

Keeping an Account:
The Role of Archives and Archivists in Accountability

Heather Briston
Corrigan Solari University Historian and Archivist
University of Oregon
August 1, 2004, revised October 1, 2004

Abstract: An examination of the fundamental role of archives and archivists in promoting accountability. Includes a discussion of both the impact of laws on the role, and the legal implications of the role of archives. Exploring the perceptions of archives and accountability in the general public as viewed by archivists. Concluding with a discussion of actions for archivists to take to foster a wider public understanding of the role of archives and archivists in accountability.

Biography: Heather Briston is the Corrigan Solari University Historian and Archivist at the University of Oregon. Her previous appointment was at the Environmental Design Archives and The Bancroft Library, University of California, Berkeley. She received her M.S. in Information specializing in Archives and Records Management from the University of Michigan. She also earned a J.D. from Syracuse University.

Accountability – to be accountable. In the Oxford English Dictionary it is defined as “liable to be called to account, or to answer for responsibilities and conduct; answerable, responsible.”¹ Each of us can think of examples from our countries and our lives of individuals, organizations, institutions, and governments being held accountable. The decision to buy a house and incur a mortgage. The appointment of a new organizational liaison. The purchase of land to build a new dormitory. The passage of a law to regulate the emissions of factories. Embedded in these accounts are the who, what, why, when and how of actions, decisions, and interpretations. It is these accounts that archivists select, describe, and preserve in repositories, and which place archives at the foundation of accountability. This is an analysis of the role of archives in accountability, particularly legal in nature, and the affect of this function on our users and our profession, using American examples.

Accountability

In a recent book by Richard Cox and David Wallace, *Archives and the Public Good*, accountability and the role of archives takes center stage. In that book the authors use a definition from Kevin P. Kearns, *Managing for Accountability* that is a more pragmatic approach than that of the OED. These are described as “the combination of ‘legal and regulatory mandates,’ ‘negotiating with ...clients, special interest groups, and other stakeholders,’ ‘discretionary judgements, calculated risks, and entrepreneurial ventures,’ and finally, advocacy involving the need to ‘interpret and communicate the needs of citizens to higher authorities who have the power and resources to meet those needs.’”² This definition expands the facets of accountability and its operation. Both the view taken by Wallace and Cox, and the definition in the OED will be considered in this paper.

The most common definition of an account in a legal forum is the use of documents as evidence. As defined in the United States (US) Federal Rules of Evidence, a non-public document is deemed to be authentic, and can be entered into evidence when accompanied by a written declaration by a custodian or qualified person that it was a) made at or near the time of occurrence of events, or by or from a person with knowledge of the requisite matters, b) kept in the course of regularly conducted activity, c) made by the regularly conducted activity as a regular practice.³ It is in the nature of their creation that documents are given the ability to hold someone accountable.

The materials in repositories document mandates, relationships, and needs. They are the foundation of accountability and as archivists, we are responsible for managing and administering them. This can be best seen in the enforcement of legal accountability. However, legal challenge and enforcement are not the only form that it takes. Archives support the roles of collective memory and symbolism as well. Log books noting the purchase and sale of slaves in the Southern US prior to the Civil War are an example. Archives also hold material that support ethical, societal, and personal accountability. Thus, while accountability is often seen as a legal and enforcement function, it does not always require an operation of law, but only an accounting of actions, decisions, or intentions of others in the past or the present, or of our own accounting to future generations.

Law, accountability and archives

Much of this paper will focus on legal accountability and the role of archives in a democratic society. One of the earliest hallmarks of modern archives is the custodial role as related to a government's accountability for its actions and its decisions to its citizens.⁴ The role of archives in accountability operates in many cases, because of the function of laws and regulations. At their root, they prescribe, circumscribe, or prohibit particular actions, and hold people or entities to an account. Archives created in the course of actions or decision making are documentary evidence of that which created them. This happens at every level of government and in every realm of society: council minutes of a discussion of where to site a school, a doctor's treatment plan for a patient, or an admission denial from a university. All of these are records that can be found in record centers or archives.

Often for public records, laws and regulations govern retention, destruction, and access. For example, the records of the University of Oregon fall under an Oregon Administrative Rule.⁵ The rule is format neutral and prescribes retention, destruction, and access, but does not dictate creation of records. Other laws in the US govern access to records, and as a result impact accountability. For example, the Freedom of Information Act (FOIA) operates to provide a process to access federal government information, with the exception of nine cases of privacy and national security where information is not accessible.⁶ Laws that foster accountability must also balance other legal concerns, such as the right to privacy and national security. Unfortunately it is the experience of many researchers that in practice the FOIA law is cumbersome and time consuming to use. However, though imperfect it does lead to the release of information.

Public records are not the only materials that are used to hold others to account, private business records are also governed by laws that effect their preservation and access. In the US, the Sarbanes-Oxley Act, passed in 2002 was a response in part to the Enron scandal and the shredding of documents in anticipation of legal action. It broadens the scope of documents that must be preserved to avoid an obstruction-of-justice claim.⁷ This is known in US Civil Procedure law as "spoliation of evidence," and it involves the willful destruction of evidence, or the failure to preserve potential evidence for another's use in pending or future litigation.⁸ Thus in both the public and private realm laws operate to support legal and public accountability.

Recently an Executive Order (EO), issued by the President, and a US court decision, both went to the heart of accessibility to records, with an impact on accountability. They are Executive Order (EO) 13233 and the Supreme Court decision in *Cheney v. US District Court of the District of Columbia*. The Presidential Records Act (PRA) of 1978 changed the legal ownership of Presidential records from private to public and covers the official records of Presidents and Vice-Presidents created or received after January 1981.⁹ At the close of an Administration the official records should be transferred to the National Archives and Records Administration (NARA). Public access to the records through FOIA would begin five years after the end of the Administration, but it allows the President to invoke six different restrictions on access for up to twelve years.¹⁰ The

program of public ownership and a plan for regulating access to Presidential records did not stay unmodified for long.

During the Reagan Administration, EO 12667, was signed providing the President with unfettered authority to invoke executive privilege concerning any and all openings under the PRA.¹¹ In January, 2001 the remaining set of records of the Reagan Administration, the first President subject to the PRA, were scheduled for release. After three requests for an extension by the White House to review and open the records, EO 13233 was signed in November 2001, superceding 12667. It negates the twelve year deadline for opening Presidential and Vice Presidential records with provisions giving both the former and current Presidents, Vice Presidents, as well as their family members and heirs the right to block release of any privileged Presidential papers.¹² This also includes the rights of Congress and the courts to obtain access. Since November 2001, Congressional attempts to over-ride this EO have failed. In addition, a case was brought in US District Court seeking to stop implementation of the order. That case was dismissed in March 2004, as no longer justiciable since all but 74 pages had been released, and those remained closed for constitutionally asserted privilege.¹³ Others note that there are numerous outstanding requests for records and that the remaining 74 pages are not the only inaccessible records.¹⁴ A request to alter or amend the judgement was allowed by the court in May 2004, with briefs filed by both sides in response to the issues surrounding a claim of privilege in June 2004, currently there is no decision.¹⁵ This does not bode well for the future if access to records is unsatisfactory even after two and a half years of litigation.

A recent court decision focused on whether the records of an Executive Branch advisory committee are subject to discovery. Unfortunately, the Supreme Court did not rule on the issue of access. Instead the case was sent back to the Court of Appeals for a decision on the issue of access.¹⁶ A decision on the merits, access to records and separation of powers, remains to be adjudicated. These actions and decisions could have a profound impact on the ability of citizens, courts, and lawmakers to hold the nation's leaders accountable.

Users and the role of accountability

In 1934, President Franklin Delano Roosevelt, signed legislation establishing the National Archives and said,

“To bring together the records of the past and to house them in buildings where they will be preserved for the use of men and women in the future, a nation must believe in three things.

It must believe in the past.

It must believe in the future.

It must above all, believe in the capacity of its own people so to learn from the past that they can gain in judgement in creating their own future.”¹⁷

The statement by Roosevelt underlines the centrality of users in the analysis of our role in accountability. Users hold others accountable, and hold archives and

archivists accountable in the execution of their work. Citizens have a right, and some would say, a duty, to review the records created and held by governments to insure that actions taken, and decisions made on their behalf are made in the best interests of the citizenry, and if not that those responsible are made to account. In the case of government archives, the potential user group, as well as the scope of the potential accountability, is large. This is especially true when one considers that some users are journalists, who then disseminate the information they gather to an even larger secondary user group.

As in the previous example, the role of archives in accountability serves many different constituencies. For each repository there is a core constituency. However, are we any less accountable to those groups outside the core? In the climate of shrinking budgets and rising costs of archives management, can archives afford to have as broad a role in accountability as we currently undertake? In some repositories, users are charged for extended research done on behalf of a patron who is not directly associated with the institution. Even though it may be a public institution, not all members of the broader constituency can be treated equally, as a result of the volume of requests and size of staff. This is a dilemma that institutions face. It cannot be solved here, but it must be added to the dialogue and considered in the analysis of our role in accountability.

Our users are not the only parties affected by the role archives take in accountability. Another level of accountability, taken not so much from the content of documents, but from their existence, affects the archivists who are accountable to users by the performance of their work in selection, access, and preservation. It is in these situations where, because of conscious decisions or inadvertent mistakes, the light of accountability shines rather brightly and uncomfortably on the archival profession. Many are examples we know all too well, the destruction of the Heiner records in Australia, Concordia University records in the Fabrikant affair,¹⁸ and the FBI records at NARA. Although an accounting can be uncomfortable, often the results help to improve and further support the archives' role in accountability.

For other repositories, the extent of their role in accountability is smaller than those of government repositories, but no less important. For example, as a university archivist at public, state-supported institution, I am accountable to not only the university students, faculty, staff, and alumni, but to the people of the state of Oregon for the proper management of public documents. Private archives are generally not widely available and their access is often closely controlled. However, while the scope of those who can hold them accountable is smaller, the accountability itself is not limited. Even for the most private of corporations, there can be public accountability. In the US, publicly traded corporations have to file annual reports of their earnings and finances with the Securities and Exchange Commission, and those reports are then available to a wider audience.¹⁹ Accountability is wrapped up in every potential use of archives, even history and genealogy. Sometimes it is forgotten, but it is users who energize the archives and

papers held in a repository, and therefore give life to the role of archives in accountability.

The Archival Profession and Accountability

The role archivists take to support accountability is three-part and permeates throughout an archival program. The first part is accessioning and appraising records. No matter where in the life cycle the decision is taken, the evaluation of records for evidential, historical, administrative, financial, legal, or informational value is significant. The second part comes in making records accessible. In order to support accountability, records must exist, but they also must be accessible to those who wish to hold others to account. Although records are known to exist, they are not useful for an account until they can be read, analyzed and shared with others. If the minutes of a discussion on where to site an elementary school are closed to access, the ability to discover knowledge of ground water contamination is thwarted. Finally, preservation of materials supports accountability, insuring that the materials deemed to be of value are available for analysis now and into the future. Through the actions of accessioning, appraisal, access and preservation, archivists insure the availability of records to hold others, and themselves accountable.

Archivists and Perceptions of Accountability

The archival profession has taken steps to understand its role in accountability and how this is perceived by its potential users in an international survey the “Society and Archives Survey” by Richard E. Barry, Barry and Associates conducted in November 2002.²⁰ The initial survey, while small – 671 respondents, highlighted patterns and concerns about society’s perception of the role of archives in accountability.

It is important to note that the majority of respondents to this survey identified themselves as archivists or records managers, and thus the survey represents our perception of how others perceive us. This, in and of itself, does not make the survey findings any less important. As professionals working with our constituency of users, we all can provide many examples of under-valuation, ignorance, and indifference. However, what do these results say about ourselves as a profession and our view of our role in accountability? Generally the results are not optimistic.

The perception of society’s views of the value of archives was that there was both a lack of opinion and a lack of knowledge about archives, with a division on whether there was any impetus for change.²¹ Respondents perceived that when society had any opinion of the value of archives, it was as historical research-oriented, rather than as vehicles of accountability.²² Respondents ranked journalists, legislators, and organization heads highest for the ability to make contributions to changing society’s perceptions of archives, and these groups were also expected to make a large contribution.²³

Interestingly for this discussion of legal accountability, the survey looked at the perceptions of lawyers and legislators. Respondents ranked attorneys last in potential for making contributions to changing society's perceptions about archives. They also did not expect attorneys to make a large contribution to change. Yet in every society, attorneys and jurists are a group charged with insuring accountability under the law. Unfortunately there were no respondents from either of those two categories to the survey, and thus their perceptions are second hand.²⁴ While the results would say that the perceptions of attorneys are negative or ambivalent at best, it can be argued that while they may not be familiar with the role of archives and records centers and the work of archivists, they most certainly understand the need for records management, policies for records retention, and the power of documentary evidence. A search in an openly available legal web site, under "records retention" brings up 30 articles and cases. The articles stating forcefully the importance of having a records retention policy in place for good legal management, efficiency, and reporting.²⁵ Thus, our perceptions, while highlighting areas requiring advocacy, also may underline some of our own misconceptions.

Archives and accountability – What can we do as archivists?

At a time when current events make it plain that our role of fostering accountability is most needed, archives and archivists are perceived as being of very little value, or of not having a role in insuring accountability. At the same time, those for whom accountability is paramount are perceived as not doing enough to foster our role in accountability.

Advocacy on responsible record keeping and the work of archivists, and education are our best tools. The climate currently supports responsible record keeping in thought, if not in deed. It is not easy and it is time consuming, but we must reach out on behalf of our profession and the role of archives in accountability. We already do this when it comes to illustrating the historical role that archives play, and thus probably the reason why in the survey our highest visibility was in historical and cultural realms. Therefore, when we are talking to groups about the historical and cultural richness of our collections, we need to take the opportunity to show more of the many roles that archives play, and make it relevant to our audience. Speaking of audience, we need to broaden our base. Each one of us is an advocate for our profession, and we must pursue this role diligently. In the survey we identified many constituencies that could and should help, but they cannot, and they will not without archivists first as their own best advocate. As some have noted in the survey, accountability is a tough sell, because often people think of their own accountability first.²⁶ In these cases, we need to explain how a lack of accountability can be more problematic than being held to account without documentary support.

As Richard Pearce-Moses, the newest Society of American Archivists Vice President/President-Elect said in a recent interview "All archivists must make records and record-keeping visible to those who create and use records to insure that they

understand the value of records in all formats.’ . . . ‘We must speak eloquently and passionately about the importance and nature of records. . . .’²⁷ This seems like a daunting prospect – so many users, and so few practitioners. Others will say that they have tried and no one is listening and no one understands. It is my experience that advocacy and education is an iterative process and an investment in the long term. When presented with an opportunity to speak about the archives I take it, be it an individual or a group, or a classroom full of undergraduate students.

We know that archives and the archival profession take a seminal role in supporting accountability in democratic societies. In legal accountability it can be seen in evidence of government decisions or in records retention of private companies. We see it undermined by recent government actions. The role of archives in accountability can be found in the work that we do as a part of our profession – selection, access, and preservation. Our users complete the circle by utilizing materials to hold others to account. However, the perception is that the role of archives in accountability is invisible. This perception must be addressed through advocacy, because whether others understand or not, the validity of governments, institutions, and relationships rests on accountability.

¹ *Oxford English Dictionary Online*, 1989 ed., s.v. “accountability.”

² Richard J. Cox and David A. Wallace, eds. *Archives and the Public Good; Accountability and Records in Modern Society*, (Westport, Connecticut: Quorum Books, 2002), pp.3.

³ *Ped. R. Evid.* 902.

⁴ Judith Ellis, ed., *Keeping Archives*, 2d ed. (Port Melbourne, Victoria: Thorpe, 1993), pp. 3.

⁵ *Or. Admin. R.* 166-475 (2004).

⁶ 5 U.S.C. § 552 (2002).

⁷ Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204.

⁸ Katheryn Baltes, “Records Retention: The Need for a Good Corporate Policy,” 2003, http://library.lp.findlaw.com/civilprocedure_2_777_1.html (28 July 2004).

⁹ 44 U.S.C. §2201-2207.

¹⁰ 44 U.S.C. §2204

¹¹ *Exec. Order No.* 12,667, 54 *Fed. Reg.* 3403 (1989).

¹² *Exec. Order No.* 13,233, 66 *Fed. Reg.* 56,025 (2001).

¹³ “Archive, historians ask judge to rethink dismissal, . . .,” (2004)

<http://www.gwu.edu/~nsarchiv/news/20040430/> (28 July 2004).

¹⁴ *Ibid.*

¹⁵ American Historical Association, *et al.* v. National Archives and Records Administration, *et al.* Order No. 1:01CV02447 (CKK) (U. S. Dist. Court for the District of Columbia) 2004

¹⁶ *Cheney v. United States District Court for the District of Columbia*, No. 03-475 (U.S.) 2004.

¹⁷ John W. Carlin, “Developing the National Archives Experience,” *Archival Outlook* (July/August 2002): 23.

¹⁸ Cox and Wallace, pp. 293-317 and pp. 283-291.

¹⁹ <http://www.sec.gov>

²⁰ Richard E. Barry, “Report on the Society and Archives Survey,” (2003)

<http://www.mybestdocs.com/barry-r-soc-arc-surv-report-030129toc.htm> (28 July 2004).

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ <http://www.findlaw.com> (28 July 2004).

²⁶ Barry, <http://www.mybestdocs.com/barry-r-soc-arc-surv-report-030129toc.htm> (28 July 2004).

²⁷ Teresa Brinati, “Richard Pearce-Moses Elected Vice President/President-Elect,” *Archival Outlook* (May/June 2004): 8.