

**Society of American Archivists
Council Meeting
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Chicago, Illinois**

**Issue Brief: Confidentiality of Private Information
Held in Public Records**

(Prepared by the Committee on Advocacy and Public Policy)

BACKGROUND / DISCUSSION

This issue brief addresses the following priority within the SAA Public Policy Agenda, as approved by the SAA Council in May 2015: “To ensure the protection of citizens’ rights as well as the individual’s right to privacy, SAA will consistently take into account privacy concerns in certain categories of archival records.”¹

RECOMMENDATION

THAT the following issue brief on Confidentiality of Private Information Held in Public Records be approved:

**SAA Issue Brief:
Confidentiality of Private Information Held in Public Records**

SAA POSITION

Privacy is a fundamental right enjoyed by all. Similarly, access to public records is a fundamental right necessary to all within a democratic government. To resolve the inherent tension between these two rights, SAA recommends that:

- All laws and all policies regarding access to public records containing Personally Identifiable Information (PII) should include appropriate language that the right to personal privacy ends upon the death of an individual.
- Because of the difficulties that can be encountered in determining if an individual has died, access to public records containing PII should be made possible through a legally established date of presumed death. This date should be 72 years after the date found on an individual record that includes personal information.

¹ <http://www2.archivists.org/initiatives/saa-public-policy-agenda>

This general recommendation should not be understood to recommend closing records containing personal information available for public use through more liberal access laws or through specific exemptions to existing law, such as the “safe harbor” exemptions found within the Health Insurance Portability and Accountability Act (HIPAA). Nor should this general recommendation be understood to interfere with legitimate needs for information for reasons of public safety. The standard proposed here is the maximum reasonable period that SAA believes is necessary to protect personal privacy. It does not imply that shorter periods of closure, where they exist or may be proposed, are unwise.

This recommendation applies only to records created by or submitted to the federal government in the normal course of business, or non-federal records over which federal law has placed specific restrictions on access for reasons of privacy. Although it may have implications for other types of records closed for reasons of privacy, records which are public property through a deed of gift, such as gifts to archival agencies, or records in the possession of non-federal governmental agencies or quasi-public bodies, are not included in this recommendation.

SAA will:

Closely monitor local, state, and federal legislation pertaining to privacy, work with other organizations that are interested in these issues, and advocate for pertinent legislation.

THE ISSUES

Privacy is a fundamental right. The federal government, in the course of doing necessary work, collects large quantities of information about the lives of private citizens. For good reason, laws require that this information remain confidential for a period of time. For the same reasons, federal law also requires that certain records gathered by private organizations, such as certain medical or educational records, be closed to the general public.

This acknowledged, access to public records is also a fundamental right. Federal policymakers have long had to balance the individual’s right to privacy against a broader good that may be accomplished by sharing certain types of personal information, as well as the felt need to require that certain personal records be kept private regardless of which agency gathers them. This has resulted in a peculiar and sometimes contradictory patchwork of laws regarding access to private information found in public records.

American law has long made some personal information easily available in a timely manner. Examples include:

- Voting registration records: The public interest in fair and honest elections is of great importance, and thus the rolls of individuals registered to vote are publicly and readily available. In many states these rolls document not only the names and addresses of those who are registered to vote, but also the elections in which individuals have voted and their party affiliation.
- Professional licensing information: The public’s need to be assured that an individual has obtained a recognized level of proficiency in an area of endeavor licensed by the state (e.g., doctor or plumber) requires that individuals who hold such certificates make them available for public inspection.
- Educational achievement data: Closely related to practice regarding professional licensing data, matriculation information regarding individuals is generally available to the public, again as a way to verify an individual’s credentials.

- Personal licensing information: Public safety or health may require that individuals who perform certain tasks, such as driving a car or being permitted to carry a concealed firearm, be licensed, and that the public have access to relevant records to assure such licensure has been obtained.

Federal law also allows certain (otherwise closed) PII to be made available to appropriate personnel for reasons of public safety. Some types of personal information, such as that compiled in the decennial U.S. Census, have been deemed confidential for a fixed period of time. For example, since 1978, individual data gathered in each decennial Census is closed to the public for 72 years. After that period the needs and interests of researchers—primarily genealogists—have been deemed to outweigh the personal privacy concerns of individuals enumerated in the Census. Other types of personal information, such as detailed information relating to a person’s education or individual health records, may be closed by federal law to the public for a longer period. In existing federal law, it is often unclear when, if ever, these educational and health-related privacy rights terminate.

SAA believes that all personal information found in public records can eventually be made public. Individual privacy is not a perpetual right. In determining when private information may be made public, SAA supports the following statements:

- Existing federal safeguards for the protection of PII found in public records should not be extended.
- Federal individual privacy legislation should favor public access over private closure of public records. In situations in which there is disagreement about what PII should or should not be private, the burden of evidence should be placed on those who advocate for privacy rather than those who advocate for open records. Federal laws and policies related to public records should explicitly state that any closures due to an individual’s privacy interest will be lifted upon the death of that individual.
- Whenever possible federal law should create a mechanism so that an appropriate waiver agreement or a consent of subject agreement may make records (closed for reasons of privacy) open to research at the earliest possible date.
- Although an individual’s right to privacy ends at death, SAA notes that the survivors of someone recently deceased may desire to mourn privately. Thus SAA supports the idea that the immediate family of a deceased individual may temporarily close public records, such as autopsy photographs, during a brief period of mourning. But this right is subject to the same balancing test as all privacy concerns, and occasionally a public need for information regarding the circumstances surrounding an individual’s death will outweigh a family’s desire for privacy.
- The recommendations made in this document suggest that certain existing federal privacy restrictions, most obviously those found in HIPAA, should be shortened.² SAA recognizes the aspirational character of this recommendation. While recommending this goal, SAA recognizes the need for all individuals who currently have access to records closed under HIPAA to comply with the law as it is written and currently interpreted.
- Although the idea that privacy ends with an individual’s death is not a particularly radical one, implementation of the concept is complicated by the need to document an individual’s death. Due to

² SAA also acknowledges that, under a 2009 agreement between the National Archives and Records Administration (NARA) and the U.S. Citizenship and Immigration Service (USCIS), Alien Files (A-Files) are not transferred to NARA custody, and thus made publically accessible, until 100 years after the immigrant’s year of birth.

the potential difficulty in proving that an individual has died, SAA believes that, in addition to allowing access to personal records when documenting a death, a uniform date of presumed death should be established in federal law. The date of presumed death should be 72 years after the date found on an individual record that includes PII.

- A 72-year rule, consistent with that established for personal data collected by the U.S. decennial Census, creates a reasonable balance of an individual's right to privacy, the amount of time and effort that may be necessary to document the death of an individual or group of individuals, and the public good that may come about from the use of personal data.

Support Statement: In support of SAA's Public Policy Agenda, the issue brief provides members and other prospective audiences with SAA's considered opinion on the topic of privacy in public records, supporting a delicate balance between personal privacy and public access.

Relation to Strategic Priorities: Addresses Goal 1. (Advocating for Archives and Archivists), Strategy 1.2. (Educate and influence decision makers about the importance of archives and archivists), and Strategy 1.3. (Provide leadership in ensuring the completeness, diversity, and accessibility of the historical record).

Fiscal Impact: Approval of the issue brief does not commit SAA to expend funds on any particular advocacy effort.