UK / EU information rights balance of competences: data protection and archives

UK Background

The UK archives sector has a challenging task complying with data protection law, given its imperatives to increase public access and at the same time manage personal data frequently at a more granular level (personal data or records redacted of it) than the traditional unit of production (the record). It is also a challenge for archives to retro-fit DP compliant practice onto accumulations of manual records many of which were received prior to the 1984 Act, let alone 1998. Further still, usable archives require the presence of personal data: historical and other research depends on the human interest stories as do the accountability and evidential functions of archives.

The Data Protection Act 1984 had little relevance for the sector, owing to the then low level of digital processing by them and the focus on commercial direct marketing. By the time of the transposition of the 1995 Directive, initiatives to increase public access through digitisation and online cataloguing projects had increased the relevance of archival data processing as had the advent of born-digital records. The Directive, though, was shy of tackling analogue personal data head on. It also provided or a general research-related exemption (Research, History and Statistics) as well as deference to national laws on many issues, including archives.

The UK transposition of 1998 took several approaches that we would now consider to be "gold plating", particularly as regards the bringing in of many manual records within data protection: this was not done elsewhere in Europe.

The 1998 regime has constrained archival processing in several key areas:

1 Problems with determining when data subjects are deceased, taking processing out of the personal data definition;
2. The ability to host and index personal data on the internet;
3. The viability in some cases of commercial licensing partnerships to increase access through digitisation, even at the level of feasibility studies.

The advent of Freedom of Information legislation in 2000-05 has introduced a legal duty to disclose information in archives that is not exempt. This is a complex matter usually requiring consideration of information *contained in* records rather than an overall judgement about records as a unit and fine shadings of fairness and legality as regards the data protection principles. Most European archival systems have long closure periods for records and in some cases far beyond 100 years: far easier for archives to administer, but far less open.

Differences in archival systems

European archival systems are mostly less constrained than that in the UK owing to a more thorough statutory underpin, less strict FOIA regimes, but also in part from civil law systems. Whilst most of the activities of UK local government archives (approximately half the sector) are carried out under discretionary powers rather than specific legal obligations and the private sector has little legislation to comply with beyond DPA itself and legislation concerning sector- specific record types or common types such as financial, employment and health and safety records. Discretionary or permissive powers are insufficient to qualify the new data protection restrictions on processing now proposed. It is possible to imagine a situation where a greater legal definition of the archives sector might have to exist in UK national legislation. The GDPR could push some public UK archives towards longer closure periods as well as increase overheads. It could outlaw certain current processing by private sector archives or by excessive regulation make the continuation of them so onerous as to cause their sponsors to withdraw.

Issues with the original proposal

Issues with the European Commission's original proposal as the starting point for the GDPR in descending order of importance are as follows:

- The fundamental rights approach taken by the European Commission in drafting the GDPR;
- The concomitant failure to instruct legal drafting to observe a proportional regulation according to the level of processing being undertaken (archival processing often being minimal whilst data subjects are alive and personal data present);
- The problems with the negotiation process for the GDPR began, we believe, with a failure by the Commission to consult its Archival Policy branch during the gestation of the Regulation and the complexity and ambition of the proposed instrument itself. This would have smoked out the futility of archives without traces of human activity evidenced in personal data and might have pointed to a different approach to the original Article 83;
- Agreeing a complex and far-reaching instrument of 91 Articles across all sectors of 28 member states is not something that should have been attempted on a 2–year timescale: 5-7 years might be more realistic; and
- The form of the proposed legislation as a Regulation rather than a Directive and the extent of the proposed Commission delegated acts are also problematic.

In more ideal circumstances, deference to member states' legal and archival traditions would have been achieved by the original logic and design of the legislation rather than messy retro-fitting as is currently being attempted. The entities currently earmarked to fix the problems in negotiations (national archival regulations in the Council and the advice of the European Archives Group in the Parliament) ought not to be preferred over national policy and Parliament. The additional concepts in the present wordings (especially for us the word "archives") create more problems than they resolve. It would be a positive development if the form of the measure were changed to a Directive or an alternative and more jurisprudential approach to the legal articulation developed…. or both.

Conclusions

Settling the competence for data protection mainly at the European level is not implausible and has some benefit particularly to the operation of the single market. Free movement of goods and people depends on some regulated ability to move information about people for it to work efficiently. The extension of this into information rights is also consistent with UK policy, but the rush to get a very complex instrument agreed on an unrealistic timescale and the lack of pragmatism of a fundamental rights approach have created the present problems. In addition, a series of procedural omissions have compounded the problems. The attempts to fix this in the current texts are making the drafts ever less coherent rather than progressing towards a workable solution that meets UK needs.

In many of these areas the issues for archives with the texts as they currently stand in both European Parliament and Council are the same as many other issues the proposed Regulation for the UK, although there are additional detailed concerns as set out above.

Malcolm Todd
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