

Ethical Dilemmas in Records Management

RMAA (NSW Branch) Lunch-Time Seminar 6 April, 2004

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Recordkeepers don't face ethical dilemmas because they don't have any ethics to start with. Doesn't that sound awful? The positive part of this message is that we can do something about it. Let me explain how.

Is there a distinction between ethical behaviour and acts of conscience? Where does whistle blowing fit in? I have separated out four forms of behaviour in the diagram. This is not the only way to cut the cake and the behaviours set out here are not clear cut or mutually exclusive. You could replace "ethical behaviour" with "accountable behaviour", for instance. The matrix simply helps clarify some of the issues.

<p>UNCODIFIED BEHAVIOUR</p> <p>Conflicting or Disputed Expectations</p>	<p>WHISTLEBLOWING</p> <p><i>Interfering; Renegade; Troublesome; Loose Cannon; Busybody; Courageous; Heroic; Unpredictable</i></p>	<p>INDIVIDUAL BEHAVIOUR</p> <p>Personal; Idiosyncratic; Odd</p> <p>Man Out; Live & Let Live; Doesn't Bother</p> <p>Me; Principled; One-Eyed</p>	<p>UNCERTAIN OR DISPUTED ROLE</p> <p>Not Assigned, Enforced, or Bench-Marked</p>
<p>CODIFIED BEHAVIOUR</p> <p>Agreed or Shared Expectations</p>	<p>LAW ABIDING BEHAVIOUR</p> <p><i>Enforcement; Compliance; Punishment; Good Citizen; Prohibition; Policing; Predictability; "Certainty"</i></p>	<p>ACCOUNTABLE BEHAVIOUR</p> <p>Conformity; Reliability; Credibility; Accountability; Trustworthy; Auditing; Monitoring</p>	<p>ASSIGNED OR AGREED ROLE</p> <p>Understood, Enforced, and Bench-Marked</p>
	<p>COMMON RESPONSIBILITIES</p> <p>Universal Application; Wide Impact</p>	<p>INDIVIDUAL (OR GROUP) RESPONSIBILITIES</p> <p>Particular Application; Specific Focus</p>	

Ethical and Related Behaviours

What does ethical behaviour mean for a professional records manager? It means having an effective Professional Ethical Code - a code of behaviour that tells us what to do and what not to do in professional matters. Professional ethics are not unrelated to morality, but they are distinguishable from acts of conscience. An act of conscience emanates from a moral code. A Code of Professional Ethics itemises

professional behaviours which are collectively approved as good practice (whatever we may think as individuals) or behaviours which are collectively condemned and are therefore disallowed even if individually we see do not agree with that. Without a professional code of ethics to guide us, we have only our individual morality to govern our response to difficult situations. We may well choose to act out of conscience in a professional matter, but this must not be confused with acting ethically in a professional sense.

The Banks and Gold Coast Real Estate

As it happens, there was a very good example on TV last Sunday night. One of the magazine programmes was exposing a scam in which Gold Coast real estate was being sold at inflated prices. The scheme involves people mortgaging their homes to pay for the properties by increasing the mortgage on their homes. The Banks know the new properties are over-valued but don't care because the loan is secured on another property which covers the loan. One person was asked if the Banks had an obligation to tell their clients that their investment was next to worthless. He replied : "Legally no; ethically and morally, yes". Now that I work in a Bank, I know this is not quite correct. In addition to substantial legal regulation, Banks operate under ethical codes and charters. They do take this seriously and I would expect that the Banks would say that they are not ethically bound to reveal this information either because they are not bound to do so by law or by the ethical codes and charters under which they operate. We might still believe, however, that they are morally bound to do so.

Suppose then you are a recordkeeper handling the valuations which disclose that the Bank's customers are being ripped off but the Bank you work for has no legal or ethical obligation to disclose this information to the client. What do you do?

You could take moral action. You could try to persuade the Bank to be more open with their clients. It's unlikely to happen because, in a case like this, the Bank is likely to have thought the issue through. They might say, for example, that it is not proper for them to be giving unsolicited financial advice. Maybe, as a result of Sunday's story, they'll change their code of behaviour. But what if they don't. Then you get into whistleblowing territory.

You could take it upon yourself to start informing clients individually what you know. This would probably be a breach of your conditions of employment. Would it be a breach of the RMAA's Code of Ethics? Alternatively, you might blow the whistle on the system and go public. Perhaps this wouldn't be much use. Sunday's story suggested that this sort of behaviour by the Banks was already well known.

This would be a legitimate, but unusual, form of whistleblowing. Whistleblowers are usually exposing illegal or unethical behaviour. Here, you would be trying to expose behaviour which, though both legal and ethical, was you might think (and others might agree with you) wrong all the same. **Law-Abiding Behaviour and Whistle Blowing**

Law-abiding behaviour has a wide or universal application. The responsibility or obligation applies to everyone. The rule that every man is equal before the law means that everyone is subject to the same rules (not that everyone gets an even break). Even where only some of us are involved (in a contract of employment, for

example) the principles apply to all. The way employment contracts are interpreted and applied is in accordance with statutory or common law rules whose application is universal.

The same applies to whistle blowing. Whistleblowers are do-gooders who point out when others are breaking the law or failing in a legal obligation. They're not arguing for their own moral preferences, they are pointing out that someone is breaching a code or law that applies to everyone. It's not a matter of expressing a personal preference but of highlighting a breach of rules which everyone needs to follow.

That said, it is very often the case that, although the whistleblower correctly identifies behaviour that is, in fact, illegal or improper (and no one disputes this) what they condemn is the kind of infraction at which everyone else winks. Whistleblowers see things in black and white. Rules are there to be obeyed. They just can't accept that for most of us the application of many rules is elastic and infractions are tolerated and winked at. We even have a term for it, we call them "technical" infractions. Whistleblowers don't understand technical infractions.

When I visit Bronte Beach, I see lots of signs forbidding organised ball games, dogs, running, and host of other things which, when I look around, almost everyone is doing. No one is showing the least concern about it. If I took steps to urge the Council to enforce these by laws, I would be a whistleblower. The whistleblower is the most law abiding person you'll ever meet. The trouble is, they often blow the whistle when no one wants them to. No one thanks them for it. Whistleblowers are usually vilified, not because they're wrong, or because they're not law-abiding, but because their interference is resented.

But this mood can change very rapidly. Recently, we saw nurses in Sydney's south west who tried to blow the whistle on medical malpractice being given the usual treatment : intimidation, threats, the cold shoulder, ministerial arrogance, and (it was alleged) tampering with the records. All the usual stuff. Some of the nurses were forced to resign. But, in this case (it doesn't often happen), the mood turned. The scandal was exposed. People were dying. This wasn't something to be winked at. This was something people cared about. Public opinion (usually indifferent) became engaged and enraged – not just because deaths were involved but also because the whistleblowers who had tried to do something about it had been ignored and badly treated. This time, the whistleblowers became heroes. Other people's heads rolled. But there's a paradox here. I don't know about you, but I felt there was no real appreciation of them as whistleblowers. I thought the public mood was that they were individually heroic; that they were admired because of what was perceived as their moral courage - their conscience. Deep down, we don't really like snitches.

Ethical and Moral Behaviours

I am here drawing a distinction between Professional Ethics and Morals. Ethical behaviour typically applies only to a select group whose behaviour is regulated in relation to some particular aspect of their lives – very often their profession or an activity in which they are employed (doctors, lawyers, engineers and, we are here to ask, recordkeepers). Some footballers are currently being vilified for poor behaviour. Most people would regard what they are accused of as immoral and some of it, if proven, would be illegal. But I gain the impression that there are expectations on

them - expectations of footballers - which are different and more stringent than the moral and legal obligations we all share. I sense that they are felt (by some) to have transgressed beyond just legal and moral considerations and to have breached some standard of behaviour which applies only to footballers. There is a sense that some special requirement is on footballers which has now been violated. I'm not sure what that is. Maybe the public is confused. It's not clear whether they are being blamed for being found out (it's alright to do it, but getting found out harms the game and that's wrong) or for submitting to a "culture" of wrongdoing which footballers, in particular, should have resisted (they've let us all down by not living up to the high ideals of the game).

Morals (acts of conscience) apply to all aspects of a person's life, but ethics usually relate to only some aspect of a person's behaviour. Ethics apply to everyone within a select group, but only to that part of their behaviour connected to activity covered by their ethical code (such as, their professional, as distinct from their private, life). Morals apply to everything a person does, but moral codes are not usually accepted by everyone, nor are they binding on everyone (except, perhaps, in a theological sense). Everyone is obliged to comply with the law, conforming to a moral code is a personal choice. Ethics and morals can be in conflict – as, for example, when a Catholic doctor is called upon to perform an abortion - an ethically acceptable medical procedure.

Ethical responsibilities have a particular focus and a selective application. In a pluralistic society, we refer to moral behaviour where there is no social obligation to conform to a particular moral code. Moral behaviour, according to a person's beliefs, may be seen as admirable or detestable. Some people, prompted by religion or aesthetics, may object to near nudity on moral grounds but in our society such objections are a matter of personal choice because such scruples are not enshrined as behaviours to which all must conform. Some societies seek to make moral behaviour uniform so that it is no longer uncertain or disputed; but that is not so with us.

Ethical and law-abiding behaviours are both codified in some way. There must be agreed, or shared, or at least knowable expectations. Legally, this is to be found in statutes and in the common law precedents laid out by our courts. Or, it may be found in municipal by-laws or club rules. Complying with these rules is not ethical behaviour it is compliant behaviour. Nevertheless, ethical behaviour must be similarly codified. Moral behaviour that is uncoded may be referred to as acts of conscience. The distinction is that, socially speaking, an act of conscience is an individual act conforming to no agreed or shared expectation

Most of us have to be accountable as employees. Employers have their own methods for ensuring performance (performance agreements, KRA's, etc.). Does a professional obligation ever over-ride the terms of a contract of employment? Is it an implied term of any employment contract between an employer and a professional that some professional obligations relieve the employee of their contractual obligations? Does conformity to professional obligations in defiance of an employer's wishes justify dismissal?

After the last State election, it was revealed that reports of faults in railway bridges had been covered up and trains kept running until after the election to avoid

embarrassing the Government. During the public debate that followed a representative of the Engineers made a statement that an engineer knowing of a faulty structure which could endanger life had an ethical obligation to reveal it even if this breached the terms of his or her employment. Could recordkeepers ever find themselves in that position?

Ethical Codes

Being ethical is a sub-set of being accountable. This is not the same as being moral. Being accountable means :

- clarity of role (knowing who is accountable and to whom)
- clarity of function (knowing what are you accountable for)
- measurement (having standards or bench-marks to be measured by)
- monitoring (some method of punishing or correcting deviance)

Do we have accountabilities outside the terms of our employment - to society, to our profession, or as agents of accountability. Transparency International (Global Corruption Report, 2003) has concluded (p. 19) that “When we campaign for greater access ... we must at the same time campaign for improved records management ... There seems little point in having access to information that is chaotic and unreliable”. Are we accountable for preventing chaotic and unreliable recordkeeping? Where does it say that? How do I know what chaos and unreliability is when I see it? What keeps me up to the mark? Is there a mark to be kept up to? If so, who or what keeps me there?

There is a distinction between ethics and accountability, but they have this in common –

- roles and functions must be properly defined and clearly assigned
- there must be a standard, code or bench-mark to go by
- there must be a check to ensure behaviour conforms to the code.

Clarity of Role & Function

There is surprisingly little role analysis in our literature. Let us consider for a moment what might be involved.

- There must be a record
- It has to be useable
- It has to be protected and preserved from concealment or distortion.

An enterprise which encompasses accountable and ethical behaviour is a learning enterprise. Accountability is a sanctioned mechanism for ensuring you learn from mistakes. If such a mechanism does not exist, if learning from mistakes is not sanctioned, then individuals are compelled to respond to wrong-doing, flaws, and systemic failures by acts of conscience and by whistle blowing.

Well enforced whistleblower laws' are desirable to protect this last line of defence against recordkeeping lapses, but whistle blowing (or any act of exceptional courage) is not enough. We need systems that make exceptional acts of courage unnecessary. I'm not against whistle blowing, I would just add the caution that too much emphasis on whistle blowing as 'our last line of defence' distracts the eye from the main game - viz. systemic solutions which provide safeguards against recordkeeping failures. There is lack of clarity around the definition and assignment of recordkeeping roles and functions in relation to accountability. It is too easy for recordkeepers to become confused or bamboozled (or, worse, to use the confusion to slip out of responsibility). Clear accountability must be clearly assigned. There is a lack of benchmarks and check mechanisms by which to judge recordkeepers in the performance of their assigned role and function (if any). Some people point to the codes of ethics in this regard. I invite you to examine those that are up on the websites of the professional bodies (ASA & RMAA¹). They fail for want of certainty. An ethical code must be sufficiently detailed, specific, and unambiguous that - in a particular instance - it determines an outcome that is different from the one which would otherwise occur. Otherwise it is just good advice.

The RMAA Code is short and devoid of specific meaning. The ASA Code is longer and includes a lot of stuff about collection management, reading room ethics and delivery of third party access, some of it equally relevant (of course) to records managers. There is nothing about appraisal, completeness, authenticity, etc. except for this :

1.1.1 Archivists take care to know of, and endeavour to comply with, legal requirements pertaining to the creation, disposal, access and copying of data regardless of format.

"Endeavour to comply ...", not "comply", just "endeavour" and only with legal requirements, mind you, nothing else. "Yes, gov', you got me bang to rights, but I plead not guilty on the grounds of endeavour." ASA may have intended it to mean that you should obey the law if you can but not at the expense of professional obligations (i.e. that it's OK to break the law sometimes on ethical grounds) but I doubt it. The collection management and access stuff is obviously borrowed from the ethical codes of other professions. They are not specific to recordkeeping. They are issues we share with others. Something needs to be said, but if you strip them out of the ASA Code, what you have left is pretty much like the RMAA Code - short, unspecific, and devoid of meaning which would enable it to be applied.

Critiquing these and other ethical codes badly needs doing, but at greater length than is possible here. I don't, therefore, ask you to accept my view that they are worthless. There are three possible views :

- They're worthless.
- They're everything they need to be.

¹ The Australian Society of Archivists (ASA) Code of Ethics may be found at - <http://www.archivists.org.au/about/ethics.html> and the Records Management Association of Australasia (RMAA) Code of Ethics is at - <http://www.rmaa.com.au/docs/membership/codeofethics.cfm>.

- They go some part of the way, but need improvement.

Even if the codes of ethics were adequate, however, another question remains : what are we responsible for –

- technical proficiency (as providers or enablers)?
- policing (as monitors or enforcers of recordkeeping standards)?
- support (as standard setters or educators)?

In other words, is it clear :

- who we are accountable to (employers, society, third parties, or the profession)
- what we are accountable for (ordaining, providing, mentoring, monitoring, policing, auditing, etc.)
- how our performance should be measured (conformance to process or quality of outcome)
- by whom (or how) our performance can be monitored and corrected.

Are we accountable to our Nazi employers for building a better recordkeeping system to count heads as they pass into the gas chamber? If we refuse to do so, is it merely an act of personal conscience, or a duty to society, or is it in obedience to professional standards?

How can we feel secure about recordkeeping if people like us are not punished for violating the standards of our profession? How can people know whether we are acting well if there is no process for evaluating our performance? How can anyone evaluate our performance if there are no standards or benchmarks by which to measure it? How could such benchmarks (if they existed) be applied if our role and function is unclear (i.e. if our responsibility for conforming to those benchmarks is not established)?

To put it in its bluntest form : what is the use of a professional standard or code of ethics which is so elastic that it cannot possibly ever bring the professional employee into conflict with his or her employer or under disciplinary correction by a professional board or tribunal? In this regard, the violation of a procedure or technique is not the heart of the matter. Of far more weight are questions of outcome and purpose - directed to the issue what we are responsible for (and to whom).

There needs to be clarity over the range of possible roles and functions. Then roles and responsibilities need to be clearly assigned. Standards have to be developed. Benchmarks have to be figured out based on those standards. A system is needed to monitor and enforce those benchmarks.

The recordkeeping profession does not (and, in the absence of further work) cannot act ethically and, I would argue, cannot act accountably either. This is based on the twin observations that

- roles and functions are not properly defined and assigned and
- (even if they were) there is no check to ensure that we are carrying out our assigned roles and functions.

ICAC, Corruption, and Accountability

A few weeks ago the head of Sydney's Ferries was summarily sacked. I wasn't able to follow the case blow by blow, but it was initially stated that there was no reason (apart from vague references to recent operational troubles) and that the man's contract allowed the Transport CEO to dismiss him without having to state a reason - effectively, dismissal without cause. Then, after the issue started to become political, it was suggested that corruption was involved and there had been an ICAC² investigation. So far as I can tell, there was no ICAC finding and, I think I recall correctly, ICAC said so. Ordinarily, mere investigation, in the absence of an adverse finding, would not justify dismissal.

NSW has (or once had) a definition of corruption. I didn't have time to check if this is still the case, but the old definition and its application in the Greiner Affair illustrates my point. You are (or were) corrupt in NSW public life if you are found to have committed either -

- an illegal act, or
- a breach of a code of behaviour by which you are bound.

Ian Temby found Premier Nick Greiner had acted corruptly. Greiner had offered a place to Terry Metherell with the purpose of removing him from Parliament to the advantage of the governing party. Eventually, the courts found in Greiner's favour. The court's reasoning was that Greiner had not acted illegally. The sole basis for a finding of corruption was, therefore, if he had breached a code of behaviour by which he was bound. The courts found that, although public servants and other officials were bound by well established codes of behaviour, politicians were subject to none of them. In effect, unless they break the law, politicians can't be corrupt in NSW because they have no ethics.

That, in my submission, is our case also. That is our case. We don't have any ethical dilemmas because we have no ethics to speak of.

We have it in our power to do something about this. We can explore what is needed to develop and apply effective codes of behaviour. But that task is ahead of us. Those we have give the appearance, not the substance, of a code of behaviour.

In the Greiner case, as I have somewhat facetiously described it, it was not argued that there were no codes of behaviour. It was argued that they did not apply to politicians. There lies the importance of role definition. It's not enough to have a code of behaviour. It must clearly apply to you. You must be under an obligation to conform to it. So even if you think the codes we have aren't flawed in the way I suggest, you're still not out of the woods.

² Independent Commission Against Corruption

It wasn't that there were no codes. It was that Greiner's role and function (as Premier) did not oblige him to conduct himself in accordance with those codes. Getting effective codes of behaviour for recordkeepers is only half the battle. It must also be clear that it is our role and function to behave in accordance with those codes. This obligation might be written into our contracts of employment or, more controversially, it might be written into our statements of professional obligation - obligations which operate outside of our commitments to our employers. Employers recognise that, when they employ a doctor or a lawyer, they will have ethical restrictions which the person who pays them cannot require them to breach. It is not yet so, I feel, with recordkeepers. This is no reason not to strive for it.

Some people may argue that the Records Management Standard (AS ISO 15489) supplies the code of behaviour and (by implication) the warrant to act ethically or, at least, accountably. Like the Codes of Ethics, these documents deserve a more detailed analysis in this regard than I am able to give them now.

In the time available here, let me just sketch the bare bones of my case that the Standard, for all its merits, doesn't support either ethical or accountable behaviour.

- It is primarily technical : it tells you how to do it, not what to do.
- It is reliant on other codes and principles; the ethical heart has been ripped out of it.
- It exhorts, it does not prescribe; nothing (or almost nothing) is prohibited.

I raise this not to criticise the Standard (which does not set out to be a professional code of ethics) but because some people (including some of its authors) have endeavoured to persuade me that the Standard serves in place of an ethical code. It doesn't.

None of us here can just go home now and write a better code of ethics and then ask our associations to endorse and issue them. That is not what professional ethics is about. A professional code of ethics must represent an agreed (and, preferably, passionately held) collective view about what is approved and what is disallowed professional behaviour. We haven't got that because we haven't considered it in enough depth or with enough passion. If better codes emerge, it can only be from a collective will, not from an individual's effort³. But before the collective will can be ascertained, we have to become sufficiently stirred to know that we need a professional ethical standard. I am not in the least abashed about presenting you

³ The ASA's Code is almost entirely the work of one person - Anne Mitchell (with the assistance of a few others). She worked tirelessly for several years to get "buy-in" from the rest of the profession. My sense (I stand ready to be corrected) was that there was very little interest in the draft Code. Certainly not wholistic interest. At best, people glanced over it to see if there was any clause they weren't comfortable with. But there was, in my view, very little engagement with it as a positive statement of intent. The result was a chipping away at Anne's draft rather than a building of a professional consensus. Eventually it was approved, I felt, as a result of exhaustion rather than any collective sense of accomplishment. This is not a criticism of Anne Mitchell who deserves praise for persisting with so little encouragement.

here with a problem and no solution. It is the nature of professional ethics that no "I" can ever do that⁴. Only "we" can do that.

Together, we can find a solution. But not before we have first agreed together that there is a problem.

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⁴ Or, to paraphrase Sir Humphrey Appleby : no ethical code can ever be embodied in the perpendicular pronoun.