



## **Data Protection and ‘Archiving purposes in the public interest.’**

### 1. Introduction and definitions

The 2016 EU data protection regulation (GDPR) contains a new regulatory term “archiving purposes in the public interest” related to safeguards and derogations e.g. in article 89(3). In this paper, ARA defines ‘archiving purposes’ conservatively, ie the ‘reason for existing’ or their ‘justification’ rather than a more liberal, deterministic definition (eg, their goal, ‘ambition’ or ‘conviction’). In this way, ‘archiving purposes’ helps distinguish the **‘custodial function’** and importance of acquiring, preserving and providing access to personal data in archives from **‘customers’** or users of archives for research, academic, journalistic or other purposes.

Archives have many legitimate established ‘uses’ in the public interest, including scientific and historical research and statistical utility. Previously, the UK Data Protection Act had specific conditional exemptions for “research purposes,” including statistical and historical purposes. Such exemptions were successful in striking a balance between the rights of data subjects and the legitimate needs of researchers and, ideally, should be maintained in implementation of the GDPR.

The broader ‘public interest’ dimension for archives is a welcome new concept in the GDPR and offers the potential to establish the wider benefits of archiving. The following reflects ARA’s view on how the term ‘archiving purposes in the public interest’ should be elaborated both as a value statement in its own right (eg, to help inform future policy and laws) and to inform applications for specific derogations under the GDPR (see our second paper).

The following comprises ARA’s views on the issues around “archiving purposes in the public interest.” We have seen a text produced by the National Archives and have included elements from that document where we agree. ARA’s views are aimed at stimulating debate and informing policy-makers: they range more widely, as ARA has membership, expertise and interests across the sector.

### 2. What are ‘archiving purposes in the public interest’?

**All archiving purposes serve the public interest:** we cannot conceive of any situation where recording and storing records in - and the ability to retrieve them from - any archive would not be in the public interest. Further, any definition of ‘archiving purposes in the public interest’ should start by acknowledging the full breadth and diversity of the archiving sector and ownership of archives. The breadth is increasing exponentially in the digital age as citizens increasingly archive their own files, personal photographs, correspondence, and so on in the Cloud and other digital media.

Archiving is the principal means for securing accountability, audit, accuracy and objectivity of information held in a society. Government papers that are transferred to a national public archive are **one very small part** of an archiving community where decisions and decision-makers are recorded, their contributory factors and reasons addressed and assessed, and where evidential failures or omissions can be identified. Records pertinent to individual questions or issues are seldom held only in one place: fragments may be held in several places, including a mix of public and private archives. Therefore, maintaining the integrity of archives across all of the public, private and voluntary sectors, ensures that the record is as complete as possible and can serve the present and future public interest – eg public inquiries, civil litigation, commercial transactions, judicial investigations, probate, etc.

In the case of archiving, ‘private profit’ and ‘public interest’ are complementary and **not** contradictory. The vast majority of archives – many thousands in the UK alone - are run by private individuals, membership organisations or local groups – eg families and individuals, businesses, local communities, trades unions and non-governmental organisations. Such archives are usually resourced, staffed and managed solely through private means. But they routinely allow access to researchers, journalists and individual citizens on a completely free, pay-for or restricted basis. (Some archives are closed to researchers for decades into the future but can be said to exist in the future public interest).

Archiving purposes also serve the economic interests of society. Music, film, art, internet-based, photographic and many other copyright-commercial archives are an established part of our business landscape as well as providing a vital educational resource in the public interest. They also employ thousands of skilled people and generate significant amounts in tax and export earnings. Without such private collections, legitimate public interests could be harmed. **Further, the owners of private archives are not obliged to maintain them. Any actions by government or in law that make it more difficult, legally riskier or more bureaucratic to resource and manage an archive could have the (perhaps unintended) consequence of collections being destroyed, broken up, sold or allowed to decay.**

Archiving is also an attribute of a civilised, democratic society. The ability to learn from the experience of past human activity and engage in informed discourse, even about the distant past, is one of the keys to the development and maintenance of modern civilisation. Alongside this sits the recognition of the inherent importance of recording and storing information and evidence for future use – as both a professional skill and as a public ‘good’ - independently of direct human memory or interaction. Humans have routinely created records across history to support current personal, cultural or business activity. But their records have provided value many decades and centuries after their time, and very often for purposes beyond those originally intended. Similarly, it is impossible to place a future ‘value’ now on items held currently in any archive – it may only be several generations before a fragment of information leads to a major discovery or provides crucial insight into a major question.

Archives avoid dependence on fallible (or selective) human memory, helping people recall what was said, done or seen in previous times. And, as **primary sources**, archived materials

do not look after themselves; they require the specialist conservation and preservation skills of professionals, whether several centuries-old documents or born-digital records. For records to retain their value and integrity, and (crucially) to maintain their impartiality in bearing witness to past events, it is vital that personal data is retained in archived material. Arbitrarily removing personal data from archives would be akin to removing its 'DNA' and corrupting the historical, commercial and social record.

Finally, even archives that might be perceived as part of the public sector – such as university archives and private collections held in public places of deposit – have no statutory basis and may be at risk as part of the GDPR's stipulation that archives require a 'legal obligation' to carry out their functions or provide services. Many **university archives** in the UK, for example, have no formal legal basis or obligation to operate an archive. The permissive environment of the common law has enabled them and thousands of other public and private archives to flourish, and it should be the government's objective to ensure that this successful model continues into the future without hindrance.

Records are the product or by-product of human activity and necessarily contain traces of identifiable individuals and their data as agents or subjects in those interactions. Archiving purposes generally cover the later stages of a document life-cycle, that is to say records, or accumulating series of records, considered for, or determined (by archival and records professionals) to be worthy of permanent preservation and transferred to archival institutions or archival functions within an organisation. But there is increasing overlap in the documentary life-cycle in the digital age as records are transferred electronically. Archives are intrinsically linked to the earlier stages of a document life-cycle, the creation of records and the specialist records managers who oversee them.

In order for the transfer of records to archival custody to take place, the bodies creating or using them for a current business purpose must be able to carry out appropriate actions such as identifying and selecting records for retention and transferring them to archival custody whether to an external body or an internal archival function. Bodies and individuals that create records should therefore **also be covered by the concept of archiving purposes in the public interest** to the extent necessary to enable them to lawfully and professionally carry out these actions. For example, under the UK Public Records Act, government departments are responsible for selection and safekeeping of records prior to transfer. These processes are necessary to protect the integrity and authenticity of records identified as worthy of permanent preservation. However, in the private and voluntary sectors, and parts of the public sector, there is no such archival and transfer legislation defining responsibilities, making it even more important that some wider provision is made in law to cover these groups when the GDPR enters into force.

The concept of archiving includes **arrangement, organisation and cataloguing of material**. Materials being archived are usually unique in content and context (unlike a library) because overwhelmingly they are not published to the world at large at creation but arranged according to the business process that created them. Once in a public sector archive, under existing

provisions, personal data is likely to be unavailable to the public for several decades to protect the privacy rights of individual. However, this may not be the case in the vast majority of archives in the private and voluntary sectors. In any case, all archives need to be able to **process personal data as part of their roles as custodians and cataloguers well in advance of use of personal data by future researchers**. This is essential if archives are to ensure the survival of records to enable future research.

(The above points show why, in the context of the GDPR, a clear statement by government is needed, to the effect that all archiving purposes are in the public interest. Further, any UK legislation that flows from the GDPR – ideally secondary legislation – should make clear that established practice in the UK archive sector to date should both continue unchanged and constitutes a valid legal basis in terms of conformity with the GDPR.)

### 3. Existing definitions and terms relating to archives

#### - UNESCO universal declaration on archives

The International Council on Archives (ICA) brings together archive professionals from across the globe. The ICA initiated the **Universal Declaration on Archives** that was adopted in Paris by the UNESCO on 10 November 2011. UNESCO encourages its Member States (like the UK) to be guided by the principles set out in the declaration. Among other things, the declaration takes the universal view and does not distinguish between public and privately-owned archives when assessing the public interest. The declaration states that:

“Archives record decisions, actions and memories. Archives are a unique and irreplaceable heritage passed from one generation to another. Archives are managed from creation to preserve their value and meaning. They are authoritative sources of information underpinning accountable and transparent administrative actions. They play an essential role in the development of societies by safeguarding and contributing to individual and community memory. Open access to archives enriches our knowledge of human society, promotes democracy, protects citizens’ rights and enhances the quality of life.”

#### - EU Council of Ministers

In a 2003 resolution, the European Council of Ministers stressed the importance of archives for the understanding of the history and culture of Europe. In particular, that “**well-kept and accessible**” archives contribute to the democratic functioning of society. In its view, such well-kept and accessible archives:

- Provide individuals, organisations and states with the evidence that enables them to justify their rights
- Enable citizens to exercise their right of access to official information and the state to account for its actions

- Preserve the memory of society by constituting the sources of its individual and collective history
- Enhance the sound functioning of public and private, administrative and commercial organisations.
- Freedom of Information

Archiving aids public debate through the freedom of information. If archives are in poor condition and difficult to use, the ability to consult them and extract value from them is diminished, along with the citizen's ability to enforce his right to information. However, the value of archives to society is broader than accountability. Private and charitable archives underpin much of our knowledge of inheritance, reputation and asset ownership, including economic transactions and valuations.

### **What are not 'archiving purposes'?**

- Not information held in current records (or records management of current records) with ephemeral value or documents/electronic files scheduled for destruction
- Not operational research for an existing business purpose by the initial data controller
- Different from separate IT terms used for aggregation of digital files in one wrapper or making a back up
- Not for storing unselected information that is no longer current (ie, not a data dump)

### **Areas in the GDPR relevant to assessing archiving purposes in the public interest**

- Processing relates to purpose by an archival custodian to acquire, preserve, appraise, arrange, describe, communicate, promote, disseminate and, when appropriate, provide access to records of enduring value [recital 158] (NB includes pre transfer processing by creator bodies)
- Meeting professional standards to show that archives are well managed to protect the records and ensure authenticity and integrity
- Intention is for permanent preservation
- Intention is for public access at appropriate time where regulations and conditions of material permit or to enable future research or other compatible purposes of processing which are in the public interest (for example a charitable purpose)
- An active process, eg stored in a managed environment with controlled access.

### **Additional requirements**

A 'code of practice' for the archives and records sector relating to the GDPR and defining 'archiving purposes in the public interest' may be required to inform best practice in the sector and act as a guide to policymakers. ARA (as the leading membership and professional body in the sector) stands ready to produce such a draft.

ARA

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