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Personnel Files,  
Confidentiality  
And The Right  
To Privacy [1]

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## INTRODUCTION

Church records are created for various purposes and, in many cases, contain confidential information that must be safeguarded to protect the privacy and reputation of the Christian faithful. The handling of personal information obliges those responsible for such information to observe confidentiality to protect the privacy of the persons concerned. Privacy is a natural right that the Church safeguards in respect of the dignity each person possesses. From her foundation, the Church has been concerned with the protection of the right to privacy and the dignity of the person, and it contributed indirectly to the 1948 Universal Declaration of Human Rights. In the Code, canon 220 imposes the obligation to protect the fundamental right to privacy and a good reputation.<sup>2</sup>

In the court of public opinion, the mention of secrecy or privacy relating to the Church provokes thoughts of the Church “covering up” criminal activity. However, the Church, like every organization, maintains personnel files that contain confidential information.

- 1 Part 2 will be published in the March issue of *The Furrow*. This paper was presented at the 56th Annual Convention of the Canadian Canon Law Society, Ottawa, on 18 October 2022.
- 2 Canon 220: “No one is permitted to harm illegitimately the good reputation which a person possesses or to injure the right to any person to protect his or her own privacy.” (Cf. CCEO c. 23.) The right to privacy in civil law and American jurisprudence is a fairly recent invention. The term “civil law” refers to all secular law systems, including common law, whereas “common law” is reserved to the laws of jurisprudence following the Anglo-American legal system.

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Proper handling of these records is one way of protecting the privacy of staff, which can be easily violated when information is revealed by the mishandling of personnel files. Such violations can lead to the unlawful harm of a person's good name or an injury to the individual's right to protect his or her right to privacy.

This paper will analyze the concepts of confidentiality, privacy, and the right to privacy as applicable in Church documents, archives, and access to records. Further, we will offer insights into the general principles of collecting personal information, the composition of records, and the management of church personnel files. Of significance to this study is the obligation of competent authorities to observe confidentiality and protect the right of each person to privacy, as well as the obligation to protect the common good. Fundamentally, there are limitations and excesses that result from the relationship between transparency and secrecy in the Church.<sup>3</sup> We shed light on these issues while focusing on the church's fundamental mission of evangelization.

### 1 – THE CONCEPT OF PRIVACY

The concept of the right to privacy dates back to a law review article published in December 1890 by Samuel Warren and Louis Brandeis, two Boston lawyers. They described the right to privacy as the “right to be let alone” and expressed the common law understanding of it as securing to each individual the right to determine ordinarily to what extent his thoughts, sentiments, and emotions would be communicated to others.<sup>4</sup> Even though this definition is not universally accepted, it offers a foundation for discussion.

[P]rivacy is difficult to define because it is exasperatingly vague and evanescent, often meaning strikingly different things to different people. In part this is because privacy is a notion that is emotional in its appeal and embraces a multitude of different ‘rights’, some of which are intertwined, others often seemingly unrelated or inconsistent. Of late, however, lawyers and social scientists have been reaching the conclusion that the basic attribute of an effective right of privacy is the individual's ability to control the circulation of information relating to him –

3 See J.P. Soler and R. De Oca Montes, *Transparency and Secrecy within the Catholic Church*, Chicago, Midwest Theological Forum, 2022, 2.

4 See S.D. Warren and L.D. Brandeis, “The Right to Privacy,” in *The Harvard Law Review*, vol. 4, no. 5 (1890), 197. By 1890, a vast literature of law had developed to protect privacy as confidentiality. Therefore, it is incorrect to portray Warren and Brandeis as the originators of the right to privacy. Instead, they shifted from the concept of confidentiality to what they termed “inviolable personality.”

power that often is essential to maintaining social relationships and personal freedom.<sup>5</sup>

The right to privacy is understood by theologian Richard McBrien as “[...] the right to the protection of one’s secrets, of one’s confidences, of one’s psychic self. Thus, my privacy is violated, if someone reads my mail without permission, or photographs my medical records surreptitiously, or tape records my conversations without my knowledge, or tells other persons something communicated in the strictest confidence or wiretaps my telephone without legal warrant or probes into my credit records without my consent.”<sup>6</sup>

Meanwhile, confidentiality focuses on relationships. “Confidentiality focuses on trusting others to refrain from revealing personal information to unauthorized individuals. Rather than protecting the information we hide away in secrecy, confidentiality protects the information we share with others based upon our expectations of trust and reliance in relationships.”<sup>7</sup> In other words, the individual entrusts his personal information to the Church guaranteed by confidential relations,<sup>8</sup> the law of which protects relationships in which an individual entrusts his interests to another.

The law of confidential relations protects a variety of relationships in which one party entrusts his or her interests to another. One of the most important aspects of maintaining all ecclesiastical records is observing and maintaining confidentiality. There is a reasonable expectation that the collected information will not be revealed to an unauthorized person without the consent of the individual concerned or the appropriate ordinary.

- 5 A. Miller, “The New Technology’s Threat to Personal Privacy,” in *Assault on Privacy*, Ann Arbor, Michigan, University of Michigan Press, 1971, 25.
- 6 R. McBrien, “The Believer’s Right to Privacy,” in William C. Bier, *Privacy: A Vanishing Value*, New York, Fordham University Press, 1980, 124. Black’s Law Dictionary defines privacy as “the legally protected right of an individual to be free from unwarranted publicity and to be protected from any wrongful intrusion into his private life which would outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities” (H.C. Black, *Black’s Law Dictionary*, 5th ed., St. Paul, MN, West Publishing Company, 1979, 1075).
- 7 See N.M. Richards and D.J. Solove, “Privacy’s Other Path: Recovering the Law of Confidentiality,” in *The George Washington University Law Review*, 96 (2007), 125.
- 8 Confidential relations are defined as “relations formed by convention or by acquiescence, in which one party trusts his pecuniary or other interests to the fidelity and integrity of another, by whom, either alone or in conjunction with himself, he expects them to be guarded and protected.” (See T.M. Cooley, *A Treatise on the Law of Torts or the Wrongs Which Arise Independent of Contract*, Chicago, Callaghan and Company, 1879, 508. See N.M. Richards and D.J. Solove, “Privacy’s Other Path: Recovering the Law of Confidentiality,” in *George Washington University Law School*, 96 (2007), 135.

The management of records is a sensitive issue because of the confidential nature of the information contained.<sup>9</sup> The Code obliges those appointed to curial offices to promise to fulfill their function faithfully and observe secrecy, according to the manner determined by law or the bishop (c. 471). Good management of the acts of the curia establishes who owns the file, what goes into it, who has access to it, and the retention period. Where there is good management of records, decisions are documented, records are kept current according to the norm of the law, and records are secured (see c. 486 § 1). In other words, good record management ensures accountability on the part of the chancellor and the archivist.

The bishop appoints the chancellor and vice chancellor, who are notaries of the curia (c. 482). The chancellor must be of unimpaired reputation and above all suspicion, because the primary duty of the chancellor is to ensure that acts of the curia are gathered, arranged, and safeguarded in the archive of the curia (c. 482 § 1). The chancellor is to keep an inventory of the documents in the archive (c. 486 § 3). In practice, this involves collecting various documents and arranging them so they are easily accessible for the proper governance of the diocese.

Negligence in handling records may result in the disclosure of information that is otherwise confidential and a violation of privacy, causing harm to a person's good name. The duty of the chancellor to care for documents includes authenticating them when needed (c. 483 § 1). The new title of Book VI, "Delicts against Good Reputation and Delict of Falsehood," indicates that the offence of falsehood is a violation of the dignity of the person.<sup>10</sup>

The newly revised canon 1391 specifies that authenticating a false document or composing a false document is a delict against good reputation. Although the canon does not address privacy, reputation and privacy can hardly be separated where a falsehood against an individual has been perpetrated: "A person who composes a false public ecclesiastical document, or who changes, destroys or conceals a genuine one, or uses a false or altered one" (c. 1391, 3<sup>o</sup>) asserts a falsehood and is subject to punishment according to the gravity of the offense (c. 1336 §§ 2-4). Falsifying documents in a personnel file or negligently disclosing those documents harms the

9 "Records management is the systematic control of all records from creation or receipt through processing, distribution, maintenance, and retrieval to their ultimate disposition" (J.J. Teanor, "Records Management," in *The Catholic Lawyer*, vol. 42, no. 1 (2002), 51.

10 J.I. Arrieta, "A Presentation of the New Penal System of Canon Law," in *J*, 77 (2021), 260.

reputation of the concerned person and is a violation of privacy. This is not permitted according to canon 220.<sup>11</sup>

## 2.1 – ECCLESIASTICAL DOCUMENTS AND PRIVATE DOCUMENTS

Records are categorized according to their nature. Canon 1540 distinguishes between public ecclesiastical documents, public civil documents, and private documents.

### 2.1.1 – PUBLIC ECCLESIASTICAL DOCUMENTS (C. 1540 § 1)

Sacramental records are public ecclesiastical documents, retained by parishes or the chancery. They pertain to the status of a person in the Church, and access to them is generally restricted because they contain certain information beyond the fact of the administration of the sacrament. For instance, in the case of baptism, adoptive and biological parents may be identified, depending on the particular law of the conference of bishops. This policy may state that sacramental records are not open to the public, any research is performed by archive staff only, or that access may be granted by the bishop or the chancellor. A legitimate reason must be given for genealogical research, along with a relevant connection to the person being researched.<sup>12</sup>

There is no specific mention of personnel files in the Code. In practice, every diocese and religious institute maintains them. Records of priests and religious usually contain public ecclesiastical documents (e.g., records of ordination and/or religious profession).

A personnel file should be maintained for each lay employee and volunteer with the following contents, as applicable: employment application, résumé, employment contract, salary and benefits information, performance review, disciplinary information, safe environment training, and records. If medical information is provided, it should be maintained in a separate file for confidentiality. The archivist must be familiar with the requirements of civil law.

It is important to recognize that people have a right, both canonically and civilly, to know that the information about them in the archives is correct. They also have a right of access to the

11 See *Catechism of the Catholic Church*, no. 2477. The CCC defines calumny as “[...] a false statement which harms the reputation of others and gives occasion for false judgments concerning them.” Detraction is that action through which one, without an objectively valid reason, discloses another’s faults and failings to another or to others who did not have legitimate reason to know it. See c. 1391.

12 “Sacramental and Genealogy Requests,” <https://www.catholicahawaii.org/diocesan-offices/office-of-the-chancellor/sacramental-and-genealogy-requests>.

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information in their own personnel file and to make or obtain copies of documents which are of a public nature and pertain to their own status as persons (c. 487 § 2). They do not have the right to remove documents from their files, so access might be granted on the condition that a staff member is present.

### 2.1.2 – PRIVATE DOCUMENTS (C. 1540 § 3)

Any other documents, apart from those stated in canon 1540 §§ 1 and 2, are private. Confidential information should be kept no longer than is necessary or required by law. It is important to retain a summary of relevant information when documents are being destroyed. For example, personnel files may contain records of a sensitive nature, such as dispensations from impediments. These are not public ecclesiastical documents and do not become so by being placed in an official file of an ecclesiastical institution. They are private documents and the sole property of the ecclesiastical authority in whose possession they are retained.

### 3 – MANAGEMENT OF ARCHIVES (CC. 482 - 491)

The Council of Trent promulgated regulations on the preservation of important documents. Even prior to that, several popes had initiated legislation on management of records and archival reforms. On 14 June 1727, Pope Benedict XIII issued the Constitution *Maxima vigilantia*: “A Constitution on archives [is] to be erected in Italy for the preservation of legal papers and documents pertaining to cathedral churches both collegiate and noncollegiate, to seminaries, monasteries of both men and women, guilds, confraternities, hospitals and to all other pious institutions legally instituted.”<sup>13</sup> This Constitution regulated the information to be kept in archives and the norms governing access to the archives.

The norms on archives are found in canons 486-491 of the 1983 Code and *CCEO* canons 256-261. There are no canons that apply specifically to archives in religious institutes or societies of apostolic life. However, by analogy, the canons on diocesan archives can be applied. The law gives indications of what type of material ought to be preserved, e.g., sacramental records, and documents regarding church property ownership and rights (c. 1284 § 2, 9<sup>o</sup>; *CCEO* c. 1028 § 2, 8<sup>o</sup>).

The diocesan chancellor is the legal custodian of the archives (c. 482 § 1; *CCEO* c. 252 § 1). Canons 486-491 and *CCEO* canons 252-261 address the chancellor of the diocesan curia and his or

<sup>13</sup> Benedict XIII, Constitution *Maxima vigilantia*, 14 June 1727, in *Bullarium Romanum* 12, Rome, 1736, 221-225.

her role in maintaining the diocesan archives. Together with the diocesan bishop, the chancellor determines what is of its nature private and what is public. In turn, this determines what should be kept in the secret archive and what can be kept in the general archive.

The law places emphasis on the confidential nature of the archive and archive material. Therefore, access is restricted (c. 487 § 1). There are three sections in the archives, that is, general, historical, and secret archives (489 § 1). All three must be securely locked (c. 486 § 2). Only the diocesan bishop keeps the key to the secret archive, and the same norm can apply by analogy to the major superior of a religious institute. The chancellor and the diocesan administrator can access the secret archive when necessary.

### 3.1 – GENERAL ARCHIVE (CC. 486-488)

The records of the general administration of the diocese are kept in the general archive. The diocesan bishop, vicar general, moderator of the curia, chancellor, archivist, and chancery notaries have access to the general archive. Access by other persons in the diocesan curia may be granted as needed, with the permission of the diocesan bishop or the chancellor.

The obligation of some practical, orderly arrangement of the archives is the subject of canon 486 (*CCEO* c. 256). Active documents or files that are not strictly confidential are kept in the general archive; otherwise, they belong in the secret archives. Included in the general archives are common documents (active files) like records of ordinations (c. 1053 and *CCEO* c. 774) and authentic documents regarding church property ownership and rights (c. 1284 § 2, 9° and *CCEO* c. 1028 § 2, 8°).

Records are to be maintained according to the guidelines established in particular law for archives, including a retention schedule. Records older than the retention period should be destroyed in accordance with the law and the directive in the retention policy. The exception is if records are relevant to current civil or canonical litigation, in which case the records must be preserved until the chancellor (in consultation with canonical and civil counsel) determines that the records are no longer needed.

### 3.2 – THE HISTORICAL ARCHIVE (C. 491)

The historical archive contains records of historical significance to the diocese or other ecclesiastical institution.<sup>14</sup> The diocesan

14 J.M. O’Toole, “Diocesan Archives: Twenty-Five Years of Preserving American Catholic History,” in *U.S. Catholic Historian*, vol. 16, no. 1 (1998), 1-2.



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bishop, the vicar general, the moderator of the curia, the chancellor, the archivist, and chancery notaries have access to the historical archives. Others may be granted permission. The archive is to be locked, and only the bishop and the chancellor are to have the key (c. 487 § 1). The permission of either the bishop or of *both* the moderator of the curia and the chancellor is required to enter the archive (c. 487 § 1 and *CCEO* c. 257 § 1).

Canon 487 § 2 allows interested parties to access/obtain an authentic public document (or a photocopy), personally or through a proxy. The canon does not grant the right to access private documents. The removal of any document from the archives is restricted by canon 488 (*CCEO* c. 258), except with the consent of the bishop or of *both* the moderator of the curia and the chancellor, and only for a short time. Historical documents become public after seventy years, but confidential documents remain confidential indefinitely.<sup>15</sup> Civil legislation must be consulted, and nothing from the historical archive is to be destroyed.

### 3.3 – THE SECRET ARCHIVE (CC. 489-490)

The protection of confidential church documents in a secret file originated with a 1741 decree by Pope Benedict XIV.<sup>16</sup> The 1917 Code of Canon Law mandated each diocese to maintain archives which are locked and from which documents cannot be removed (see *CIC/17* c. 379 § 1). Canons 389 and 340 of the 1983 Code govern secret archives: “In the diocesan curia there is also to be a secret archive, or at least in the common archive there is to be a safe or cabinet, completely closed and locked, which cannot be removed; in it documents to be kept secret are to be protected most securely” (c. 489 § 1). Once placed in the secret archive, documents cannot be taken out, and they can only be accessed by the diocesan bishop for consultation. Confidential documents and documents of great sensitivity are kept securely there, and the diocesan bishop is the sole custodian of the key (c. 490 § 1).

A few canons specify the documents to be kept in the secret archive, including matrimonial dispensations (c. 1082), secret marriages (c. 1133), dispensations from impediments to holy orders (cc. 1047-1048), decrees of dismissal from religious life (c.700), documents relating to loss of clerical status by dismissal, and invalidity of orders or dispensations (cc. 290-293). The Code

15 F. Morrissey, “Confidentiality, Archives and Records Management,” in *The Catholic Archive*, 26 (2006), 21.

16 Benedict XIV, Encyclical letter *Satis vobis*, 17 November 1741, nos. 10-11, <https://www.vatican.va/content/benedictus-xiv/it/documents/enciclica--i-satis-vobis-compertum--i--17-novembre-1741-il-pont.html>.

also specifies that preliminary investigations (c. 1717) and “the acts of the investigation, the decrees of the ordinary which initiated and concluded the investigation, and everything which preceded the investigation are to be kept in the secret archive of the curia” (c. 1719).

Some documents in the secret archive are kept at the discretion of the diocesan bishop to prevent scandal or illegitimate damage to someone’s good name, including priest personnel files.<sup>17</sup> It should be noted that “[...] placing personnel files in the diocesan secret archive will not suffice to shield confidential documents from court ordered disclosure in civil litigation.”<sup>18</sup>

When can records in the secret archive be destroyed? Penal or criminal case documents are to be destroyed only if there has been a canonical trial that has issued a definitive sentence. If no trial has taken place, all documents are to be kept. If the case is terminated for any other reason before a final determination of guilt or innocence, the entire file must be retained. Documents in the secret archive must be maintained until the guilty party has died, or ten years have passed from the condemnatory sentence. A summary case with the texts of the definitive sentence is to be retained permanently (c. 489 § 2 and *CCEO* c. 260 § 2).

Access to the secret archive is restricted to the diocesan bishop (c. 489) and people authorized by him (c. 490). The diocesan administrator has restricted access to the secret archive, in a case of true necessity.

On 22 October 2019 with the *motu proprio*, “For the Change of the Name of the Vatican Secret Archive to the Vatican Apostolic Archive,” Pope Francis renamed the Vatican Secret Archive the Vatican Apostolic Archive, “without prejudice to its identity, its structure and its mission.”<sup>19</sup> It may be time to begin to use language like “restricted access archive” or “reserved archive.”

17 See N.P. Cafardi, “Discovering the Secret Archives: Evidentiary Privileges for Church Records,” in *Journal of Law and Religion*, vol. 10, no. 1 (1993-1994), 97.

18 *Ibid.*, 99.

19 Pope Francis, Apostolic Letter m.p. *L’esperienza storica*, 22 October 2019, in AAS, 111 (2019), 1681- 1683, English translation in *Review for Religious*, (2020), 49-51.