

Discussion of the Boston College/IRA Oral History Situation

**(Prepared by the SAA Government Affairs Working Group for
Council Discussion in January 2013; Revised and Posted on February 11, 2013)**

Several SAA members have brought to the attention of the Council an ongoing legal case in which oral histories conducted on the subject of the Irish “Troubles” and housed at Boston College have been subpoenaed by the United States government at the request of the Police Service of Northern Ireland to be used as potential evidence in a murder investigation begun in 1972. Honoring of the subpoena would violate the confidentiality terms agreed upon by those interviewed and the individuals who conducted the interviews. A federal district court and the First Circuit Court of Appeals have ruled that the subpoena is legal. A request to have the case reviewed by the United States Supreme Court is pending.

Members of the Society have both asked that SAA intervene in the specific case and posed the question of what broader issues are raised by this matter, in particular if there is or should be a legally recognized right of “archival privilege” that would shield archivists and those who donate material to archives from unwelcome legal action.

Presented below is a discussion of the case itself and the matter of “archival privilege” that was prepared by SAA’s Government Affairs Working Group. The SAA Council believes that it is inappropriate for the Society to take a formal position on the case or on the concept of “archival privilege” at this time. The Council does, however, welcome and encourage discussion across the profession in the hope that it will result in a preponderance of professional opinion regarding the matter.

BACKGROUND

Boston College began an oral history project in 2001 when an agreement was reached to conduct interviews regarding the “Troubles in Ireland” with members of both the Irish Republican Army (IRA) and individuals tied to the Loyalist UVF/Red Hand Commandos. The agreement apparently was signed on behalf of Boston College by Robert K. O’Neill, director of the John J. Burns Library, Boston College, and Thomas Hatchey, executive director of Boston College’s Center for Irish Programs.

This agreement stipulated that confidentiality of the interviews was guaranteed “to the extent of [sic] American law allows and the conditions of the interview and the conditions of its deposit at the Burns Library, including terms of an embargo period.”

Subsidiary agreements between the scholars undertaking the project and the interviewees apparently did not make clear that confidentiality was limited to “the extent of American law.”

- Ed Moloney, a Northern Ireland journalist, served as director of the project.
- Anthony McIntyre interviewed 26 IRA provisional members
- Wilson McArthur interviewed an unspecified number of Loyalist participants.

The project was completed successfully and remained largely unnoticed until 2010, when Moloney published a book, *Voices from the Grave: Two Men's War in Ireland*, based on the oral histories of two, now deceased, interviewees. An introduction to the book was written by O'Neill and Hatchey.

The book subsequently was made into a documentary that aired on Radio and Television Ireland (RTE) on October 26, 2010. The book and documentary made widely known both the existence of the oral histories and their pertinence to an ongoing murder investigation regarding Jean McConville.

- McConville was a mother of ten children who disappeared in December 1972. At the time she was alleged to be a police informer. Her family denied the accusations. In 1999 she was declared to be a victim of the IRA. In 2003 her body was discovered.

The "Disappeared Commission" of the Police Service of Northern Ireland (PSNI) had begun an investigation of the abduction and presumed killing of Jean McConville and eight others in December 1972. Given the public revelation of new evidence in the case, PSNI requested access to the interviews under the United States-United Kingdom Mutual Legal Assistance Treaty.

- Acting upon this request, a subpoena was duly served on the John J. Burns Library of Boston College on May 11, 2011.

Boston College resisted the subpoena in Federal District Court but surrendered the oral histories, without appeal, when they lost their case. Eventually the entire body of oral histories in their possession was surrendered to the Court.

At the same time, Anthony McIntyre, who also had been subpoenaed, declined to turn over material in his possession regarding these interviews, in particular passages deemed relevant to the McConville investigation.

On September 1, 2011, McIntyre and Moloney asked a federal court to "quash the subpoenas" against both McIntyre and Boston College.

On December 16, 2011, McIntyre and Moloney's request was denied in Federal District Court. The decision was appealed.

On January 23, 2012, Massachusetts Senator John Kerry wrote to Secretary of State Hillary Clinton and Attorney General Eric Holder to express his concern regarding what impact the release of the information sought by the PSNI "may have on the continued success of the Northern Ireland peace process." At least eight U.S. Senators and 11 Members of Congress have written to the Secretary of State asking her to intervene in the matter based on these concerns.

- Apparently the hope is that through State Department intervention, the British Governor could be persuaded to voluntarily withdraw its request for the oral histories, thus ending the legal proceedings. It is unknown whether Clinton has honored the request that she intervene.

In July 2012 the First Circuit Court ordered compliance with the subpoenas.

On October 17, 2012, Justice Breyer stayed the First Circuit Court's order, pending the Supreme Court's ruling on a request by McIntyre and Moloney that the Supreme Court review the case. That ruling currently is pending.

DISCUSSION

On the Merits of the Specific Case:

Boston College officials appear to have been clear, when an agreement initially was reached to undertake this project and house the resulting oral histories in the college library, that all promises of confidentiality made to interviewees were subject to U.S. law.

- Boston College officials failed, however, to exercise ongoing diligence over the project. Boston College staff either failed to review or reviewed insufficiently the agreements drawn up for participants' signatures. Such review should have led Boston College staff to draw this matter to the attention of the project staff in order to utilize appropriate language in the agreements regarding confidentiality.

The researchers, apparently acting in the belief that additional assurances of confidentiality made to the oral history subjects could be supported in case of legal action, made additional written promises to participants in the oral history project that went beyond those offered by Boston College, but project staff did not disclose to participants that these additional assurances were made on behalf of the project staff and did not represent the position of Boston College.

- These additional assurances apparently were founded in the researchers' belief in a legal theory of "archival privilege" previously rejected by a federal court.
- In 1986 a federal court was asked to rule specifically on an alleged "archival privilege" of confidentiality. At issue was a subpoena issued against a closed collection at the Wisconsin Historical Society. The Court ruled, "...the situation before the Court is one where a member of the plaintiff class seeks to insulate otherwise discoverable documents from disclosure simply by virtue of the fact that she has placed them in an archive under an agreement restricting access ... In such a case, the access restriction agreement must yield to the judicial process' search for truth."¹

As in 1986, in the current case both the Federal District Court and the First Circuit Court ruled in favor of the government and held that access restrictions specified in the deed of gift were not sufficient to withstand a court subpoena.

¹ Harold L. Miller "Will Access Restrictions Hold Up in Court? The FBI's Attempt to Use the Braden Papers at the State Historical Society of Wisconsin." *The American Archivist* 52 (Spring 1989): 185.

- Boston College's legal response to the subpoena seems minimal. Although Boston College did contest the initial subpoena served upon it, the College seems to have failed to defend confidentiality "to the extent of [sic] American law allows" by declining to appeal the adverse ruling to the Federal District Court.

Although it is not relevant to the legal case, Moloney's decision to use two oral histories to publish a book, which clearly was within the terms of the relevant donor agreements, nevertheless drew unwelcome attention to those and other interviews—a situation that the author might reasonably have expected to occur and might reasonably have been prepared to deal with in a realistic way.

- In 1999 Moloney risked jail time when he refused to reveal information he possessed regarding the murder of Pat Finucane, an IRA lawyer allegedly killed by Loyalists. Although Moloney eventually won this case (arguing before the Court as a journalist, not a historian) and was not required to disclose the material desired, this experience should have made him acutely aware of the possibility that authorities might seek information regarding the murder investigation of Jean McConville.

Boston College officials share culpability in the matter of publication in that O'Neill and Hatchey wrote an introduction to Moloney's volume, thus making clear that they were aware of the publication project and, at least in appearance, giving their imprimatur to the work. They, and Boston College, also should have been prepared to deal in a realistic way with the likely consequences resulting from the book's publication.

Given these circumstances—that the project staff, for whatever reason, chose to ignore existing case law and assure participants that a greater level of confidentiality could be given the oral histories than could reasonably be assumed, and that Boston College failed to carefully review the legal agreements signed by participants for conformity with the promises about confidentiality made by the College and to insist that those promises be represented in writing—the Government Affairs Working Group suggests that SAA take no position on the case at hand.

On the Issue of a Legally Recognized "Archival Privilege" to Maintain Confidentiality:

The Government Affairs Working Group notes, for the record, that the question of "archival privilege" has been raised previously with the SAA Council. In 1986 the Council declined to take action when it was asked to do so in a case regarding a federal subpoena issued against a closed collection at the Wisconsin Historical Society. A federal district court sustained the legality of that subpoena. (See Harold L. Miller, "Will Access Restrictions Hold Up in Court?" *The American Archivist* 52 [Spring 1989]: 180-190.)

Based on the Miller article, the claim that there is a legal privilege to confidentiality that archivists may invoke to gain exemption from a court order or other appropriate legal process currently is without legal standing.

The belief that there should be an archival privilege of confidentiality rests on the "need of history" for honest information, and thus the need to shield honest answers from potential legal

consequences. Clifford M. Kuhn, a past president of the Oral History Association, has warned that sources “will be far less likely to take part in such activities” if oral history participants cannot be guaranteed confidentiality.

The belief that there should be an archival privilege of confidentiality requires careful and thorough discussion within the archival profession. Although some members of the profession clearly believe that such a right should be asserted, others believe that asserting such a right could be interpreted as an unfortunate exercise in absolutism that would be detrimental to the broader public interest. At the very least, such a right would have to be nuanced carefully and placed into a context of mutual rights and responsibilities that others might legitimately assert for the availability and use of archival material under certain circumstances.

Although the Council might encourage professional discussion on the subject of a legally recognized archival privilege of confidentiality, we recommend that the Council take no position on the matter.

Professional discussion should also make clear the consequences to donor relations if archivists and others involved in obtaining historical documentation are perceived to be giving legal advice that has little chance of being supported in court. We believe that the archivist’s responsibility to donors is to represent any legal matter as best reflects current law. Potential donors should make informed decisions based on the likely legal ramifications of their actions, not on legal speculation.