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THE LONG-TERM PRESERVATION OF IDENTIFIABLE PERSONAL DATA: A COMPARATIVE ARCHIVAL PERSPECTIVE ON PRIVACY REGULATORY MODELS IN THE EUROPEAN UNION, AUSTRALIA, CANADA AND THE UNITED STATES

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The ethical and legal obligations of recordkeeping participants (record creators, recipients of the communication and/or of the action, the record subject, third party users and preservers), in relation to privacy requires balancing the protection of personal information from inappropriate collection, use and disclosure, with its preservation for record accuracy, reliability and authenticity essential to societal, corporate and personal accountability. Privacy and data protection legislation generally conforms with the international privacy principle that personal information should only be collected, used or disclosed for its primary or original purpose, and that its use and disclosure for secondary or other purposes is subject to strict limitations. On the basis of this principle, legislative initiatives in many countries mandate the destruction or the de-identification of personal information once its primary purpose has ceased, which means personal data is unlikely to reach an archive or be available for future research. A prime responsibility of archivists is to ensure that records are preserved for other purposes that may not be apparent to their primary one. The question is whether the central privacy principle and the limitations it provides are sufficient to satisfy the recordkeeping principle of reliable and authentic records that have other uses not envisaged by their original purpose.

Privacy legislation and codes include provisions that affect accuracy, reliability, authenticity and preservation of records. Within the European Community, article 6 (1)(b) of Directive 95/46/EC allows further processing for 'historical, statistical or scientific purposes', but only when appropriate safeguards are in place. Not all EC member states have interpreted Article 6 (1)(b) in the same way. Can archival institutions or preservers rely on these provisions for archival preservation of personal data? What about the private sector [compatibility issue]? What are the archival consequences of privacy requirements on records creators? Is the fundamental right to privacy wider than the data protection issue?

This paper reports on key findings of a comparative study of privacy regulatory models and their 'archiving' provisions. It analyses some specific archival exemptions in privacy legislation for historical research in European Community countries, and comparable

provisions of Australian, American, and Canadian law as they impact on long-term preservation of personal data in electronic records. In addition, mini-case studies illustrate the fine balance of the issues discussed, and their global context. The research concludes that the general EC Data Protection directive introduced not total harmonisation, but an extremely full and detailed regime that required many member states to revamp substantially their privacy provisions, but there are important differences in how the archival perspective has been addressed.

Third party interests including that of researchers and archivists are often excluded from the privacy legislative framework. The archival notion of 'lapse of time' on de-sensitising personal information has been one of the major arguments supporting the eventual disclosure of personal information to third parties. This principle must be given due weight in privacy laws. The role of trusted third parties in protecting privacy is often overlooked in privacy legislation. In the public sector this has been the role of government archival authorities in regulating access and appraisal of records, for example exemptions from privacy acts for archival authorities or organisations that hold long-term personal data. Preservation of personal data in its digital form and in particular when used in networked environments must involve attention to the technical detail of electronic archives without losing a handle on the broader legal and moral issues. The uncertainty of the extent to which data may be personal may further deter the preservation of websites or other dynamic records. Stronger privacy legislation can however enhance record integrity. For example by minimising control over unauthorised access to, distribution of and tampering with personal data in electronic networks. In addition 'privacy enhancing technologies' that anonmise data provide further privacy protection, if they are reversible.

The interrelationship of archival, privacy and FOI legislative regimes, and which laws take precedence affects the archival case for preserving personal data. The Australian, Canadian and American regimes are a point in case. The public and private sector is another area of concern, with preservation strategies more likely to be in place for the former. The interpretation of 'other uses' or 'further processing' in privacy law will vary from one jurisdiction to another. However, if 'historical' and other research or archival exemptions in privacy laws are read narrowly, as processes that take place *after* personal information has been collected, and in fact constitute further 'processing' of personal data that is not allowable, they become ineffective in protecting personal data from destruction and long-term preservation. Archives cannot preserve what has not survived, but even early appraisal decisions may not always get around privacy issues. It may be that the consideration of these issues early is essential for the archival policy agenda. The Belgian position supports adopting appraisal and preservation processes well into the first stages of record creation. Basically the incidence of personal data as an integral part of the record (and possibly essential to its being seen as authentic) means that there is another statutory default running in the opposite direction to the privacy one.

The policy recommendations arising from this paper are to promote the addition of archival and researcher ethics codes into the privacy legislative framework, as has been done in Italy. That this has not been achieved elsewhere in the European Union is partly owing to the complexity of the issues and the contradictions in other policy areas that

need to be balanced. Privacy needs to be integrated with freedom of information legislation, archival regimes and more needs to be done to promote the preservation of archives by private sector organisations. For the future good of archives it is vital that a wide scope of interpretation be given to what in terms of uses is deemed to be permitted ‘further processing’ where these are additional to the primary purpose of the creator.