

Trudy Huskamp Peterson

Chair of the International Council on Archives' Human Rights Working Group and of the Working Group on Access to Archives, both of International Council on Archives.

The Access Initiative

Franz Kafka – lawyer, insurance company employee – knew access issues. In his novel *The Castle* the central figure, K., a land surveyor, is trying to figure out why he has been summoned by an official of the Castle. The official replies that a decree came saying that a surveyor would be summoned. A chaotic search for the decree follows. K. offers to help search, but the official says no, “I’m not keeping official secrets from you, but to let you look through the files would be going too far.” After more unfocused searching, the official tells the surveyor that the decision to summon him “was carefully considered” and he “can prove this through the file.” The surveyor gives up, saying, “Well, the files won’t be found.” Won’t be, not cannot be found. K. is denied access.¹

Access is the availability of records for consultation as a result both of legal authorization and the existence of finding aids. Since 1995 the International Council on Archives has published four standards on archival description: ISAD(G) in 1994, ISAAR(CPF) in 1996, ISDF in 2008, and ISDIAH in 2008. These standards cover finding aids, one of the two key elements of archival access; they have transformed the practice of description. Now the ICA is turning to the other element of access: the legal authority to consult archives.

The International Council on Archives has long been concerned with the question of access to archives. In the wake of the political changes in Europe at the beginning of the 1990s, European archivists developed an “Outline of a Standard European Policy

on Access to Archives,” which was adopted as an ICA position at the Annual General Meeting in Edinburgh in 1997. The “Outline,” however, focuses almost entirely on access to official governmental archives, with only one statement on access to non-governmental records: “It is recommended that attempts should be made to bring arrangements for access to private archives in line with those for official archives, whenever that is possible.”

Two additional ICA documents underscore the importance of access as an element of archival practice: the Code of Ethics and the Universal Declaration on Archives. The International Council on Archives adopted its Code of Ethics in 1996, which states in principles 6 and 7:

Archivists should promote the widest possible access to archival material and provide an impartial service to all users.

And Archivists should respect both access and privacy, and act within the boundaries of relevant legislation.

In 2010, the ICA adopted the Universal Declaration on Archives, which notes “the vital necessity of archives for supporting business efficiency, accountability and transparency, for protecting citizens rights, for establishing individual and collective memory, for understanding the past, and for documenting the present to guide future actions,” identifies one of the vital roles of archivists as “making these records available for use” and pledges to work together in order that “archives are made accessible

to everyone, while respecting the pertinent laws and the rights of individuals, creators, owners and users.”

In the spring of 2010, at the request of the ICA Committee on Best Practices and Standards, a small group of archivists met to discuss whether it was possible to develop a standard of good practice for public access to all archives, governmental and non-governmental. The working group decided that a statement of professional practice on access to archives was both possible and necessary. The draft statement of professional practice consists of twelve principles with a commentary explaining each principle, and a technical report outlining the basic processes used to implement the principles, a glossary. These principles will be debated at an invitational consultative meeting to be held in Paris in February. After that consultation they will be revised and made public in the summer. They will be discussed at an open forum at the International Council on Archives’ meeting in September in Toledo, Spain, and revised again as needed. Assuming this timetable holds, they will be proposed for adoption at the ICA General Assembly meeting in Brisbane, Australia, in 2012.

The first draft principle states the general public right of access. The next nine principles state the rights of users. The final two principles state the rights of archivists to participate in the access process. As they currently stand, the twelve draft principles are:

1. The public has the right of access to archives of public bodies. Both public and private entities should open their archives to the greatest extent possible.
2. Archives make known the existence of archives.
3. Archives make known the existence of restrictions imposed on access to all their holdings. Organizations that permit public use of any part of the archives publish an access policy.
4. Archives ensure that general restrictions on access are clear and of stated duration, are based on pertinent legislation, acknowledge the right of privacy in accordance with cultural norms, and respect the rights of owners of private materials.
5. Archives make known the existence of closed items.
6. Records are available on equal terms of access. Records that have been made available to one member of the general public are available to all others on the same terms and conditions.
7. Archives ensure the preservation of, and access to, records that provide evidence needed to assert human rights and to document violations of them.
8. Records that have been made public officially before their transfer to the archives remain public.
9. Archives deliver partial (redacted) records to users when practicable in

order to provide information from records that cannot be made available in their entirety.

10. Users have the right to appeal a denial of access to an independent body.
11. Archivists have access to closed records and perform normal archival work on them.
12. Archivists participate in the decision-making process on access.

At first glance, these principles seem commonsensical, even mundane. Each of them, however, has been the subject of contention in archives. In this paper I will look at each one of the principles and tell a small story about an archives problem that involved the principle.

1. The public has the right of access to archives of public bodies. Both public and private entities should open their archives to the greatest extent possible

This is a general principle that applies to all archives wherever located. Here is a current story that involves many of the problems of access covered by the principles.

Between 1946 and 1948 the U.S. Public Health Service, several Guatemala government ministries, and the Pan American Sanitary Bureau (which became the Pan American Health Organization (PAHO)) cooperated in a study of sexually transmitted diseases. The experiment, carried out principally by a U.S. doctor named John Cutler with the assistance of a Guatemala official named Juan Funes, tried to infect

soldiers and prisoners with syphilis and gonorrhea, both directly and by permitting infected prostitutes to have sex with them. In addition, inmates in Guatemala's only asylum were involved in infectious tests. Most participants who became infected were treated with penicillin and were presumed cured.²

The records of the experiment should be in the archives of all three parties to the experiment: Guatemala, PAHO and the United States. At the time of writing, I do not know—there has been no public disclosure—where the Guatemala records are. PAHO is a regional arm of the World Health Organization (WHO); the archives of WHO are at WHO headquarters Geneva, Switzerland, but the regional arms of WHO are to maintain their own records. I telephoned the PAHO library and left a message, asking where the PAHO archives are located. The call was not returned.

The U.S. records of the experiment (which include both paper records and still photographs) were not turned over to the U.S. National Archives. Instead Dr. Cutler, the lead researcher, took them with him as his personal property when he left the government. In 1990 he donated them to the University of Pittsburgh, a quasi-private university in the state of Pennsylvania. There the archivists processed them; Dr. Cutler controlled until he died and after that the dean of the university's graduate school of public health controlled access. The processing archivists seem not to have consulted with anyone about the severe

ethical violations of the experiment, although they processed the records to the file folder level so they surely must have seen the experiment records. They put the finding aid to the Cutler papers on the Pitt archives' internet site.

When a history professor asked to use the records after Dr. Cutler died, the dean authorized it, apparently without reviewing the records. Consequently the researcher saw all the reports, names and photographs of the persons who were subject to the experiment. She, in turn, waited months before using this information in a speech, which she then turned into an article for publication. She sent her draft article to an official at the U.S. Center for Disease Control—not because of the ethical problem but, in her words, because she wanted him “to look at the science and make sure I had it right.”³ The official, alarmed, reported the entire story to his superiors, with the result that on October 1 the president of the United States telephoned the president of Guatemala to apologize for the events of 70 years ago.

As soon as the story became public, some arm of the U.S. government (the university would not tell me which one) contacted the university, seeking to determine whether the materials are, in fact, US government records. In response, the university closed the records to further use, took the finding aids to the papers off its website, and even deleted Cutler's name from the list of papers of faculty members that the archives holds. When I asked to see the finding

aid, the university denied me access to it. I appealed, and the university did not respond. The state of Pennsylvania has a Freedom of Information Act, but it does not cover the records at the University of Pittsburgh.

So the public is denied access to what are (logically) government records of the United States, denied access to government records in Guatemala because they have not been located, denied access to the records of an international body because they have not been located, and denied access to a quasi-private body of records (the finding aid prepared by the university archivists). The archives at the university did make known the existence of the papers—but now does not. The university seems not to have recognized the right of privacy of the subjects of the experiment; at best the university personnel were not alert to the human rights violations that were recorded in the materials and did nothing to alert the appropriate government officials. And, finally, the records once open—albeit to researchers approved by the dean—have been closed.

And yet these records relate to the most crucial human rights issue imaginable: the impairment of human health by state action.

2. Archives make known the existence of archives

Let me use another Guatemala story to illustrate this principle. Guatemala established a truth commission in 1997 at the

end of its civil war. As they began their investigations, the commissioners asked to see police records. The police denied that they had any records, saying they had destroyed them all in the wake of the peace accords. So the truth commission wrote its report without access to police records. It was not until 2005, half a dozen years after the report was published, that the staff of Guatemala's human rights ombudsman accidentally stumbled upon the police archives. The records—hundreds of thousands of documents—are now being arranged and described, and some of these records were used in October 2010 to convict two policemen of the disappearance of a union leader during the war.⁴

And here is a U.S. example: one day in the early 1990s when I was a senior official at the U.S. National Archives I got a telephone call from another senior staff member. He told me that one of the security agencies asked him if the National Archives would agree not to reveal that we held records seized by U.S. military forces in Korea during the Korea War. I told him we absolutely would not, that the records were described in the *Guide to the National Archives* published in 1974 and we would not now deny their existence. He conveyed the message and I never heard any more about it.

Knowing that archives exist is the crucial first step to using them for any purpose whatsoever, from legal research on the most horrific crimes to research on family history. And that knowledge supports two social goods: first, it keeps people needing

to use records from wasting time trying to figure out where they are; second, it benefits the organization by showing that it is a good custodian of its records by preserving them in the archives.

3. Archives make known the existence of restrictions imposed on access to all their holdings. Organizations that permit public use of any part of the archives publish an access policy

Once a researcher knows that the records exist, the next step is to find out whether they are available for research use. Many archives hold materials that are closed to public use for a period of time. Sometimes government laws specifically prohibit access to certain types of materials, while in other cases the archives itself or its parent body sets the general standards.

Researchers who are unable to learn whether the records are available may waste time and money. In an open letter published in November 2005, three researchers wrote about their problems with archives in Romania. One, a Ph.D. candidate at the Sorbonne, reported that he applied for permission to use the *Securitate* archives (the *Securitate* was the secret police during the Communist era from 1948 to 1989), paying more than \$500 for a permit that he got in July 2004. When he went to the archives, however, he learned that there was no list of fonds and he needed to “wait some time to allow (the archives) to carry on the necessary investigations.” There followed a year and a half of “complete

silence.” He had no notice that the records would be closed.⁵

4. Archives ensure that general restrictions on access are clear and of stated duration, are based on pertinent legislation, acknowledge the right of privacy in accordance with cultural norms, and respect the rights of owners of private materials

Archives and archivists stand for access to their holdings; however, they are also responsible for applying restrictions to specific records for finite durations. Five restriction categories are common to archives, whether the materials are records or personal papers, donated or held within the creating institution: privacy, business information, personnel data, investigative information, and statutory restrictions. The application of these concepts varies by type of material and type of archival institution (for example, personnel data are unlikely to be found in donated personal papers in a historical society; in government archives statues or executive orders may close records containing national security information).

No restriction endures forever. Restrictions either are in force for a specific period or until an event happens or until the passage of time is such that no harm will come from the disclosure. The Ottoman archives in the states archives of Turkey, for example, are available for use by anyone over 18 years old except the “archival material which has not yet been classified. will not

be available for research.”⁶ What “classified” means in this context is not clear, nor is it clear how a researcher would be able to challenge a denial of access based on delay of classification.

In most instances archivists must apply restrictions that they have not had a part in negotiating. But in some cases, a donor or employing institution has not provided a specific restriction for a category of information that if revealed would damage an individual or risk a lawsuit against the archives. In those cases, the archives must rely on its own general restrictions, especially on privacy, in order to protect the individuals and the archives. At one archives where I worked, a man was donating his personal papers. As the archivist was loading the boxes into the archives’ car, the man’s wife came running out the door. “You aren’t giving them the letters you wrote me from the South Pacific, are you?” (The man had been in the army in the South Pacific during World War II.) He looked at her and drawled, “Yup. I meant it then and I mean it now.” It turned out that he had written sexually explicit letters to his wife and they were in the boxes. Although he did not restrict access to them, the archives recognized the wife’s privacy right in the letters and restricted them until both husband and wife were dead.

5. Archives make known the existence of closed items

Just as a user needs to know the general categories of materials that are restricted,

the user also needs to know when an item has been removed from a file. Several kinds of problems arise here. First, if a document is removed from a file without inserting a withdrawal marker in its place or if part of an electronic document is deleted without replacing the deletion with an equal amount of blank text, the researcher has the false belief that he has seen everything when he has not.

This became an issue in the US when the National Security Council (NSC) deleted a portion of an electronic document, inserted no replacement markings, and released it. The researcher eventually discovered the omission, and the NSC, embarrassed, had to insert space markers where the information was deleted and re-release the item.

Second, freedom of information responses sometimes fail to make known the existence of specific closed items because the processing staff members chose items and supply them, without context, to meet the user’s request. The requester may not be notified if a record is totally withheld.

Finally, selective or “highlights” publications of records also leave the reader with no knowledge of what is missing. In 1989 the U.S. Department of State published a volume on Iran, 1951-1954, in its *Foreign Relations of the United States* series. It failed to include documents that mentioned the CIA role in the coup. The ensuing scandal (the fact of CIA involvement is well known, even if not officially confirmed at that time) led the U.S. Congress to require

the State Department to establish an historical advisory committee to help guard against such omissions in the future.

6. Records are available on equal terms of access. Records that have been made available to one member of the general public are available to all others on the same terms and conditions

This principle specifies equal access for the *general public*. Some pressure for unequal access comes from authorized biographers and “friendly” researchers. Some donors of personal papers make a specific provision in the deed of gift that their authorized biographer can have unrestricted access to items that are closed to everyone else. Some university archives have had personal papers donated to them through the efforts of a professor who in turn asks the archives to close the materials until he has done his research in the materials.

A researcher looking at how France drew borders in French West Africa went to the national archives of Mali. He had a government research authorization with his photograph and signature and a stamp showing he had paid a “documents tax.” When he got to the archives, however, he was accused of being a spy for either Senegal or Burkina Faso and told he could not see the archives. Eventually he succeeded, but only after what he called “romancing the archivist.”⁷

7. Archives ensure the preservation of, and access to, records that provide

evidence needed to assert human rights and to document violations of them

Many researchers have the right to see specific types of information, usually information about themselves or about someone with whom they have a clear legal relationship (for example, guardian, attorney, doctor). The key here is that if one person is given access to, for instance, his adoption files, other persons seeking their own adoption files also have the right to have access to those files. It does not mean that the general public has that right.

In its *Updated Set of Principles on Impunity* the United Nations High Commission on Human Rights established the following priority categories of persons seeking access to archives bearing witness to human rights violations:

Victims, their families and relatives have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victim’s fate. (Principle 4)

Access to archives shall be facilitated in order to enable victims and persons related to claim their rights. (Principle 15)

Access should also be facilitated, as necessary, for persons implicated (in perpetrating human rights violations), who request it for their defence. (Principle 15)

Access to archives should also be facilitated in the interest of historical research, subject to reasonable restrictions aimed at safeguarding the privacy and security

of victims and other individuals. Formal requirements governing access may not be used for purposes of censorship. (Principle 15)

The courts and non-judicial commissions of inquiry, as well as the investigators reporting to them, must have access to relevant archives. (Principle 16)

All persons shall be entitled to know whether their name appears in State archives and, if it does, by virtue of their right of access, to challenge the validity of the information concerning them by exercising a right of reply. The challenged document should include a cross-reference to the document challenging its validity and both must be made available together whenever the former is requested. Access to the files of commissions of inquiry must be balanced against the legitimate expectations of confidentiality of victims and other witnesses testifying on their behalf. (Principle 17(b))⁸

In 2007, using files maintained by the security services of Ethiopia's 1974 to 1991 regime, an Ethiopian special prosecutor sentenced Mengistu Haile Mariam to life in prison (later the Supreme Court sentenced him to death on genocide charges). The files also form the basis for thousands of other criminal cases.⁹

This right is not without costs. The most famous case of the right to know and the despair of knowing is that of Vera Wollenberger, an East German woman who asked to see the file kept on her by the Stasi, the

secret police of the former German Democratic Republic. And what she found out was that her husband had been informing on her.¹⁰

But the right to know what the State has done is fundamental to human rights. Whether the State is obligated to preserve non-governmental records to secure these rights is a question that has not yet – to my knowledge – been adjudicated, but the sense of the responsibility is that if the State knows that records in non-governmental hands shed light on human rights abuses, it has the duty to preserve them, also.

8. Records that have been made public officially remain public

This principle refers to records that have been opened through official processes, not records that have been leaked and made available to the public. For example, the UN High Commissioner for Refugees releases its records for research use when they are 20 years old, subject to some restrictions. The UNHCR records of the refugee crisis during the Balkan wars of the 1990s are not yet open; however, the press releases and clipping files of the public information office for the period of the wars have been open in the archives ever since they were transferred to archival custody a dozen years ago and are regularly used by researchers who find them an excellent chronology of the conflict.

A controversy recently arose in South Africa over records first made public and then closed. In 1996 former President Thabo

Mbeki gave African National Congress (ANC) records to the University of Fort Hare; the records were “declared open to all” and were used by researchers. After the *Sunday Times* of South Africa ran stories in April 2010 about corruption that it said was based on the ANC records in the archives, the archives were closed, first closed for relocation and then were “closed pending an investigation on how the material could be accessed.” Following the *Times*’ lead, various news organizations asked for access, were denied and wrote about it, causing an “uproar in the media.” By July the records were said to be open “with the process of applying.”¹¹

9. Archivists deliver partial (redacted) records when practicable if by so doing the access request can be fulfilled in whole or in part

Often an item can be made available if an appendix is not included or a paragraph is deleted. Closing a 60-page document because of a sentence on one page is simply not acceptable. Certainly redaction is more work for the archivist but it provides much more information to the user than simply closing the entire document. Two considerations in deciding whether to segregate and withhold portions are called the “mosaic or jigsaw puzzle test” and the “Swiss cheese test.”

The jigsaw puzzle test asks the archivist to decide whether the disclosure of the information, while innocent in itself, could be linked to other information that would

allow the researcher to uncover what the archives is trying to protect (in the US government this is called a “mosaic” test). The problem here is that the archivist cannot be expected to apply more than normal knowledge to the implications that might be drawn from the records.

While many of the documents that are redacted in a government archives are those from security agencies, archivists may also redact items to protect personal privacy, fulfill a donor’s deed of gift, or comply with institutional access policies. Once while working at the U.S. National Archives I redacted a document and sent it to the requester. The requester, a specialist in the subject, filled in the blanks on the copy and sent it back asking us to “confirm” his guesses. We didn’t confirm, but he was very close to right.

The Swiss cheese test asks the archivist to look at the item and decide whether, if all the restricted information is deleted, is there anything left that makes sense. Is it more holes than cheese? Worse, is what is left misleading? If so, it is better to withhold the entire item than provide a misleading item.

The National Security Archive points to a good example of misleading redaction; in fact, a redaction that in the words of the Archive “reverses the meaning.” A U.S. CIA document memorandum on death squads in El Salvador, dating from 1984, was released to the *New York Times* in 1987 in heavily redacted form but leaving in the information that military leaders pledged to “punish human rights offenders.” When the full version was released in 1993 in

response to a request from the truth commission in El Salvador, it showed that the Salvadoran authorities were taking only token action because they were afraid of “confronting rightwing extremists and that the CIA thought the government of El Salvador was “incapable of undertaking a real crackdown on the death squads.”¹²

10. Users may appeal a denial of access to an independent body

In many countries the government legislation on freedom of information guarantees that the requester will get a chance to plead his case for access if he is turned down when he makes his first request for access. Slowly this practice is spreading into other institutions; the World Bank recently revised its access policy to include an appeal process. An appeal makes sure that an arbitrary decision in the first instance can be challenged and potentially reversed. Furthermore, a senior official may be more willing to see the public benefits of releasing information than is the initial reviewer who often believes that he has no flexibility in following the restriction guidelines.

The United Kingdom has a quite recent freedom of information act. The statistics for 2009 show that there were 61 appeals from “departments of state” to the information commissioner. Of those, 42 were upheld in full, 12 overturned in full, and 7 overturned in part. In other words, in 31% of the cases, an appeal resulted in the release of more information.¹³ That is an appeal worth making.

11. Archivists have access to closed records and perform normal archival work on them

The archives of the United Nations holds the records of the truth commissions in El Salvador and Guatemala. Under the terms of the deposits, the records are closed to public access. However, the UN interprets this as a ban on any kind of work in the records – preservation, arrangement or description. Consequently the records, which include fragile electronic and audio-visual records, are deteriorating.

I have had this problem, too. I was hired to describe a body of records, and I requested some of them for review. I was denied access to several files; it took several rounds of negotiation before I gained access.

And in several countries the national archives is in theory responsible for the records of the government but does not have access – even for preservation purposes – to inspect storage conditions or even ascertain the volume and condition of the records of the previous heads of state.

These are impossible situations; archivists must be trusted to ensure that records are preserved and described, whether or not they are restricted from public access.

12. Archivists participate in the decision-making process on access

This principle addresses several problems.

Some archives hold records that are closed but are not permitted to make any judgment about when they can be opened.

In some cases the decision on access must in very case be referred back to the originating entity; this opens the door to unequal access because one office will make one kind of decision without knowing what another office is doing with a similar request. Offices often do not want to be bothered with access requests and either delay decisions interminably or simply grant access without looking at the records (as, apparently, the University of Pittsburgh official did with the syphilis records). Furthermore most archivists have a better sense of the history of their institution than the operating offices do; archivists may also have greater knowledge of the information that is already available to the public. This makes them the persons best able to decide whether older information can be released without harm.

In other cases the lawyers for the government make all the decisions. All too often lawyers believe that only someone with legal training can handle access issues. While it is true that archivists engaged in making access decisions on complex records need legal support, it is not true that an attorney

has to rule on every request. While lawyers for the institution are very knowledgeable about the current institution and mindful of its interests and prerogatives, they often are not as concerned about the information on persons other than the employees, for example, while archivists are trained to look at all information in the record. Ignoring the archivist's perspective risks over protecting institutional interests and under protecting public interests.

* * *

Those are the twelve principles as currently drafted. They probably will change, perhaps in order, perhaps in number, before the draft is released for public comment next summer.

The problems of access to records are real. Balancing the needs of users and the needs of the records creator is never easy. But unlike Kafka's records custodians, today archivists must and do find the file, do make it available responsibly, and do put it away again such that it can be found and used in the future. Access is forever an unfinished business.

N O T A S

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R E S U M O

Princípios propostos pelo Grupo de Trabalho sobre Acesso aos Arquivos do Comitê de Boas Práticas e Normas do Conselho Internacional de Arquivos. O estabelecimento, em âmbito internacional, de parâmetros comuns de acesso a documentos públicos e privados.

Palavras-chave: acesso a arquivos; Declaração Universal sobre Arquivos; Código de Ética dos Arquivistas; Conselho Internacional de Arquivos; Comitê de Boas Práticas e Normas do Conselho Internacional de Arquivos.

A B S T R A C T

Principles proposed by the Working Group on Access to the Archives of the Committee on Best Practices and Standards of the International Council on Archives. The establishment, in the international context, of common parameters on access to public and private documents.

Keywords: access to archives files; Universal Declaration on Archives; Code of Ethics of Archivists; International Council on Archives; Committee of Best Practices and the Standards of International Council on Archives.

R E S U M É N

Los principios propuestos por el Grupo de Trabajo sobre Acceso a los Archivos del Comité de Buenas Prácticas y Normas del Consejo Internacional de Archivos. El establecimiento, en el contexto internacional, de parámetros comunes acerca del acceso a los documentos públicos y privados.

Palabras clave: acceso a los archivos; Declaración Universal de Archivos; Código de Ética de los Archiveros; Consejo Internacional de Archivos; Comité de Buenas Prácticas y Normas del Consejo Internacional de Archivos.