

As the former director of the Belfast Project at Boston College, I write this paper as both a response to the Background Paper on the PSNI/DoJ subpoenas prepared by the Society of American Archivists (SAA) for its members and to correct the numerous factual errors contained therein. I also ask that this paper be given the same level of distribution to your members as the background paper, not least to compensate for the fact in the preparation of your document you neglected to consult myself or any of the researchers. Having put together a paper which faults myself and my staff without asking for our input, the least we deserve is a full right to reply. This is that reply.

You write in the Background section:

“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.”

The way this is written suggests that the scholars, i.e. myself and the interviewers drew up these misleading agreements or donor contracts and there is an unspoken implication of deception, either deliberate or because of ineptness, on our part.

I think it is important that your members have access to a full text of the relevant section of that donor agreement, i.e. the contract signed by the interviewer and interviewee, so that they can understand better what happened.

The relevant section reads: “Access to the tapes and transcripts shall be restricted until after my death except in those cases where I have provided prior written approval for their use following consultation with the Burns Librarian, Boston College. Due to the sensitivity of content, the ultimate power of release shall rest with me. After my death the Burns Librarian of Boston College may exercise such power exclusively”.

It was this contract, and in particular the phrase “the ultimate power of release shall rest with me”, that gave us the confidence that the interviews would be safe and it was on this basis that we participated in the project with Boston College.

Notwithstanding references to “the extent that American law allows”, a phrase that was confined to my own contract with BC, a document which did not once mention the word “confidentiality” [contract available for inspection should you wish], the key document in oral history is always the donor agreement which is where such reservations should be expressed, assuming they apply.

The absence of the “American law” phrase from the donor contract implies that it is legal in America for an interviewee in a project like this to have ultimate power over his or her interviews. Against a background of assurances from Boston College that the project would not go ahead if there was any danger to the interviews, that was how we viewed the donor contract. Had the phrase “to the extent allowed by American law” been inserted say at the end of the first sentence - which it should have been - so many red lights would have flashed that the project would have been stillborn, certainly on our side of the Atlantic.

The question of who composed and approved this contract therefore becomes vital.

The way you have explained this to your members suggests or implies on one reading that we were

responsible for drawing up the contract. I suspect, although I do not know, that this thought has been planted in your head by Boston College. All the more reason then that you should have come to us for our side of that story. You must have known that ourselves and BC were at odds, sometimes fiercely, over this and other issues.

The allegation against us is not true and let me explain why. When these matters were being discussed with Boston College back in 2001, we were all based in Belfast (I moved to NYC later). None of us are or were lawyers. Most certainly none of us knew anything about American law. In sharp contrast, Boston College not only has its own law school but its own legal office with experienced counsel to give expert advice on a range of matters, not least contracts.

Do you seriously think that a) we considered ourselves or were in any way competent to draw up a contract that would apply in a country where we did not live and whose laws we were unfamiliar with and b) do you think Boston College would allow a bunch of amateurs living 3,000 miles away who were ignorant of American contract law to draw up an agreement dealing with the ownership rights of such an archive, especially considering that its unique and singular nature would, with time, bestow upon it considerable value?

The answer to both questions is an emphatic 'No', as common sense would tell you. As we have insisted from the outset, Boston College drew up, approved and supplied us in Belfast with this contract which made no mention of "American law" to the interviewees who were taking huge risks by getting involved. As I say, had the contract included this clause the project would have been dead in the water, as I suspect Boston College knew full well. Indeed I would go further and say that BC had a compelling motive to exclude the "American law" phrase from the donor contract.

To further support our case on the all-important contracts question, I supply below a copy of an email from Bob O'Neill, the librarian at the Burns Library, Boston College, to myself in January 2001 confirming that BC's legal counsel, Tom Hachey and himself would draw up the donor contract. (Hachey is head of the Irish Center at BC and was effectively in charge of the project) Given all that you have wrongly alleged about myself and the other researchers I think I am entitled to ask you to supply all this evidence to your membership.

Finally, consider this aspect of the affair: the Belfast Project lasted five years and every week or month tapes, transcripts and contracts were dispatched from Belfast to Boston. If BC was so aware of the importance of "American law" why, during all that time did not one member of academic staff or the legal counsel's office notice that their researchers had omitted these key words from the donor contract as BC alleges happened?

ADDITIONAL COMMENTS AND CORRECTIONS

1. The project lasted from 2001 until 2006. It did not go "unnoticed", it was kept secret, very successfully so, until the publication of *Voices From The Grave* in March 2010.

It is important that your members should know some background to the publication of this book. In the discussion between myself and BC over the terms of an embargo, BC at first wanted it limited to ten years since the college normally expected "a return" from such investments within a reasonable time. I objected on the grounds that this could put interviewee lives at risk and suggested instead adopting the UK and Irish 30-year rule. That was unacceptable to BC. The college clearly wanted a rapid dividend from its investment. Finally we settled on a lifetime embargo which appeared to offer the best protection to participants since not even the IRA could reach beyond the grave.

BC's business oriented approach to the project was reflected in the college's desire to see some sort of published product coming out of the archive. On one occasion, during a trip to Belfast, Tom Hachey met the two interviewers and asked them if they could persuade the participants to change the terms of their contracts to allow publication of interviews while they were still alive. He also asked me the same by telephone. All three of us refused him. If BC was so cognizant of the limitations of American law and the legal dangers that would flow from revealing the project's existence and participants, why on earth did Hachey do this?

The publication of *Voices From The Grave* was partly a way to satisfy BC's desire to see a concrete product from their investment in the archive and it would happen four years after the project had ended. As it happened the book was based on the interviews of a leading Belfast IRA member, Brendan Hughes, who had effectively made it a condition of his participation that we try to publish his interviews as quickly as possible after his death. So the book satisfied two demands.

2. Jean McConville was not alleged to be a police informer. She was alleged to be an agent for British military intelligence.

3. There is no such thing as 'The "Disappeared Commission" of the Police Service of Northern Ireland'. The commission you refer to is called the Commission for the Location of Victims Remains (CLVR). It is an entirely civilian body and it was set up on the initiative of President Bill Clinton to help find the bodies of the so-called 'disappeared', i.e. people killed and buried in secret graves by paramilitaries during the Troubles. It has the power to grant an amnesty to people who provide them with information but its secretary has said that since the BC subpoenas were served people have stopped coming to the commission. The DoJ's co-operation with the police in Northern Ireland has had a chilling effect, preventing other relatives from ever finding their loved ones. The CLVR has no powers to conduct criminal investigations; these are the preserve of the PSNI.

4. On the issue of PSNI investigation of Jean McConville's disappearance you imply that the inquiry into her death has been ongoing since 1972. This is not true. It is important that your members know that while Mrs McConville was abducted in 1972, the authorities did absolutely nothing about her case and did not even categorise her death as murder for the best part of 20 years. A report into her disappearance slated the police and British Army's handling of the case and the fact that the PSNI have shown interest in her case only very recently has strengthened the suspicion that reactionary elements in the police, opposed to the new political order in Northern Ireland in the wake of the peace process, are hoping that the subpoenas will embroil the IRA leader Gerry Adams in the McConville disappearance, thus both damaging him and the peace process.

There is more than a hint of abuse of process in this legal action with which the Holder DoJ is co-operating.

5. You write: "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."

This implies that it was the book, *Voices From The Grave* and the accompanying documentary which sparked the subpoenas. Again you are wrong. The book was published in March, 2010. A month earlier, in February 2010, Dolours Price, one the interviewees, gave an interview to a newspaper in Belfast admitting her role in the McConville disappearance and also revealing her participation in the Belfast Project at BC. The subpoenas were based primarily on this disclosure, not anything contained in the book.

Even so, the subpoenas were flawed. Dolours Price never mentioned McConville in her BC interview, a fact to which I attested in a court affidavit. She was then and afterwards suffering from serious psychological problems, had attempted suicide several times and recently died from a drug overdose. Neither the PSNI nor the DoJ ever attempted to obtain her interviews with the Belfast newspaper, possibly because they thought the BC interviews incriminated Adams more thoroughly. Again the suggestion of abuse of process rears its head again.

6. You write, in reference to the hearing at the Boston District 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.”

This is also incorrect. Anthony McIntyre has not been served with a subpoena. Only BC has been served with subpoenas.

He was not asked to turn over material; indeed he has no material to hand over since no interviews or interview material was kept in Ireland for security reasons.

This is what happened. The judge, when he ruled against BC, asked the college to separate from the archive those interviews which mentioned Jean McConville so that they could be handed over to the DoJ. The Burns librarian, Bob O’Neill told the court, much to the incredulity of the judge, that since he had never read the interviews he could not help.

Imagine that? A prestigious college funds an expensive oral history archive and the librarian charged with overseeing it claims he never once read a single interview! Was he not even curious? Did he not think it part of his job to check on the quality of the material BC was paying for? Or was this a stratagem to avoid a criminal charge that he had failed to report Jean McConville’s murder, while dumping on Anthony McIntyre in Ireland?

O’Neill suggested that the court contact Anthony McIntyre for the necessary information but he took a principled stand and informed the court that he was not going to give up interviewees to whom he had promised confidentiality. Even so, it had been five or six years since Dr McIntyre conducted the interviews; how could he be expected to recall who said what about whom? Your members can themselves judge Dr O’Neill and BC’s behaviour and motives in this matter.

7. Myself and Dr McIntyre, who you should know holds a doctorate in political science, decided that Boston College was only going through the motions of resisting the subpoenas and so we sought separate legal advice and since the Fall of 2010 have been conducting our own legal fight. It is ourselves who are applying for cert at the Supreme Court, not Boston College. I won’t bore your members with the details but suffice it to say that inasmuch as BC did put up a legal fight, they did so only because I leaked the story of the subpoenas to the New York Times in May 2011. Otherwise, I suspect, the interviews would have been quietly handed over without a fight. The resentment and anger felt by BC towards myself because I did this has been reflected in a campaign of smear an innuendo against myself and hostile briefings, the traces of which are detectable in the background paper you prepared. The section below is particularly grievous in this regard.

You write: “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”.

So why did BC not insert this into the donor contract where it belonged? Why was it hidden away in my employment contract? Shouldn't the interviewees have been told, before they signed donor contracts, that their interviews were in fact at risk from US law?

Here is what my contract had to say about US law: "Each interviewee is to be given a contract guaranteeing to the extent American law allows the conditions of the interview and the conditions of its deposit at the Burns Library, including terms of an embargo period if this becomes necessary, as outline herein".

Then you write: "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".

This is an outrageous, defamatory allegation to make which is totally unsupported by evidence of any sort. The offence is all the more egregious since you failed entirely to ask for our version of all this.

The evidence that does exist points in the other direction. I attach below a tiff of the email dealing with the donor contract from Bob O'Neill to myself sent in January 2001 which makes clear that he, Tom Hachey and the BC legal counsel would draw it up. This they did and copies of the contract were mailed to us for use in Belfast.

So when you write that "These additional assurances apparently were founded in the researchers' belief in a legal theory of "archival privilege" rejected by a federal court" you are entirely wrong. The assurance we relied upon can be found in the wording of the donor contract which Bob O'Neill's email confirms was Boston College's work.

8. You write that "Moloney's decision" to publish the book drew unwelcome attention to the archive. I have corrected that above. The PSNI attention was drawn to the archive before the book was published while publication of the book was as much BC's initiative as anyone's. You are singing Boston College's tune here, or should I say Jack Dunn's.

The truth about the book is that BC was closely involved in the decision to publish it, that Dr O'Neill and Prof Hachey initially wanted their bylines on the book but agreed instead to write a foreword and that they negotiated a deal with the publishers, Faber, that fifty per cent of the royalties would go to Boston College. Boston College and Faber also negotiated an agreement to give Faber publication rights. So one way and another BC was fully involved in the decision to publish a book.

In the event both Hachey & O'Neill did not hand over the royalties to BC but kept them for themselves. I was forced to make all this public when BC spokesperson Jack Dunn accused me on Irish television of being so eager to make money from a book that I disregarded the legal perils of publication. The full sorry story, in its way characteristic of BC's behavior during this affair, can be read here:

<http://www.irishcentral.com/news/Boston-College-academics-kept-book-royalties-on-IRA-oral-history-project--140546133.html>

and here:

<http://chrisbrayblog.blogspot.com/2012/02/called-to-account.html>

and here:

<http://www.bostonglobe.com/metro/2012/02/27/two-profited-from-book-based-disputed-ira-interview-archive-school/f1Cr74IImSIVH15eKT2laK/story.html>

9. On the issue of confidentiality guarantees from BC, had you consulted us, Wilson McArthur for one, the Loyalist interviewer, would have been able to tell you that when he and a representative of the Ulster Volunteer Force met with Bob O'Neill in Belfast to negotiate the UVF's participation in the project they specifically asked O'Neill if there was any possibility that the interviews could fall into the hands of the PSNI. He assured them that this could not happen and so on that basis the UVF agreed to take part. I guess Jack Dunn didn't tell you that.

10. Yes, as you write, it is true that I beat a subpoena rap once before but why didn't you point out to your members that this happened in Belfast which is in the jurisdiction of British law, not America. Now the last time I looked, Britain and the US are different countries and have different legal systems. America has a written constitution and a Bill of Rights, which guarantee free speech and due process. Britain does not. As a journalist covering the Troubles I had to overcome censorship laws enforced by both the British and Irish governments while working in an environment in which police hostility to the media was endemic. When we considered this project we were painfully aware that there were institutions that had handed over confidential material to the authorities unasked! Why do you think we looked to America to house this archive? It was because we believed we could trust in a political system which offered its citizens such guarantees.

I will end by saying just two things. First, the real target of this affair is the NI peace process. It is well known that Gerry Adams, the Sinn Fein leader, was in charge of the unit that "disappeared" Jean McConville and it is my conviction that reactionary elements within the police are behind this move and they are hoping the interviews will incriminate him. If they are successful I cannot see the power sharing government in Belfast surviving. They are intent on damaging the peace process, which brought important policing reforms, and wish to wreak revenge against Adams, a figure who was in their eyes the Irish Bin Laden. Two US presidents, Clinton and George W Bush made the peace in Ireland possible; will a third help to bring it down?

Doubtless ourselves and Boston College will be fighting about this matter until hell freezes over, which is both a pity and a waste. What should have happened is that BC ought to have put that to one side and have concentrated instead on defending their researchers and the project participants, all of whom took enormous risks to give this archive to the college. Whatever the legal niceties, the interviewees were given pledges of confidentiality which BC was morally obliged to defend. They did not, they have not. The message is a dispiriting one: do not participate in sensitive research with Boston College for they will abandon you if they have to. And if you go to jail or even face a violent death then so be it.

Equally, American academe should have recognised the grave threat posed by this DoJ action to academic freedoms in America. But that has not happened. The message from that inaction is the same as from BC: do not participate in sensitive research with an American college because you will be dumped if necessary. And the result? The death of such research in America. This is not the proudest moment in the history of American academic life.

Ed Moloney

New York, February 27th 2013

O'Neill email attached below: