

**LIBR 256 Archives and Manuscripts
FINAL EXAM**

II. Copyright and Privacy (30 Points)

My first step in determining whether or not to use the image would be to contact someone at Tomorrow's Happy Citizens to determine ownership and copyright status of the photo. These are central issues that need to be addressed before any other questions can be answered. There are many other questions to ask: Who took the photograph? Does the photographer own it, or was he/she working for hire? Does the THC own it? Is it considered property of a public or private archives or private individual or organization? Has the owner placed any sort of copyright restrictions on it? Would they give me permission to use it in the exhibit? If they do not own it, can they provide the contact information of the owner? Was the event private or public? Did the subjects know they were being photographed? Can the people in the photograph be identified?

The legal and ethical issues involved in this case are related to copyright, privacy, and the Freedom of Information Act. Though there is no date on the photo, it should be assumed that it is still under copyright. Obviously, if the THC is knowledgeable about the photo, they might be able to provide different information. Generally, as the exhibit would be intended for non-profit, educational purposes, it would fall under the fair use provision of Title 17 of the United States Code on copyright (Hunter, 2003, p. 227), so use should be acceptable even without permission. However, as the photo would also be published online and if no copyright permission was explicitly granted, there may be an issue per the Digital Millennium Copyright Act of 1998. It would be safest to attempt to acquire permission to use the photo from its copyright owner. Privacy issues relate to the individuals included in the photo and their "right . . . to be let alone, to live a life free from unwarranted publicity" (Peterson & Peterson, 1985, p. 39). Even if the copyright owner does not have any restrictions on use, the archives is responsible for protecting other individual's privacy in order to avoid potential lawsuits (Peterson & Peterson, 1985, p. 42). Finally we come to the Freedom of Information Act (FOIA), which provides that the people have a right to know the business that the government conducts on their behalf (Peterson & Peterson, 1985, p. 45). Given that the Senator is included in the photo, the FOIA provisions and exclusions may need to be considered.

If the THC owned the photograph and copyright and gave me permission to use it in the exhibit, I would cite the photograph as "Senator Worthington with staff and unidentified supporters. Used with permission of Tomorrow's Happy Citizens (location of THC)". If the event was known and specific people identified, then that information could also be included in the caption. The staffer whose name tag is displayed should not pose a privacy concern because she would have been previously publically identified as such. "Once information is in the public domain, it's not possible to return it to a privacy sphere" (Peterson & Peterson, 1985, pp. 53-54). Based on this decision, the staffer's name tag would not need to be removed from the photo. Assuming some sort of photo manipulation was planned, however, the permission to manipulate the photo would need to come from the copyright owner and be in accord with his/her/its copyright restrictions. If the owner allowed manipulation of the photo, it would be best to briefly explain the manipulation as part of the caption.

As to the privacy rights of the individuals in the photo, there are several issues to consider. First, as the Senator only recently retired, it is assumed that all individuals in the photo are still alive, and so do retain their right to privacy. “Archivists must always be cautious when handling personal information about living individuals” (Peterson & Peterson, 1985, p. 55). If the event was a public one and covered by the media, and this photo was published in a newspaper, then the photo was already in the public domain, and privacy concerns are lessened. The other question is whether or not the people knew they were being photographed. If they did, there are no privacy concerns. If they were unaware, there may be privacy concerns if it was thought that their presence in the photo with would negatively impact their reputation or otherwise cause them “ ‘injury and embarrassment’ ” (Peterson & Peterson, 1985, p. 53). It really depends on the nature of the event and the reason for these individuals’ attendance. Depending on the ownership, this photo might qualify as a federal or state record and therefore be subject to the Freedom of Information Act or its state equivalent, which may or may not cover legislative branch records. Further, we must understand the nature of the event to understand if this was related to government business. “Context is all-important” (Peterson & Peterson, 1985, p. 55). As the Senator’s staff was included at the event and name tags were obviously in use, it is more likely that it was some sort of more official government event where the Senator was acting in his professional capacity.

My decision to use the photo would be entirely dependent on the considerations detailed above. Once I had contacted the THC and learned what I could of ownership and copyright restrictions, I would consult the archives’ legal counsel to determine a safe course of action. Without knowing the answers to the above questions, my initial decision would be to forgo use of the photo in the exhibit. If the goal of the exhibit is to increase the reputation and use of the archives, a lawsuit over privacy or copyright concerns would have a more significant negative impact than the use of the photo would have a positive impact. Ultimately, this one photo—especially as it does not relate to the Senator’s hallmark legislation and is not part of the archives’ collection—isn’t going to make or break the exhibition. The quality of the materials *in* the archives should be sufficient to anchor the exhibit. If they are not, then perhaps a different exhibit topic should be selected.

References

- Hunter, G. S. (2003). *Developing and maintaining practical archives: A how-to-do-it manual* (2nd Ed.). New York, NY: Neal-Schuman.
- Peterson, G. M., & Peterson, T. H. (1985). *Archives & manuscripts: Law*. Chicago, IL: Society of American Archivists.