# Data protection in the archives world – fundamental right or additional burden?

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## ABSTRACT

Since the very existence of the archiving institutions, they store and make available information which may be considered as "personal data", in the current sense of this concept. The development of the modern IT infrastructure and threats to the privacy of the individuals associated with it generated, during the last quarter of the 20th century, the establishment of comprehensive data protection legislation on international, European, national and even subnational level. Even if the archiving of personal data was not originally considered as a significant threat to privacy, the development of the data protection rules brought a profound impact on archiving processes. Firstly, the data protection rules are contributing to limit personal information from being archived, thus limiting the amount and quality of information being preserved for future generations. Secondly, when "personal data" are archived, their accessibility is likely to be limited, creating a burden for the archiving institutions and a restriction for the users of the archives, in particular researchers.

The existing data protection legislation attempts to balance the conflicting rights to privacy and data protection on the one hand and preservation and accessibility of archives on the other hand.

## CONTENT

At the European level the fundamental rights to privacy and data protection are recognised by Article 8 of the European Convention of Human Rights[1] and Articles 7 and 8 of the EU Charter of Fundamental Rights[2]. More specifically, the right to the protection of personal data is regulated by the Council of Europe Convention 108 of 1981[3] and the EU Directive (EC) 95/46 of 1995[4]. The national legislations on the protection of personal data should in principle be in line with these European instruments. As the processing of personal data by the institutions and other bodies of the European Union is concerned, Regulation (EC) 45/2001[5] is applicable to them.

The first and potentially fundamental impact of these rules on archiving is the application of the data minimisation and data retention principles. In fact, the personal data must be adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed (Art 6.1.(c). of the Directive (EC) 95/46)[4]. The correct application of this principle limits the amount of data collected and subsequently archived. More importantly, the data must be kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed (Art 6.1.(e) of the Directive (EC) 95/46)[4]. Even if exceptions for the historical and scientific use of data exist in the current legislation, the amount of personal data deposited in archives is likely to be limited. The risks for destruction of data which are used to justify some subjective rights is probably overstated; these data, like population registers or notarial acts, are being preserved under the specific national legalisation. However, it is likely that personal data which is not legally necessary to be preserved but which constitutes a memory of a society in a particular moment of history will not be preserved in the archives. They will perhaps be preserved by private actors on the archives of the internet… The role of specific record keeping institutions as guardians of the collective memory is being redefined and their role challenged by other forms of preservation of records of human activity.

When personal information is present in an archive, the first issue that an archivist faces is whether data protection rules apply. Their application is limited to the "personal data" defined as "information relating to an identified or identifiable natural person". The scope of this definition is wide: it concerns not only information related to private live but also to the professional activities of a person, it covers all forms and supports of information (paper, electronic, sound, image,…). It has, at least in the large majority of jurisdictions, an important limitation: data protection rules apply only to living individuals and therefore concern only recent records. In absence of the regulation on the European level, various national regimes coexist in case when it is impossible or excessively difficult to establish whether a person is living. For instance, a person might be considered deceased, and therefore all records concerning him/her not falling under data protection rules, 100 years after birth.

In case the data protection rules do apply, the "data controller", which will in principle be the record keeping institution, has to inform the persons concerned about the processing of their personal data. Such information should include notably the identity of the controller, the purposes of the processing and, if applicable, the data processed, the recipients, etc. There is however no obligation to inform the person concerned if the provision of such information proves impossible or would involve a disproportionate effort or if recording or disclosure is expressly laid down by law, in particular for processing for the purposes of historical or scientific research. But in these cases appropriate safeguards for the persons concerned should still be provided.

Another consequence of the application of the data protection rules is the right of the person concerned to access his or her data, request their rectification, object to the data processing or even request the data to be deleted. The recent judgement of the Court of justice of the EU in ruling concerning Google (case C-131/12 of 13 May 2014) was precisely related to a right to be forgotten by internet search engines.

The obligations of confidentiality and security of data have a consequence on the accessibility of the data. In principle only persons who are subjects of the records may be granted access to them, except if the access is permitted on the base of a specific legislation. Access by third parties should in principle be allowed

only for a legitimate purpose and be subject to an appropriate contract imposing an obligation of confidentiality.

Constraints flowing from the data protection legislation may impose the conservation of the personal data in anonymous and/or pseudonymised form which normally will not be considered as personal data.

The medium on which data are preserved play a very important role in striking the right balance between the legitimate public interest in research and the rights of individuals. There is obviously a fundamental difference between the conservation of data in paper files and on electronic storage which can be easily accessed and researched via the internet.

The new EU Data Protection regulation, which will eventually become directly applicable in all the EEE Member States, is still in a preparatory phase. The data processing regime for archiving purposes is the subject of negotiations between the actors of the legislative process. The new regime will have to define the balance between different freedoms, individual rights and public and private interests; specify the “appropriate safeguards” for the persons concerned by the data processing by the archives; determine the scope of access to personal data and define the space left to the national and European legislator in the implementation of data protection in the context of archiving.

## REFERENCES


[1] European Convention of Human Rights. http://www.echr.coe.int/Documents/Convention_ENG.pdf

[2] Charter of the Fundamental Rights of the European Union. 2012/C 326/02 http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT

[3] Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data http://conventions.coe.int/Treaty/en/Treaties/html/108.htm

[4] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:31995L0046

[5] Regulation (EC) No 45/2001 of the European Parliament and the Council of 18 December2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:008:0001:0022:en:PDF