

ACCESS TO CONFIDENTIAL RECORDS IN A STATE ARCHIVES

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FOREWORD

House Resolution No. 11, adopted by the Fourteenth State Legislature, requested the Legislative Reference Bureau to conduct a study of the various federal and state statutes relating to the retention and dissemination of records maintained by public archives and to recommend solutions and propose legislation on the storage of records, the duration of storage, and destruction or release of confidential matters. The specific nature of the question concerned the lifting of access restrictions on confidential public records acquired and preserved in the state archives.

This report responds to the resolution.

The Legislative Reference Bureau thanks the various state archivists from across the country who responded to the Bureau's request for information regarding methods of handling confidential records. Special mahalo goes to the staff of the Hawaii State Archives, Historical Records Branch, and especially to the State Archivist, Ms. Jolyn Tamura.

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Director

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Chapter 1

INTRODUCTION

Objectives of the Study

House Resolution No. 11 (see Appendix A) requested the Legislative Reference Bureau (Bureau) in conjunction with the State Archives, to study the various federal and state statutes relating to the retention and dissemination of records maintained by public archives and recommend solutions and propose legislation relating to the storage of records, the duration of storage, and destruction or release of confidential matters.

Methodology

Background information for this study was collected from interviews with the Hawaii State Archives staff and a review of the literature on this subject. In addition, the Bureau surveyed forty-nine state archives for laws, rules, or attorney general opinions to identify their methods of dealing with the privacy issue. Other information collected for this study came from the National Archives and Records Administration (NARA) and the Council of State Governments (CSG) which maintains a clearinghouse for state archival and records management information through its relationship with the National Association of Government Archives and Records Administrators (NAGARA).

Organization of the Report

The report is presented as follows:

Chapter 1 is the introduction. This chapter describes the objectives and methodology of the study, as well as the scope of the report. A short explanation of the role of records in government and the function of a public archives are provided as background to understanding the basic issue of access to confidential records in an archival setting. Concluding this chapter is a brief history of the Hawaii State Archives.

Chapter 2 provides a review of the literature on the issue of access to restricted public records which are housed in an archives.

Chapter 3 describes how the Federal government and other states handle this question. How Hawaii's State Archives currently handles access to public records of a confidential nature is also described.

Chapter 4 contains recommendations, including proposed legislation.

Scope of the Report

In 1987 Governor Waihee appointed an Ad Hoc Committee on Public Records and Privacy Laws consisting of nine members with a variety of

experience in government, media, and law. According to the Committee's Report:

"The Governor charged the Committee to review the current law and the implementation of that law, to solicit public comment, to review alternatives to the current law, and to report back the findings of this work."¹

The Report indicated that until the Committee was appointed:

Hawaii's current law has operated to keep most records which involve an individual confidential. It has, however, not done so through a balancing test which weighs competing interests but rather by the unintended interplay between statutes (Chapters 92 and 92E) written at different times for different purposes and without regard for each other. The results leave everyone involved (the public, the media, and government officials) uncertain as to the effect of the law in any particular instance and unlikely to agree on the interpretations made in specific cases. Repeated efforts to address this subject at the Legislature have produced little agreement or progress in resolving the dispute.²

During the Committee's receipt of testimony, concerned individuals raised the issue of access to public records, and more specifically, access for research purposes and restrictions on access to archive material. "The overwhelming sentiment expressed to the Committee was for a test (to determine access) which provides for maximum public access to records with a narrow range of exceptions. In fact, as one Committee member said, it should not so much be a balancing test as a presumption of openness."³

Testimony indicated that certain records at the State Archives, some over 100 years old were unavailable to researchers because of concerns over privacy and confidentiality. Although the Acting State Archivist, Ken Kiyabu, urged the adoption of the Georgia Records Act of 1972 for the State of Hawaii, the 1988 Legislature opted instead for H.R. No. 11, requesting a study of the issue before any legislation was adopted.⁴

The scope of this report, therefore, is limited to a review of the problem of access to public records stored in a public archives which contain information of a private or confidential nature and which are inaccessible to researchers. Many states, including Hawaii, have laws generally known as "open records laws" which provide for access to records stored in administrative agencies. These laws generally provide that public records are available for inspection during normal office hours.⁵

This study focuses only on the small quantity of records which has been transferred legally and for historical purposes to a public archives and which contain access restrictions because of privacy or confidentiality concerns. The approach of this study is to recommend ways in which the legislature can address the concerns of historians and other researchers by setting time limits for the termination of private, confidential, and other restrictive classification of records in the archives.

Records and the Function of Archives

The word "archives" can mean any of several things. According to one author, there are three ways in which the word archives is used:

- (1) The non-current records of an organization, institution, or individual which are selected for preservation because of their continuing value.
- (2) The repository or building (or part thereof) where archival material is stored.
- (3) An agency responsible for the selection, preservation, documentation and making available of archival material.⁶

Government offices collect information about individuals from birth, through life, to death. These bits of information are collected for certain purposes such as identifying property rights through land ownership records, providing government services such as social welfare services, collecting taxes, and a variety of other government functions. The State of Hawaii, for example, is operated by nearly twenty functional departments and many boards, commissions, and agencies. These agencies and departments collect data about the environment (for example, air and water quality information); people (e.g., census); businesses (e.g., licenses, trademarks); land ownership; agricultural production statistics; and promotion of products of Hawaii. Whether this information is collected and stored on paper or machine readable tape, disk, or other media, all are considered government "records".

A record can be defined as any recorded information related to the work of a governmental office regardless of who created it or how information was recorded. In Hawaii, a "government record" means information maintained by an agency in written, auditory, visual, electronic, or other physical form.⁷

Among other things the information in these records provide:

- (1) The duties and responsibilities of the agencies;
- (2) A record of services provided, benefits received, or legal rights of the individuals served by the agency.

It is helpful in the discussion of public archives to begin with a description of records management in general and the process through which records control is achieved. Records management is the orderly control of records from the time they are created, organized, and maintained, until they are finally disposed of after serving their purpose, or preserved for historical value. Efficient records management results in creation of records for specific purposes, speedy retrieval of records when needed, and economy in the operation of government offices.

A records inventory is usually the first step towards identifying the various records collected and maintained by an agency. An inventory consists of a listing of records series--records arranged as a unit because they relate to a particular subject or function, which are normally filed together, and evaluated as a whole. From this inventory, information about

the rate of growth, filing problems, frequency of use, and other qualities can be identified.

After records have been inventoried, each record series is evaluated for its purpose and value, and a retention period assigned. This is the process of "scheduling" records. The determination of retention periods is based on analyzing legal, audit, and other requirements for retaining the records. A records retention and disposition schedule is a management tool used to prescribe the time to retire records to inactive status and eventually the time to destroy or dispose of the records. It is usually during the inventory and scheduling phases that access limitations to private or confidential records are determined. Government agencies which have up-to-date schedules would have identified records for systematic removal to the state archives.

In the State of Hawaii, the Archives Division of the Department of Accounting and General Services (DAGS) provides assistance to all state agencies in developing records retention and disposition schedules, operates a State Records Center which stores inactive records, and provides limited microfilming services to state agencies.

Creation of an Archives

Most government records do not have to be retained forever. According to Pederson, archivists estimate that "about 90 per cent to 95 per cent of records generated should be destroyed after they have served their purpose and have met other legal or financial requirements."⁸

Archives are created for the preservation of the remaining five to ten percent of records of enduring historical value. Archivists are trained to identify those records which should be stored in archives. Historians, researchers, genealogists, sociologists, and many other citizens use these records to collect information and gain an understanding of life during times long past. The history of a culture, a neighborhood, a society, and nation can be reconstructed from the study of its records.

Typical uses of archives include the study of the official papers of key government leaders, or the collection of descriptive accounts of immigrants' lives from letters, diaries, and other items. Research techniques have changed over time and more recently the research approach has been to collect information that spanned a number of years and use statistical techniques to develop data on trends over time and look at group experiences or cultural changes.⁹

Regardless of the techniques and research emphasis, archival material are a valuable resource to society as a whole. When access to archival records is restricted because of confidentiality or privacy concerns, researchers find their work thwarted.

Records may be restricted for privacy reasons when the information contained in them are of a highly intimate personal nature and which if released, could subject the person (and sometimes that person's descendants) to embarrassment, ridicule, or other unfavorable action. In fact, the

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definition of "personal record" includes information about a person's education, financial, medical or employment history, any identifying marks, symbols, photograph, voice print, home address, phone number, and birth, death, marriage, and divorce information found on vital record certificates, or information on an application for a license.¹⁰

In the State of Hawaii, there is a presumption of openness with regard to public records since the adoption of Act 262 in 1988 (chapter 92F, Hawaii Revised Statutes). The balancing test is to provide the access to records of historical significance while providing that privacy concerns are protected until a time in the future when the individuals affected are no longer alive.

History of the Hawaii State Archives

The Hawaii State Archives was established by statute in 1905. When the Hawaii public archives building was opened for business in 1906 it was distinct in that it was "the first building in the United States erected solely for the custody and preservation of public archives."¹¹

According to the NHPRC Final Report:

With the 1906 opening of the Archives Building, the new agency began collecting more than 100 years of records of early Hawaii, the Constitutional Kingdom, and the Republic, scattered among government offices, storerooms, basements, and private homes, and prey to moisture, insects, fire and careless handling.¹²

Hawaii and the state archives have had several residents, primarily former missionaries, who performed historian/archivist duties during the early 1800's, collecting, sorting, arranging, and indexing or cataloging these records. The NHPRC report provides a brief description of the early days of records collection in Hawaii.

Dr. Gerrit Parmele Judd was the first to oversee the collection and arrangement of government documents. Dr. Judd was a former medical missionary, member of the King's Treasury Board, Translator, and Recorder for the kingdom. Dr. Judd was succeeded by Robert Crichton Wyllie who collected papers from native officials and non-native residents of long standing. The first legislative appointee to sort and classify records pursuant to a 1892 appropriation was Reverend Roswell Randall Hoes, but the 1893 revolution brought his work to a halt. Under the Republic of Hawaii (1893-1898) the Foreign Ministers, first Dr. Nathaniel Bright Emerson and then Henry E. Cooper organized and cared for the records of the Republic.

Hawaii became a territory of the United States in 1898. As a territory, the records of Hawaii during 1898 through 1959 could have been acquired by the National Archives, but this never occurred. The accomplishments of the State Archivists since the passage of the Archives Act of 1905 are succinctly described in the NHPRC Final Report and provides a valuable summary of the early years:

The Archives Act of 1905 authorized the governor to appoint a

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three-member board of Commissioners of Public Archives "to collect all public archives, to arrange, classify and inventory the same; to provide for their safekeeping; and to compile and furnish information concerning them." The Commissioners were to receive only expenses, and were authorized to hire someone to do their work. A former bookkeeper and meteorologist, Robert Colfax Lydecker, was engaged as clerk to the Board, later being called Librarian of the Public Archives. Lydecker's lack of training in historical methodology did not impair his performance as Hawaii's first official Archivist in the formidable task of collecting, evaluating and indexing 100 years of records.

The Board next revived the 1903 plan for a hall of records, for which an appropriation was still available, but shortly due to expire. Rather than a hall of records concept under which government departments retained control of records deposited in a central building, the Archives Commissioners requested that the building house public archives over which they would exercise complete authority. The Commissioners prevailed; the planned inscription of the handsome little building was changed to "Archives."

The Library of Congress was notified that the Territory's archives were now secure under the care of a competent librarian, and the transfer of trunks and chests of records to the new building's vault commenced.

For the next 40 years, the chief archival interest was in historical records, with little concern for current ones. Librarian Lydecker located and surveyed public records on all islands, and requested private institutions and individuals to turn over government documents in their possession. All such returns were made voluntarily; the Archives never resorted to replevin proceedings.

There was little American precedent to follow in establishing archival administration. Lydecker had some assistance from the New York Public Library, but for the most part he and the Commissioners formulated their own policies. No statement of Lydecker's archival theory survives, but his arrangement practices reflect the principle of respect de fonds, by which government records are grouped according to the administrative unit which created them, and preserved in the arrangement given them by the creating agencies.

Reference service to the public and to government agencies underwent several changes during the early years. A short-lived rule prohibited copying of documents. At the start, the archivist allowed government officials to remove materials from the building for use in their offices; this was restricted by requiring a Commissioner's signed order for such removal until 1919, when the Board prohibited removal of archives altogether.

Accessible records proved their worth in court claims against the Territory, especially in land cases which the government won in

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a number of disputes through records in the Archives. In 1909, a law was enacted providing that certified copies of archives were considered legal evidence without the need of producing the original in court. An official Archives seal was adopted, although legal authority for the seal was not enacted until 1945.

Librarian Lydecker was concerned with preservation as well as gathering and organizing his archives: a chemical from a drug store in town was used as pest control. Translation from the Hawaiian was an important aspect of preservation, for with the passage of time many corruptions had crept into the Hawaiian language, making reading of 50 year old documents increasingly difficult for natives of the current time. Funds were acquired from the legislature for a succession of translators of the Archives staff.

Transcription by typing from disintegrating paper or faded sheets was another preservation project under Lydecker, as well as the binding of earlier transcriptions, and loose horizontal filing of documents originally folded in thirds.

Lydecker's system for archival description was a card catalog made up of a number of separate indexes. This was the current method for dealing with manuscripts in libraries and historical societies; apparently the idea came from the New York Public Library in 1906.

Lydecker remained as archivist for 19 years until his death, and was succeeded in 1924 by a newspaperman, Albert Price Taylor.

Taylor's main contributions during his seven years as archivist were the increased indexing of newspapers, collection of private papers, and extensive publication of articles based on the Archives holdings. During the process of collecting private papers, Taylor claimed to have obtained many official records which had fallen into private hands.

Mid-Twentieth Century: Ever Expanding Records

Miss Maude Jones succeeded Taylor in 1931 and served as Territorial Archivist for the next 24 years, with the exception of a 20-month hiatus during a political squabble over her appointment. Her experience was in library work but her archival arrangement practices generally conformed to the provenance of origin theory begun by her predecessors.

An avalanche of records had filled the Archives building by the middle of the Jones administration. In 1938, Jones recommended purchase of a microfilm camera; this was achieved in 1950. The crowded condition of the building and the cost of archival care led to a 1945 law authorizing public officers to microfilm records and, with the approval of the commissioners of the public archives, to destroy originals after filming. By 1949, the disposal law had been amended to permit a new disposal committee to approve the destruction of non-essential records without first filming them.

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Miss Jones' goal of publishing a catalog of the Archives holdings was never realized, but accumulated cards in the index drawers grew at a great rate, roughly 40,500 cards per year. A fee system for copies was established and rules of access and use of the Archives were codified. Reference services expanded notably in this period: from 867 inquirers in 1932 to 7,299 in 1954.

World War II brought martial law to Hawaii. The Archives staff was prepared to evacuate certain records to the chapel of the Royal Mausoleum in Nuuanu Valley but the need did not arise. An offer from the National Archives to shelter Hawaii's records was not acted upon.

The crowning achievement of Miss Jones' administration was construction of a new Archives building, opened in 1953.

Redefining Archival Administration

The present administration commenced in 1955 with the retirement of Miss Jones and the appointment of Miss Agnes C. Conrad, the first archivist to be engaged by competitive examination under high standards of qualification. Early in this administration, the Archives Board adopted the Conrad Plan eliminating certain non-archival activities. Records storage for private organizations was discontinued, and the records of functioning groups returned to them. All material accepted into the Archives custody was to be available for use by the public. The book collection was culled and limited to those of value in using government records; newspaper indexing was curtailed to include only items on the general history and government of Hawaii, and ceased altogether when the State Library began publication of indexes. A records disposal policy established that records accessioned by the Archives must possess permanent value and be approved by the Archivist. These changes reflected a decided shift toward a more consistently archival emphasis in records management.

Changes Under Statehood

A major change in the administrative structure of the Archives occurred in 1959, when Hawaii became a state. The new State Constitution limited the number of executive departments to 20, requiring the consolidation of nearly 100 Territorial agencies. The Archives lost its status as an independent agency, becoming a division of the Department of Accounting and General Services (DAGS), and the Archives Board of Commissioners and records disposal committee were disbanded. As executive head of DAGS, the State Comptroller was named as custodian of public archives with final authority in disposal of records at the state level.

Legal title to holdings in the archives was confirmed to the State under the Hawaii Omnibus Act, U.S. Public Law 86-6234, 1960. Any possible threat to Hawaii's keeping its archives was finally removed.

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The Conrad administration has concentrated on producing descriptive inventories of the holdings in its custody, and has consolidated a number of indexes begun by its predecessors. Lamination and microphotography have been practiced for conservation, and a centralized microfilming service for all state agencies was started in 1959. Those records regularly filmed have included court cases, notary records, property tax records, partnership and corporate reports, university and high school records, state payroll records and National Guard records.

A nationwide survey of state archives conducted in 1962-63 concluded that Hawaii was one of a minority of states with an adequate archival program, saying:

"Ironically, the Territory of Hawaii, now the youngest state...preceded most the states in caring for its archives.... Its archival program may be said to have developed slowly but consistently over a period of sixty years..."

This report commented, however, that Hawaii's Archives needed additional professional staff for records arrangement and description as well as a records management program with state agencies, and that the planned records center should be built as soon as possible.

Since that assessment, the State Records Center opened in 1976, but the need for additional staff remains a concern.¹³

There have been several changes to the State Archives administration since the publication of the final report of the NHPRC. Agnes Conrad retired in 1982. Ruth Itamura, a former State Librarian, was appointed in April 1983 and served until December 1986.

The Deputy Comptroller, Ken Kiyabu, served as Acting Archivist for about nine months until the present Archivist, Jolyn Tamura was appointed in September 1987.

Chapter 2

REVIEW OF THE LITERATURE

House Resolution No. 11 called for a review of state and federal laws pertaining to access to confidential public records in an archives. Access in this context is generally defined as the "authority or right of a researcher (outside of government creators or receivers) to obtain information from or to do research in archival materials in the custody of an archives."¹

According to Baumann:

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 ever more vexing during the remainder of this century.²

A review of the literature revealed that discussions about the problem of access to confidential records in an archives is a recent phenomenon, with early reports appearing during the 1970's. This coincides with the period following the adoption of the Federal Freedom of Information Act (FOIA) of 1966 as amended, the passage of the Privacy Act of 1974, and the increased use of computers in social science research.

Studies in the 1970's

The increasing use of one kind of record, the personal case record, which contains personal data such as medical history, therapy, or other socioeconomic information has increased the awareness of the problem of access to confidential records.

Virginia Stewart raised this issue in a 1974 article in which she described the developing social and historical research methods which affect records management and archives management. On the one hand, efficient records management encourages the disposal of records after they have reached the end of their retention periods. However, Stewart reported:

Practices which are promoted in the interest of efficient records management may be antithetical to scholarship.... [T]he archivist must recognize that in assuming custody over case records he becomes responsible for administering materials in which two social values--the public's "right to know" and the individual's personal privacy--come into potential conflict.

Public acceptance of the use of case records for purposes other than the provision of services to patients and clients is conditional upon the maintenance of individual privacy. Basically,

the doctrine of privacy assumes that the individual has a right to a certain "social space" free from undue interference from the larger society of which he is a part.³

Stewart indicated that as of that date "no institution had formally worked out a policy statement covering acquisition, custody, and access to case records from a theoretical and legal perspective." She warned that "enforcement of appropriate standards cannot end with the granting of research access. The archivist must take measures to effect compliance, a function that appears to have received insufficient attention."⁴

Stewart went on to describe the method of administering access to social welfare case records at the Manuscript Section of the University of Illinois Library at Chicago Circle. This library developed a contractual agreement between the researcher and the archives. The researcher must make application, stating his research purpose. The application is reviewed and the researcher interviewed by the Manuscript Librarian. All research notes are subject to review for compliance with applicable restrictions, and a copy of any publication resulting from the research must be provided to the Manuscript Section. Among other things the researcher agrees to hold harmless and indemnify the Board of Trustees of the University of Illinois, its officers, agents or employees, for any loss or damage to them occasioned by the release of the informational content of these records. The researcher is alerted to his possible financial liability in the event of a lawsuit arising from his use of confidential materials. The archivist also checks the researcher's credentials, reviews the application and the researcher's notes.⁵

The Manuscript Section has other policies regarding acquisition, custody and access to confidential records, including extent and time-period of restrictions, maintenance of confidentiality during technical processing and storage, and procedures governing research use. Stewart said that "no collection has been accessioned with an absolute prohibition on use of the record series."⁶

Studies in the 1980's

In 1982 Kathy Roe Coker conducted a survey of all 50 states seeking "to secure the latest information on the policy and progress of state archival institutions in providing access to confidential records within their custody."⁷

Coker's findings indicated that as of 1982 seven states (Georgia, Illinois, Indiana, Kansas, Kentucky, Oregon, and Utah) had limited the period of closed access to archival records, ranging from 25 years to the death of the individual identified in the records, through legislative means. Other states have used the contract route, or sought formal Attorney General opinions in order to address the issue of when the right to privacy ends for records stored in the public archives.

Also, in 1982 Robbin surveyed fifty states on the privacy-access debate among state archivists. Robbin published her findings in 1986 and examined public policy issues of personal privacy and access to restricted records for social research.⁸

Robbin's findings indicated that while archivists generally had little difficulty recognizing the competing values of privacy rights versus access rights with regard to the records stored in archives, most archives had not developed formal policies and practices concerning access at least as of 1981-1982 when the survey was conducted. In fact:

Policies and practices were determined largely by their relationship with the originating agency, which de facto decided retention schedules. Archivists generally preferred institutionalizing the decision-making process through the legal system and standard operating procedures. They were not satisfied with the current statutory situation. Archivists overall appeared relatively uninformed about the statutory environment in which they operated. Their knowledge of statutes was relatively modest.⁹

Robbin's Findings

Robbin sought to collect information about six areas:

- (1) The archivist's level of knowledge about state privacy, confidentiality, and open records laws and provisions for research access to confidential health and social science records;
- (2) Archival policies and practices for health and social science records;
- (3) The archives' relationship with the creating agency and whether archivists wanted this relationship modified;
- (4) Politics and the archivist;
- (5) The archivist's response to the debate on privacy and access; and
- (6) The archivist's perception of important issues facing the archives in 1982 and the relative importance of access.

Robbin concluded that:

The findings suggest that policies and practices for responding to requests for restricted records are not well developed. Institutional constraints place a low priority on access to confidential records for social research, archivists are not well informed about confidentiality and access statutes, and archivists are not politically active.¹⁰

Baumann's survey of fourteen states 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 definition of privacy and

freedom of information laws vary from state to state.... The fourteen states surveyed were Alabama, California, Georgia, Illinois, Indiana, Kentucky, Michigan, Minnesota, New York, North Carolina, Ohio, Pennsylvania, Utah, and Wisconsin."¹¹

Baumann reported that his 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."¹²

Baumann's Findings

Baumann described three general approaches on access administration in the states: (1) legislated, (2) contracted, and (3) limited.

Legislated access generally provides for the release of restricted records after a designated period of time or separate statutes that provide for access for research purposes as well as administrative uses (Illinois and Wisconsin). ...States with contracted access have directed their efforts toward developing a system of contractual agreements or inter-agency instruments that grant researcher access to records held by the state archives (Michigan, New York, and to a limited degree, California and Minnesota for example). ...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 (Alabama, California, North Carolina, and Pennsylvania).¹³

Hawaii would probably fall into Baumann's third category because Hawaii's state archives has no legislation or official procedures for handling records which have restricted access due to privacy concerns.

Baumann's Recommendations

Baumann described in detail Michigan's contractual arrangement for mental health records and the Georgia Records Act of 1972. A copy of Michigan's contractual agreement is reproduced in Appendix C. The contractual agreement requires a researcher to complete a contract form and describe the research project and the use to which the information will be put. Then a reference archivist screens the application. The researcher must agree to certain conditions:

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- (1) The researcher must keep confidential any identifiable personal information about the record subject;
- (2) The researcher must allow the state archives to review the researcher's notes or writings before dissemination;
- (3) The researcher is legally bound to pay damages of \$1,000 for violating provisions of the agreement; and
- (4) The researcher must indemnify and hold harmless the state and its agencies for any costs or damages which may accrue from the use of the records.

Three parties must sign this agreement: (a) a representative of the Department of Mental Health; (b) a representative of the Department of State, Michigan History Bureau, Archives Unit; and (c) the researcher.

These provisions are nearly identical to those reported for the Manuscript Section of the University of Illinois Library at Chicago Circle described by Virginia Stewart in 1974.¹⁴

In an agreement such as the one described for Michigan's mental health records, there is an attempt to balance the client's right to privacy with the researcher's need for information. According to Baumann:

The Michigan contractual experience proved so successful that both departments sought to codify practice into law. Public Act 319 of 1980 (399,41(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 for research purposes provided the names of individuals identified in materials are protected from disclosure." This extends the contractual agreement process to all administrative records, as well as case files.¹⁵

There are, however, potential problems with the contractual agreement method. In some instances, a department might use the fact that certain records are confidential to deny preservation in an archives and instead destroy what might have been records of potential historical value. An alternative to the contractual method is legislation developed in Georgia. Again citing Baumann:

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 agreements (contracts). All restrictions are

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cited on the schedule. Records held by the state archives prior to 1972 are presumed to be covered under the act.¹⁶

The Georgia Act has four major components:

- (1) 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." (Section 98)
- (2) Restrictions on access to "confidential, classified or restricted records" in the archives are to be removed 75 years after the creation of the records. (Section 100)
- (3) The State Records Committee may lift restrictions of records in the archives as early as 20 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." (Section 92)
- (4) The act defines conditions for research access to restricted records (Section 101). 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. It is significant that the burden of decision to allow use of the records in the agency (often in the archives as well) is 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.¹⁷

Baumann noted that:

The Georgia Records Act is an easy law to follow and is more comprehensive than the legislation found in any other state surveyed, and does provide adequate flexibility in a unified program where records management and archives are administered by a single authority.¹⁸

There have been other studies which discuss the issues surrounding access to public records containing confidential information (see Appendix B), but the surveys by Coker, Robbin, and Baumann were particularly useful for comparisons with the Bureau's findings. The Bureau's survey results are presented in the next chapter.

Chapter 3

SURVEY RESULTS

Part I. How Other State Archives Handle the Confidential Records Issue

Introduction

The Legislative Reference Bureau wrote to each state's archives for their respective laws, rules, or attorney general opinions on the handling of access to confidential archival records. This chapter presents excerpts of the responses received. A chart summarizing states' provisions in the area of access to records is presented in Exhibit 1.

Alabama. Alabama does not have laws providing for the release of restricted records after a designated period of time.

State agency records in the state archives are scheduled for permanent retention. Access restrictions to specific series would be included in the records schedule and corresponding catalog record.¹ Baumann reported Alabama as one of several states which functions without specific legislation and operates without written guidelines.²

Alaska. No response.

Arizona. There is no specific access law for closed records in the Arizona archives.³

Arkansas. Arkansas does not accept materials which are considered confidential. State agencies and departments which produce confidential materials are requested to keep such materials themselves.⁴

California. California does not have a specific law which lifts access restrictions on archival records. Within the California State Archives, a number of records are restricted by law, State Archives policy, or agreement with the donor or depositing agency. Restricted records include: (1) governor's papers, (2) legislative papers, and (3) certain agency records.⁵

Baumann reported that California used a system of contractual agreements at one time but also operated in most respects without written guidelines.⁶

Colorado. The Colorado Division of Archives and Public Records has no guidelines or policy as to when closed/restricted records in its holdings may be opened to the public after a certain span of years.⁷

Connecticut. No response.

Delaware. Delaware does not have any formal policy or statute addressing the question of access to confidential records retained permanently in the state archives.

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Instead, the archives uses an informal rule that permits release of confidential records requested by a researcher if the archivist feels that "all the parties or events named in the records are 'long dead', which usually means something older than 60-75 years." Thus, "confidential records" with the exception of adoptions, have been released in this manner for at least 20 years. No problems have been experienced so far.

Delaware is also in the process of drafting new policies for the handling of confidential records in the archives.⁸

Florida. Florida reported that restrictions on public records are scattered throughout Florida statutes and cannot be easily summarized for this study.⁹ There appears to be no provision for the lifting of access restrictions on archival records after a certain period of time.

Georgia. With two exceptions, state laws regarding confidentiality and openness of records apply to records in the State Archives just as they apply to the records in State agencies and local governments. The exceptions are in the Georgia Records Act, O.C.G.A. 50-18-100:

- (1) Any restricted records in the Archives becomes open 75 years after its creation, and
- (2) The State Records Committee may, by unanimous decision lift restrictions as early as 20 years after creation of the records.

The Georgia Records Act also contains procedures for the use of confidential records for research purposes (O.C.G.A. 50-18-101). This section applies regardless of whether the records are in the State Archives.

The Archives also protects confidential records through the retention schedule process which spells out which agency records are to be transferred to the Archives. These schedules identify which records are closed by law and give the appropriate code citation. Also, the same details are recorded on the transmittal forms used to transfer the records to the Archives.¹⁰

Hawaii. Hawaii does not have statutory provisions for lifting access to confidential records in the State Archives. In Coker's study, she reported that Hawaii's State Archives had established a nonlegislative alternative to releasing restricted records after a period of time. Coker said that Hawaii's archives rule of access is based on the public records law which exempts from general access records which invade an individual's right of privacy. Hawaii's archives is reported to follow the National Archives' policy in terminating the right to privacy at the death of an individual.¹¹

It appears that this informal rule was never described in formal Archives policy. The State Archives was not able to locate a copy of the State Archivist's letter of December 16, 1980 to Ms. Coker. Rules governing the public use of the State Archives and Records Center is reported in Title 3, Chapter 20, Hawaii Administrative Procedures. Relevant use restrictions are specified in section 3-20-6:

SUMMARY OF STATE ARCHIVES' ACCESS POLICIES FOR CONFIDENTIAL RECORDS

State	Access restric- tions lifted after "N" years provided by statute	Access restric- tions lifted after "N" years by formal, writ- ten administra- tive rule	Access provided by contractual agreement be- tween archives and researcher	Other access provisions, e.g. attorney general opinion, appro- val from creat- ing agency	Access provided by informal, un- written rule on an ad hoc basis	Notes
Alabama						O
Alaska*						
Arizona						O
Arkansas						A
California			X	X		
Colorado						O
Connecticut*						
Delaware					60-75+ yrs	
Florida						B
Georgia	75 yrs, 20 yrs		X	X		C
Hawaii						O
Idaho*						
Illinois	75 yrs					D
Indiana	75 yrs					E
Iowa*						
Kansas*						
Kentucky*						F
Louisiana*						
Maine	50 yrs					G
Maryland	20, 60, 100 yrs					H
Massachusetts					death	I
Michigan		20 yrs/death		X		
Minnesota		50/72 yrs	X	X		J
Mississippi*						
Missouri*						
Montana				X		K
Nebraska					X	L
Nevada	50 yrs					M
New Hampshire				X		N
New Jersey						O
New Mexico*						
New York			X			
North Carolina				X		
North Dakota*						
Ohio						O
Oklahoma*						
Oregon*						
Pennsylvania				X	75 yrs	P
Rhode Island						O
South Carolina				X		Q
South Dakota			X	75 yrs		R
Tennessee					70 yrs	S, A
Texas				death		T
Utah	75 yrs					
Vermont						A, O
Virginia*						
Washington*						
West Virginia				X		
Wisconsin			X	60 yrs		U
Wyoming						O

*No response

- A. The Arkansas History Commission will not accept confidential records into its collection. The same is true for Vermont and Tennessee.
- B. The Florida State Archives reported that its Attorney General prepared a 300 page book, "Government in the Sunshine Manual" which contains the rules governing access. Restrictions on public records are scattered throughout Florida statutes. The Archivist did not report whether there is a specific provision for lifting access to confidential records after a period of time.
- C. Georgia statutes permit lifting restrictions as early as 20 years after creation of the records upon the unanimous decision by the State Records Committee. (A.C.G. 50-18-100(c)). The statute also provides for use of confidential records for research purposes upon written agreement with the researcher (A.C.G. 50-18-101)).
- D. Illinois has limited access restriction to 75 years except for mental health records (I.R.S. 1987, chapter 116, para 43.10(4)).
- E. Indiana provides that "notwithstanding any other law, a public record that is classified as a confidential other than a record concerning an adoption shall be made available for inspection and copying 75 years after the creation of the record." (Ind. Code Section 5-14-3-4(e).)
- F. While the Bureau received no response from the State of Kentucky, Baumann reported that Kentucky has a 50 year rule on access.
- G. Maine allows the state archivist with written concurrence from the head of the agency from which the records were transferred (or a successor, if any), to remove any restrictions on use of records that have been in existence for more than 50 years (Administrative Instruction, Nov. 15, 1976, referring to Section 95, Subsec. 3, M.R.S.A., Title 5.)
- H. Maryland has no specific legislation which lifts access to confidential records, but its state archives may disclose vital records to (among others) an individual who requests an "old vital record which means a record in the custody of the archives, that pertains to a birth that occurred more than 100 years ago, to a marriage or divorce that occurred more than 60 years ago, or to a death more than 20 years ago. (A.C.M. sec. 9-1015.)
- I. The Massachusetts' state archives reported that access restrictions end at the death of the subject individual, except for mental health, mental retardation, and prisoner records.
- J. The Minnesota state archives' use policy provides that private information will not be open until 50 years after the date the information was created or collected and confidential information will not be open until 72 years after creation or collection. Private data is information about individuals that is not public, but is accessible to the subject individual. Confidential data is information on individuals which is not public and not accessible to the subject individual. (Minn. Historical Society, Access to Government Records in State Archives, Use Policy.)
- K. The Montana Historical Society reported only informal arrangements with state agencies, giving as an example, a 40 year restriction period for bank examiner records for closed banks. (Letter from Sue Jackson, State Archivist, 7-8-88.)
- L. Nebraska's response included Rules of the State Records Administrator and retention and disposition schedules which do not directly address the access issue.
- M. Nevada provides that public records which have been declared by law to be confidential must remain confidential for 50 years, or, if the records relates to a natural person until his death whichever is later unless another period has been fixed by special statute (N.R.S. 378.300 (1987)).
- N. The New Hampshire Code of Administrative Rules provides that records deposited in the archives remain the property of each creating agency, and neither confidential records nor their contents shall be released except to the holding agency or to others having authorized permission from each agency.
- O. No law, policy, or guideline (formal or informal) exists in this state to determine when closed/restricted/confidential records may be opened to the public after a certain span of years.
- P. The Pennsylvania archives applies a 75 year access rule where there is no applicable law affecting a particular record.
- Q. South Carolina does not have any formal rules or laws permitting confidential records to be released after a specified period of time but generally permits research use of records unless prohibited by law. Through its records management program it allows for permanently valuable restricted records to be retained for a long enough period to permit lifting restrictions after death of the subject individual.
- R. Restricted records (patient's records, social service case files, prisoner files) in the South Dakota archives are made available to researchers after 75 years or 75 years plus majority, for minors' records. (Letter from Linda M. Sommer, State Archivist, June 27, 1988.)
- S. Tennessee's archivist reported that "generally state law does not provide statutory retention periods for confidential records. Those confidential records which are given legal retention periods become public property after 70 years unless other arrangements are made." However Tennessee no longer accepts confidential records for its archives. (Letter from Edwin S. Gleaves, July 13, 1988.)
- T. In Texas, the right to privacy lapses upon death except for medical records according to an attorney general's opinion. Medical records are specially provided for protection so that even upon death the medical records cannot be disclosed unless proper written consent has been filed by a personal representative. (Attorney General Opinion, No. JM-229, Nov. 14, 1984.)
- U. In Wisconsin, division of corrections' records are open and accessible after the offender's death or 60 years after the last date of supervision. (Policy for Use of Restricted Records, State Historical Society of Wisconsin: Procedures 2.e.)

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(a) The use of archives is subject to the restrictions set forth in section 92-50, Hawaii Revised Statutes, and to restrictions placed on the records by the agency of origin or by statute.

(c) State records center records shall be restricted to use by the employees of the agency which transferred the records for storage, or by researchers having permission of the agency, unless the records transmittal list authorizes release of control of the records by the agency.

Idaho. No response.

Illinois. The Illinois State Archives is not permitted to place access restrictions upon records in its holdings that are any greater than those that existed when those records were created, and after such materials reach an age of 75 years those restrictions too are removed, except in the case of mental health records (IRS, 1987, Chap. 116, para. 43.10 (4)). There is no pending legislation or Attorney General opinions that deal with such matters. The State Archives has no written or published policies regarding access.¹²

Indiana. The State Archives of Indiana follows state law concerning access to public records. Records may be declared confidential and excepted from the right to inspect, unless access to the records is specifically required by a state or federal statute or is ordered by a court under the rules of discovery. However, except for adoption records, the time limit followed is to allow access to a public record classified as confidential 75 years after creation of that record (I.C. 5-14-3-4(e)).¹³

Iowa. No response.

Kansas. No response. Coker reported Kansas has a 70-year access limitation.¹⁴

Kentucky. No response. Baumann and Coker reported that Kentucky has a 50-year rule on access.¹⁵

Louisiana. No response.

Maine. Maine State Archives' Administrative Instruction indicated that M.R.S.A., Title 5, section 95, subsection 3 provides that "restrictions or limitations imposed by law on the examination and use of records transferred to the Archives ...shall remain in effect until the records have been in existence for 50 years, unless removed or relaxed by the State Archivist with the concurrence in writing of the head of the agency from which the records were transferred or his successor in function, if any."¹⁶

Maryland. Maryland's laws on access to public records does not contain any references to lifting restrictions to public archives records.¹⁷

Massachusetts. In Massachusetts, the restrictions which govern records in creating agencies continue to operate after these records are transferred to the State Archives. The Archives administers these restrictions in

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accordance with pertinent statutes, regulations, and standard practices of agencies.

The release of restricted records varies with the type of record. It is generally acknowledged, although no overreaching statute now exists, that individuals have no privacy rights after death, and that records containing personal data governed by the Fair Information Practices Act (Mass. Gen. Laws ch. 66A) may be released as public record after the death of the data subject.

Other laws governing restricted records require records to remain confidential in perpetuity. Mass. Gen. Laws ch. 123, §36 governs research access to department of mental health and mental retardation client files; access to these records is controlled by departmental research review committees.

Prisoner records are governed by Mass. Gen. Laws ch. 6, §172 (Criminal Offender Record Information Act). Access to these records is also restricted in perpetuity, and is controlled by the Criminal History Systems Board. Recently, a special commission studying this law suggested a revision which would make these records public after the death of the subject individual.¹⁸

Michigan. According to David J. Johnson, State Archivist of Michigan, information contained in "Confidentiality of Records and Access" by Kathy Roe Coker remains accurate for the State Archives of Michigan (see Chapter 2 for a summary of Coker's findings). Public Act 319 of 1980 (Mich. Comp. Laws section 399.4a) authorized the State Archives to preserve confidential records gathered by a governmental agency and to make information available for research under specified conditions.

The Michigan State Archives uses a contractual agreement between researcher and Archives for the release of confidential mental health records for legitimate research purposes.¹⁹

Minnesota. Minnesota's state archivist reported that the law in these areas is extremely lengthy and complex. However, in a single-sheet explanation of access to government records in state archives (albeit out-of-date according to the state archivist) use policy is determined from the status of the record in the agency of origin. Thus, if the record was public while in the agency of origin, then these records are accessible in the state archives by any member of the public.

If the records contained information that was classified private, they will not be open until 50 years after the date the information was created or collected. If the records were classified confidential, then the records are not open until 72 years after their creation or collection. "Private data" is data that is not public, and accessible to the individual subject of the data. "Confidential data" is data that is not public and not accessible to the individual subject of the data. Records documenting adoptions, illegitimate births, and paternity cases are not accessible regardless of the date of the records, except by law or upon court order.

There are five exceptions to the policy on access, including access to private data by the subject of the data or to a family member doing genealogy

if approved by the archivist and if the researcher signs a statement agreeing to use the information about his or her family only and only for personal interest.

Procedures for filling an application and use agreement form to use private or confidential records and an appeal form for denial of access are also available.²⁰

Mississippi. No response.

Missouri. No response.

Montana. The state of Montana has not yet officially tackled the problem of access to confidential records. Currently, the Archives has been able to reach agreements with several state agencies about confidential records they produce, but these are informal agreements that have not been tested on any legal grounds. The archives hopes to continue these informal arrangements until the matter can be addressed thoroughly by legislation. The arrangements include agreeing on restricted access for a limited time period (in the case of bank examiner records for closed banks, a 40-year restriction period) and on limited use of information contained in some confidential records (in the case of records from the state mental hospital, only the names, ages, etc., of patients can be used for research; medical treatment information, etc., cannot be used for individual patients).²¹

Nebraska. Material received from Nebraska included the Rules and Regulations of the State Records Administrator of the State of Nebraska, Micrographics Standards, and a Retention and Disposition Schedule. None of these publications addresses the particular issue of this study, that is, access to confidential archival records which have been permanently closed to researchers.²²

Nevada. The Nevada State Archives reports that there are no general laws that deal with the confidentiality of government records. The Attorney General has opined that access to records can only be restricted by statute and they are on an individual basis. The statute dealing with records in the archives supersedes all other confidentiality statutes, but the records must be in the legal custody of the Division of Archives and Records to apply.

Records of constitutional officials that are received by agreement are governed by the terms of the agreement. Records such as governor's constituent correspondence and Prison Inmate Case Files are restricted for 50 years or the life of the individual (Nev. Rev. Stat. section 378-300). Archives staff makes it incumbent upon the researcher to prove the death of the individual with a death record or an obituary after the 50 years criteria has been met. If there is no record of death, archives staff can look into the record for the birth date of the individual to determine if the person would be more than 100 years old. If the criteria of the 100-year rule is met, staff will allow the researcher to see the record.

Legislation regarding confidentiality of records will probably be submitted by the Attorney General's office for the 1989 session of the Nevada Legislature.²³

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New Hampshire. New Hampshire does not have any laws or regulations addressing the issue of access to archival records which have been closed to researchers because of confidentiality.²⁴

New Jersey. New Jersey does not have a law which provides for the release of confidential records in the Archives after a specified period of time.²⁵

New Mexico. No response.

New York. New York does not have any law, or any attorney general opinions relating to opening confidential records after a period of time. Several years ago "legislation was proposed to lift all restrictions on access to confidential records in the State Archives after 75 years, but the proposal was rejected in legislative committee."

Under current policy, the archives follows its "Procedures for Administering Access to Confidential Records" which "in general under the state's permissive Freedom of Information Law, the Archives may release confidential information if it deems such action not likely to result in harm. In several instances, the Archives and an agency which is transferring confidential records enter into an agreement to govern access to the records. Such agreements benefit the transferring agency by allowing them continued authority to restrict access. The Archives benefits because [they] likely would not otherwise acquire the records and because it is helpful to [them] to have the expert opinion of the agency staff when reviewing requests for research access to certain confidential records. Finally, researchers benefit because their chances of gaining access to confidential records is improved." New York also provides a contractual method of access for mental health clinical case records for legitimate research purposes (see Appendix C).

According to its Director, "Our experience and that of some other states is that these agreements are effective in balancing privacy concerns and legitimate research concerns."²⁶

North Carolina. North Carolina does not have specific laws or policies regarding access to confidential archival records. In those cases where questions regarding the confidentiality of records and access arise, the state archives seeks an opinion or clarification from the office of the Attorney General.²⁷

North Dakota. No response.

Ohio. Ohio does not require opening of records after a designated period of time. The Ohio Historical Society has not adopted rules governing access.²⁸

Oklahoma. No response.

Oregon. No response.

Pennsylvania. Pennsylvania's archives does not have a published statement outlining their position on privacy and confidentiality. According to the Associate Archivist:

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When a request for access to confidential material arises, the Archives first determines if use of the materials is covered by a particular legislative act and follows the law accordingly. For example, a recent Mental Health Act outlines that a patron must obtain permission for access to a patient's medical records from the particular agency in which those records were created, i.e., a state hospital, orphanage, etc.

In cases where there appear to be no law applying to a particular record, the Archives temporarily are imposing a 75-year access rule, i.e., denying access to confidential records 75 years (old) or less. Seventy-five years seems to be sufficient time to diminish the sensitive nature of such items.²⁹

Rhode Island. Rhode Island does not have any laws or policies providing for the release of restricted records after a designated period of time.³⁰

South Carolina. South Carolina does not have any laws or policies providing for the release of restricted records after a designated period of time.³¹

South Dakota. Records in the South Dakota State Archives are restricted on a case-by-case (generally, series-by-series) basis through a retention schedule or throughout the accessions process. There is no legislation known to the Archivist which covers the subject for records as a whole. There are no Attorney General Opinions on file which concern access to records. This may be because the State Archives has only been in existence for slightly more than a decade.

Access to restricted records may be provided by permission of the donor/donor agency and the State Archivist. Researchers complete a form on which the particular restrictions are stated and sign their agreement to abide by those restrictions. In the two and a half years that the Archivist has been in her position, they have had no problem providing data to scholarly researchers doing statistical studies. Most of the restricted records in their custody concern patient's records, social service case files, or penal system files of one type or another. Such records are usually restricted for 75 years, or majority plus 75 years in the case of files pertaining to minors.³²

Tennessee. Tennessee reported that the State Library and Archives no longer receives any materials regarded as confidential under state law. Before they allow access to previously acquired confidential records, a researcher must provide written permission from the originating agency's records officer.

Generally, state law does not provide statutory retention periods for confidential records. Those confidential records which are given legal retention periods become public property after 70 years unless other arrangements are made.³³

Texas. In Texas, confidential records not covered by the Medical Practices Act are open for research upon the death of the subject of the records. A rule of thumb is that any pre-1900 records are opened without

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further inquiry of the researcher. Requests for later records require proof that the subject is dead or that the researcher is acting for the subject. In the absence of such proof, the requested file is reviewed by the Reference Archivist. If there is a reasonable presumption that the subject is dead and that the privacy rights of third parties will not be compromised, the file is released.

According to an Attorney General's Opinion, in Texas, the right to privacy lapses upon death except as to medical information. There are no statutes that provide for the release of restricted records after a designated period of time in the sense of a law which states that a specified record may be opened after a specified number of years.³⁴

Utah. Utah's Archives utilizes a "pre-classification" scheme of assigning access designations to data within records series or the records series as a whole. These access designations cover records stored in the agencies as well as the Archives and revert to "public" after 75 years (Utah Code Ann. section 63-2-89).³⁵

Vermont. The Vermont State Archives does not hold confidential records. For example, legislative committee minutes are open records, as are all the gubernatorial records received (including pardons).³⁶

West Virginia. No formal policies or legislation exist, but the Archivist reports that they have informal agreements with certain agencies, such as the Vital Statistics Division, Department of Health, in which they agree not to make the original volumes of birth and death records available to the public to browse, but the Archives will copy any certificate requested through the use of the index. They also have some Corrections records which are accessed through the staff only, because of the state's Privacy Act. The Archives will also close portions of private papers such as those of former governors if they feel that the Privacy Act might apply to certain materials. Otherwise, the collections are available to the public if their physical condition allows.³⁷

Wisconsin. Wisconsin does not have any law that provides for the release of restricted records after a designated period of time. Wisconsin Statutes 16.61(3)(d) provides:

Records which have a confidential character while in the possession of the original custodian shall retain their confidential character after transfer to the historical society unless the board of curators of the historical society, with the concurrence of the original custodian or the custodian's legal successor, determines that the records shall be made accessible to the public under such proper and reasonable rules as the historical society promulgates. If the original custodian or the custodian's legal successor is no longer in existence, confidential records formerly in that person's possession may not be released by the board of curators unless the release is first approved by the public records and forms board. For public records and other official materials transferred to the care of the university archival depository under paragraph (b), the chancellor of the university preserving the records shall have the

power and duties assigned to the historical society under this section.

Records from the Division of Corrections are accessible after the offender's death or 60 years after the last date of supervision (State Historical Society Policy). A copy of the Historical Society's agreement for the use of restricted health records is reproduced in Appendix C.³⁸

Wyoming. Wyoming does not have a compilation of information regarding its state laws providing for the release of restricted records after a designated time period, and therefore are unavailable.³⁹

Part II. How the Federal Government Handles Access to Confidential Records

Access guidelines for the federal government are contained in "Guide to the National Archives of the United States" published by the Superintendent of Documents, Government Printing Office, 1974. Revisions or additions to these restriction guidelines are reported in 36 CFR Ch. XII, section 1254.30 et seq. (Subpart C--Access to unclassified records and donated historical materials) and Part 1256--Restrictions on the use of records.

The National Archives and Records Administration (NARA) complies with the use restrictions prescribed by statute, executive order, donors of historical material, or other restrictions specified in writing by the agency from which the records were transferred. The NARA is subject to the requirements of the federal Freedom of Information and Privacy Acts (FOIA). A detailed description of the FOIA and the Privacy Act is available in chapter 3 of volume one, Report of the Governor's Committee on Public Records and Privacy, so only a brief description is provided here.

Open access to public information of all kinds is governed by the FOIA.⁴⁰ Under the FOIA, all government records produced or collected by the agencies of the federal government are available to a requester unless specifically exempt. Each federal agency is required to publish certain information in the Federal Register which describes the organization and its functions, rules, descriptions of forms, reports, papers, and policies adopted by the agency.

The FOIA describes the procedure for requesting records from a federal agency, the time limits for responses to requests, and appeals when requests have been denied.

The Privacy Act of 1974 is designed to protect against "an invasion of an individual's personal privacy by requiring federal agencies to permit the individual to (1) determine what records pertaining to him are collected or used by such agencies; (2) prevent the unanticipated use of those records without his consent; (3) permit individual access; (4) assure collection or use of personal information for a necessary and lawful purpose, with current and accurate information with adequate safeguards to prevent misuse; and (5) provide civil remedies for willful and intentional misuse of the information resulting in violation of an individual's rights."⁴¹

Privacy Concerns

Information that would invade the privacy of an individual includes information:

about a living individual which reveal details of a highly personal nature that the individual could reasonably assert a claim to withhold from the public to avoid a clearly unwarranted invasion of privacy, including but not limited to information about the physical or mental health or the medical or psychiatric care or treatment of the individual, and that--

(1) Contain personal information not known to have been previously made public, and

(2) Relate to events less than 75 years old.⁴²

The National Archives restricts access to records of a private nature by permitting its disclosure only to:

(1) Employees of the agency that originated or transferred the records to the archives, who need the record in performance of official duties;

(2) Researchers for the purpose of statistical or quantitative research when such researchers have provided the National Archives with adequate written assurance that the records will be used solely as a statistical research record and no individually identifiable information will be disclosed; or

(3) The subject individual, provided:

(i) The records do not contain investigatory material compiled for law enforcement purposes,

(ii) A source who provided evaluation material used to determine potential for promotion in the armed services was promised confidentiality,

(iii) The information is not classified security material.⁴³

Where personal information can be deleted NARA will make a "sanitized" copy of the record available to the researcher.⁴⁴

NARA will not grant access to restricted census and survey records of the Bureau of the Census less than 72 years old containing data identifying individuals enumerated in population censuses in accordance with 44 U.S.C. 21098(b).⁴⁵

Unclassified and Donated Historical Records

Access to unclassified and donated historical materials is governed by rules complying with the Freedom of Information Act (FOIA). In general, requests for unclassified archives can be made through the FOIA procedures listed in the Archives regulations (36 CFR Ch. XII, Subpart C) with a written request to the Assistant Archivist, among others, clearly stating that the request is being made pursuant to the FOIA.

When restricted records are requested, NARA consults with the agency from which the records were transferred to determine which exemption justifies continuing the restrictions.

Procedures specify how a denial is made and how the requester may appeal the denial to the Deputy Archivist.⁴⁶

Summary of Survey

Thirty-four states responded to the Bureau's survey. Most states responding to the Bureau's inquiries enclosed copies of their state's government records act (also described as sunshine laws, or freedom of information acts), which generally define the term "public record", state that all public records of the state (with some exceptions) are available for inspection by the citizenry during normal business hours, allow for copying at a nominal fee, and provide for a grievance procedure if a requester is denied access to public records. In addition, these laws also provide that records which are in the issuing, or creating department and in a state records storage center belong to the department and the accessibility rules or laws are applied by departmental personnel. Hawaii's old public records law which had been codified in Part V of Chapter 92, Hawaii Revised Statutes, had similar provisions. These provisions (and others) now exist in the new Uniform Information Practices Act. An archives must comply with its state's government records law, but these laws often do not address the narrower issue of when restrictions to confidential records in a public archives can be lifted. Records which have been transferred to the archives are to be retained in perpetuity because of their inherent historical, administrative, or other value. In several states, archives' staff apply the same restrictions which were applicable to the records while those records were in the department. That is, if access to certain records had been restricted due to privacy concerns or were confidential for other reasons while the records were in the department, then these records would continue to be confidential or inaccessible to researchers even after being transferred to the archives. This appears to have been the policy for the Hawaii State Archives. Where confidential records have been acquired by an archives, this policy would result in permanent inaccessibility of certain records. The Bureau's survey showed that the archives of many states have approached this problem in a variety of ways.

The Bureau's survey of other state archives' policies regarding access to confidential material confirmed findings in published studies which reported that only a few states have provided through legislation for the lifting of access restrictions on public records in a public archives after a certain period of time. Many states like Hawaii have not addressed this issue at all.

About one-fourth of the states responding (9 of 34) have no policy or law for handling access to confidential records in their respective archives.

Three states, Arkansas, Tennessee, and Vermont, have avoided this issue by refusing to accept records which have no date for lifting accessibility (i.e., are closed permanently). In refusing to accept confidential records there is some danger of the permanent loss of potentially valuable historical material.

Seven states reported statutory provisions which lift restrictions after a specified period of time: Georgia, Illinois, Indiana, Maine, Michigan, Nevada, and Utah.

Although statutory provisions are not common, when combined with informal and formal procedures for lifting restrictions, the Bureau found that at least fifteen states have placed some kind of time limit on confidentiality and privacy of government records. (See Exhibit 1.)

Legislated access provides that records which are restricted shall be made available to the public after a certain number of years, generally seventy-five years, or after the death of the person about whom the record pertains. In some states access may be lifted after a shorter period of time. In some cases, restrictions might be lifted after a specified period for most records, but not for medical, mental health, or prison records.

Seven states' archives provide access through contractual arrangements between the archives and a researcher (California, Georgia, Michigan, Minnesota, North Carolina, South Dakota, and West Virginia). In these contractual arrangements, the state archives allows a researcher access to certain kinds of confidential records (for example, mental health records) provided specific conditions are met by the researcher. Contractual agreements are usually formalized by a form, with the archivist making the final determination on the legitimacy of the research. In some states the archives permit access to confidential archival records only upon approval from the originating department despite the fact that the records are under the archives' control. In this way, for example, contracts can be used to permit a social scientist access to confidential records for statistical research purposes.

Five states (Connecticut, Massachusetts, Pennsylvania, South Carolina, and South Dakota) reported their archives have informal, unwritten policies. Informal access might be descriptive of those state archives which, lacking legislation and formal administrative guidelines, have developed informal, internal procedures which may or may not be written into an archives policy. That is, when the issue arises, the state archives might make its own ad hoc evaluation of a researcher's legitimacy and integrity to permit access if there appears to be no law which expressly prohibits access. Some of these states have also informally set time limits on the period that any confidential record can remain closed to researchers.

Two state archives, Maine and Minnesota, reported they have formal administrative rules providing for the lifting of access restrictions after a period of time.

ACCESS TO CONFIDENTIAL RECORDS IN A STATE ARCHIVES

Twelve state archives defer to other agencies for access determination. This could take the form of a request for an attorney general's opinion, or seeking approval from the originating agency before granting access to confidential records which were in the archives.

Table 1

STATE SURVEY RESULTS

Number of states responding: 34 of 49

No Policy:	9 states
Statutory provision:	7 states
Formal administrative policy:	2 states
Contractual arrangement with researcher:	7 states
Defers to other access provisions:	12 states
Informal, unwritten policy:	5 states

Table 2

NUMBER OF STATES WITH SPECIFIED TIME LIMITS ON CONFIDENTIAL RECORDS

(Some states have more than one time limit)

20 years:	2 states
50 years:	4 states
60 years:	2 states
70 years:	1 state
72 years:	1 state
75 years:	7 states
at death:	2 states

Federal guidelines for access records in the National Archives and Records Administration (NARA) are provided by the Freedom of Information Act (FOIA), the Privacy Act, and in some cases, special restrictions placed by the issuing agency. NARA's rules provide: (1) access to confidential records for quantitative research, (2) sanitized copies with personal information deleted, if this is possible, (3) compliance with special departmental restrictions, if any, and (4) no access to census records less than 72 years old.

Chapter 4

FINDINGS AND RECOMMENDATIONS

House Resolution No. 11 requested the Legislative Reference Bureau to conduct a study of the various federal and state statutes relating to the retention and dissemination of records maintained by public archives, and to recommend solutions and propose legislation relating to the storage of records, the duration of storage, and destruction or release of confidential matters. The genesis of this resolution had its roots in 1987.

In 1987, the Governor's Committee on Public Records and Privacy received testimony from researchers who claimed that confidential public records in the state archives--some over 100 years old--were not accessible because of confidentiality or privacy concerns.¹

The Bureau therefore examined how various public archives handle access to confidential records which are permanently closed to researchers because of access restrictions. Access to confidential public records in other government offices was not the focus of this study.

Findings

1. The Role of Records Management

The function of the Hawaii State Archives is to preserve and make available, among other things, historical public records which describe the governance and administrative progress of the state government and its various agencies. In some cases, the records preserved in the archives may contain information of a private, or confidential nature. Access to these records may have been restricted during the period the record was used actively by the department, and retained its confidential status upon transfer to the archives.

The issue of access to confidential archival records is linked to the principles of records management--methods used to control the creation, growth, use, storage, and disposal of records. Records management is the responsibility of every state agency, but the State Archives advises each agency in the various processes and methods of records control. For example, the State Archives' records management staff might assist an agency in selecting a filing scheme, and help determine the optimum length of retention of certain records, given the function of the agency, the legal requirements, etc. Departmental attention to records management techniques results in the identification and appraisal of all records created and collected by the agency.

The development of retention schedules along with access restrictions, if any, enables the offices to organize and control the growth of records for efficient and economical management. Historical records, whether confidential or not, are identified at this time for eventual transfer to the public archives. Records which are not destined for permanent retention in the

archives are stored elsewhere for eventual disposal after the records have met legal, audit, or other administrative needs.

The inaccessibility of the confidential archival records to researchers, historians, genealogists, and others, raised the issue of whether and when access may be granted. The Bureau's research into this issue revealed that the federal government and the various states have approached this problem in different ways. Formal methods such as legislation or administrative rule lift access restrictions after a specified period of time, usually seventy-five years. Some states, lacking laws, have established informal policies to permit access after the passage of a certain number of years.

In other states, the archivist and the researcher enter into a contract which permits the researcher access but forbids releasing any identifiable pieces of information about individuals. The remaining jurisdictions have no procedures, policies, laws, at all or defer to the attorney general or the issuing agency for access rules and policy.

The State of Hawaii is in a strong position for coordinating its records management program and its historical records (archives) programs because both records management and the public archives programs have been administered by the same agency, the Archives Division in the Department of Accounting and General Services (DAGS), for more than twenty-five years. Although the historical records branch in the Archives Division predated the records management branch by about fifty years, historical records are usually identified through an ongoing records management program and represent less than ten per cent of the total amount of records produced by government agencies. The records management branch of the Archives Division works in conjunction with the historical records branch in identifying and appraising that portion of public records which should be preserved in the public archives. Absent unusual circumstances, an archives will not acquire records which have not been inventoried and appraised because without an appraisal it would be difficult to justify permanent preservation. Furthermore, title to these records still rests with the creating agency and the public archives will defer to the department for access to these records.

In the past, the Hawaii State Archives has accepted confidential records from some departments which had not been inventoried and appraised. It is not clear why, but these records were probably accepted as a courtesy or for the convenience of the department. These records properly still belonged to the department, but when researchers sought access to these records, they were referred first by the department to the archives, then back to the department, causing confusion and, in some cases, accusations of hiding information.

The following findings and recommendations do not apply to unscheduled records which have not been properly inventoried and appraised. It goes without saying that records which have not been properly inventoried and appraised, should be. The scope of this study is limited to providing findings and recommendations for those confidential historical records which have been properly scheduled and transferred to the State Archives.

2. Impact of the Uniform Information Practices Act

Hawaii's Uniform Information Practices Act (Modified) is being implemented by the Office of Information Practices pursuant to Act 262, Session Laws of Hawaii 1988 (Chapter 92F, Hawaii Revised Statutes). This Act also repealed Hawaii's Public Records Act, Part V, Chapter 92, Hawaii Revised Statutes, and Chapter 92E, Hawaii Revised Statutes (Fair Information Practice (Confidentiality of Personal Record)).

One of the purposes of this new Act was to "enhance governmental accountability through a general policy of access to government records". To this end, state agencies will be required to disclose a variety of governmental records, except those containing certain confidential or personal information.

The following recommendations are made with the understanding that the State Archives will work closely with the Office of Information Practices to coordinate accessibility of confidential records which are under the archives' purview.

3. Survey Findings

The Bureau surveyed all forty-nine state archives for laws, policies, etc. regarding access to confidential records preserved in the archives. Thirty-four state archives responded. Nine state archives reported they have no laws or policies regarding this issue. Three state archives avoid the issue of access by refusing to acquire confidential records. Seven state archives have legislation which lifts access restrictions after a period of time, ranging from twenty years to seventy-five years, or death of the subject individual. Seven states have formal or informal rules (instead of legislation) which permit researchers to access confidential records after a specified period of time has elapsed. At least twelve state archives defer to their attorney general or to the creating agency for approval to grant access to confidential records in the archives. Whether through formal legislation or informal guidelines, the seventy-five-year limitation period appeared to be the most common choice among states, probably because it coincides with the average human lifespan.

Seven state archives provide access through contracts between researchers and the archives. A contractual arrangement requires that the archivist make a case-by-case evaluation before granting access. Some states have a combination of legislated access, contractual access, and informal rules.

The National Archives and Records Administration (NARA) of the federal government also follows a mixture of access rules, within the guidelines of the Freedom of Information Act, the Privacy Act, and special department restrictions, if any. Individually identifiable census records are not accessible until after the passage of seventy-two years.

Recommendations

The recommendations of this report address the special access issues surrounding confidential public records which have been properly transferred to the State Archives. If records have not been appraised for historical value and have not been "scheduled" after a records inventory, then these records still belong to the creating agency and the following recommendations are not applicable.

There are at least three different avenues available to the Legislature:

1. Require that all public records in the Hawaii State Archives, regardless of access restrictions and regardless of the kind of record, be made accessible to researchers after a specified period of time, say seventy-five years after creation of the record. Seventy-five years is an arbitrary number which can be raised or lowered as the Legislature sees fit.

An example of suggested legislation for this recommendation can be found in Appendix D.

2. Authorize the state archives to determine the time to lift the accessibility period through administrative rule pursuant to chapter 91, Hawaii Revised Statutes.

An example of this recommendation can be found in Appendix E.

3. Allow the state archives to handle each question of access through the contract route. This would not require any legislation but would allow events to raise the issue on a case-by-case basis with the archivist developing guidelines and policies for identifying legitimate researchers, permitting access to closed records, and checking the finished product so that private information is not released or identified. As long as there is no legislation to release records after a certain period of time, this is probably the default position which would be taken by the archives, short of denying access altogether.

Sample contract formats are reproduced in Appendix C.

Of the three methods available, the Bureau favors the legislative method over the administrative rule or contract routes because it clearly lifts restrictions after a specified period of time. The contract method leaves the decision to the discretion of an archivist to determine the legitimacy of a researcher or the kind of research being conducted and also requires the archivist to review the final product, article, or study to identify whether information of a confidential or private nature has been revealed.

Allowing the status quo to continue not only prevents researchers from conducting research from confidential government records, but may result in the state archives proceeding on an informal basis to permit access by some individuals to certain records, but not to others, leading to inconsistent access by researchers.

Footnotes

Chapter 1

1. Governor's Committee on Public Records and Privacy, Report. Honolulu: Dec. 1987 (4 vols) vol. 1, p. 3 (hereinafter Governor's Committee).
2. Ibid., vol. 1, p. 2.
3. Ibid., vol. 1, p. 67.
4. Ibid., vol. 1., pp. 70-71.
5. Haw. Rev. Stat., ch. 92, part V, Public Records.
6. Ann Pederson, (ed.), Keeping Archives (Sydney: Australian Society of Archives, Inc., 1987), p. 2.
7. Haw. Rev. Stat., ch. 92F.
8. Pederson, p. 5.
9. See Dale C. Mayer, "The New Social History: Implications for Archivists" American Archivist, vol. 48, no. 1, Fall 1985 pp. 388-399.
10. Governor's Committee, op. cit. vol. 1, p. 11.
11. Hawaii State Historical Records Advisory Board, Hawaii's Historical Records Repositories Survey, Assessment and Recommendations for The National Historical Publications and Records Commission. Final Report (Honolulu: 1982), p. 6 (hereinafter NHPRC Final Report).
12. Ibid., p. 7.
13. Ibid., pp. 8-11 (citations omitted).
2. Ibid., at p. 350.
3. Stewart, "Problems of Confidentiality in the Administration of Personal Case Records" 37 American Archivist 389, July 1974, citations omitted.
4. Ibid., at 391.
5. Ibid., at 396.
6. Ibid., at 395.
7. See Coker, "Confidentiality of Records and Access: A Survey of State Archival Institutions." Records Management Quarterly, July 1982, at 22-31.
8. Robbin, "State Archives and Issues of Personal Privacy: Policies and Practices" 49 American Archivist 163 (Spring 1986).
9. Ibid., at 175.
10. Ibid., at 163.
11. Baumann, supra n. 1, at 355.
12. Ibid., at 354, citations omitted.
13. Ibid., at 357.
14. See Stewart, supra n. 3.
15. Baumann, supra n. 1, at 363, citations omitted.
16. Ibid., at 364-365, citations omitted.
17. Ibid., at 365-366, citations omitted.
18. Ibid., at 366.

Chapter 2

1. Baumann, "The Administration of Access to Confidential Records in State Archives: Common Practices and the Need for a Model Law", 49 American Archivist 349, at 351 (Fall 1986).

Chapter 3

1. Letter from Deborah Skaggs, Head, Records Management Division, Department of Archives and History, Montgomery, Alabama, July 19, 1988.

2. Baumann, "The Administration of Access to Confidential Records in State Archives: Common Practices and the Need for a Model Law," 49 American Archivist at 357.
3. Martin Richelsoph, Division Manager, Records Management Division and David H. Hooper, Department of Library, Archives, and Public Records, Phoenix, Arizona, July 28, 1988.
4. Letter from John L. Ferguson, State Historian, Arkansas History Commission, Little Rock, Arkansas, June 22, 1988.
5. Letter from John F. Burns, Chief of Archives, California State Archives, Sacramento, California, June 30, 1988.
6. Baumann, supra n. 2, at 357.
7. Letter from Terry Ketelsen, State Archivist, Division of Archives and Public Archives, Denver, Colorado, June 21, 1988.
8. Letter and other materials from Joanne A. Mattern, Deputy State Archivist, Bureau of Archives and Records Management, Dover, Delaware, August 8, 1988.
9. Letter from Richard Roberts, Public Services Section, Florida State Archives, Tallahassee, Florida, June 28, 1988.
10. Letter from Edward Weldon, Director, Department of Archives and History, Atlanta, Georgia, June 24, 1988.
11. Coker, p. 24.
12. Letter from John Daly, Director, Illinois State Archives, Springfield, Illinois, June 21, 1988.
13. Letter and materials from Edwin J. Howell, Executive Director, Indiana Commission on Public Records, Indianapolis, Indiana, June 21, 1988.
14. Coker, "Confidentiality of Records and Access," Records Management Quarterly, July 1982, at 28-29.
15. Baumann, supra n. 2, at 356 and Coker, supra, n. 13, at 29.
16. Materials from James S. Henderson, State Archivist, Maine State Archives, Augusta, Maine, July 5, 1988.
17. Material received from Edward C. Papenfuse, State Archivist, Maryland State Archives, Annapolis, Maryland, June 21, 1988.
18. Letter from Albert H. Whitaker, State Archivist, Boston, Massachusetts, July 7, 1988.
19. Letter and materials from David J. Johnson, State Archivist, Michigan Department of State, Lansing, Michigan, July 12, 1988.
20. Letter and materials from Sue E. Holbert, State Archivist, Minnesota Historical Society, St. Paul, Minnesota, June 24, 1988.
21. Letter from Sue Jackson, State Archivist, Montana Historical Society, Helena, Montana, July 8, 1988.
22. Material received from Ray Dittmer, Assistant Director Micrographic Services, Records Management Division, Lincoln, Nebraska, July 19, 1988.
23. Letter from Jeffrey M. Kintop, Archivist, Nevada State Library and Archives, Division of Archives and Records, Carson City, Nevada, June 28, 1988.
24. Material received from Frank C. Mevers, Division of Records Management and Archives, Concord, New Hampshire, July 19, 1988.
25. Letter from Karl J. Niederer, Chief of Archives, Division of Archives and Records Management, Trenton, New Jersey, June 24, 1988.
26. Letter and materials from Thomas E. Mills, Director, State Records Division, Albany, New York, August 23, 1988.
27. Letter and materials from David J. Olson, State Archivist, Division of Archives and History, North Carolina Department of Cultural Resources, Raleigh, North Carolina, July 7, 1988.
28. Letter from John Stewart, Archives-Library Division Ohio Historical Society, Columbus, Ohio, July 6, 1988.
29. Letter from Linda A. Ries, Associate Archivist, Division of Archives and Manuscripts, Pennsylvania Historical and Museum Commission, Harrisburg, Pennsylvania, July 1, 1988.
30. Letter and materials from Albin Wagner, Public Records Administrator, Providence, Rhode Island, June 23, 1988.
31. Letter from William L. McDowell, Jr. Deputy Director for Administration and Planning, Department of Archives and History, Columbia, South Carolina, July 11, 1988.

32. Letter from Linda M. Sommer, State Archivist, South Dakota Historical Society, Pierre, South Dakota, June 27, 1988.
33. Letter from Edwin S. Gleaves, State Librarian and Archivist, Nashville, Tennessee, July 13, 1988.
34. Letter from Carolyn V. Majewski, Assistant Director, Texas State Archives, Austin, Texas, June 28, 1988.
35. Letter from Cherie Ann Nash, Acting Supervisor, Records Analysis, Salt Lake City, Utah, June 28, 1988.
36. Letter from D. Gregory Sanford, State Archivist, Office of the Secretary of State, Montpelier, Vermont, June 22, 1988.
37. Letter from Debra Basham, Archivist, Department of Culture and History, Charleston, West Virginia, July 5, 1988.
38. Material received from F. Gerald Ham, State Archivist, State Historical Society, Madison, Wisconsin, June 22, 1988.
39. Letter from Julia A. Yelvington Division Administrator, Archives, Records Management, and Centralized Microfilm Division, Cheyenne, Wyoming, June 21, 1988.
40. 5 U.S.C. sections 552 and 552a.
41. Governor's Committee, Vol. 1, p. 25.
42. 36 CFR Ch. XII section 1256.16 (7-1-88 edition).
43. 36 CFR Ch. XII section 1256.16 (7-1-88 edition).
44. 36 CFR Ch. XII, section 1256.4(a)(2) (7-1-88 edition)
45. 36 CFR Ch. XII, section 1256.4(a)(3) (7-1-88 edition)
46. 36 CFR Ch. XII, Subpart C, sections 1254.30-1234.36 (7-1-88 edition).

Chapter 4

1. Hawaii Report of the Governor Committee on Public Records and Privacy. Honolulu: 1987, at V.I, 70; V.II, 114; and V.II, 200.

HOUSE OF REPRESENTATIVES
FOURTEENTH LEGISLATURE, 1988
STATE OF HAWAII

H.R. NO. 11

HOUSE RESOLUTION

RELATING TO STATE ARCHIVES.

WHEREAS, the Legislature has declared that it is the policy of this State that the conduct and formulation of public policy shall be conducted as openly as possible by enactment of Part I of Chapter 92, Hawaii Revised Statutes; and

WHEREAS, the Legislature also has declared its intent to protect the people's right to know by enactment of Part I of Chapter 92, HRS; and

WHEREAS, the declared policy and intent assure access to public records that evidence the formulation of public policy, as reflected by the enactment of Part V of Chapter 92; and

WHEREAS, the information intended for storage in public archives represents a potential untapped resource by which citizens and the state government, its officers, and employees may benefit through availability and legitimate use of the information; and

WHEREAS, the state archives are charged with the responsibility of storing, maintaining, and making available state agency records deposited with the archives; and

WHEREAS, such records include agency records of a confidential nature; and

WHEREAS, Chapter 94, provides little guidance with respect to the regulation of public dissemination of records maintained by the State archives, duration of storage of public or confidential information, and retention and disposition of confidential information; now, therefore,

BE IT RESOLVED by the House of Representatives of the Fourteenth Legislature of the State of Hawaii, Regular Session of 1988, that the Legislative Reference Bureau is requested to conduct a study, in consultation with the state archives, of the various federal and state statutes relating to the retention and dissemination of records maintained by public archives and to

H.R. NO. 11

recommend solutions and propose legislation relating to the storage of records, the duration of storage, and destruction or release of confidential matters; and

BE IT FURTHER RESOLVED that the Legislative Reference Bureau shall report its findings and recommendations to the Legislature twenty days before the convening of the Regular Session of 1989; and

BE IT FURTHER RESOLVED that a certified copy of this Resolution be transmitted to the Legislative Reference Bureau.

OFFERED BY:

Mike Patis
Eden
Kenneth Arah
Carl Jukunaga
Joan Hayes
Mark Dole
George Spini
Henry C. Carabali
Peter K. Ago
James R. Long
James R. Long
John Dole
David Dole

David M. Hays
David Dole
George Spini
REB BELLINGER
Mark Dole
John Dole
William Hays
Frank Hays
Calvin Hays
Roland Hays
Light L. Hays
James Hays
James Hays

Marshall V. Hays

HR HRO F-8208

JUD-WAM 3916F

H.R. NO. 11

Robert J. Smith

Donnell Hawkins

Mike Cagney

Jim Smith

Tom Cannon

James M. Smith
David K. Smith

Appendix B

ARTICLES ON ACCESS TO CONFIDENTIAL RECORDS IN STATE ARCHIVES

1. Roland M. Bauman, "The Administration of Access to Confidential Records in State Archives: Common Practices and the Need for a Model Law" 49 American Archivist 349, (Fall 1986).
2. Kathy Roe Coker, "Confidentiality of Records and Access: A survey of State Archival Institutions," Records Management Quarterly (July 1982) 22-31.
3. Margaret L. Hedstrom, "Computers, Privacy, and Research Access to Confidential Information," 6 Midwestern Archivist, no. 1 (1981), 5-18.
4. Gary M. Peterson and Trudy Huskamp Peterson, Archives and Manuscripts: Law (Chicago: Society of American Archivists, 1985), especially chapters 3-4.
5. Planning for the Archival Profession: A Report of the SAA Task Force on Goals and Priorities (Chicago: Society of American Archivists, 1986).
6. Alice Robbin, "State Archives and Issues of Personal Privacy: Policies and Practices," 49 American Archivist (Spring 1986) 163-175.
7. Sandra Singer, "Confidentiality of Legislative Research Documents" 12 State Legislative Report no. 9 (Denver: National Conference of State Legislatures, Nov. 1987).
8. Virginia R. Steward, "Problems of Confidentiality in the Administration of Personal Case Records," 37 American Archivist (Summer 1974) 387-398.

Appendix C

MICHIGAN

MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN

SECRETARY OF STATE



LANSING

MICHIGAN 48918

MICHIGAN HISTORY DIVISION

ADMINISTRATION, PUBLICATIONS
RESEARCH, AND HISTORIC SITES
208 N. Capitol Avenue
517-373-0510

STATE ARCHIVES
3405 N. Logan Street
517-373-0512

STATE MUSEUM
208 N. Capitol Avenue
517-373-0515

In order to gain access to mental health records, you must complete the accompanying form and return it to the Archives. Please note that page 2 calls for you to prepare on a separate sheet a description of your research project. Explain why you want to see the mental health files and what you intend to do with the information obtained. Enter the title of this study in the space provided on page 2. These steps are required to ensure that no one's privacy is violated.

Once the enclosed form is returned to the Archives, we will forward it to the proper authorities for approval. After a decision is made on your request, we will notify you of the verdict. If you are given permission to see mental health records, you will have to come to the Archives and examine the documents in person.

Sincerely,

Le Roy Barnett
Reference Archivist
Michigan State Archives

CONTRACTUAL AGREEMENT

FOR THE

RELEASE OF CONFIDENTIAL MENTAL HEALTH RECORDS

FOR

LEGITIMATE RESEARCH PURPOSES

This Agreement, made and entered into this _____ day of _____, 19__, by and between the Michigan Department of State, Michigan History Division, Archives Unit, hereinafter referred to as the "Archives", and _____ of _____, hereinafter referred to as the "Researcher".

WITNESSETH:

WHEREAS, the parties hereto desire that Confidential Mental Health Records in the possession of the Archives be released for legitimate research purposes, and

WHEREAS, the parties also desire that the identity, confidentiality, and privacy of persons whose names appear in such Records be protected,

NOW, THEREFORE, IT IS MUTUALLY AGREED by and between the parties hereto that:

1. The Archives shall:

a. Permit the Researcher to review the Confidential Mental Health Records described hereinbelow at the Archives' office in compliance with the provisions of this Agreement.

b. Approve in writing the dissemination of any paper, article, publication, or other written material presented to the Archives for review pursuant to paragraph 2.f. when same is in compliance with the following provisions of this Agreement.

2. The Researcher shall:

a. Search for information contained in the Confidential Mental Health Records, hereinafter referred to as "Records", described in the research proposal entitled, "
 ", attached hereto and incorporated herein by reference as Appendix "A", which proposal shall also describe the Researcher's particular interest in and intended use of the Records.

b. Respect the confidential nature of the Records and not indicate the name or identity of any person identified in those Records in any notes, written materials, oral presentations, or publications prepared by the Researcher or any agents, employees, or assigns thereof.

c. Disclose the name or identity of any person identified in the Records only when such disclosure is germane to and consistent with the authorized purpose for which disclosure was sought, and moreover only when such identification is essential in order to achieve the purpose for which the information was

sought or when preventing such identification would clearly be impractical, but in no event when the person whose identity would be disclosed is likely to be harmed by such identification.

d. Inspect the Records during normal business hours and only within the premises of the Archives' office and not leave said premises with any Records, or copies thereof, containing a name or identifying information, i.e., information that would, in the absence of a name, identify a person.

e. Permit, upon request of the Archives, examination of any written or other material proposed to be taken out of the premises of the Archives' office and the purging, lining out, deletion, or expunging of names or other identifying information at cost to the Researcher.

f. Present to the Archives for review and approval a copy of any paper, article, publication, or other written material which was prepared by the Researcher, or any agents, employees, and assigns thereof, before said paper, article, publication, or other written material is otherwise disseminated. Such copy shall be retained by and become the property of the Archives.

g. Disseminate any paper, article, publication, or other written material presented to the Archives for review pursuant to paragraph 2.f. only upon receipt of written notice from the Archives that the Archives is satisfied that said paper, article, publication, or written material is in compliance with the provisions of this Agreement.

h. Pay to the Archives upon demand, in the event that the Researcher has failed to comply with one or more of the foregoing

provisions of this Agreement and inasmuch as the harm caused by such failure will be difficult to accurately estimate, the reasonable sum of one-thousand dollars (\$1,000.00) as liquidated damages.

i. Indemnify and save harmless the State of Michigan, the Archives, the Michigan Department of Mental Health, and any other state agency, and all officers, agents, and employees thereof, for any costs incurred in defending any civil or criminal litigation, and for any monetary judgments which might result from such litigation, stemming from the release of confidential information, including but not limited to the release of names, to and by the Researcher, and any agents, employees, and assigns thereof.

j. Conduct research only after this Agreement has been approved and endorsed by a duly authorized representative of the Department of Mental Health, who in any case shall endorse this Agreement before its execution.

DEPARTMENT OF MENTAL HEALTH

Approved_____ Disapproved_____

By_____

Title:

Date_____

DEPARTMENT OF STATE
MICHIGAN HISTORY DIVISION
ARCHIVES UNIT

RESEARCHER

By_____

By_____

NEW YORK

CONTRACTUAL AGREEMENT

FOR THE

RELEASE OF CONFIDENTIAL INFORMATION FROM

STATE OFFICE OF MENTAL HEALTH CLINICAL CASE RECORDS

FOR

LEGITIMATE RESEARCH PURPOSES

This Agreement, made and entered into this _____ day of, _____, 19____, by and between the New York State Education Department, State Archives and Records Administration, hereinafter referred to as the "Archives," and _____ of _____, hereinafter referred to as the "Researcher."

WITNESSETH:

WHEREAS, the parties hereto desire that information from the State Office of Mental Health clinical case records in the possession of the Archives be released for legitimate research purposes, and

WHEREAS, the parties also desire that the identity, confidentiality, and privacy of persons whose names appear in such Records be protected,

NOW, THEREFORE, IT IS MUTUALLY AGREED by and between the parties hereto that:

1. The Archives shall:

a. Permit the Researcher to review the clinical case records at the Archives in compliance with the provisions of this

which a patient's identity may be determined.

d. Inspect the records during normal business hours and only within the premises of the Archives' research room and not leave said premises with any Records, or copies thereof, containing a name of identifying information, i.e., information that would, in absence of a name, identify a person.

e. Permit, upon request of the Archives, examination of any written or other material proposed to be taken out of the premises of the Archives' research room and the purging, lining out, deletion, or expunging of names or other identifying information at cost to the Researcher.

f. Present to the Archives for review and approval a copy of any paper, article, publication, or other written material which was prepared by the Researcher, or any agents, employees, and assigns thereof, before said paper, article, publication, or other written material is otherwise disseminated. Such copy shall be retained by and become the property of the Archives.

g. Disseminate any paper, article, publication, or other written material presented to the Archives for review pursuant to paragraph 2.f. only upon receipt of written notice from the Archives that the Archives is satisfied that said paper, article, publication, or written material is in compliance with the provisions of this Agreement.

h. Indemnify and save harmless the State of New York, the State Education Department, the Archives, and any other state agency, and all officers, agents, and employees thereof, for any costs incurred in defending any civil or criminal litigation and

for any monetary judgments which might result from such litigation, stemming from the release of confidential information, including but not limited to the release of names, to and by the Researcher, and any agents, employees, and assigns thereof.

i. Conduct research only after this Agreement has been approved and endorsed by a duly authorized representative of the State Office of Mental Health who in any case shall endorse this Agreement before its execution.

Office of Mental Health

Approved _____ Disapproved _____

By _____

Title: _____

Date: _____

New York State Education Department

Office of Cultural Education

State Archives and Records

Administration

By _____

Title: _____

Date: _____

RESEARCHER

By _____

Date: _____

WISCONSIN

STATE HISTORICAL SOCIETY OF WISCONSIN

AGREEMENT FOR USE OF RESTRICTED MATERIALS IN HEALTH RECORDS

I, _____, will be using the following materials (brief description of materials, including call numbers, if applicable):

I will be using these materials for the following purpose(s) (brief description of purpose or product of your research; attach prospectus if available):

I agree not to disclose individually identifiable information from these records (e.g. names, addresses) either directly or through deductive disclosure (e.g. recognizable physical descriptions).

I agree to accept the responsibility for violation of the above statement.

I will provide the holding repository with a copy of the written product of my research, if possible.

I agree not to photocopy any of the materials.

Researcher's Signature: _____

Date: _____

Archivist's Signature: _____

Date: _____

Appendix D

Suggested Legislation

SECTION 1. Chapter 94, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

"§94- Access to restricted records in the state archives. Historical records which are transferred to the state archives shall be retained for posterity and title shall vest in the state archives. All restrictions on access to public records which have been deposited in the state archives, whether confidential, classified, or private, shall be lifted and removed seventy-five years after the creation of the record."

SECTION 2. This Act shall apply to all records in existence on its effective date or created thereafter.

SECTION 3. This Act shall take effect upon its approval.

Appendix E

Suggested Legislation

SECTION 1. Chapter 94, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

"§94- Period of confidentiality of confidential public records. The state archives may adopt rules pursuant to chapter 91, to establish periods after which restricted confidential public records stored in the state archives may be accessed by any member of the public."

SECTION 2. Not later than July 1, 1991, the state archives shall publish a list of confidential records currently available for research in the archives and indicate for each type of record, the number of years after which access shall be permitted.

SECTION 3. This Act shall take effect upon its approval.