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Serving the Genealogical and Historical Research Communities: An Overview of Records Access and Data Privacy Issues

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Abstract

This brief presentation examines the issues that archives, libraries, and other information service providers face in providing access to records to the genealogical and historical research community while meeting the requirements of protecting personal data of living individuals. In order to stimulate discussion, many questions are raised but not answered. These include the all important question of whether data protection, which is intended to protect the privacy rights of living individuals, should be extended to the personal data of deceased persons. Finally, some suggestions are made about how to deal with proposed data protection directives and/or legislation.

Library services and patron research needs

Let us provide a setting for this discussion of records access and data privacy issues by briefly introducing the library services and patron research needs at our institution. “FamilySearch,” another name for the Genealogical Society of Utah, is a non-profit institution, registered in the State of Utah (USA). We serve the general public through our main library, which is known as the Family History Library, in Salt Lake City, Utah, more than 4,000 family history centers, or branch libraries, in 88 countries, and our free website www.familysearch.org.

Our mission is to preserve and provide access to historical information that can be used to reconstruct ancestral and related families and to compile genealogies or family histories. Of course, much of this information is primary source material for research in a variety of other topics such as historical demography, family reconstitution, social history,

migration and immigration, linguistics and dialectology, and anthropology and ethnography, to name a few.

We work in collaboration with archives, libraries, and museums, government departments and agencies, research institutions, churches, and private owners around the world to preserve and make available their valuable holdings to researchers in microform and digital formats. Access is made easier by organizing records through detailed cataloging and creating indexes to their contents. The general public is provided access through our library system and website and through the reading rooms and websites of our partner institutions and affiliated entities.

Our primary users are individuals whose ancestors and kindred dead appear in the records that are made accessible. We encourage our users to share the results of their research through our website and online databases.

As is evident in the foregoing, a genealogical library or collection serves the genealogical and historical research communities by facilitating access to the original source documents and associated indexes that are needed to uniquely identify individuals, whether living or dead, and to accurately place them within the context of their families and ancestral lineages. Sharing information is part of the collaborative research process that enables the researcher to be successful and others to enjoy the results.

This brief presentation examines the issues that archives, libraries, and other information service providers face in providing access to records to the genealogical and historical research community while meeting the requirements of protecting the personal data of living individuals. Due to time constraints this topic can be treated only in a cursory way. Since our collections contain information about both living and dead persons, attention is first given to protection for personal data of living individuals and its implications for genealogical and historical information services. For the sake of discussion, many questions are raised but not answered. These include the all important question of whether data protection, which is intended to protect the privacy rights of living individuals, should be extended to the personal data of deceased persons. Finally, some suggestions are made about how to deal with proposed data protection directives and/or legislation.

Access to records and protection of personal data

Tension between the public's right to access information and the individual's right to privacy of personal information presents significant challenges to genealogists and family and local historians and to the libraries, archives, and other institutions that serve them. The right of citizens to access the records of government bodies that show their workings and decision-making processes is regarded as fundamental to the creation and maintenance of democracy.¹ Many of these records contain information that

¹ For some examples, see Fred Gate quote in Cary E. Clayton, "The Public's Record: Open Access vs. Personal Privacy," 2, 1 May 2008 < http://www.it.ojp.gov/initiatives/files/the_publics_record.pdf >; Gerald Benjamin, "Public Records and Contempt for Democracy," 7 April 2008, 15 May 2008

uniquely identifies members of the community.² Government, of course, is not the only collector of personal data. For profit companies and not-for-profit institutions such as churches and voluntary associations are also busy creating and collecting personal information about customers and members. The easy and universal access provided by automated electronic databases and digital images on new media and through the Internet,³ as well as use of these kinds of data to harm identifiable individuals through persecution, discrimination, and identity theft, for examples, has given rise in recent decades to legislative and administrative measures to protect the individual's right to privacy of personal data in government and in private records.⁴

The data in question are referred to variously as "personal data" (European Union), "personal information" (Canada) and "personally identifiable data" (United States). The European Union's directive on data protection defines "personal data" as:

. . . any information relating to an identified or identifiable natural person ('data subject'); and identifiable individual is one who is identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity ; . . .⁵

<<http://greaterny.blogspot.com/2008/04/public-records-and-contempt-for.html>; and Robert Smolla, "The People's Right to Know: Transparency in Government Institutions," 15 May 2008 <<http://usinfo.state.gov/products/pubs/democracy/dmpaper10.htm>>.

² Robert Gellman, "Public records: Access, Privacy, and Public Policy," 21 April 1995, 15 May 2008 <<http://www.cdt.org/privacy/pubrecs/pubrec.html>>. Note the author's narrow definition of public records as ". . . any information maintained by law, regulation, or practice, by or in behalf of a unit of federal, state, or local government that contains information that can be linked to a specific individual." Most of the public records that he lists are useful for genealogical research, yet he does not touch on this subject as being among their uses. In what is otherwise an excellent and thoughtful study, this oversight is typical of deliberations on data privacy and protection. Note also the absence of genealogy and history in the Individual Reference Services Group list of major uses of public records in Clayton, 4-5.

³ The concern is succinctly stated by Yasushi Umehara, "Historical records kept in public archives, which are not normally viewed unless there is an interest at stake or a reason that would necessitate action, are in a state of 'practical obscurity.' However, in today's highly networked society courtesy of the Internet, information concerning the past has become easily accessible by anyone, anytime, creating a critical situation in terms of privacy protection;" see his "Protection of Personal Information and Information Disclosures in Public Archives in Japan," a paper presented at the 15th International Conference on Archives, 2004, 15 May 2008

<<http://www.wien2004.ica.org/fo/speakers.php?ctNvi=48&ctNv1=48&ctNv2=&IdSpk=485&AlpkSpk=&p=&SpkV=2>>.

⁴ For an example of the extension of data protection to the private sector, see Canada's Personal Information Protection and Electronic Documents Act (13 April 2000), Part 1: Protection of Personal Information in the Private Sector, 15 May 2008

<<http://www2.parl.gc.ca/HousePublications/Publication.aspx?pub=bill&doc=C-6&parl=36&ses=2&language=E&File=19#1>>. This law (hereafter referred to as "PIPEDA") applies to commercial activity including professional genealogical research but not to individuals engaged in private, non-commercial research; see Margaret Ann Wilkinson, "Legal Matters Related to Genealogy Part 1: Privacy and Personal Data Protection for Genealogy," *Families* (February 2007):46.1:19.

⁵ 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, *Official Journal of the European Communities* (23 October 1995): 1.281/38 (hereafter referred to as "Directive 95/46/EC").

In Canada's Personal Information Protection and Electronic Documents Act, "'personal information' means information about an identifiable individual, . . ."⁶ In the United States "personally identifiable information" is generally understood to refer to data that can be used to identify an individual uniquely, such as social security number, birth date and place, mother's maiden name, address, etc.

In principle, data protection directives and laws are designed to protect personal data provided by the data subject himself or herself. Yet, as shall be discussed below, extension of personal data protection for living individuals to deceased persons is being considered or practiced in some countries. If this development were to gain currency internationally, the implications for genealogical and historical research could be devastating.

A Chinese gentleman once observed that biography, genealogy, and local history were three legs of the same stool.⁷ From the biographical details of the lives of living and deceased persons, individuals can be grouped into families and linked from generation to generation into pedigrees. The activities of individuals and their families, and, in many countries, their lineages over time are at the core of the history of the localities where they resided.

Genealogy could not be done without access to personal data. Local history would be disemboweled without personal data. Information service providers need to come together and work closely with administrators and legislators to ensure the protection of the right of the public to access records and information for these legitimate research purposes.

European Union Directive 95/46/EC

The European Union (EU) has been leading the way on data protection for "natural persons," who, judging from the contents of Directive 95/46/EC," must be living. This interpretation is stated explicitly by The National Archives of the United Kingdom in its guidelines to archivists on the implementation of the UK's Data Protection Act 1998.⁸ An annual report of the data protection commissioner of Ireland states, "The key principle of data protection is that living people should be able to control how personal information is used or at the very least to know how others use that information."⁹ Data protection statements posted on websites of family and local history societies in the UK

⁶*Op. cit.*, note 3.

⁷ Comment made by the late Mr. Li Shixian in conversation with Melvin P. Thatcher in the later 1970's.

⁸ Public Record Office, *Data Protection Act 1998 – A Guide for Records Managers and Archivists*, 2000: 3, 15 May 2008 <<http://www.nationalarchives.gov.uk/documents/dpguide.pdf>>.

⁹ Fourteenth Annual Report of the Data Protection Commissioner presented to each house of the Oireachtas presented pursuant to section 14 of the Data Protection Act, 1988 (2002), 52, 15 May 2008 <http://www.dataprotection.ie/documents/annualreports/annual_report_2002.pdf>

and elsewhere speak only of protecting personal data provided by individuals who register or must provide such information for transaction purposes.¹⁰

To facilitate the flow of personal data within the internal market of the EU for commercial purposes while protecting the right of the individual to a private life, the Directive 95/46/EC does the following:

- stipulates the obligations of the data controller in processing (i.e., collecting, organizing, updating, correcting, storing, displaying, etc.) personal data;¹¹
- requires the data subject's "unambiguous consent" to legitimize these activities;¹²
- details various notifications that must be given to the data subject concerning the processing of his/her personal data, whether collected directly from the data subject or acquired via another party;¹³
- specifies the data subject's rights to personal data including access, rectification, erasure, and blocking and notifying recipients of any changes.¹⁴

The processing of certain types of personal data is prohibited, namely "racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and . . . health or sex life."¹⁵

Exemptions from these requirements are permitted only in order to reconcile the right of privacy and of the freedom of expression for journalistic and artistic purposes.¹⁶

Long term retention and use of personal data for historical, statistical, and scientific research purposes are not considered to be incompatible with the original purpose(s) for collecting personal data provided that the state has adequate safeguards in place.¹⁷

The directive applies to automated personal data and to manually processed data in a filing system or that are intended to be included in a filing system which is organized based on criteria that facilitate identification of the data subject. It also applies to the processing of personal data by all data controllers except "by a natural person in the

¹⁰ For some examples see: Federation of Family History Societies, "Privacy Statement," 4 June 2006, 15 May 2008 <<http://www.familyhistoryonline.net/general/privacy.shtml>>, The Cobbold Family History Trust, "Data Protection Act 1998 and Privacy," <<http://www.cobboldfht.com/data-protection-act.html>>, Huntingdonshire Local History Society, "Data Protection Act," <<http://www.huntslhs.org.uk/join.shtml>>, Christchurch Local History Society, "Data Protection Act 1998," <<http://www.communicate.co.uk/dorset/clhs/page22.phtml>>.

¹¹ Directive 95/46/EC 281/40 (II.I.6).

¹² Directive 95/46/EC 281/40 (II.I.7.a).

¹³ Directive 95/46/EC 281/42-43 (II.IV).

¹⁴ Directive 95/46/EC 281/43 (II.V).

¹⁵ Directive 95/46/EC 281/40 (II.III.8.1).

¹⁶ Directive 95/46/EC 281/41 (II.III.9).

¹⁷ Directive 95/46/EC 281/40 (II.I.6.a and c).

course of a purely personal or household activity.”¹⁸ This means that directive applies only to government and commercial processing of personal data.

Implications for genealogical and historical information services

How do the concepts and principles in this directive affect archives, libraries, and non-profit genealogy and local history societies? These institutions exist to collect, organize, store, and make information available for research. They, of course, gather personal data of staff members and many collect personal data directly from their patrons for administrative purposes. Data protection statements on their websites show that the obligation to protect these personal data is widely accepted.¹⁹ Their holdings, however, are comprised of records and publications which often contain personal data collected by a third party. Website data protection statements are silent on the processing of third party data.

Personal data in many kinds of source documents acquired in original or secondary formats by archives, libraries, and societies are in an unorganized state and difficult for researchers to use. The materials are inventoried or cataloged according to logical criteria that generally do not have anything to do with identifying a particular person. However, the need for easier access to individual level data is being addressed more and more by these institutions and/or their patrons, through the creation of name indexes. Do the results of name indexing bring the hitherto unorganized information in these source documents within the purview of data protection for living persons?²⁰

Because the retention of personal data for historical, statistical, and scientific research is not deemed incompatible with the original purpose of collecting personal data by the data controller, the repository, or storage, function of libraries, archives, and societies appears to be on safe ground.

Whereas libraries, archives, and societies may be exempted from some of the requirements of data protection directives and laws, they are, nevertheless, expected to observe the spirit of those requirements.²¹ Will they have the resources to redact or block personal data of living persons from images and hard copies of indexes and source documents?²² How useful will a population census schedule be with personally identifiable data and racial or ethnic origin redacted from it? Will they refuse to accept or give access to compiled genealogies because a genealogy connects the deceased with

¹⁸ Directive 95/46/EC 281/40 (I.III.1-2).

¹⁹ *Op. cit.*, note 10.

²⁰ The Society of Genealogists in the UK has pointed out this effect in “The Data Protection Act 1998 and Genealogists,” 15 May 2008 <<http://www.sog.org.uk/leaflets/dpa2.pdf>>. Concern has also been raised by the Australasian Federation of Family History Organizations (Lesle Berry, memo to Office of the Federal Privacy Commissioner on “Response to Issues Paper,” 22 December 2004).

²¹ See East of London Family History Society, “Membership Records and the Data Protection Act”, 15 May 2008 <<http://www.eolfhs.org.uk/members/eolmbr06.htm>>.

²² As a consequence of the Data Protection Act 1998 only edited versions of electoral rolls may be provided to the public in the UK; see Blackburn and Darwen Council Information Gateway, 15 May 2008 <<http://www.blackburn.gov.uk/server.php?show=ConWebDoc.2876&viewPage=2>>.

their living descendants whose personal data are displayed in it? Will they simply stop giving access to all materials that contain personal data for living persons?

Charging for access to records is becoming increasingly common, especially on the Internet. Due to budget reductions and changes in funding policies, some archives and libraries have to raise revenue through charging a fee for access to their holdings. Self-supporting genealogical and local historical societies are finding that charging for access to indexes and source documents via their websites is a convenient way of raising needed revenue. Cooperation with E-commerce companies provides an alternative for collecting revenue for access to records. What is the risk that exemptions granted for non-commercial processing of personal data will be lost through any of these kinds of activities and relationships?

Should personal data of deceased persons be protected?

Whereas data protection directives and laws concern the personal data of living persons, there are some who would extend protection to the personal data of deceased persons. For example, while ruling in favor of a patron's request for 1911 census data in 2006, the Information Commissioner of the United Kingdom offered his opinion that the obligation of maintaining the confidentiality of personal data in censuses extends to deceased persons. The notice states,

“Although not a prerequisite for every breach of confidence, the Commissioner considers that it is both legitimate and necessary to consider both detriment to the confider of the 1911 census schedule, to others included in the schedule and to their surviving relatives.”²³

Concern for the impact of revealing personal data about deceased persons in records that include information on living (or surviving) relatives is a key driver of this line of thinking.

In laying down guidelines for government agencies on the implementation of the national Privacy Act 1988, Australia's privacy commissioner has stated, “Although information about dead people is not technically considered personal information, Agencies are encouraged to respect the sensitivities of family members when using or disclosing it.”²⁴ Taking note of a fairly common practice in the country, the Australian

²³ Information Commissioner's Office, “Freedom of Information Act 2000 (Section 50) Decision Notice, 11 December 2006: 9-11, 15 May 2008
<http://www.ico.gov.uk/upload/documents/decisionnotices/2006/101391_dn_rt_changes.pdf>.

²⁴ Privacy Commissioner, Plain English Guidelines to Information Privacy Principles 4-7: Advice to agencies about storage and security of personal information, and access to and correction of personal information, February 1998: 3, 19 May 2008
<http://www.privacy.gov.au/publications/HRC_PRIVACY_PUBLICATION.pdf_file.p6_4_15.7.pdf>.

Law Reform Commission is recommending the addition of a section to the privacy law that would restrict records about a person for thirty years after his or her death.²⁵

The underlying assumption of the National Archives Law of Japan is that records shall be open to the public. However, records that contain personal information are, nevertheless, subject to restrictions in archives. All records with personal information are restricted for thirty years from the time of creation. Older records may be withheld from public access at the discretion of the archivist when disclosure of “personal secrets” might “unfairly and adversely affect the person’s rights and/or interests.” Family relations and family origins are regarded as personal secrets.

Whereas Japanese archives are exempt from the country’s Personal Information and Protection Law, which applies to information about living individuals, the use of such information after a person dies is a matter of concern of archivists. In the words of a national archivist:

There is normally “no privacy for the deceased,” but considering the Japanese mentality, we need to be careful with these matters as the feeling of the bereaved families for the deceased (respect for, memory of, and honor of the deceased) may be violated. Also information on [the] family register, family relations and marital status, hereditary diseases and others may invade the privacy of the deceased as well as the descendants. This type of information needs to be protected for a longer period of time under the current situation.

With respect to the family register, the archivist notes, “. . . there is currently no set time limit for access restriction. In Japan, the current status does not allow for the active contribution of archives to genealogical studies.”²⁶

The bottom line for protecting the personal data of a deceased person in these examples is to protect living descendants from embarrassment, discrimination, or decisions by third parties, such as a health insurance company, that would adversely affect them. This commonality must be kept in mind when assessing the purpose and impact of proposed data protection directives and legislation on library services and records access. Is there a set time limit on restricted access? A directive or law that would not set a time limit would impose an unreasonable and unacceptable restriction on the public’s right to access information for genealogical and historical research.

Dealing with proposed data protection directives and legislation

Discovery of proposed directives and legislation in time to do something about addressing them is critical. Whereas successful efforts were made recently to rescue the

²⁵ Discussion Paper 72, Review of Australian Privacy Law, September 2007: 231-33, 19 March 2008 <<http://www.austlii.edu.au/au/other/alrc/publications/dp/72/10.pdf>>.

²⁶ *Op. cit.*, note 3.

2006 Australian Census from destruction²⁷ and to preserve access to the post-1901 Canadian censuses, a protracted struggle that lasted over eight years,²⁸ discovery is not always timely. For example, publication of the California death index online on e-genealogy websites in 2002 evoked remedial legislation (SB 1614) which was not discovered by the genealogical community until a few days before it was up for vote in the State Assembly. This left very little time to organize effective community feedback to the sponsor of the proposed law.²⁹ The Australian Law Reform Commission's proposed recommendation to restrict access to the records of deceased persons for thirty years did not catch the attention of the genealogy community until about a month before the comment period was closed in December 2007. Again, the timing was a bit late for organizing and coordinating community feedback.³⁰ So developing ways and means for early discovery of proposed directives and legislation is an imperative for archives, libraries, and other information service providers.³¹

Care needs to be taken to analyze the language of proposed directives and legislation and assess its impact on access to records and information services. For example, are the personal data of only living persons targeted for protection? Is the information that would be protected by closure of your records already available from other public sources? How will your ability to provide information to researchers be impacted? What is the extent of materials in your collection that will be subject to restriction? How will your ability to acquire records in the future be affected? Based on the results of the assessment, a position and plan of action, if warranted, may be formulated by your institution. An informed decision will certainly be better for your researchers than indecision.

A concerted effort must be made to get to know the proponents of restricted access to records and the information that they contain. What are their motives? What is

²⁷ For documentation, see Australasian Federation of Family History Organizations, "Save the Census," 10 May 2007, 19 May 2008 <<http://www.affho.org/projects/census.php>>.

²⁸ For more information visit Gordon A. Watts, "Biography and Links to Global Gazette Articles," 9 May 2008, 29 May 2008 <<http://globalgenealogy.com/globalgazette/authors/authgw.htm>> and scroll down to "Post-1901 Census News (Canada) columns – links to articles posted 1999-2005."

²⁹ The California Federation of Genealogical Societies first spoke up for the local genealogical community. A national appeal for moderation to the state Senate Appropriations Committee in the form of a "Joint Resolution and Petition from Federation of Genealogical Societies and the National Genealogical Society" was drafted at the last minute (19 May 2008

<<http://www.ancestry.com/learn/library/article.aspx?article=5777>>) but not in enough time to make a positive impact, at least according to news reports which do not mention genealogists as among the parties whose needs carried weight in revisions of the proposed law. See also Kimberly Powell, "Freedom of Information vs. Right to Privacy: Genealogists Fight Back against Threatened Record Closures," 10 February 2003, 29 May 2008 <<http://genealogy.about.com/library/weekly/aa021003a.htm>>.

³⁰ Australasian Federation of Family History Organizations, *Newsflash* 26 (December 2007), 2.

³¹ The Public Records Access Monitoring Committee of the International Association of Jewish Genealogical Society is an example of the type of early alert organization that is needed. Visit IAJGS Home Page, <<http://www.iajgs.org/>> and click "Latest Alerts" for a description of its mission and an example of its function. The Records Preservation and Access Committee, which is a joint committee of the Federation of Genealogical Societies and the National Genealogical Society in the United States, is another example of a legislative watchdog group interested in promoting and protecting records access; for a description of its mission and methods, see <<http://www.ngsgenealogy.or/comrecords.cfm>>.

the logic of their position? How broadly have the implications of their proposal been considered? Answers to questions such as these will enable the identification of common ground and isolate areas where educational work is needed. This will facilitate the development of a solid strategy for effecting changes.

Assuming that action is warranted, a decision will have to be made to go it alone or as part of a coalition of interested parties. Potential coalition members can be found among providers and consumers of information. These include archives, libraries and museums, as well as genealogy and local history societies. E-commerce companies, newspaper associations, the insurance industry, and private investigators have also been able to get the attention of legislators in matters concerning access to records. Sometimes commercial interests carry more weight than those of information repositories and academic and amateur researchers.

Conclusion

Advocates of open records argue that the act of providing access harms no one; rather harm is caused by the abuse and misuse of information.³² Whereas the greater good of society is served by access to information, service providers do, nevertheless, need to be sensitive to the rights of privacy of living individuals. Policing use of the information is something for which the service provider, particularly in the case of libraries and archives, cannot be held responsible in any meaningful way. Ultimately, the sense of honor and the personal integrity of our patrons or users determine the uses to which the information is put. If the user can be identified, user privileges can be withdrawn and in extreme cases s/he can be held accountable in a court of law.

With regard to access to records and data protection, information service providers need to work with proponents of data protection to ensure that directives and legislation preserve as much access as possible without compromising the privacy of living persons. What constitutes compromising is something that has to be defined by the values and mores of a given society. Within those parameters, information service providers must do their homework, get organized, and work pro-actively to provide access to records and information responsibly. The unlimited, perpetual extension of data protection to the personal data of deceased persons is to be avoided whenever possible. Perpetual data protection for the deceased would all but kill genealogical research and severely cripple historical research. The greater good of society in our respective countries would suffer.

³² See, for example, Armina Bradford Bepko, "Public Availability or Public Obscurity: The Debate over Public Access to Court Records on the Internet," *New York Law School Review* (2005) 49: 980, 1 May 2008 <<http://www.nyls.edu/pdfs/vol49no3p967-992.pdf>>.