases without formal authority to do so.
[3]An Oversight Committee on Indiana Records operated between 1977 and 1983.

six had enacted privacy legislation. Three general approaches on access administration in the states can be identified: legislated, contracted, and limited. States with legislated access are those that have adopted legislation providing for the release of restricted records after a designated period (e.g., 75-year rule) or have passed separate statutes that provide for access for research purposes as well as administrative uses. While all of the states fall into this category to some extent, such open records legislation and access by special statute (i.e., mental health records) vary a great deal. In some instances, legislation clearly provides that the conditions of use are the same in the agency and the archives. In other states, this provision is not incorporated or fully spelled out even though legal ownership resides with the originating agency.[27]

States with contracted access have directed their efforts toward developing a system of contractual agreements or inter-agency instruments that grant researchers access to records held by the state archives. The principal states in this category are Michigan and New York. In some states, such as California and Minnesota, this practice is not as popular as it once was. Research use of confidential records is usually informal, since practices have not been codified outside of Michigan.

States with limited access provisions function without much specific legislation on public access to public records, do not commonly use contracts to acquire records, and make records available and operate in most respects without written guidelines. The states in this category include Alabama, California, North Carolina, and Pennsylvania.[28]

The survey yielded a number of other generalizations about the way in which state archivists address the issue of access. First, most of these fourteen state archives confronted access issues largely because a question had to be resolved. More often than not, state archivists turned to colleagues to determine how they administered access to a certain body of records and, in some cases, applied their answers or policy to the need.[29]

Second, in states where records management and archives are under a single authority, state agencies appear to be much more involved in the administration of access to records after they are transferred to the custody of the state archives than they are when those authorities are divided. This is especially true in Georgia, Kentucky, North Carolina, and Utah. The principal exceptions are New York and Wisconsin, where the archives are active partners in the administration of records in the agency even though they do not hold responsibility for records management. In New York the state archives is interested in creating cooperative linkages with state agencies on archival issues and has adopted the interagency agreement

[27] *Wisconsin Statutes* (1983-84), 37th ed., 16.61 (13) c (p. 389); and interview with Harry Miller, 8 August 1985. See also Alice Robbin and Linda Jozifacki, comp., *Public Policy on Health and Welfare Information: Compendium of State Legislation on Privacy and Access*, rev. ed. (Madison: University of Wisconsin, 1983), 3-11.

[28] Telephone interviews with archivists Richard Cox, John Burns, and David J. Olson. Also see Jane Britton to Baumann, 26 February 1986; Frank D. Gatton to Baumann, 17 July 1985; and David J. Olson to Baumann, 20 February 1986; Bentley File, PHMC.

[29] There is evidence of this process in the files at the Michigan state archives. For example, see F. Gerald Ham to David J. Johnson, 17 February 1977 (copy); James D. Porter to David J. Johnson, 17 February 1977 (copy), W.N. Davis, Jr., to David J. Johnson, 31 January 1977 (copy), Administrative File of the State Archives Section, Bureau of Archives and History, Department of State, Michigan (hereafter cited as Administrative File). These letters were in response to David J. Johnson's letter seeking information.

approach to administer access. The agreements with the agencies are neither authorized nor required by law. New York wants "to insure agencies that the Archives will carefully consider privacy implications and thereby encourage agencies to preserve the records."[30] Even in Wisconsim, where by law the conditions of use established for records in the agency follow the records to the state archives, contracts are used. Recent efforts to add a 75-year rule in each of these states failed.[31]

Utah is the only survey state in which the state agencies assign access designations to all personal data contained in all records series through a State Records Committee. The executive secretary of this body is the state archivist. The 1983 Utah legislation appears to have been modeled after the Minnesota Government Data Practices Act of 1974, as amended.[32] In some respects Utah appears to be in the vanguard with several policies and procedures designed to "delineate rules for access and protection in keeping with the provisions of archives law." In December 1985, Utah published the 205-page *Key to Privacy*, the first Utah Information Practices Act report. As archivist Cherie Nash explained, Utah did "not have a consistent policy for the protection of or access to information not about individuals and not protected by statute or administrative rule."[33] The act presently does not cover information of a proprietary nature, such as trade secrets or financial information, but an administrative rule or a freedom of information act is being developed to cover these needs.

Case Studies on Access Administration: Indiana and Michigan

Of the fourteen state archives programs surveyed, Indiana and Michigan merit particular emphasis because they provide contrasting case studies of the legislative and agency-contract approaches.[34] In both states access to confidential records is a salient issue, and archival program administrators are attentive to advancing solutions beyond their office into other branches of government. Although solutions of these two states are not offered as models to follow, one can learn much from their experiences.

[30]Tom Mills to Baumann, 21 February 1986, Bentley File, PHMC; discussion with Larry Hackman, August 1985, Ann Arbor.

[31]Michael J. Fox to Baumann, 20 February 1986, Bentley File, PHMC; Mills to Baumann, 21 February 1986; memorandum in support of "An Act to Amend the Arts and Cultural Affairs Law and the Public Offices Law in Relation to the State Archives (N.Y.)."

[32]The Minnesota Government Practices Act of 1974, as revised in successive years, is very inclusive and offers a great deal of specificity. Not only does the long, complex piece of legislation assist agencies by detailing access provisions to records, but also it permits the state archivist to make all decisions on access relating to records in the custody of the Minnesota Historical Society independently of other authorities. In short, restrictions placed on records in the agency end when the records are transferred to the custody of the state archives. This special legislation is, however, more convoluted because it gives the state archivist so much discretionary power (waivers to access restrictions are made frequently); this model is less likely to be adopted in the other states, and because of the specificity of the legislation it is subject to many amendments. Individuals must use the courts. See below, note 62.

[33]Cherie Nash to Baumann, 24 December 1985, Bentley File, PHMC. This authority was established in the *Utah Code* (1985-86), chapt. 2, 63-2-60ff. See also Cherie Nash to Baumann, 28 January 1986, Bentley File, PHMC.

[34]The state archives of Michigan and Indiana were selected initially because they offered different approaches to the administration of access to restricted records and they were close to Ann Arbor, Michigan. During August 1985 personal visits were made to each of these archives, and there was considerable follow-up by telephone and letter. In Indiana I discussed the subject with archivist John J. Newman and with Edwin J. Howell, Director, Indiana Commission on Records; in Michigan I spoke with David J. Johnson and with David J. Olson, formerly state archivist.

The two state programs are structurally very different. In Indiana, archives and records management activities are integrated in the Indiana Commission on Public Records. In Michigan, the archives is a unit in the Bureau of History, Department of State, while the records management functions are assigned to the Department of Management and Budget. It is not surprising, then, that the two states have different approaches to the administration of access to restricted records. In each case, institutionalization of the archives' decision-making and standard operating procedures forced the records programs to make professional and political choices on the privacy-access issue. These choices, as will be shown, affected the direction of the archives/records program.

Indiana was among the first states to follow the federal lead of examining privacy rights and records-keeping practices. Using facts gathered from hearings by a gubernatorial commission, the General Assembly passed the Fair Information Practices Act (P.L. 21, Sec. 1) in 1977. This act essentially broadened the powers of the forty-year-old Commission on Public Records and pooled resources for records administration. It was significant in a number of respects. First, it led, in 1979, to the integration of the State Library's state archives and the Department of Administration's records management functions into a newly constituted Indiana Commission on Public Records. Second, the act, as originally passed, established three classes of records: (1) confidential by statute or by promulgated rule or regulation, (2) restricted by law promulgated by the Oversight Committee of the Commission on Public Records, and (3) open or unrestricted. Third, as a consequence of requiring each agency to prepare a general records management inventory and a specific inventory of record series containing personally identifiable information, the act had a very positive impact on the state archives and records management programs. Agency doors were opened to record inspections as they never had been before. Accessions nearly tripled from 1977 to 1980.[35]

Despite the official title of the Indiana law, its purpose was procedural, not intellectual. It operated either on the principle of the informed consent of the subject of the record or on measures invoking an "impartial referee to weigh competing interests."[36] In creating the Indiana privacy program to sort out and interpret the existing patchwork of inconsistent laws and administrative practices—to say nothing of Hoosier individualism—legislation was the preferred means "to achieve compliance."[37] The Commission on Public Records became the "clearinghouse to classify records of state agencies, to handle appeals for access, and to recommend related legislation."[38] The high number of daily transactions required assigning one staff member almost full-time to monitor the access inquiries. Notably, the process provided for access to records for research purposes through an agreement between the researcher and the agency or between the researcher and the state archives. Other disclosures were possible on demonstration of a compelling public interest. The law also

[35]Interview with John J. Newman, 26 August 1985; Newman to Baumann, 19 June 1985, 5 March 1986, Bentley File, PHMC.

[36]James W. Williams, "Indiana 'Privacy' Law," *Newsletter*, Midwest Archives Conference (6 October 1978): 12.

[37]Interview with John J. Newman, 26 August 1985.

[38]Williams, "Indiana 'Privacy' Law," 13-14.

established an appeal process in the Marion County Superior Court.[39]

The Indiana privacy legislation was successfully implemented between March 1977 and March 1983. There was considerable interagency coooperation, planning, publicity, and weighing of the "right of privacy" against the public's "right to know." Nearly 1,000 records series containing personally identifiable information were identified, and these records were classified open, restricted, or confidential. Access for research purposes was approved. Certain media interests, however, were unhappy with the act because it seemed to give the commission too much power to restrict access. Further, the commission lacked full-time personnel to publicize the commission's role in the program. The media wanted readier access to records such as local arrest or accident reports. Consequently, in 1982 when the state General Assembly was reviewing the 1953 Hughes Anti-Secrecy Act, the news media used the opportunity "to get what they wanted"—to overturn the key provisions of the 1977 Fair Information Practices Act.[40]

Under the Indiana Open Records Law of 1983, as amended in 1984 and 1985, state agencies regained the authority to determine access and the Commission on Public Records lost its rule-making authority. According to State Archivist John Newman, it is now more difficult to protect the rights of individuals because of the multiple levels of interpretation of legal intent and a greater potential for unequal access to records. On the positive side, the General Assembly adopted a 75-year rule on restricted records, modeled after Georgia's legislation.[41] The amended privacy law, which incorporates judiciary and executive agencies or departments, has not yet been tested in court.

The Indiana case study indicates that too much centralizing of access decision-making can prove counter-productive and that relations with other agencies and interest groups can change. Likewise, the fact that the access-privacy issue became the "vehicle to achieve structural changes and larger program objectives, such as word simplification, standardization of forms and restructuring of records-keeping systems," should not be overlooked.[42]

By comparison, the Michigan state archives has received favorable attention in archival literature for developing the interagency contract approach in 1978. In fact, one authority writing in the *American Archivist* hailed the contractual form as "a model for other archives," one that "provides extensive safeguards against the misuse of confidential records."[43] In recent years it has become common for state archival programs to administer access to restricted records by initiating written contractual agreements with record-creating agencies. Although neither authorized nor required by law, such agreements are utilized when no clear legal provisions govern the transfer of confidential records from an agency to the state archives, or when no written research guidelines are in place to regulate access to records that are

[39]Interview with John J. Newman, 26 August 1985.

[40]Ibid. Telephone interview with Edwin J. Howell, director, Indiana Commission on Public Records, 19 February 1986.

[41]*Indiana Code*, P.L. 19-1983, Sec. 5; P.L. 34-1984, Sec. 2, P.L. 54-1985; interview with John Newman, 26 August 1985; *Indiana Code*, P.L. 43, Sec. 3(e).

[42]Telephone interview with Edwin J. Howell, 19 February 1986.

[43]Anderson, "Public Welfare Case Records," 173-74. See also Coker, "Confidentiality of Records and Access," 24, 26.

presumably restricted and already in the custody of the state archives. When Alice Robbin asked archivists how they accessioned confidential records or provided access to them, she discovered that many of them played a passive role and are prepared to leave the responsibility for access to the agency even though department heads were "unaware of the archival role or historical nature of public records."[44]

During the summer of 1976, the Michigan state archives learned of the planned closing of the Ionia State Hospital for the Criminally Insane. The state archives wanted to accept on transfer the permanently valuable records of the hospital or at least to work with the Department of Mental Health to ensure that it would safely maintain the sensitive records either in its office or in a records center. Citing sections of Public Act #258 (1974), the Michigan Department of Mental Health seemed unwilling for legal and ethical reasons to transfer the records to the state archives. Since the archives had limited experience with confidential records and there was some concern that the department might seek to destroy those records, every effort was made to develop a reasonable approach to the problem.[45] Furthermore, because Michigan law was silent on the transfer of mental health records, all parties became concerned about the precedent that might be set. It also appears that the Department of State, the parent agency of the archives, did not want the state archives to make trouble.[46] The acquisition of the hospital records could hardly have a positive impact on the career of the secretary of state. While agency mental health records deemed confidential could be legally accessed for legitimate research purposes, the existing provision seemed inadequate to the chief legal officer in the Department of State. Once confidential records left the agency the lines of responsibility for administering access became unclear, especially when the law specified no procedures.

Believing that the long-term legal responsibility of the Michigan History Bureau to preserve and make available public records for historical research was at stake, the archives surveyed California, Illinois, Oregon, and Wisconsin to determine how these states handled the acquisition and administration of confidential records received from an agency.[47] It found that Illinois and Wisconsin relied upon legislative statute while California and Oregon operated under interagency contractual agreements to administer access to confidential records and establish conditions of use. The practices of the California state archives may have been especially influential, since the state archivist emphasized the flexibility and practicality of agency agreements.[48]

A reading of the file on this subject at the state archives affirms that neither the Department of State nor the Department

[44]Robbin, "State Archives and Issues of Personal Privacy," 168-72; quoted material on p. 170.

[45]David J. Johnson to Baumann, 22 August 1985, Bentley File, PHMC; interview with David J. Johnson, 27 August 1985; David J. Johnson to Mike Washo, 7 October 1976 (copy), Administrative File.

[46]Telephone interview with David J. Olson, 7 January 1986. Olson was state archivist of Michigan in 1976-1977.

[47]David J. Johnson to W.N. Davis, Jr., 26 January 1977 (copy); Johnson to F. Gerald Ham, 9 February 1977 (copy); Johnson to James D. Porter, February 1977 (copy); Johnson to David J. Olson, memorandum of telephone conversation on 6 December 1979 with Sidney McAlpin, dated 13 December 1979 (copy), Administrative File.

[48]W.N. Davis to David J. Johnson, 31 January 1977 (copy), Administrative File; telephone interview with David J. Johnson, 11 September 1985.

of Mental Health wanted to draft legislation to create an archival exception for research use or a time-limit provision. Likewise, neither department wanted a formal opinion from the attorney general. "We consider this to be a serious matter," wrote History Division Deputy Director Mike Washo, "inasmuch as an adverse opinion from the attorney general's office could seriously jeopardize our ability to collect historically significant records from Mental Health and other state departments."[49] David J. Johnson, then assistant state archivist, also expressed the fear that an adverse opinion by the attorney general "could result in the required destruction of valuable and irreplaceable records from the Department of Social Services presently preserved in the state archives."[50] The Michigan Department of Mental Health—having a better entrée through its legal staff with the attorney general—forwarded a draft letter of agreement and transfer procedures worked out with the state archives to an assistant attorney general for an advisory opinion. The attorney offered some changes in the wording and suggested specific changes in the contract to be signed with researchers. The archives was notified of this at the time.[51]

What is significant is not the specific additional assurances sought and obtained by the mental health department from the attorney general's office, but rather that all three state government agencies preferred to use this in-house consultative approach. Apparently, no agency wanted to take the time or assume the political risks associated with the development of special legislation. The fact that Illinois and Wisconsin had adopted a legislative strategy does not seem to have been shared by the archivists with the Department of Mental Health. David J. Olson, then state archivist of Michigan, maintained that the strategy was "not clearly thought out" and was "not the result of research and evaluation." Instead, he reported, it was a "pragmatic approach to a specific situation" that reflected little concern whether it was "respectable in archival practice."[52]

It took Michigan nearly a year to survey other states and develop the interagency contract and the accompanying forms and guidelines. There is no evidence that Virginia Stewart's 1974 article was reviewed, although Michigan followed generally the same procedures she had advanced.[53]

The contractual arrangement adopted by Michigan operates at the level of the agency as well as the researcher. Researchers seeking access to mental health records must be screened by a reference archivist. The researcher completes the contract form and a separate description of the research project and use to be made of the information obtained. All research requests approved by the archives are forwarded to the Department of Mental Health for final review and approval.

The agreement between the agency and the archives attempts to balance the client's right to privacy with the re-

[49]Mike Washo to Phillip Frangos, 14 October 1976 (copy); also see Mike Washo to Norman Berkowitz, 22 March 1977 (copy), Administrative File.

[50]David J. Johnson to Mike Washo, 7 October 1976 (copy), Administrative File. In this memorandum Johnson, in an effort to prevent the destruction of the records by the mental health department, advanced the need for a fifty- or seventy-five-year retention period. "Then in accordance with an approved Retention and Disposal Schedule," he wrote, "the files could be transferred to the Michigan History Division."

[51]Interview with David J. Johnson, 27 August 1985.

[52]Telephone interview with David J. Olson, 7 January 1986.

[53]Stewart, "Problems of Confidentiality," 387-98.

searcher's need for information and legally binds the researcher to accept conditions of research use. More specifically, it obligates the researcher to accept four major provisions:

(1) to keep confidential any identifiable personal information about the record subject;
(2) to allow prepared notes or writings based on his/her research to be reviewed by the state archives before dissemination;
(3) to pay damages of $1,000 for violating provisions of the agreement; and
(4) to indemnify and hold harmless the state and its agencies for any costs or damages which may accrue from the use of the records.[54]

Although the Michigan letter of agreement between the archives and the researcher—like contracts developed by other states—has not been tested in court, it has worked exceedingly well. Between 1978 and 27 August 1985, the archives processed fifty-one requests from researchers desiring access to the mental health records. A review of this permanent file indicates that all of the research recommendations made by the archives were approved by the Department of Health. In one case, the researcher had to supply additional information about the purpose of the research project before approval. In a second case, the Department of Mental Health considered the researcher's expressed interest in Civil War records "too nebulous" and authorized access to the records of only one person.[55] More than two-thirds of the requests were for genealogical information. There are no known incidents of researcher abridgement or violation of the approved conditions of use. Finally, the relative success of the contractual system has enabled the state archives to acquire the records of nine other state mental health hospitals.[56] The Department of Mental Health has been encouraged to preserve records and, concurrently, to consider privacy implications at the same time. Michigan now holds an outstanding collection of mental health records.

The Michigan contractual experience proved so successful that both departments sought to codify practice into law. Public Act 319 of 1980 (399, 4a (2)) stipulates that confidential records acquired by the secretary of state from a government agency "shall be kept confidential pursuant to the terms of a written agreement." The secretary of state and a representative of the donating agency are required to sign a written document, which specifies "the terms and conditions under which the materials are to be kept confidential," and it may provide for "releasing materials for research purposes provided the names of individuals identified in materials are protected from disclosure."[57] This extends the contractual agreement process to all administrative records, as well as case files.[58]

[54]"Contractual Agreement for the Release of Confidential Mental Health Records for Legitimate Research Purposes." The two-part contract must be signed by three parties: a representative of the Department of Mental Health; a representative of the Department of State, Michigan History Bureau, Archives Unit; and the researcher. The New York State Archives uses a similar document.

[55]Lee Barnett to Bill Allen, 31 October 1980 (copy), Administrative File.

[56]These include Alpena, Clinton Valley, Coldwater, Kalamazoo, Lapeer, Newberry, Northville, Plymouth, and Ypsilanti. See the Michigan state archives accessions register.

[57]Page 1083.

[58]Interview with David J. Johnson, 27 August 1985.

A Model Law: The Georgia Records Act

Although no detectable trend or pattern of approach to administering access can be found in the fifty states, more state archivists are beginning to better understand access issues and to improve access administration in their programs. The process of administration of access to confidential records can be complex, as witnessed in Indiana and Michigan. Even though individual program needs and conditions in each state may preclude any one access strategy or law for all states, my Pennsylvania experience and this survey indicate the relative merits of a legislative strategy over an unauthorized contract approach.

Recent attempts in Wisconsin and New York to negotiate specific agreements with originating agencies have yielded "mixed results." In Wisconsin, archivist Michael J. Fox reports that two agencies refused to delegate any authority in this area to the archives; a successful contractual agreement, however, was developed covering Division of Corrections case files.[59] Between November 1985 and February 1986 the New York state archives staff was denied access for appraisal purposes to potentially valuable records from three agencies; each agency "based its denial on the confidentiality of the records, which of course the agency plans to destroy."[60] These examples suggest the pitfalls associated with the contract or interagency agreement approach, which has no legislative basis.

Among possible strategies to legislatively administer access to restricted or confidential records, there is a preferred model for state archivists to consider. As observed in 1981 by F. Gerald Ham and R. Joseph Anderson,[61] the Georgia Records Act of 1972, as amended, is a model law. The Georgia legislation is preferable because it is more adaptable than Minnesota's law[62] and more comprehensive than Utah's program.[63] According to Harmon Smith, one of the architects of the Georgia legislation, the genesis of the ideas contained in two of the code sections "came to me from reading the article by Virginia R. Stewart in the 1974 *American Archivist*."[64]

The Georgia Records act specifically addresses administration of access to restricted records, and it is supplemented by well-developed, written implementation procedures. All records must be scheduled on an approved records retention and disposition schedule permitting timely consideration of access issues. Because all questions concerning confidentiality are immediately covered on the approved records retention schedule, no need exists to develop formal interagency

[59]Michael J. Fox to Baumann, 20 February 1986, Bentley File, PHMC.

[60]Tom Mills to Baumann, 21 February 1986, Bentley File, PHMC.

[61]Ham, "Archival Strategies for the Post-Custodial Era," 209; Ham's case was based on the work of Kathy Unertl, "Privacy Legislation: Access Restrictions and Archival Records" (unpublished paper, Archives Seminar, University of Wisconsin, 18 December 1979); F. Gerald Ham to Baumann, 20 February 1986, Bentley File, PHMC. R.J. Anderson wrote that the Georgia statute represented "the ideal from the archival point of view" ("Public Welfare Case Records," 172-73).

[62]"Government Data Practices Act," Chapt. 13, sections 1-5, and 1985 revision, *Laws of Minnesota for 1982* (St. Paul: State Printer), 217-20; 1984 revised, 136-37; 1985 revised, 32-35. The official records act is in *Minnesota Statutes*, 138.17. Duane Swanson to Baumann, 29 January 1986, Bentley File, PHMC.

[63]In Utah the State Records Committee has statutory authority (under section 63-2-68.1 of the *Utah Code* annotated) to approve classifications applied to record groups by the responsible authority of a state agency, or to classify records on its own initiative. All decisions made by the committee are reported in the *Annual Retention Schedule*. The committee also stands as a board of appeals. See *Key to Privacy*; *1985 Utah Information Practices Act Annual Report* (Salt Lake City, 1985), xiii.

[64]Harmon Smith to Baumann, 5 September 1985, Bentley File, PHMC.

agreements (contracts). All restrictions are cited on the schedule. Records held by the state archives prior to 1972 are presumed to be covered under the act.[65]

The law contains four important elements that describe access. First (section 98), the records of constitutional officers are declared public records that can be restricted in the state archives for "no more than 25 years after the creation of the records." Second (section 100), restrictions on access to "confidential, classified or restricted records" in the archives are to be removed 75 years after the creation of the records.[66] This time period was selected "because most confidentiality is based on individual rights of privacy and 75 years is a nice, round figure approximating life expectancy." The framers also were "aware of the precedent set for the opening of the 1900 United States Census after 72 years."[67] Legislated time limits on restrictions are rare in the United States, but, as shown in Table 1, four other survey states—Illinois, Indiana, Kentucky, and Minnesota—operate under similar legislation. As previously noted, Indiana follows the Georgia time frame and Kentucky operates with a fifty-year rule. Specifying the time of restrictions is especially important to the archivist when appraising or accessioning closed records of archival value.

Third, the State Records Committee, authorized under section 92, may lift restrictions on records in the archives as early as twenty years after the creation of the record. Such decisions must be written and require unanimous committee vote. These requests to lift restrictions can be initiated "either by the director of the department or by the head of the agency that transferred the record to the archives."[68] Though not used to date, this proviso in the Georgia law recognizes that there are instances when the need for confidentiality in public records diminishes rather quickly. This provision also balances the personal rights of privacy with the public's right to know. The status of the State Records Committee is enhanced by having the independently elected attorney general as a member. Finally, the Georgia courts upheld the law's concept that the rights of privacy are not absolute. Thus, alongside the statutory law, there has developed pertinent case law.[69]

Fourth (section 101), the act defines conditions for research access to restricted records. After a researcher is determined qualified, the agency head is responsible for having the researcher sign an agreement binding him to the conditions of use outlined in the law.[70] It is significant that the burden of decision to allow use of the records in the agency (often in the archives as well) is

[65]Interview with Harmon Smith, 8 July 1986.

[66]"Georgia Records Act" (Ga. L. 1972, p. 1267, and 1), 524; 526.

[67]Harmon Smith to Baumann, 5 September 1985, Bentley File, PHMC.

[68]"Georgia Records Act," 520.

[69]Cf., *Irvin et al.* v. *The Macon Telegraph Publishing Company et al.*, 253 Ga. 43 (316 SE 2d 449), 1984; *Houston* v. *Rutledge*, 237 Ga. 764-66 (229 SE 2d 624), 1976; *Athens Observer, Inc.* v. *Anderson*, 245 Ga. 63-64 (263 SE 2d 128), 1980; *Brown* v. *Minter*, 243 Ga. 397-98 (254 SE 2d 336), 1979; *Northside Realty Associates, Inc. et al.* v. *Community Relations Commission of the City of Atlanta et al.*, 240 Ga. 432-36 (241 SE 2d 189), 1978. These cases helped to clarify the definition of "public record" and gave support to the Open Records Act (50-18-70 to 74).

[70]"Georgia Records Act," 527. Also see "Regulations for Protecting the Security of Confidential Records," Georgia Department of Archives and History, 1975 internal regulation (Harmon Smith to Baumann, 27 January 1986, enclosure, Bentley File, PHMC). Under point 5, on page 2, it reads: "All personnel must sign an awareness statement acknowledging that they have been made aware of these regulations and of any laws or other regulations relating to confidential records. This statement also serves as an agreement by the staff member to comply with any applicable laws and regulations."

placed on the agency that created the records and not on the archives or records administrator. The whole records system is agency-dependent, and the archives often passes the burden back to the agency.

The Georgia Records Act, in particular as it relates to administering access to restricted records, is noteworthy. It is an easy law to follow and is more comprehensive than the legislation found in any other state surveyed. The administration of access is addressed and determined in the Public Records Statute, not special legislation. There are, moreover, different regulations for administrative and research uses. While allowing too much agency input and inhibiting the state archivist's discretion once the records are under his/her custody, the act does provide adequate flexibility in a unified program where records management and archives are administered by a single authority.

Making the Right Choices: Laws and Procedures

Each state must consider its options when deciding upon an access policy for confidential records. To be sure, an archivist must invest time in reviewing and evaluating the associated program needs, the political considerations, and existing procedural precedents that have been established by either legislation or practice. The archivist needs to consider the advantages and disadvantages of a particular policy approach in a specific archival setting and to work with the counsel of the state archives/records program. The checklist of useful questions, shown in the appendix, is meant to provide direction to programs making such decisions.

It is also advisable for an archivist to study the Georgia Records Act and compare it to current legislation and authorities in his/her state. The archivist should analyze the relevant administrative issues and adopt a policy approach to administer access. This is a complex and challenging process. It also will be necessary to develop written, in-house implementation procedures that adhere to state rules and regulations. Georgia's "Regulations For Protecting the Security of Confidential Records" are but one good example found among the states surveyed. The archivist investigating access also should be prepared to inventory all of the records series containing confidential information.

All too often, busy program directors faced with a crowded agenda handle policy issues relating to personal privacy and access to restricted records only when a particular matter must be resolved. They are "too busy trying to survive."[71] Others, required to implement new access legislation, lack specific procedures to do so. Taking an active posture and articulating a written access policy can lead to positive, long-term results for a state archival repository.[72] Administering access is "time-consuming" and "detail-oriented," but a policy can be developed in stages. According to a recent authority, "stated access policies are the bedrock of access administration."[73]

The practical benefits of a written repository policy on access to restricted or confidential records are three-fold. First, the existence of a specific policy and established procedures for handling confidential records minimizes administrative uncertainty, enhances archival authority and responsibility in this domain, and speeds up the reference process to the benefit of all users. The

[71]Robbin, "State Archives and Issues of Personal Privacy," 175.
[72]These benefits can be seen especially in Georgia, Indiana, Michigan, Minnesota, Utah, and Wisconsin.
[73]Peterson and Peterson, *Law*, 60.

public has a right to know if records are restricted, and how to gain access for research purposes to such records. The "post-custodial" information society assumes that access is being addressed. For example, the AMC format manual contains a field and subfields for recording information about access restrictions.[74] For too many archival programs in the United States, this must remain an empty field.

Second, because access relates to appraisal and accessioning processes, it is assumed that archivists will recognize user interest and access restrictions when appraising the value of information. "Whatever the scope of the restriction," write Frank Boles and Julia M. Young, "access limitations affect the use of the records and thus the worth of the information they contain."[75] It is well documented that considerations of bulk and confidentiality have been a "major obstacle in the accessioning of public welfare files, and the extent of the problem is apparent when one examines state records schedules."[76] It is equally well documented that state archival programs have acquiesced to transfers of records with either long-term or permanent restrictions. In some cases state archivists have been reluctant to adopt written provisions allowing legitimate research in accessioned records, evidently hoping that research use would take care of itself. As one former state archivist remarked, "As the years go by, the sensitivity of records changes. Reclassifications become possible. . . . Somewhere in the future, although perhaps the time be distant, all records become safely open to use."[77] In all of the aforementioned records situations, access issues would have been routinely resolved if the archivist had exercised more leadership, if access concepts had been better defined, and if written procedures had existed.

Third, formal access procedures—established by a state archivist who has made an active choice and has worked closely with creating agencies on access matters—ultimately will lead to a state archives acquiring a larger number of records of archival value that can be readily used by the researching public. Relevant literature underscores the point that among state agencies policies and practices regarding access to confidential information often are underdeveloped and uneven.[78] The absence of an overriding statute frequently means that access decisions are left, by default, to program directors who created or received the files.[79] A state archives displaying appropriate initiative by offering agencies formal access procedures based on a reasonable approach, however, can reduce the variations in agency-imposed restrictions, enhance the understanding of research uses, and reduce the "undue amount of discretion

[74]Nancy Sahli, *MARC, For Archives and Manuscripts: The AMC Format* (Chicago: Society of American Archivists, 1985). Restrictions on access are to be noted on tag 506. See also Kentucky's "Data Dictionary Master Data Elements List," 21 March 1986 (unpublished).

[75]Frank Boles and Julia Marks Young, "Exploring the Black Box: The Appraisal of University Administrative Records," *American Archivist* 48 (Spring 1985): 130.

[76]Klaassen, "Provenance of Social Case Records," 18.

[77]W.N. Davis to David J. Johnson, 31 January 1977 (copy), Administrative File.

[78]Robbin, "State Archives and Issues of Personal Privacy," 163, 174-75; Anderson, "Public Welfare Case Records," 171-75; Peterson and Peterson, *Law*, 99-100.

[79]This is the case in Pennsylvania where bureaucrats operating at the level of a bureau director are able to make decisions on whether a record is administrative or public. Known examples include administering access to the health studies of Three Mile Island and the radon gas surveys of the Department of Environmental Resources.

agencies have in determining who will and who will not be allowed to examine public records."[80]

Occasionally, the state archival programs are guilty of arbitrary judgments. Depending upon their political persuasion or values, archivists can and do restrict access to records even when the information is neither statutorily nor administratively defined as confidential. A clearer understanding of the issues on the part of the archivist should lead to the development of better guidelines for users and staff or to reviewing the files of an agency. And, as Alice Robbin discovered, archivists prefer "institutionalizing the decision-making process through the legal system and standard operating procedures."[81]

Planning for the Future

Goal III, objective C, in *Planning for the Archival Profession: A Report of the SAA Task Force on Goals and Priorities* specifically recommends that archivists "initiate and/or support legislation, regulations and professional practices which allow maximum access to public and private records, while protecting individual and organizational rights and interests." The GAP report also encourages archivists to guarantee appropriate access to archival records by playing an "active role in writing legislation and developing archival practices" that balance the need for maximum access and protect rights.[82]

The National Association of Government Archivists and Records Administrators (NAGARA) should establish a blue-ribbon committee supported by legal counsel to draft a model law on the administration of access to confidential records in state archives. Archivists produced a model law relating to library/archives theft in 1975, and uniform state archival legislation was proposed in the late 1930s.[83] Some of the approaches and legislation reviewed above could serve as the basis for a model law on access. Many archivists/records administrators find the need to judge their own situations against accepted standards or models. Neither Indiana nor Michigan was able to draw on such help. The time is right for the development of a set of standards for access to confidential records, along with provisions to be included in a model law, for state archival programs. In developing such a model statute, or amendment to the existing public records act, archivists need to take into account the established state and federal case law. The archival profession has outgrown SAA's 1973 statement "Access to Research Materials. . ." and the reference in the "Code of Ethics." NAGARA, an affiliate of the Council for State Governments, and the Society of American Archivists can fill the vacuum. Such a model law will directly benefit nongovernmental archivists who face similar problems on access and seek similar solutions to these problems. The responsibility of archivists to better define and administer the common law right of access to public records—emphasizing simplification, clarity, and a balancing of the public's right to know against an individual's privacy rights—is long overdue.

[80]Hedstrom, "Computers, Privacy and Research," 9-10. See also Robbin, "State Archives and Issues of Personal Privacy," 173-75.

[81]Robbin, "State Archives and Issues of Personal Privacy," 175.

[82]Page 25. The strategies and activities are on pages 26-27.

[83]See Timothy Walch, *Archives and Manuscripts: Security* (Chicago: Society of American Archivists, 1977), 26-27; Albert R. Newsome, "Uniform State Archival Legislation," *American Archivist* 2 (January 1939): 1-31.

Appendix

Questions to Consider When Determining an Access Policy for Confidential Records

A. Interagency Letter of Agreement (Contract Form)

1. Is this a reasonable approach in light of the present public records law, privacy legislation, and other state rules and regulations?
2. Should the archives program share authority on access with the agency when the records are in the custody of the state archives? When is enough discretion given in determining who will or will not be allowed to examine public records?
3. Should the archives develop official rules and regulations governing access to confidential records in the custody of the state archives? If so, who needs to approve them?
4. Should the state archives limit access to confidential records on the basis of a researcher's qualifications, motives, or in the manner in which the information will be used?
5. Is the development of contracts, with one or more agencies, over a period of time, cost- and time-effective?
6. How do you fend off the arbitrary application of restrictions on access to public records by government agencies?
7. Are privacy rights in your state sufficiently protected by prohibiting researchers from disclosing or disseminating information that might identify a subject of the records?
8. Does a provision for indemnifying the agency for damages serve to transfer liability from the archives to the user of the confidential record?
9. Do agency personnel care as much about research use as the archivist and how are archivists to understand when confidentiality is obsolete?
10. What implications does the interagency agreement hold for the appraisal of records?
11. What are the political implications of the procedural precedents?
12. What is the repository's relationship(s) with the source of the records and other persons?
13. Is the review process unnecessarily complicated, resulting in delays for researchers?
14. Over time, what is an acceptable number of agreements to negotiate? When are the burdens greater than the benefits?

B. Legislation

1. Will legislation open up "Pandora's Box" and provide legislators or lobbyists an opportunity to challenge the need for a public records program?
2. Should the legislation be broadly stated and incorporated in a public records act, or should a special statute be approved to handle mental health records?
3. Does the archives have the influence to pursue passage of legislation?