Balancing Privacy and Access in School Desegregation Collections: A Case Study

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Abstract

Some fifty years ago, Virginia embarked on a strategy of "massive resistance" to desegregation that locked out over 14,000 primary and secondary public school students for up to five years. Collections that document this period often contain individual student records and politically sensitive information. Contradictory laws (FERPA, HIPAA, and FOIA) affect access to these collections. This case study examines decisions regarding access and privacy made by three repositories with such collections. The author raises questions about the legality and ethics of restricting access to collections that contain confidential records and calls for the establishment of best practices to guide the archivists through conflicting access laws.

Desegregation. This single word conjures up images of angry mobs, cross burnings, and courthouse steps. To Virginians, it also evokes an era that valued segregation over public education, an era that many would like to forget. Indeed, for nearly half a century, studies of desegregation in Virginia schools were difficult to undertake because of the lack of primary sources. But, in early 2009, with a great deal of fanfare and substantial public interest, communities around the state commemorated the fiftieth anniversary of the repeal of the Virginia laws that mandated segregation in its public

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schools. Newspaper articles, archives exhibits, books, and scholarly publications helped to raise public awareness about the history of school desegregation.[1]

The slow process of dismantling Jim Crow school segregation began in Virginia with a 1951 strike by African American students in rural Prince Edward County as they protested the deteriorating conditions in their tarpaper shack schools. This strike eventually escalated into a lawsuit that became part of *Brown v. Board of Education* decided in 1954.[2] In reaction to *Brown*, Virginia launched a sweeping program of resistance to school desegregation, known as Massive Resistance, in 1956. As part of the "Southern Manifesto," Senator Harry F. Byrd, head of Virginia's Democratic Party machine, engineered state laws to prevent school desegregation.[3] These laws prohibited public financing of any integrated school and created an apparatus that made it easier for local school districts to avoid desegregation by suspending compulsory education laws.

Massive Resistance led to the closing of schools in four communities and delayed, for decades, integration in others. The governor closed three districts—Norfolk, Front Royal, and Charlottesville—in 1958. In Norfolk, the biggest school district in the state, nearly 10,000 students were locked out of their schools for five months. In rural Front Royal, where some black students had to commute sixty miles to get to a black high school, the white high school was closed for five months. In Charlottesville, home of the University of Virginia, schools were closed for an entire school year. In 1959, federal and state courts struck down most of the provisions of Massive Resistance laws, and the schools that had been closed in these three districts were reopened.[4] The fourth district, Prince Edward County, responded to the courts' decisions by shutting all schools

[1] See, for example, Denise Watson Batts, "When the Wall Came Tumbling Down: A Story in Six Parts," 2008, *The Virginian-Pilot.* This provides a comprehensive history of the end of state-mandated school segregation in Norfolk, Virginia. Batts won an award for this series, which she discusses in a radio talk show, Norfolk's WHRV-FM show *HearSay* with Cathy Lewis, 24 September 2008, available at http://hamptonroads.com/node/481513, accessed 31 January 2010. See also, Cassandra Newby-Alexander, Jeffrey Littlejohn, Charles H. Ford, Sonia Yaco, and the Norfolk Historical Society, *Hampton Roads: Remembering Our Schools* (Charleston, S.C.: History Press, 2009); Charles H. Ford and Jeffrey Littlejohn, *Elusive Justice* (Charlottesville: University of Virginia Press, forthcoming); Daniel Schmidt, "Fifty Years of Struggle against 'Massive Resistance'," *To The Roots* (5 November 2008), available at http://totheroots.wordpress.com/2008/11/05/50-years-of-struggle-against-massive-resistance/, accessed 14 January 2010; Old Dominion University Libraries, "School Desegregation in Norfolk, Virginia" (6 January 2010), available at http://www.lib.odu.edu/special/schooldesegregation/index.htm, accessed 7 February 2010. The Resources link includes a bibliography.

[2] *Brown v. Board of Education of Topeka* (I) 347 U.S. 483 (1954) was a consolidation of four U.S. District Court cases: *Brown et al. v. Board of Education of Topeka et al.* (Kansas); *Briggs v. Elliott, No. 2* (South Carolina); *Davis et al. v. County School Board of Prince Edward County, Virginia, et al., No. 4*; *Gebhart et al. v. Belton et al., No. 10* (Delaware).

[3] See generally James W. Ely, *The Crisis of Conservative Virginia: The Byrd Organization and the Politics of Massive Resistance* (Knoxville, Tenn.: University of Tennessee Press, 1976). See also, Alexander Leidholdt, *Standing before the Shouting Mob: Lenoir Chambers and Virginia's Massive Resistance to Public-School Integration* (Tuscaloosa: University of Alabama Press, 1997).

[4] On 19 January 1959, the Virginia Supreme Court decided *Harrison v. Day*, 200 Va. 439, 106 S.E.2d 636 and a three-judge U.S. District Court decided *James v. Almond,* 170 F. Supp. 331 (E.D. Va.).

for African American students for the next five years. While the school closings in Little Rock, Arkansas, are well known and well documented, few people outside the Commonwealth seem to remember the Virginia school closings.[5] One reason for this anonymity may be related to the lack of documentation concerning the school desegregation process.[6] Those school desegregation records that exist often contain material (such as student and personnel records) that raises privacy and confidentiality issues.[7] This further shrouds history, as Sarah Eskridge noted in her 2006 history of the Pupil Placement Board, a pivotal state agency for enforcing segregation: "As of now, I am the only researcher with access to those documents, and this feat took four months of wrangling to achieve. With the records under such tight restrictions, historians have difficulty assessing the

[5] Virginia, like Kentucky, Massachusetts, and Pennsylvania, is a commonwealth.

[6] The author is the founder and cochair of the Desegregation of Virginia Education (DOVE) Project, a statewide task force that seeks to locate, identify, and encourage the preservation of documentation of the school desegregation process in Virginia, see http://www.lib.odu.edu/special/dove, accessed 28 June 2010.

[7] The terms *privacy* and *confidentiality* are used interchangeably in this article. Richard Pearce-Moses, *Glossary of Archival Terminology* (Chicago: Society of American Archivists, 2005) defines privacy as "1. The quality or state of being free from public scrutiny. 2. The quality or state of having one's personal information or activities protected from unauthorized use by another…" Confidentiality is defined as "1. Kept secret within an authorized group. 2. Not to be disclosed." The phrases "student records," "education records," and "scholastic records" are not synonyms. I use *student records* to generically describe records related to individual students. *Education records* and *scholastic records* are legal terms. As defined in the Virginia Freedom of Information Act (Va. Stat. § 2.2-3701), " 'Scholastic records' means those records containing information directly related to a student and maintained by a public body that is an educational agency or institution or by a person acting for such agency or institution."

FERPA, (20 U.S.C. 1232g(a)(4)) defines "Education records":

"(a) The term means those records that are:

(1) Directly related to a student; and

(2) Maintained by an educational agency or institution or by a party acting for the agency or institution.

(b) The term does not include:

(1) Records that are kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record.

(2) Records of the law enforcement unit of an educational agency or institution, subject to the provisions of Sec. 99.8.

(3)(i) Records relating to an individual who is employed by an educational agency or institution, that: (A) Are made and maintained in the normal course of business; (B) Relate exclusively to the individual in that individual's capacity as an employee; and (C) Are not available for use for any other purpose.

(3)(ii) Records relating to an individual in attendance at the agency or institution who is employed as a result of his or her status as a student are education records and not excepted under paragraph (b)(3)(i) of this definition.

(4) Records on a student who is 18 years of age or older, or is attending an institution of postsecondary education, that are: (i) Made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his or her professional capacity or assisting in a paraprofessional capacity; (ii) Made, maintained, or used only in connection with treatment of the student; and (iii) Disclosed only to individuals providing the treatment. For the purpose of this definition, "treatment" does not include remedial educational activities or activities that are part of the program of instruction at the agency or institution; and

(5) Records that only contain information about an individual after he or she is no longer a student at that agency or institution."

role of the Pupil Placement Board in the Massive Resistance movement, in local school systems, and in the minds of Virginia citizens."[8]

Archivists ask whether public openness or student privacy is more important. Sara Hodson characterizes "the competing ethics of providing access while protecting privacy" in the papers of well-known, high-profile individuals.[9] These competing ethics are evident in school desegregation records, which contain material about ordinary people acting within a highly charged political context.

Despite the historical importance of this facet of Virginia history, some archivists hesitate to acquire collections that contain school desegregation material because of the political nature of the records and the confusion over privacy laws related to student records. This case study presents three examples of repositories weighing competing demands in this environment, both protecting the confidentiality of students and allowing researchers access to key historical material. In all the cases, archivists attempted to follow the sometimes-conflicting laws governing access to their collections or institutional access guidelines.

Legal Framework

Two categories of laws relate to archival collections: those that protect individuals' privacy by restricting access to records, and those that protect the public's right to know by expanding access. In Virginia's school desegregation records, two groups have privacy rights—staff and students. A variety of laws governs access to school employee records.[10] The privacy of scholastic records of students in Virginia is primarily protected by *Virginia Code* Title 22.1 (Education) and Title 23 (Educational Institutions).[11] Complicating matters for archives is the fact that while individual states may have laws that govern students' privacy rights, federal statutes are also relevant. The Family Educational Rights

[8] Sarah Eskridge, *Virginia's Pupil Placement Board and the Massive Resistance Movement, 1956–1966* (Richmond: Virginia Commonwealth University, 2006), 1.

[9] Sara S. Hodson, "In Secret Kept, In Silence Sealed: Privacy in the Papers of Authors and Celebrities," *American Archivist* 67, no. 2 (Fall/Winter 2004): 195. Other resources for the competing ethics of access and privacy for archivists in addition to those in the footnotes are Tamar G. Chute and Ellen D. Swain, "Navigating Ambiguous Waters: Providing Access to Student Records in the University Archives," *American Archivist* 67 (Fall/Winter 2004): 212–33; Elena S. Danielson, "The Ethics of Access," *American Archivist* 52 (Winter 1989): 52–62; Marybeth Gaudette, "Playing Fair with the Right to Privacy," *Archival Issues* 28, no. 1 (2003–2004): 21–34; Heather MacNeil, *Without Consent: The Ethics of Disclosing Personal Information in Public Archives* (Chicago: Society of American Archivists, 1992); Todd M. Power, "Identity, Integrity, Authenticity, and the Archives: A Comparative Study of the Application of Archival Methodologies to Contemporary Privacy," *Archivaria* 61 (Spring 2006): 181–214.

[10] One such law is Va. Stat. § 2.2-3800, Virginia Government Data Collection and Dissemination Practices Act.

[11] One specific instance is Va. Stat. § 22.1-287, "Limitations on access to records," available at http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+22.1-287, accessed 27 July 2009.

Privacy Act (FERPA), sometimes known as the Buckley amendment, governs access to student records in any educational institution that receives funds under any program administered by the U.S. Department of Education.[12] All public and some private schools, as well as certain educational agencies, must comply with FERPA.[13] This federal law prohibits schools from disclosing any personally identifiable information about students without their (or their parents') permission.[14] Even material containing no student names, but that "would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty" is protected.[15] FERPA defines an *education record* broadly, as the "records, files, documents, and other materials" that are "maintained by an educational agency or institution, or by a person acting for such agency or institution." Court decisions on FERPA conflict, depending on what constitutes a student record.[16]

Some types of data disclosures are permitted under FERPA. Directory information (i.e., name, age, parents' names, and addresses) can be released to the public. Researchers may access education records if all personal identifiers are removed. After the tragic shootings at Virginia Tech in 2008, education records can be shared "to protect the health or safety of the student or other

[12] *Family Educational Rights Privacy Act (FERPA), U.S. Code* 20 (2008), § 1232g; *Code of Federal Regulations* 34 § 99, see http://www.ed.gov/policy/gen/guid/fpco/ferpa/index.html, 237, accessed 29 December 2009.

[13] *CFR* 34 § 99.1. "To which educational agencies or institutions do these regulations apply? (a) Except as otherwise noted in Sec. 99.10, this part applies to an educational agency or institution to which funds have been made available under any program administered by the Secretary, if—(1) The educational institution provides educational services or instruction, or both, to students; or (2) The educational agency provides administrative control of or direction of, or performs service functions for, public elementary or secondary schools or postsecondary institutions."

[14] *USC* 20 § 1232g(b)(4)(A)."Personally Identifiable Information The term includes, but is not limited to—(a) The student's name; (b) The name of the student's parent or other family members; (c) The address of the student or student's family; (d) A personal identifier, such as the student's social security number, student number, or biometric record; (e) Other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name; (f) Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or (g) Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates."

[15] *USC* 20 § 1232g (b)(4)(A)(f).

[16] For a detailed discussion, see Mark A. Greene and Christine Weideman, "The Buckley Stops Where? The Ambiguity and Archival Implications of the Family Educational Rights and Privacy Act," in *Privacy and Confidentiality Perspectives: Archivists and Archival Records*, ed. Menzi L. Behrnd-Klodt and Peter J. Wosh (Chicago: Society of American Archivists, 2005): 181–98.

individuals."[17] Education records can also be disclosed for financial aid purposes and to other schools to which a student transfers.[18]

FERPA has a counterpart in the medical field that also affects access to school desegregation records. The privacy of individuals' medical information, such as psychologists' reports on students that are sometimes included in the school desegregation collections, may be protected by the Privacy Rule in the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA).[19] The Privacy Rule prohibits "covered entities"—health-care providers that transmit patient information electronically, health-care data clearinghouses, and health plans—from disclosing health information without patient permission.[20] Because almost all health-care providers currently transmit patient information electronically, almost all are subject to this act. The act applies to all "protected health information" (PHI) in covered entities and all formats of patient records, whether electronic or paper.[21] This means, for example, that a clinical social worker's handwritten notes about a student's mental health are subject to HIPAA's nondisclosure regulations if he or she works for a covered entity. In addition to HIPAA's Privacy Rule, other federal and state regulations may also govern the confidentiality of medical records.[22]

Because health information is usually found within education records at schools, HIPAA's Privacy Rule generally does not apply at schools that are subject

[17] *CFR* 34 § 99.36(a).

[18] *CFR* 34 § 99.36(a) Subpart D,"May an Educational Agency or Institution Disclose Personally Identifiable Information from Education Records?"

[19] *CFR* 45 § 160 and Subparts A and E, § 164, *Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule, Federal Register* 67, no. 157, Rules and Regulations (14 August 2002), available at at http://www.hhs.gov/ocr/privacy/hipaa/administrative/privacyrule/privruletxt.txt, accessed 20 April 2010.

[20] Defined in *CFR* 45 § 160.103. "Covered entity means: 1) A health plan. 2) A health care clearinghouse. 3) A health care provider who transmits any health information in electronic form in connection with a transaction covered by this subchapter," available at http://edocket.access.gpo.gov/cfr_2002/octqtr/pdf/45cfr160.103.pdf, accessed 16 April 2010.

[21] *Protected health information* (PHI) and *individually identifiable health information,* two related terms, are defined in *CFR* 45 § 160.103: "*Individually identifiable health information* is information that is a subset of health information, including demographic information collected from an individual, and: 1) Is created or received by a health care provider, health plan, employer, or health care clearinghouse; and 2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and (i) That identifies the individual; or (ii) With respect to which there is a reasonable basis to believe the information can be used to identify the individual.…Protected health information means individually identifiable health information… 2) Protected health information excludes individually identifiable health information in: (i) Education records covered by the Family Educational Rights and Privacy Act, as amended, 20 U.S.C. 1232g; (ii) Records described at 20 U.S.C. 1232g(a)(4)(B)(iv); and (iii) Employment records held by a covered entity in its role as employer."

[22] For an example of some other federal laws see Privacy Rights Clearinghouse, *Fact Sheet 8: Medical Records Privacy*, "3. What medical information is not covered by HIPAA?" (November 2009), available at http://www.privacyrights.org/fs/fs8-med.htm, accessed 7 February 2010.

to FERPA.[23] However, the boundaries between the two laws are far from clear. If a school is a covered entity, the Privacy Rule may govern health information in education records, sometimes in combination with FERPA, depending on who created the record and for what purpose.[24]

Although not explicitly stated in the two laws, administrative codes, or judicial rulings, FERPA and HIPAA's Privacy Rule are generally considered to apply retroactively.[25] In other words, student education and health records created before the laws were passed are protected. The privacy rights of deceased students are more complicated. Although the general wisdom is that the right to privacy dies with the subject, this is not uniformly true for FERPA or HIPAA's Privacy Rule. The right to privacy under FERPA, as interpreted by the U.S. Department of Education's Family Policy Compliance Office, "lapses upon the death of the person who holds it."[26] The privacy rights of a deceased minor student under FERPA, however, exist until his or her last surviving parent dies.[27] FERPA does not protect the privacy of deceased adult or postsecondary students; "an educational agency or institution may disclose such records at its discretion."[28] Such discretionary access need not be a formal policy but can be decided on a case-by-case basis.[29] Some schools have instituted a policy that researchers must prove that the student is deceased to gain access to his or her records.[30]

[23] See the exception to the definition of "protected health information" in the HIPAA Privacy Rule at *CFR* 45 § 160.103 (2) (1).

[24] For a fuller discussion, see U.S. Department of Health and Human Services and U.S. Department of Education, "Joint Guidance on the Application of the Family Educational Rights and Privacy Act (FERPA) and the Health Insurance Portability and Accountability Act of 1996 (HIPAA) to Student Health Records" (November 2008), available at www.hhs.gov/ocr/privacy/hipaa/understanding/coveredentities/hipaaferpajointguide.pdf, accessed 2 September 2009.

[25] Menzi L. Behrnd-Klodt, *Navigating Legal Issues in Archives* (Chicago: Society of American Archivists, 2008), 138; Susan C. Lawrence, "Access Anxiety: HIPAA and Historical Research," *Journal of the History of Medicine and Allied Sciences* 62, no. 4 (2007): 436. An exception is Wisconsin, where due to a state law regarding retroactivity, FERPA only applies to records created after the bill became law. Virginia W. Fritzsch, "Pre-1974 School Records Are Open without Restriction," memo from the state public records archivist, 1 October 1998.

[26] David Schuman, Deputy Attorney General, Department of Justice to University of Oregon, "Re: Petition for Public Records Disclosure Order: University of Oregon Records" (15 June 1998), 3, http://www.doj.state.or.us/public_records/orders/cross_61698.pdf, accessed 28 June 2010.

[27] Letter, Paul Gammill, Director, Department of Education Family Policy Compliance Office, to Margaret Parker, Florida Department of Education, 20 February 2009.

[28] Gammill to Parker, 1.

[29] Bernie Cieplak, U.S. Department of Education Family Policy Compliance Office, telephone conversation with author, 20 April 2010.

[30] For example, University of Wisconsin General Counsel, "FAQ—Student Records: Family Educational Rights and Privacy Act (FERPA)" (2007), available at http://www.uwsa.edu/gc-off/deskbook/ferpafaq.htm, accessed 31 January 2010.

HIPAA "covers the records of the dead as well as the living and gives no time limits for how long records of the deceased must be protected."[31] The federal Freedom of Information Act (FOIA) allows agencies to make a subjective choice about disclosure of the records of the deceased, "as a general rule, under the Privacy Act, privacy rights are extinguished at death. However, under FOIA, it is entirely appropriate to consider the privacy interests of a decedent's survivors."[32] Individual states' Freedom of Information (FOI) laws may specify privacy rights of the deceased. In Virginia, records of deceased students are open to FOI requests.[33]

HIPAA's Privacy Rule and FERPA have another important similarity: they primarily dictate the actions of record *creators*. These laws focus on the use and disclosure of active medical and education records. HIPAA's Privacy Rule explicitly states that only covered entities must abide by its nondisclosure policies.[34] Consequently, the Privacy Rule governs access to medical records in an archives only if it is a covered entity.[35] If an institution creates (or maintains) education records, FERPA governs access to these records, whether they reside at the registrar's office or in the university archives. The inverse is also true—if a student's record resides at the archives of an institution where the individual was never a student, FERPA does not apply.[36] However, some repositories, including the Wisconsin Historical Society, have interpreted FERPA to be applicable to student records held outside of the schools that created them.[37]

Offsetting privacy laws are open records laws,[38] which provide timely public access to government information, including agency rules, opinions, orders, records, and proceedings. The federal Freedom of Information Act applies only to federal agencies, but most states have enacted similar laws, such as the Virginia

[31] Lawrence, "Access Anxiety," 436.

[32] *Federal Register* 65, no. 250, (2000) p. 82482. The Privacy Act is a subsection of the federal FOIA.

[33] Megan Rhyne, Virginia Coalition for Open Government, email to the author, 1 February 2010.

[34] *CFR* 45 § 160, 162, and 164.

[35] However, *hybrid entities* (organizations that contain covered and noncovered components) and *business associates* (contractors for covered entities) are also affected by FERPA requirements. For more information, see *CFR* 45 § 164.105.

[36] Such records do not meet the FERPA definition of "education record" because they do not directly relate to a student at that institution. Bernie Cieplak, U.S. Department of Education Family Policy Compliance Office, telephone conversation with author, 26 April 2010. For a discussion of the lack of explicit FERPA guidance on this subject, see Greene and Weideman, "The Buckley Stops Where?," 189.

[37] Virginia W. Fritzsch, Wisconsin Historical Society Public Records Archivist, telephone conversation with the author, 3 February 2010.

[38] For a description of key federal statutes regarding access and privacy, including the Privacy Act of 1974 (*USC* 5 § 552a), see Menzi L. Behrnd-Klodt, *Navigating Legal Issues in Archives* (Chicago: Society of American Archivists, 2008): 114–23.

Freedom of Information Act.[39] School desegregation records created and held in public schools or by governmental agencies are typically subject to Freedom of Information laws, although most FOI laws exempt some records from disclosure. Federal exemptions include classified documents, medical records, and personnel records. Virginia's Freedom of Information Act excludes educational, health, and some types of personnel records.[40]

So the question remains: access or privacy? Choosing the balance of public access and personal privacy is sometimes a matter of risk assessment. Is it riskier to protect access or to protect privacy? As Sara Hodson points out, "Both institutions and archivists must determine acceptable risk levels for the possible legal fallout of violating someone's privacy rights."[41] In the case of FERPA, *Gonzaga Univ. v. Doe*[42] found that "FERPA's nondisclosure provisions have an aggregate, not individual, focus, and they serve primarily to direct the Secretary of Education's distribution of public funds to educational institutions."[43] Thus, some repositories may believe that they are unlikely to be sued for allowing access to education records and may err on the side of open access. Conversely, universities risk losing federal funding if they violate FERPA, so they may tend to restrict access.[44]

Case Studies

In this paper, I examine the access policies of three repositories holding significant Virginia school desegregation collections from a range of records creators. These archives represent a cross-section of types of repositories: a state library holding records created by a governmental agency, a public university with a collection created by a school district, and a religious organization with

[39] "The Freedom of Information Act, 5 U.S.C. § 552 As Amended by Public Law No. 110-175, 121 Stat. 2524," (2007), available at http://www.justice.gov/oip/amended-foia-redlined.pdf, accessed 28 June 2010; Virginia Coalition for Open Government, *2009–2010 Virginia Freedom of Information Act* (n.d.), at http://www.opengovva.org/virginias-foia-the-law, accessed 28 June 2010.

[40] Virginia and federal Freedom of Information Act exclusions: Va. Stat. § 2.2-3705.4, "Exclusions to application of chapter; educational records and certain records of educational institutions," available at http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+2.2-3705.4, accessed 21 April 2010; Va. Stat. §.2.2-3705.5, "Exclusions to application of chapter; health and social services records," available at http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+2.2-3705.5, accessed 21 April 2010; "The Freedom of Information Act, 5 U.S.C. § 552 As Amended by Public Law No. 110-175, 121 Stat. 2524," "This section does not apply to matters that are...."

[41] Hodson, "In Secret Kept, In Silence Sealed," 211.

[42] *Gonzaga Univ. v. Doe* 536 U.S. 273 (2002).

[43] *Gonzaga Univ. v. Doe*, 16; For a further discussion on the lack of private enforcement of FERPA see Lynn M. Daggett, "FERPA in the Twenty-First Century: Failure to Effectively Regulate Privacy for All Students," Catholic University Law Review 59 (Fall 2008): 65-71.

[44] Student Press Law Center, "Access: This Headline Has Been Redacted Due to FERPA," *SPLC Reports* 30, no. 3 (Fall 2009): 25, available at https://www.splc.org/report_detail.asp?id=1523&edition=50, accessed 17 February 2010.

records from an outreach project. Each institution made different decisions about what types of records to make accessible and how confidentiality laws apply to the records. In each case, the paper describes the historical background of each collection, its acquisition, and the creation and nature of its access policies.

Collection 1: Pupil Placement Board Records, Library of Virginia, Richmond, Virginia

In September 1956, a special session of the Virginia State Legislature passed the Pupil Placement Act,[45] creating the Pupil Placement Board (PPB) as part of its Massive Resistance strategy.[46] The board's official mandate was to assign students to schools objectively, regardless of their race. However, the board's intent quickly became clear: "to fight, by every legal and honorable means, any attempted mixing of the races in the public schools."[47] Not surprisingly, from its inception in 1956 to its demise as a state agency in 1966, the history of the board is filled with controversy. In multiple court cases during its existence, facets of the act establishing the board were ruled unconstitutional. In response to the court rulings, the legislature rewrote the act a number of times.[48]

In 1960, it transferred responsibility for determining student placement back to local school boards. At that point, complaining that they were now only rubberstamping local decisions, all three of the board's members resigned. Governor J. Lindsay Almond, Jr. assigned new members to replace them, and the board continued for another six years, until the Pupil Placement Act was repealed.

The Pupil Placement Act required any child new to a district, moving from a primary to a secondary school, or wanting to go to a different school within his or her current district to apply to the board for placement.[49] Parents provided information about their child and requested a particular school, although typically the district sent forms to parents with the "school requested" already filled in. By crossing out that choice, parents could request a different school for their child. If the student had never attended school in Virginia, a birth

[45] As part of *Chapter 70,* the acts of the 1956 Extra Session of the Virginia General Assembly

[46] Eskridge, *Virginia's Pupil Placement,* 23; F. D. G. Ribble, "Constitutional Law," *Virginia Law Review* 47, no. 8 (December 1961): 1462.

[47] From a statement by the original board members in the Virginia Pupil Placement Board Minutes, 25 May 1960. Virginia Pupil Placement Board, State Government Records Collection, accession # 26517, Library of Virginia, Richmond, Virginia.

[48] The Pupil Placement Act of 1956 was revised in 1959 and 1964. For a discussion of the act and its legislative history, see "Seeking Legal Solutions for the 'School Problem'," in Eskridge, *Virginia's Pupil Placement Board,* 48–62.

[49] Pupil Placement Act, Va. Stat. § 22-232.1 et seq.

certificate had to be attached to the application. Occasionally, physicians' letters, notes from parents, and student records were sent to the board with an application.[50] After the application was submitted to the local school board, school officials recommended a school assignment for the student and sent the application to the Pupil Placement Board, which reviewed the application and assigned the student to a school. When parents in Richmond refused to fill out the applications, "The PPB, working with the Richmond City School Board, decided that it could gather the necessary information from the standard school registration form required by all students. The local school boards could simply send these registration forms directly to the PPB, complete with recommendations for the placement of each student."[51]

Officially, the Pupil Placement Board based decisions on such factors as student academic achievement and the geographic location of the student's residence. But, in reality, race was the sole determinant in assigning students to a school.[52] In the first three years of operation, after processing 450,000 applications, the board assigned no black students to white schools.[53] Although the Pupil Placement Board application did not ask the student's race, school districts knew the race of current students and assigned them to schools accordingly. The race of students new to the district might be determined by the answer given to "name of the last school attended" or "names of schools of other children in the family."[54] If the student had last attended a school called, for example, Booker T. Washington, that child's race would be obvious. Race was listed on the birth certificate required for students new to Virginia. And, of course, if the application was made in person, written documentation was rarely necessary

[50] Christopher J. Abraham, interview with author, Richmond, Virginia (June 2008). Abraham is the archivist for Pupil Placement Board records, Library of Virginia and was the source for the information on acquisition and processing of the collection, except as noted.

[51] Eskridge, *Virginia's Pupil Placement Board*, 39. Parents in other districts also refused to sign or submit the form as a protest against the Pupil Placement Act. See James Mcgrath Morris, "A Chink in the Armor: The Black-Led Struggle for School Desegregation in Arlington, Virginia, and the End of Massive Resistance," *Journal of Policy History* 13, no.3 (2001): 330. Some school districts responded by barring those students from attending school. In Richmond, legal action was necessary to reinstate the students and force the school district to place students in some district school, even if they did not comply with the Pupil Placement Act. See Robert A. Pratt, *The Color of Their Skin: Education and Race in Richmond, Virginia, 1954–89* (Charlottesville: University of Virginia: 1992): 23.

[52] *Leola Pearl Beckett v. School Board of the City of Norfolk, Virginia* 185 F Supp, 459, 460 (E.D. Va 1959), Findings of Fact, available at http://www.littlejohnexplorers.com/jeff/brown/beckett/beckett1959oct22.htm, accessed 23 January 2010.

[53] *Leola Pearl Beckett v. School Board of the City of Norfolk, Virginia*, 461.

[54] Eskridge, *Virginia's Pupil Placement Board*, 27.

to determine the child's racial identity.[55] Submitted as part of the application process, the birth certificate and most (if not all) of the records that specifically listed the student's race were returned to parents or were retained by the local school boards. This procedure was a sophisticated ruse that left behind little documentation of the racial basis for the Pupil Placement Board's school placement decisions.

After the dissolution of the Pupil Placement Board in 1966, its records were transferred to the Library of Virginia (LVA), the repository for the Commonwealth of Virginia's governmental records. In 2007, archivist Christopher J. Abraham began to process the collection. The collection, dating from 1957 to 1966, contains administrative legal files and 100,000 student applications—about 173,000 items. Although processing is not complete, series descriptions are included in the library's catalog and a container listing is available at the repository. Most series are arranged by locality but the student application series, the largest in the collection, is arranged chronologically by school year, then alphabetically by locality and thereunder alphabetically by pupil surname. Each record in the application series includes pupil information, local school board recommendation, and action taken by the state school board. Abraham notes that processing this collection is challenging because of its volume and the confidentiality issues in the application series. Abraham expects that it will not be fully processed until 2015.[56]

The first step taken in creating an access policy for the collection was to decide on the legal classification of its records. Abraham, in conjunction with unspecified other staff members at the Library of Virginia, decided that because the board was not a school, its records are not education records. Abraham said that because the Library of Virginia has no in-house legal counsel, but must refer all legal questions to Virginia's attorney general, no attorney was consulted about this decision.

Abraham also concluded that most of the records are not medical records, but merely commentary. The person who noted on a student's application "can't see well" or "this child is slow" was stating an opinion, not a medical fact. Therefore, since the records are neither education records nor medical records, the Library of Virginia decided that FERPA and HIPAA do not apply. Therefore, LVA decided that the records will be open to approved researchers, with some exceptions. Some medical records and education records are included in the

[55] Until *Loving v. Virginia* 388 U.S. 1 (1967), Virginia legally acknowledged only two races, "white" and "colored," following the "one-drop" rule for determining racial identity. There were two exceptions, Native Americans living on reservations were "Indian," and those with less than 1/16 Native American blood were "white" (the "Pocahontas exception"). For a discussion of the state's history of racial classification, see G. M. Dorr, "Racial Integrity Laws of the 1920s," *Encyclopedia Virginia*, (4 January 2010), available at http://www.EncyclopediaVirginia.org/Racial_Integrity_Laws_of_the_1920s, accessed 2 May 2010.

[56] Abraham, interview.

collection, for example, as in a report card or a physician's report attached to an application. In these cases, the library has chosen to seal the record for seventy-five years in accordance with the Virginia Public Records Act, which seals "any record made confidential by law."[57] Although Abraham did not state which laws made these medical and education records confidential, both are protected under state law.[58] Abraham also is sealing for seventy-five years any applications containing comments that he feels might embarrass or humiliate an individual student if made public, such as notes regarding mental retardation, personal hygiene, or mention of sexual abuse. Abraham did not cite which statute or other guideline directed him to seal such applications. He noted that he sometimes uses simple redaction to open access to a record.

Researchers must apply for permission to use the collection to the Virginia State Archivist.[59] The three-page application asks the purpose of the research, a list of past publications, description of research methodology, and for references with "first-hand knowledge of the requestor's qualifications to do research."[60] Researchers must agree not to disclose personal and confidential information, safeguard such material from accidental disclosure, and use the information "only for the purpose stated in the researcher's application form."[61] No legal basis, such as federal or state statutes, is cited on the application as rationale for the nondisclosure agreement or the researcher application. Although the Pupil Placement Board records are still being processed, an unknown number of researchers have received permission to use the collection. One researcher was allowed access to records that contained student grades and IQ tests.[62]

[57] Va Stat. § 42.1-78, "Confidentiality safeguarded," at http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+42.1-78, accessed 2 August 2009. "Any records made confidential by law shall be so treated. Records which by law are required to be closed to the public shall not be deemed to be made open to the public under the provisions of this chapter. Records in the custody of The Library of Virginia which are required to be closed to the public shall be open for public access 75 years after the date of creation of the record. No provision of this chapter shall be construed to authorize or require the opening of any records ordered to be sealed by a court. All records deposited in the archives that are not made confidential by law shall be open to public access."

[58] Va. Stat. § 32.1-127.1:03, "Health records privacy"; Va. Stat. § 22.1-289, "Transfer and management of scholastic records; disclosure of information in court notices; penalty"; Va. Stat. § 2.2-3705.5, "Exclusions to application of chapter; health and social services records"; Va. Stat. § 2.2-3705.4, "Exclusions to application of chapter; educational records and certain records of educational institution," all available at http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+TOC, accessed 24 April 2010.

[59] Pupil Placement Board, catalog record, Library of Virginia, call number 26517.

[60] Library of Virginia, *Research Agreement*, undated, email to author, 7 July 2009, 1.

[61] Library of Virginia, *Research Agreement*, 2.

[62] Eskridge, *Virginia's Pupil Placement Board*, 3.

Collection 2: Norfolk Public Schools Desegregation Papers, Old Dominion University, Norfolk, Virginia

In July 1955, the Norfolk School Board reacted to the "all deliberate speed" edict of *Brown v. the Board of Education*. While stating a willingness "to uphold and abide by the laws of the land," the board said that "local customs" and state law prohibited it from desegregating the Norfolk Public Schools.[63] The NAACP disagreed and filed suit against the school board.[64] In 1958, the board was ordered to desegregate the public schools.[65] Rather than allowing all African Americans to attend schools in their neighborhoods, the Norfolk public school administration created elaborate requirements for black students who wanted to transfer to white schools. Despite these strict requirements, 151 students applied and were subjected to several rounds of tests, as well as to intimidating hearings and patronizing interviews, and, eventually, to legal proceedings. Finally, in September 1958, under federal court order, seventeen African American students were admitted to white schools. However, the governor, J. Lindsay Almond, Jr., had the power under Massive Resistance laws to close any school that integrated, and close them he did. The families of newly admitted African American students received letters stating that their children had been assigned to white schools but, "…this school is automatically closed by operation of the State law and it will not be necessary or desirable for your child to report to the school until further notice."[66] Governor Almond closed the six white secondary schools that the seventeen black students would have integrated, and, in the process, locked out 10,000 white students as well.

For the next five months, the most populous city in Virginia was the scene of political battles between the governor, the federal courts, the city council, and the school board. The governor and the Norfolk City Council took over many of the functions of the Norfolk School Board. The city council, at one point, voted to close the black schools, which had remained open throughout this crisis. The courts prevented this move, which even Governor Almond saw as punitive.

[63] "Resolution approved by the Norfolk City School Board July 1, 1955," Box 1, Folder 4, "Integration-Misc. Statement of School Board 7/1/55," Norfolk Public Schools Desegregation Papers, Special Collections and University Archives, Patricia W. and J. Douglas Perry Library, Old Dominion University Libraries, Norfolk, Virginia, hereafter cited as NPS papers. Section 140 of the Constitution of Virginia, written by the Virginia Constitutional Convention of 1901–1902, prohibited integrated schools.

[64] *Leola Pearl Beckett v. The School Board of the City of Norfolk, Virginia*, 148 F Supp 430 (E. D. Va 1957). The case continued until 1970 as various aspects of school desegregation in Norfolk were litigated.

[65] *The School Board of the City of Norfolk, Virginia v. Leola Pearl Beckett* 246 F.2d 325 (4th Cir. 1957).

[66] Norfolk School Board, letter to parents of seventeen students, Box 2, Folder 6, "Integration-Misc. Governor of Virginia," 1958, Item 4, NPS papers.

In January 1959, a United States District Court struck down the Massive Resistance laws, and, several weeks later, the Norfolk schools were reopened.[67] Harassment and public humiliation of the African American students attempting to attend Norfolk's white schools, however, had just begun. The seventeen students and their families endured a cross burning, a stabbing, daily name-calling, and social isolation. In following years, any black student wanting to transfer to a white school was still subjected to strenuous tests and insulting formal interviews. Black students had to prove that they performed academically above the average white student, had never been in trouble, and could function in an integrated environment. Between the testing requirement and the hostile environment, few blacks were admitted to white public schools. Even after litigation abolished the testing requirement, few blacks applied for transfer to white schools. It would be almost ten more years before further lawsuits truly desegregated the public schools, with mandated school boundary changes, faculty integration, and cross-town busing. Integration, at least of elementary schools, was short-lived. As a result of widespread dissatisfaction with the busing program and in an attempt to stop "white flight," in 1986, Norfolk became the first school district in the country to end busing for desegregation in elementary schools and again was in the nation's spotlight.[68] The result was instant resegregation, as 30 percent of the city's elementary schools became almost exclusively African American.[69] Ending busing for racial balance of elementary students, according to a 1994 study by the Harvard Project on School Desegregation, caused "severe racial isolation and an increase in concentrated poverty, both of which have consistently been associated with poor school performance and inequality."[70] Other studies showed that ending busing did not stop white flight.[71] Despite these studies, Norfolk stopped racial balance busing for middle school students in 1996 and high school students in 2010.

In fall 2007, an administrator from Norfolk Public Schools contacted Old Dominion University (ODU) and offered to donate approximately 22 cubic feet of documentation on its desegregation process to Special Collections. This material, dated 1928 through 2006, included correspondence, memoranda, depositions, court orders, school directories, school board resolutions,

[67] *James v. Almond*, 170 F Supp 331 (E.D. 1959).

[68] Cassandra Newby-Alexander, Jeffrey Littlejohn, Charles H. Ford, Sonia Yaco, and the Norfolk Historical Society, *Hampton Roads: Remembering Our Schools.* (Charleston, S.C.: History Press, 2009), 113.

[69] Newby-Alexander et al., *Hampton Roads: Remembering Our Schools*, 114.

[70] Christina Meldrum and Susan E. Eaton, *Resegregation in Norfolk, Virginia. Does Restoring Neighborhood Schools Work?* (Cambridge, Massachusetts: Harvard Project on School Desegregation, 1994), 62.

[71] Leslie G. Carr and Donald J. Zeigler, "White Flight and White Return in Norfolk: A Test of Predictions," *Sociology of Education* 63, no. 4 (1990): 272–82; Amy Jeter, "Norfolk School Officials to Consider New Attendance Zones," *The Virginian-Pilot*, 1 September 2008, available at http://hamptonroads.com/2008/08/norfolk-school-officials-consider-new-attendance-zones, accessed 31 January 2010.

aggregated test data, publications, several education records, and maps. The most important historical materials are the correspondence between Governor J. Lindsay Almond, Jr. and the school administration, beginning with the letter ordering the closure of the Norfolk schools and the procedures for determining which African American students would be allowed in previously white schools.[72]

The Norfolk Public Schools administration did not examine the records to exclude confidential material prior to donating them to Old Dominion University. To understand the privacy and access issues for the donated material, as Special Collections librarian and university archivist, I researched applicable laws. The university librarian, Virginia S. O'Herron, did not want to accept anything that the Norfolk Public Schools should not have given to the university. She and I stipulated in the deed of gift that any confidential material found in the collection would be returned to the donor. After researching Virginia's FOIA and consulting with an attorney familiar with the types of confidential material frequently found in public school records, I compiled a list of categories of materials to be returned to Norfolk Public Schools. This list was appended to the deed of gift:

1. Student records—individually identifiable student scholastic or medical records, except student directory information such as name, address, or parents' name.
2. Personnel records.
3. School board records—executive or closed sessions that discuss confidential student, medical, or personnel matters.

I also created a methodology for reviewing the records and identifying this material, and communicated this procedure to the donor, the university librarian, and the processing staff. The superintendent signed the deed of gift after counsel for the Norfolk Public Schools reviewed it. While the language in the Special Collections and University Archives standard deed of gift had been approved by the university counsel, he did not review the added stipulation in the Norfolk Public Schools deed of gift.

After an initial survey of the records at the Norfolk Public Schools administrative office, I rejected some records such as personnel records and student grade and IQ lists. The remaining papers were taken to ODU's Special Collections for processing. As Jennifer K. Clayton, a PhD candidate in educational leadership and I processed the 30,000 pages of documentation, we came across some individually identifiable student information. A small percentage of this

[72] The Library of Virginia holds Governor Almond's official papers. The J. Lindsay Almond Papers at the Virginia Historical Society contain speeches and unofficial correspondence on school desegregation.

information was clearly confidential, such as a packet of material about one child containing grades and a psychological assessment. Because of the stipulation in the deed of gift, we returned records containing private information to the donor rather than redacting or sealing them.

Other material, including public documents such as civil court records and school board resolutions, lists the names, IQs, and scholastic achievements of African American children. The collection, for instance, contains school board resolutions that list the names of African American children who were rejected for transfer to white schools for failing to meet scholastic requirements. Letters sent to families saying that their child had failed the tests included a list of every other black child who failed the tests as well. Court testimony discussing the mental acuity of African American students is also part of the collection. FERPA, Virginia's student privacy laws, and federal and state Freedom of Information laws provide contradictory dictates about the confidentiality of this information. That difficulty raised the question: when a student's grades are discussed in an open school board meeting, which law trumps, FOI or FERPA? Today, school boards would not discuss a student's grades in open meetings, but in the 1950s and 1960s, it was a common occurrence. Current open meeting laws and Freedom of Information acts allow anyone access to this material. In fact, some of these documents containing confidential information can be found at other repositories, such as the National Archives and Records Administration branch in Philadelphia and the Norfolk Public Library, which have no restrictions on access.

This collection also raises privacy concerns unrelated to FOI and FERPA. It contains material that would be embarrassing to the authors if published—racist letters from teachers and parents, as well as prosegregation material written by a past member of Old Dominion University's Board of Visitors and by politicians still active in the community. The letters from the Board of Visitors member and politicians were clearly going to be open to researchers, although when a major exhibit of the material was mounted in the library lobby in collaboration with the City of Norfolk, the mayor's office requested that a particular elderly ex-politician's letters not be displayed. The university librarian agreed but noted there would be full access to them in the collection. Several staff members questioned whether the identity of the authors of the racist letters should be protected from the possible humiliation of public disclosure, but I felt strongly that these should remain open. These letters were written to a governmental body without any expectation of privacy, and I believed that they are not protected by privacy laws.[73]

[73] For a case study that, in part, discusses the risks involved with exposing the identity of Ku Klux Klan members, see Frank Boles, " 'Just a Bunch of Bigots': A Case Study in the Acquisition of Controversial Material," *Archival Issues: Journal of the Midwest Archives Conference* 19, no. 1 (1994): 53–65.

Because of the high visibility of the Norfolk Public Schools Desegregation Papers, its legal ambiguity, and the politically sensitive nature of the material, I decided to seek the university counsel's opinion on how to handle the confidential information it contains. James D. Wright, associate university counsel, advised that because Old Dominion University is a public university, the Virginia FOIA is the primary law guiding access to this collection.[74] Wright concurred that ODU could retain the parts of the collection containing confidential information in public documents and should return to the donor any material related to an individual student not in a public document. He also concurred that racist letters were not legally protected from disclosure and should remain open. I proposed that, with the exception of the material to be returned to the donor, the rest of the collection be fully open to researchers. Wright, however, expressed two concerns: that the university should be protected from litigation that could arise from disclosure of student information, and that it should respect student privacy.[75] While access to the collection as a whole is an important scholarly and community resource for exposing past injustices, could we find a way to allow it without violating the privacy of African American students listed in the records? In the midst of the City of Norfolk's year-long commemoration of the fiftieth anniversary of the end of Massive Resistance, the university did not want to risk anyone reading in the local newspaper, for example, that his or her uncle's test scores were too low for him to attend a white school. The university also wanted to make sure that Special Collections handled the confidentiality issues correctly so that it would not suffer a major public relations disaster. This is particularly important because Old Dominion University had in the past refused to admit African American students, including some of the people listed in the collection.

Wright's solution was to require all researchers wishing to use this collection to sign a nondisclosure agreement. After researching similar policies of other repositories across the country, I wrote a confidentiality and nondisclosure agreement (see Appendix A) that the university librarian and university counsel reviewed and approved without modification. Citing applicable state statutes, the nondisclosure agreement stipulates that researchers cannot publish any information from the collection that makes it possible to identify an individual student and cannot disclose the information to a third party or contact any individual whose confidential information is listed in the collection. Because I anticipated the possible use of the collection for oral history projects, the policy allows the university librarian to grant exceptions. The policy does not restrict disclosure of racist and prosegregationist notes in the collection. It

[74] Virginia Coalition for Open Government, *2008–2009 Virginia Freedom of Information Act.*

[75] Virginia FOIA excludes educational records. Va. Stat. § 2.2-3705.4, "Exclusions to application of chapter; educational records and certain records of educational institutions," available at http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+2.2-3705.4, accessed 21 April 2010.

does restrict individually identifiable education information that would currently be illegal under FERPA or Virginia privacy laws for a records creator to make public.

After researchers sign the agreement, they are allowed access to the entire collection. All patrons have access to the collection regardless of their credentials or research purpose, though we increased security measures because of its high-profile nature. While customary library photocopying and scanning policies apply, we scrutinize requests to reproduce or publish document images from this collection more thoroughly than we do others because of the confidential nature of the material. Thus far, the policy has worked well. ODU's Special Collections staff makes a point of explaining the reason behind the nondisclosure statement as they give it to patrons to sign. They have encountered little opposition to the policy, but they have fielded many questions about which parts of the collection constitute confidential data.

In the near future, Old Dominion University Libraries will digitize the Norfolk Public Schools Desegregation Papers. Adapting the on-site access policy for off-site patrons will be difficult. At present, ODU plans to identify and set aside confidential material before it digitizes the collection. Copyright issues may also preclude digitizing material written by private citizens.

Collection 3: Special Collection on Prince Edward County Virginia School Closing, American Friends Service Committee Archives, Philadelphia, Pennsylvania

Arguably, the most disgraceful manifestations of Virginia's resistance to school desegregation were the events that occurred in rural Prince Edward County, site of one of the lawsuits that led to *Brown v. Board of Education*.[76] One method of circumventing federal desegregation edicts was to offer state-funded tuition grants for students to attend whites-only private schools.[77] These schools, known as "segregation academies," sprang up around the state after 1958.[78] In some districts, all of the white students moved to state-funded private schools,

[76] *Davis et al. v. County School Board of Prince Edward County* was originally heard in 1952.

[77] After *Harrison v. Day* struck down tuition grants that were explicitly for segregation in 1959, a broader program of grants was created that continued to fund students at segregationist academies. For a discussion of tuition grants, see Television News of the Civil Rights Era 1950–1970: Tuition Grants, University of Virginia (2005), available at http://www2.vcdh.virginia.edu/civilrightstv/glossary/topic-024.html, accessed 6 January 2010.

[78] See generally "Notes: Segregation Academies and State Action," *The Yale Law Journal* 82, no. 7 (June 1973): 1436–61. Virginia Commonwealth University, "13 Known Private Schools in Virginia Established Since 1958 to Circumvent Desegregation," Virginia Commonwealth University Libraries Digital Collections, Edward H. Peeples Prince Edward County (Va.) Public Schools Collection (n.d.), available at http://dig.library.vcu.edu/u?/pec,645, accessed 5 January 2010.

leaving only African American students in the public schools.[79] In 1959, however, the Prince Edward County School Board shut down the entire public school system.[80] A private, all-white school, Prince Edward Academy, was opened, funded by state tuition grants and private donations.[81] The school board made no provisions for the county's 1,700 African Americans students.[82] In fact, no African American students in the county were publically educated for five years.[83] The threatening presence of the Ku Klux Klan, the existence of well-organized segregationist groups who controlled the local power establishment, and the lack of African American professionals effectively prevented any local challenges to the school closings.[84]

Several efforts were made to educate African American students while the public schools were closed. Segregationists offered to fund a private school for blacks but their goal was transparent—to prolong Jim Crow.[85] Only one student applied and the school never materialized.[86] Informal "parlor schools" were set up within the African American community.[87] In the fall of 1959, southern civil rights groups began meeting to figure out what to do about the Prince Edward County school closings.[88] In 1960, the American Friends Service Committee (AFSC) sent organizers to live in the county to survey the needs of the black community while working to reopen the Prince Edward County schools. When it became clear that the schools would not reopen, AFSC began the Emergency Placement Project for Prince Edward Children, which placed several hundred

[79] One example was Surry County, in central Virginia. *Griffin v. Board of Supervisors of Price Edward County*, 339 F.2d 486,490 (4d 1964).

[80] For a discussion of the struggle for school equality in Prince Edward County from 1951 to 1964, see J. Rupert Picott and Edward H. Peeples, Jr., "A Study in Infamy: Prince Edward County, Virginia," *The Phi Delta Kappan* 45, no. 8 (May 1964): 393–97.

[81] Benjamin Muse, *Virginia's Massive Resistance* (Bloomington: Indiana University Press, 1961): 149–53.

[82] Muse, *Virginia's Massive Resistance*, 151; Kara Miles Turner, "Both Victors and Victims: Prince Edward County, Virginia, the NAACP, and 'Brown'," *Virginia Law Review* 90, no. 6 (October 2004): 1683.

[83] For a discussion of the long-term effect of these school closings, see Margaret E. Hale-Smith, "The Effect of Early Educational Disruption on the Belief Systems and Educational Practices of Adults: Another Look at the Prince Edward County School Closings," *The Journal of Negro Education* 62, no. 2 (1993): 171–89.

[84] Jean E. Fairfax, "American Friends Service Committee Prince Edward County, Va., Program Student Placement Project 1960–1963" (n.d.), 5, available at http://www.co.prince-edward.va.us/images/Light%20of%20Reconciliation/AFSF%20-%20School%20closing.pdf, accessed 5 January 2010.

[85] "Private Schooling Offered to Prince Edward's Negro Children," *Farmville* [Virginia] *Herald*, 18 December 1959, 1, 7.

[86] Muse, *Virginia's Massive Resistance*, 152.

[87] Amy J. Tillerson-Brown, "Black Women in Prince Edward County: Activists and Community Builders, 1930–1965," [Farmville] *Virginia Forum*, 24 April 2009.

[88] Except as noted, background information on the AFSC project comes from Fairfax cited above and William F. Bagwell et al., "Opening Closed Doors: Narrative of the American Friends Service Committee's Work in Prince Edward County, Virginia, 1959–1965" (n.d.), 7, available at http://webarchive.afsc.org/archives/princeedward/openingcloseddoorsPec3.pdf, accessed 7 February 2010.

students with host families across the country so they could be educated. For four years, AFSC social workers provided support for the students housed with host families outside of Prince Edward County and worked to change the situation within the county so that the students could return to their homes. AFSC workers requested progress reports from teachers and corresponded with physicians about the children's health. Other AFSC staffers lobbied politicians in host cities to allow the children to attend their schools and contacted business people for financial assistance.

1963 marked the beginning of integrated education in the county. First, a coalition of local and national organizations created the unaccredited Prince Edward County Free School.[89] In 1964, the U.S. Supreme Court ordered the reopening of the Prince Edward County public schools.[90] While the school board ostensibly complied with the order by restoring funding to the public schools, it held a secret midnight meeting to appropriate three times more money for private school tuition grants than for the public schools.[91] White families claimed all the tuition grants by the next day. Further legal action was necessary to end, once and for all, tuition grants to segregationist academies in general and to Prince Edward Academy in particular.[92] When the public schools reopened, the student population consisted of 1,500 students, including eight white students. Low-income white students were shut out of the private schools because they could not afford the tuition, and they were too fearful of integration to go to the public schools. AFSC worked with the white community to convince them to send their children to the public schools, with little success. In the summer of 1965, the AFSC on-site director left the county because the organization felt that local residents would best complete the remaining work.

The records from the Emergency Placement Project eventually went to the archives of the American Friends Service Committee in Philadelphia as part of the records of the Community Relations program. The Special Collection on Prince Edward County Virginia School Closing, dating from 1959 to 1965, contains material that documents the administrative functioning of AFSC programs in Prince Edward County, as well as secondary publications about the project.[93] It also contains information about specific students in the form of correspondence, student applications, and social worker and teacher reports, according to

[89] Picott and Peeples, "A Study in Infamy," 396. See also Prince Edward County (Free School) Papers 1962–1964, Acc. #1969-38,Virginia State University Library.

[90] *Griffin v. County School Board of Prince Edward County, Va.*, 377 U.S. 218, 232 (1964).

[91] Turner, "Both Victors and Victims," 1690; *Griffin v. Board of Supervisors of Prince Edward County*, 489–90.

[92] *Griffin v. Board of Supervisors of Prince Edward County*, 490.

[93] A description of the collection is available at American Friends Service Committee, "Special Collection on AFSC Work in the Prince Edward County Virginia School Closing Issue," http://webarchive.afsc.org/archives/princeedward/princeed.htm, accessed 14 February 2010.

Donald Davis, director of the AFSC archives.[94] When the material was processed, some weeding was done to remove duplicates, but no material was redacted. The collection is now approximately five linear feet.[95]

The AFSC archives has a uniform access policy for all of its collections, which was initially developed by an archives advisory committee comprising academics from local Quaker colleges, the previous archivist, and members of the AFSC board. The AFSC board then approved the policy, though, according to Davis, it periodically reaffirms the mission of the archives, most recently in the early 1990s.

Access to AFSC collections by those not affiliated with the organization is strictly controlled. Researchers must apply to the archivist, fill out a two-page application, provide references and writing samples, and describe the subject, purpose, publication plans, and outline of their research project.[96] The archives also asks researchers for the opportunity to review any publication based on AFSC material, not to censor it but "to discuss with the researcher any information that the Communications Department feels is inaccurate or incomplete."[97] The archives director and other staff members review these research requests. After this intensive application process, no further nondisclosure or confidentiality agreements are required of researchers.

Davis says that AFSC access policies are guided primarily by 1) a desire to keep individually identifiable information from being published, and b) AFSC's general desire to control who uses its archives. One reason for such a high level of scrutiny is that the American Friends Service Committee Archives contains many politically sensitive records. Revealing personally identifiable information in some of the collections relating to the AFSC's work in foreign countries could be life threatening to those mentioned in the records. For instance, the collection from Latin America contains information about political activity that could result in the death of activists if it were released. While the political nature of the AFSC Archives guides its access policy, the politics of the AFSC Prince Edward School Closing collection has not been considered in determining access to it.[98]

Although the AFSC website notes that access to some folders in this collection that contain confidential information about children and other individuals involved in the Prince Edward County school crisis may be restricted, AFSC

[94] Donald Davis, telephone interview and emails with author, July 2008 and July 2009.

[95] Davis to author, January 2010. The size is approximate because it is contained within the records of the Community Relations program.

[96] American Friends Service Committee, "Archives," at http://www.afsc.org/ht/d/sp/i/1321/pid/1321, accessed 24 June 2009.

[97] American Friends Service Committee, "Application for the Use of the Archives," at http://www.afsc.org/about/afscarchivesappform.pdf, accessed 5 January 2010.

[98] Davis to author, 2008.

allows users access to the entire collection.[99] In a phone interview, Davis said that the American Friends Service Committee has not considered FERPA or HIPAA in deciding access to this collection. Nor did he indicate whether other privacy laws or any legal counsel had been consulted. He did not refer to any internal AFSC or external ethics guidelines, such as the SAA *Code of Ethics*, for example, as a basis for this policy. Researchers are told that they may not include student names in any final product. Patrons are allowed to photocopy most of the collection, but may not be allowed to copy information on individual students. Most researchers appear to be interested in the organization's papers, not in individual student records, although some former students have come to see their own records.

Discussion

The access policies of these repositories have three main facets: what records are restricted, who can use the collections, and what limitations are placed on use of information from the collections. The Library of Virginia restricts access to some Pupil Placement Board records but allows access to the majority of records on the grounds that FERPA does not apply to the board. Traditional medical records created by physicians are sealed in accordance with state law. It is not clear whether LVA's conclusion that other student records containing notes of a medical nature made by unknown personnel are not protected medical records is correct. What laws apply and what type of data do they protect? HIPAA's Privacy Rule defines as confidential any *information* related to a person's health created by a range of agents, whereas Virginia law protects the privacy of health *records* created by health-care entities.[100] A Pupil Placement Board record created by a school containing the comment "can't see well" would appear to fit HIPAA's definition of protected health information. However, the LVA, like most libraries in Virginia, is not a covered entity so it is not bound by

[99] American Friends Service Committee, "Special Collection on AFSC Work in the Prince Edward County Virginia School Closing Issue Scope and Content of the Collection, Restrictions," available at http://webarchive.afsc.org/archives/princeedward/scope.htm#restrictions, accessed 29 December 2009.

[100] *CFR* 45 § 160.103. "Definitions. Health information means any information, whether oral or recorded in any form or medium, that: 1) Is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse; and 2) Relates to the past, present, or future physical or mental health or condition of an individual." Va. Stat. § 32.1-127.1:03. "Health records privacy. 'Health record' means any written, printed or electronically recorded material maintained by a health care entity in the course of providing health services to an individual concerning the individual and the services provided. 'Health record' also includes the substance of any communication made by an individual to a health care entity in confidence during or in connection with the provision of health services or information otherwise acquired by the health care entity about an individual in confidence and in connection with the provision of health services to the individual."

HIPAA's Privacy Rule.[101] Since a health-care entity did not create or maintain these records, they also do not appear to meet the definition of health records, so Virginia's health records privacy statutes would not protect them. The Library of Virginia's redaction of isolated health-related comments is an accepted technique for making records accessible; however, redacting "embarrassing" or "humiliating" comments is a concern. The lack of formal methodology, selection criteria, or a review process ensures that such redaction will be arbitrary and subjective. Although some states have created a tort right of privacy for disclosure of embarrassing facts, neither FERPA nor HIPAA's Privacy Rule prohibit such disclosure.[102] Karen M. Benedict describes protecting sensitive information not covered by privacy laws as an *ethical* obligation, but that doing so in public records has legal ramifications.[103] The Library of Virginia's methodology involves intensive item-level work, and, given the massive size of the collection, processing requires a large commitment of staff time, which negatively impacts the availability of this and other collections.[104]

More disconcerting is the determination, without consulting legal counsel, that because the Pupil Placement Board was not a school, FERPA does not govern its records. FERPA certainly applies to the school districts that created and processed the applications. Additionally, FERPA governs some types of educational agencies as well as schools.[105] Although no case law has determined whether FERPA covers this board's records, a similar case may offer insight. The Minnesota Office of Higher Education (OHE) sought guidance from the U.S. Department of Education's Family Policy Compliance Office in determining whether OHE was an "educational agency or institution" whose records FERPA governed.[106] The office concluded that OHE is not an educational agency because, in part, it does not have its own students. However, it also concluded that FERPA protected some of its records. "Personally identifiable information on parents or students that OHE has obtained from education records maintained by K–12 or postsecondary institutions (i.e. educational agencies or

[101] The only libraries in Virginia that are covered entities are those associated with medical schools, such as Eastern Virginia Medical School. James D. Wright, Associate University Counsel, Old Dominion University, telephone conversation with author, 26 April 2010.

[102] Menzi L. Behrnd-Klodt, "The Tort Right of Privacy: What It Means for Archivists…and for Third Parties," in *Privacy and Confidentiality Perspectives*, 55.

[103] Karen M. Benedict, *Ethics and the Archival Profession: Introduction and Case Studies* (Chicago: Society of American Archivists, 2003), 12. For a discussion of the FOIA exemption for embarrassing material, see Behrnd-Klodt, *Navigating Legal Issues in Archives*, 157–58.

[104] For a discussion of the larger implication of such intensive item-level processing, see Mark A. Greene and Dennis Meissner, "More Product, Less Process: Revamping Traditional Archival Processing," *American Archivist* 68 (2005): 208–63.

[105] *CFR* 34 § 99.1. "To which educational agencies or institutions do these regulations apply?"

[106] LeRoy S. Rooker, Director, Family Policy Compliance Office, letter to Susan Heegaard, Director, Minnesota Office of Higher Education, January 2007, 1, available at http://counsel.cua.edu/FERPA/FPCO//MN%20Higher%20Education.pdf, accessed 1 May 2010.

institutions) retains its status as 'educational records' under FERPA."[107] Conversely, personally identifiable information obtained directly from students and parents by OHE, are not "education records" so FERPA does not protect them. Some information on Pupil Placement Board applications at LVA came directly from parents, but some was derived explicitly from students' education records.[108] Consequently, if LVA had consulted legal counsel, it may have determined that some of the PPB applications were education records and protected by FERPA. Counsel may also have found that board records fit the definition of "scholastic records" protected under Virginia privacy statutes.[109] Behrnd-Klodt recommends that, given the constantly changing definitions, we would do well to watch this situation carefully, "Since the meaning of 'educational records' is key to understanding whether records can be made accessible, archivists holding student records will need to follow the future changes to FERPA."[110] While she refers to FERPA, the same holds true for state privacy laws.

The American Friends Service Committee Archives also allows access to its school desegregation collection, and, in fact, to all its collections, without regard to FERPA or HIPAA's Privacy Rule. Davis asked me if I believed that FERPA or HIPAA laws apply to the Prince Edward School Closing collection. Without a test case that puts these issues before a court, any answer is mere conjecture. The American Friends Service Committee could be seen as acting as an educational institution during its Emergency Placement Project, and its records do contain some medical records of students and families in the form of clinical social workers' notes. However, AFSC is neither a school receiving funds from the U.S. Department of Education nor a health-care provider transmitting electronic patient information, and thus the courts may rule that it is exempt from FERPA and HIPAA's Privacy Rule.

Deciding which records to restrict during acquisition of the Norfolk Public Schools Desegregation Papers placed Old Dominion University in an unusual position. Following its agreement with Norfolk Public Schools, ODU had to appraise the collection and identify records that were a legal risk for the Norfolk

[107]Rooker to Heegaard, 3–4.

[108]Eskridge, *Virginia's Pupil Placement Board*, 39.

[109]Va. Stat. § 22.1-289. "Transfer and management of scholastic records; disclosure of information in court notices; penalty,"available at http://leg1.state.va.us/cgi-bin/legp504.exe?000+coh+22.1-289+700285, accessed 23 January 2010. " 'Scholastic record' means those records that are directly related to a student and are maintained by an educational agency or institution or by a party acting for the agency or institution. These include, but are not limited to, documentation pertinent to the educational growth and development of students as they progress through school, student disciplinary records, achievement and test data, cumulative health records, reports of assessments for eligibility for special education services, and Individualized Education Programs. Such records may be recorded in any way, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche."

[110]Behrnd-Klodt, *Navigating Legal Issues in Archives*, 139.

Public Schools to release. Although it would not have been illegal for ODU to retain individually identifiable education records created by the school district, FERPA prohibits the school district from releasing such records. The agreement signed by ODU and the school district places both parties at legal risk if the university were to mistakenly retain some confidential material—the district for releasing the records and ODU for not returning them. The school district was unwilling to review the collection, and if ODU had demanded that it do so, the collection probably would not have been donated to any archives. The issue is not that accessing the records at the school district would be inconvenient for researchers, but that the records would not be accessible at all. Researchers had reported that the school district repeatedly denied their requests to view the material on the grounds that it contained confidential material, an interesting position given Norfolk Public Schools' willingness to release them to ODU.[111] The risk of losing access to this material could be seen as outweighing the risk of inadvertently acquiring material that the donor should not have released.

The material that ODU ultimately accepted contains only individually identifiable student information in documents that were made public when they were created. The information was published in newspapers, sent in letters to groups of parents, or disclosed in and for open courts. Thus, the information would be available under the Virginia Freedom of Information Act, and ODU legal counsel determined that it would be legal for ODU to allow patrons to access it.[112]

Both LVA and AFSC control access based on patron qualifications, and they review past and future publications. This position is not in accordance with Society of American Archivists' ethics guideline, "Archivists strive to promote open and equitable access to their services and the records in their care without discrimination or preferential treatment."[113] While subjective evaluation of any researcher is of concern, it is particularly worrisome in collections of a political nature, especially when the records creator is part of the same entity that holds the records. AFSC's request for review of work before publication certainly restricts intellectual freedom. This relates more closely to a corporate archives model of access than to the model of a public institution, and, in fact, AFSC is a private entity. The stringent restrictions that AFSC has in place to control access to its archives are understandable when people's lives are at stake. Arguably, open access to the material in the Prince Edward County School Closing collection could at one time have jeopardized people's lives, since Prince Edward

[111] Jeffrey Littlejohn, telephone conversation with author, 12 January 2010.

[112] Va. Stat. § 2.2-3700, The Virginia Freedom of Information Act, (B) "...All public records and meetings shall be presumed open, unless an exemption is properly invoked..."

[113] Society of American Archivists, *Code of Ethics for Archivists*, 5 February 2005, available at http://www.archivists.org/governance/handbook/app_ethics.asp, accessed 24 July 2009.

County was rife with Ku Klux Klan activity. The effect of open access now, fifty years later, is debatable. Many other institutions permit open access to archival collections containing materials that could conceivably put someone at risk, including from far-right groups such as the Klan.[114] Any one-size-fits-all access policy like that of the AFSC is likely to be overly restrictive for some collections and not restrictive enough for others. Even if the AFSC board were willing to change this long-standing policy, the onerous task of reappraising the privacy risks of existing collections would likely be cost prohibitive.

The Library of Virginia is a public entity but has similar barriers for researchers. While the LVA's extensive researcher application may bar disclosure of individually identifiable records, it also bars "unqualified" researchers. One criteria for approval is that "The research topic is designed to produce a study that would be of potential benefit to the study of Virginia history, government or culture."[115] The library requires a list of references, a description of the object of the research, future publication plans, and a list of past publications to make this determination. The subjective nature of this application process would seem to allow denial of access on political grounds. If an applicant publishes in white supremacist journals or leftist journals, is he or she rejected? This application process also patently discourages the general public, including those whose education the Pupil Placement Board limited by relegating them to segregated schools. Academic researchers may be inhibited from using the collection. Sara Eskridge found the collection "exceedingly difficult to access."[116] This restrictive policy is all the more perplexing because the Pupil Placement Board records are public records, and therefore open to anyone who files a FOI request. The Virginia Public Records Act states, "All records deposited in the archives that are not made confidential by law shall be open to public access."[117] Yet the researcher application states, "Researchers may apply to the Library of Virginia for access to records which are *not legally or otherwise restricted"* [emphasis added].[118] Particularly since LVA determined that this collection does not contain education records, it is hard to justify this access policy.

All three repositories require researchers not to disclose personally identifiable information. Privacy is invaded, nonetheless, when a researcher sees a

[114]For example, collections on civil rights organizing in the South in the 1960s such as the Charles M. Sherrod Papers at the King Library and Archives, Martin Luther King, Jr. Center for Nonviolent Social Change. Others similar include the Betty Garman Student Nonviolent Coordinating Committee Files, 1961–1966, held by the New York Public Library. Open access in other collections puts informants at risk. See Joel A. Blanco-Rivera, "The Forbidden Files: Creation and Use of Surveillance Files Against the Independence Movement in Puerto Rico," *American Archivist* 68, no. 2 (Fall/Winter 2005): 297–311.

[115]Library of Virginia, "Research Agreement," sent via email to author, 7 July 2009, 1.

[116]Eskridge, *Virginia's Pupil Placement Board*, 3.

[117]Va. Stat. § 42.1-78, "Confidentiality safeguarded."

[118]Library of Virginia, "Research Agreement," 1.

student's confidential record, albeit in a less public manner than if the record were published.[119] The distinction is not merely one of magnitude: Tomas Lipinski points out a legal distinction between disclosing private facts and publicizing them.[120] Digitizing paper documents and placing them on the Web may make an institution a publisher, which confers different liabilities upon it.[121]

Making collections available on the Internet amplifies the problem of disclosure. How do other archivists deal with new technology regarding access and privacy issues? Martin L. Levitt describes the procedure for dealing with privacy issues when creating a eugenics website,[122] which required him to redact every name and every piece of personally identifiable information, a burdensome and unrealistic task for most archival repositories. Different collections also pose different risk factors. While the eugenics collection contains controversial material, the people mentioned in the Norfolk Public Schools Desegregation Papers are better known in the local community than are those in the eugenics collection. The Norfolk papers include materials relating to the seventeen students the City of Norfolk has recently commemorated in photographs, Web exhibits, and plaques for integrating the white public schools in 1959. The digitization of the Norfolk Public Schools material will occur when the spotlight will be shining on this moment in the city's history. If ODU staff were to miss the redaction of a single name, it could lead to a public relations nightmare and could leave ODU open to legal risk. Some lawyers, like Aprille Cooke-McKay, have suggested that the liability for breaching confidentiality primarily falls upon the donor.[123] However, ODU's agreement to accept responsibility for finding and removing materials with privacy concerns complicates the issue.

An alternative to attempting to redact every name might be to obtain permission from everyone listed in the collection. This task would be time consuming, if not impossible.[124] The Mississippi State Sovereignty Commission

[119] For a discussion of methods of protecting subject privacy, see Diane Kaplan, "The Stanley Milgram Papers: A Case Study on Appraisal of and Access to Confidential Data Files Collection at Yale," *American Archivist* 59 (Summer 1996): 288–97.

[120] Tomas A. Lipinski, "Tort Theory in Library, Museum and Archival Collections, Materials, Exhibits, and Displays: Rights of Privacy and Publicity in Personal Information and Persona," in *Libraries, Museums and Archives: Legal Issues and Ethical Challenges in the New Information Era*, ed. Tomas A. Lipinski (Lanham, Md.: Scarecrow Press, 2002), 49.

[121] Aprille Cooke-McKay, "Third Party Privacy and Large Scale Digitization of Manuscript Collections: Legal and Ethical Obligations," The Legal and Ethical Implications of Large-Scale Digitization of Manuscript Collections Symposium, University of North Carolina at Chapel Hill, February 2009, 2–3, available at http://shc2009symposia.pbworks.com/The+Legal+and+Ethical+Implications+of+Large-Scale+Digitization+of+Manuscript+Collections, accessed 14 February 2010.

[122] Martin L. Levitt, "Ethical Issues in Constructing a Eugenics Web Site," in *Privacy and Confidentiality Perspectives*, 112–26.

[123] Cooke-McKay, "Third Party Privacy," 1–2.

[124] For a discussion of how impossible a similar strategy was on a parallel issue—copyright—see Maggie Dickson, "Due Diligence, Futile Effort: Copyright and the Digitization of the Thomas E. Watson Papers" *American Archivist* 73 (Fall/Winter 2010): 626–36.

Records used a more achievable but cumbersome opt-out strategy. An index was made of the names in the commission's records, and those listed had to request to have their names redacted from the collection. A court had to rule on each redaction.[125] Lacking legal impetus and significant funding, archives are unlikely to implement this strategy. Neither Levitt's nor the Mississippi policy is feasible for most archives. Educating the community about the benefit of public access and acknowledging the risk of possible violation of privacy may be a more tenable strategy when digitizing school desegregation collections.[126] Use of the "truth commission" model may be appropriate depending on the nature of the material.[127]

A further problem with relying on researcher agreements for nondisclosure is that unless monitored by a court, as in the Mississippi case, enforcement is difficult. The same is true for researcher screening as done by the LVA and the AFSC. It is improbable that repositories would seek legal redress if a researcher published confidential student information. It would be even less likely for an archives to sue a researcher who publishes in a racist tract instead of the journal listed in the research application. Nonetheless, nondisclosure agreements may still serve several purposes that align with the SAA *Code of Ethics* suggestion that access should be "in accordance with legal requirements [and] cultural sensitivities."[128] These documents inform researchers about applicable laws and secure their agreement to comply with the repository's rules. If well crafted, such agreements provide repositories with grounds for legal action in egregious cases of disclosure. They also provide repositories some measure of legal and public relations protection. The policies show patrons, donors, people named in documents, and the courts that a repository seeks to protect privacy and to avoid adding to the humiliation endured by African American and other families during the long and continuing road to desegregating Virginia schools.

Conclusion

The three repositories examined in this case study are answering the access versus privacy question by granting public access and privacy protection to these politically sensitive collections in three different ways. The Library of Virginia's

[125]Sarah Rowe-Sims, Sandra Boyd, and H. T. Holmes, "Balancing Privacy and Access: Opening the Mississippi State Sovereignty Commission Records," in *Privacy and Confidentiality Perspectives*, 159–74.

[126]For a fuller discussion of this issue, see The Legal and Ethical Implications of Large-Scale Digitization of Manuscript Collections Symposium, available at http://shc2009symposia.pbworks.com/Due-Diligence%2C-Futile-Effort%3A-Pursuing-Copyright-Holders, accessed 14 February 2010.

[127]Elena S. Danielson, "Privacy Rights and the Rights of Political Victims: Implications of the German Experince," *American Archivist* 67, no. 2 (Fall/Winter 2004), 176.

[128]Society of American Archivists, *Code of Ethics for Archivists*.

Pupil Placement Board collection makes most of its material available to approved researchers by minimizing the portion that it considers confidential and by sealing and redacting the rest. Old Dominion University has returned some confidential material to the donor and limits public exposure of confidential material in the collection by having patrons sign a nondisclosure statement. The American Friends Service Committee Archives requires that all patrons go through a fairly rigorous formal application process.

Understanding history requires that the public be able to examine the actions of individuals and governments, while a modern society depends on the protection of individual privacy. These sometimes disparate concepts take on added importance when a government serves as the agent of inequality, as was the case in Virginia's resistance to desegregation. Restricting access to school desegregation records to protect student confidentiality could have the effect of hiding evidence of racist policies. Access restrictions become all the more suspect when the archives holding the records is part of the same state bureaucracy as the agency that created them.[129] When private organizations intervene to promote justice, other access and privacy issues are raised.

Open access to records could promote an honest understanding of the past and, with that, a healing of some of the racial wounds that have divided our country. Whether archivists promote or prohibit this process depends in part on how they assess the risks of access versus privacy. Archivists must be familiar with access laws so that they can make knowledgeable assessments of risk. The changing interpretation of laws by the courts makes it important to keep up-to-date on restricted records procedures by following archival and library publications. When crafting new or revising existing policies, archivists should involve others inside and outside of their institutions and share responsibility by consulting with supervisors, colleagues, and public relations staff. Archivists must also develop relationships with their institutions' legal counsels and ask them to review access policies. Such proactive measures provide opportunities to consider restrictions in light of changing laws but also ensure, as Heather MacNeil points out, consistency across collections.[130]

While individual archivists are obligated to be informed about the law, they need guidance in interpreting nebulous federal statutes such as FERPA and HIPAA's Privacy Rule. But what if a repository has no legal counsel to consult? And how do archival professional ethics overlay with the gray areas of these laws? As a profession, archivists need to develop best practices for interpreting access and privacy laws that impact them. The best practices could be based on a survey

[129] For a general discussion of secrecy in government as it pertains to archives, see Richard J. Cox, "Secrecy, Archives, and the Archivist: A Review Essay (Sort Of)," *American Archivist* 72, no.1 (Spring/Summer 2009): 214–31.

[130] Heather MacNeil, "Information Privacy, Liberty, and Democracy," in *Privacy and Confidentiality Perspectives,* 79.

of how archives in a variety of institutional types currently interpret the enforcement of FERPA, HIPAA's Privacy Rule, and FOIA. Knowing how other institutions deal with older records, nonagency records, and medical information within student records would be particularly helpful for archives with school desegregation collections.

Now, as never before, the balance between the right to access and the right to privacy is critical for any archivist working with collections that deal in sensitive topics. Equally critical is ensuring that access policies are not created in a vacuum. Thoughtful development of policies balancing these competing rights by archivists will play a crucial role in the public's ability to use these essential collections for future research.

Appendix A: Nondisclosure Form, Special Collections and University Archives, Old Dominion University Libraries

OLD DOMINION UNIVERSITY
Patricia W. and J. Douglas Perry Library
Special Collections and University Archives
4427 Hampton Boulevard
Norfolk, Virginia 23529

Special Collections and University Archives

AGREEMENT OF NON-DISCLOSURE FOR ACCESS AND RESEARCH

The Norfolk Public Schools Desegregation Papers contain personally identifiable educational information that is protected by the Virginia Freedom of Information Act (Code of Virginia, 2.2-3705.4). In order to gain access to this collection the patron must read and sign this non-disclosure agreement.

Patron Responsibilities

I understand that the materials to which I have requested access may contain personally identifiable student education records or other privacy protected information. I understand that personal identifying information may be used for research purposes only, and I agree to protect the confidentiality of any confidential information contained in the records used during my research. I agree not to publish, publicize, or re-disclose the confidential material to any other party for any purpose. I also agree that no direct or indirect contact will be made with the individuals to whom the personal or confidential information relates. Improper re-disclosure of privacy protected information is a breach of confidentiality which could result in the loss of access to the archival collections housed and maintained by Old Dominion University and could result in legal penalties (Code of Virginia, 18.2-186.3).

I understand that exceptions to this agreement may be granted for research purposes with the express prior written approval of the University Librarian.