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To Our Readers
(From the Editor-in-Chief)

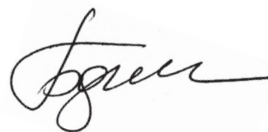
With the assistance of ICA/CLM, the State Committee of Archives of Ukraine has prepared a special issue of the journal “Archives of Ukraine”. This issue is dedicated to the Kyiv meeting of Committee on Legal Matters of International Council on Archives (ICA/CLM) and the XVth International Congress on Archives to be held in Vienna on August, 23–29, 2004.

Published herein are materials, confirming evident achievements of Ukraine in the sphere of archival legislation within the thirteen years of independence; also, in this issue are details of current activities of the committee within the four-year period, since the previous congress (Seville, 2000).

A part of these materials is being published for the first time. Another, including normative-legal acts, had been previously fully or partially disseminated in various ways – as electronic publications at ICA website, as reports at international conferences and elsewhere. We considered it appropriate to submit them to the journal for the purpose of comprehensive coverage of urgent challenges of society, as well as for the purpose of sharing the experience of responding to them pursuant to archival practices worldwide. We consider our steps in this sphere from our international experiences in the resolution of legal problems in archival affairs.

Published materials deal with the most actual problems of archival legislation. Namely, in our country the matter is about introduction of the Law of Ukraine “On Electronic Record Keeping” and a range of other legislative acts in this sphere, preparing a draft of the Law of Ukraine “On Record Keeping”, recent passing of the Law of Ukraine “On National Program for Adaptation of Legislation of Ukraine to Legislation of the European Union”.

We hope that this publication will be useful for participants of the XVth International Congress on Archives, and the tradition of sharing the National and international experience in archival editions will be continued.

A handwritten signature in black ink, appearing to be the name 'L. G. ...' with a long horizontal stroke extending to the right.

Hennadii BORIAK, Kostiantyn NOVOKHATSKY

**MODERN NATIONAL ARCHIVAL
LEGISLATION OF UKRAINE***

Ukraine belongs to those countries, which in 1991 – after the collapse of the Eurasian super-state, e.g. the USSR, – attained its independence, yet was now faced with the challenge of paving its way towards a civil society. We have strongly repudiated the Soviet totalitarian heritage, which, through its Archives, professed for the most part in declaring the primacy of the public (nomenclatured overtones abounding) over the personal; dispensed access to retrospective information purely for ideological and political characteristics, and mostly on the basis of belonging to this nomenclature; the availability and accessibility of a few state Archival systems, including: the separate Archival fond of the Communist Party, as well as the archival systems of the KGB, Ministry of Internal Affairs, Ministry for Foreign Affairs, the military-industrial complex, etc.

The archivists of independent Ukraine set forth entirely new objectives for themselves: to define the meaning and determine the niche of archives vis-a-vis their new historical realities.

First of all, it was necessary to improve the standards of protecting the archival heritage, granting overall binding power to legal regulations and procedures, as suggested by archival theory and put into place by archival practice. At the same time relying solely on the “status quo” was not the answer, but rather maintaining a steady pace alongside ever-improving and new technologies.

The second task was to democratize access to the archives according to such norms, which would, on the one hand, adhere to the necessity of the protection of national interests, human rights and freedoms, while on the other hand, would answer to international standards, requirements and experience.

The third objective lied in the need to create an integral system of holdings of retrospective documentary information, namely an National archival fond, based on the already existing pre-1991 infrastructure, which could collect archival documents of the Communist party, documents of former special services and the Ukrainian component of the military-industrial complex of the USSR. A decree of the Supreme Council of Ukraine on the transfer of these documentary infrastructures and holdings, was issued

* Extended version of the paper presented at Pre-Congress Seminar in Elbląg (May 2003). Published in: Archives in the Society. ICA Pre-Congress Meeting – Vienna 2004: Papers of the International Conference. Elbląg, May 22-24, 2003. Edited by Władysław Stępnik. The Head Office of State Archives, Warszawa, 2003, p. 240-245.

already in 1991, on the heels of the liquidation of these totalitarian institutions, thus becoming the first normative acts of modern Ukrainian legislation, with respect to the Archives.

The problematic development of a legal basis for archival affairs in Ukraine was complicated at the outset of Ukraine's independence in the early 1990's, since the guidelines of the country's overall legal system were only beginning to take shape. Moreover, archivists lacked experience in preparing legislative acts.

A certain turn of events – namely, the dissolution of certain kinds of social and state institutions in exchange for others, the swift increase of national self-consciousness, and the relevant interest to discover the historical truth – required prompt legislative regulation regarding archival issues.

While the Law on archives in Ukraine was being drafted, there existed two basic legislative acts in this field – the Principles of legislation on culture and the Law on information. Namely, the Principles for the first time declared citizens' rights to create archives and guaranteed access to archival documents, the responsibility of citizens to guarantee the protection of archives, the prohibition to withdraw documents from archival fonds on the basis of ideological or political thinking and so on. The Law on information assessed for the first time, on the legislative level, the notion of a “document”, regulated the right for obtaining information and protection of personal data, information ownership, as well as a number of issues, concerning archives.

The new archival law extended the legal norms of these basic acts.

The law determines the main entity of legal regulation as an aggregate of important archival documents, which are owned by the state and are subjects of the law, which governs on the territory of Ukraine or under its jurisdiction. This aggregate of documents has been named the “National archival fond” (further on – NAF). At the same time, in order to guarantee the proper functioning of the NAF, the law has constituted certain infrastructures – the establishment of an archival system and network. As a result, this explains why the specific legislation has been titled the law “On the National archival fond and archival institutions”. It was passed on December 24, December 1993. Later, in 1998, the anniversary of the date of the passing of this law was officially declared as a professional holiday of archivists in Ukraine.

In due time, Public relations – evolving during the development of the National archival fond – the recording and maintenance of documents, and the use of archival information, became the subject of legal regulation. However, the meaning of this law is broader than just a regulation of simply professional issues. For the first time, Ukrainian archives and legislation have together solidified the notion of the National archival fond as a single, integral entity consisting of both cultural and legal aspects, thus possessing the highest level of national value, which in itself has immeasurable significance. The documents located in the National archival fond are determined as invaluable historico-cultural if not national treasures of the highest order, and not only as transient property, subjects of scientific interest or sources of judicial evidences.

The determinative features of the Ukrainian archival law are:

– the assessment of the one-in-two core of the NAF as an integral part of not only a national, but also a world culture heritage on the one hand, and information resources for society on the other hand;

– the regulation of ownership of NAF documents, acknowledging the equality of all forms of ownership and guaranteeing the absolute right of Ukraine's people to the National archival fond as national property.

Thus, for the first time in Ukraine's history, a legal basis for the reorganization of the archives was created on the premise of de-politicization, democratization, the accessibility of state archives and protection of rights of the archives' owners and users of archival information.

The state's jurisdiction over the National archival fond does not contradict with the civil rights of the documents' owners and users and does not violate these rights. The administrative and supervisory directives of the state archival institutions, – as for all NAF documents – irrespective of their ownership, are geared only towards guaranteeing the normal and effective day-to-day operations of the NAF as well as the safety of its documents.

The legislation became a benchmark for national policy on archives. Guaranteeing the safety and accessibility of the NAF and its acquisition program are among the priority-driven directions of this policy.

Over the course of the last few years a number of important issues concerning archival affairs were regulated by certain articles in other pieces of legislation, taking into account basic principles provided by the original archival law. They are, namely, laws of Ukraine "On State Secrets", "On Privatization of State Property", "On Copyright and Relevant Rights", "On libraries and library Affairs", "On Museums and Museum Affairs", "On Bringing out, Bringing in and Return of Cultural Values" and others. Currently, more than 30 such laws are already in effect. Their norms, concerning archives, constitute the basis of Ukrainian archival legislation.

State archives have obtained a new status as institutions of social protection of citizens. A significant role in the regulation of access to NAF documents was played by another Law of Ukraine, namely the legislation "On the Rehabilitation of Victims of Political Repressions". It contained norms which significantly influenced the important social responsibility of modern archives. Soviet totalitarian society – irregardless of the "Khrushchev thaw" period of partial rehabilitation of repressed people – did not include the state archives into this activity, but rather the archives of special services, the prosecutor's office and places of incarceration. However, after the transfer of all archival investigative and criminal files from the institutions of the former KGB of Ukrainian SSR to state archival institutions for unlimited access, the contemporary archival system bears virtually the sole burden of responsibility for maintaining a suitable balance between the interests of society, which makes a concerted effort to discover the truth about the range of Stalin's repressions between the 1930s-1950s, and the interests of persons (those repressed themselves, their relatives and descendants), who are not always openly eager to disclose personal materials pertaining to punitive bodies. Thus we are faced with a serious collision between two declared legal norms: on one hand – freedom of information, on the other

hand – protection of personal data. Besides, we should be aware of the fact that not all components of this information are absolutely authentic. These new developments suggest a very important but at the same time absolutely new phenomenon for Ukrainian archivists, namely the role of “gatekeepers”. Yet, at the same time, this term is rather poorly mentioned in modern Ukrainian legislation. On the one hand, we run the danger of abuse and willfulness, on the other hand – we are severely criticized by the same scholars, journalists, public figures, who are interested in the disclosure of all pieces of information, without any exclusions about the political repressions of the former regime.

One more aspect of this problem concerns itself with a great deal of personal information, readily available in the archival fonds of the Communist party. They are various personal files, biographical references which were made without fail for every nomenclature employee, as well as “personal files”, claims and accusations, concerning nomenclature clerks. Some claims were absolutely groundless, but may be used unethically for the sake of political gain. We should not forget that the majority of the older generation of today’s politicians, including both Presidents of Ukraine, at one time, possessed rather high positions in the nomenclature of the Communist party.

Ukrainian archivists are doing their best to prevent politicians from using archival records in “dirty” PR campaigns. Fortunately, there were no known cases to use such “compromising files” of the communist party archives against political enemies during the period of Ukrainian independence. Unlike other post-socialist countries, the Communist party archives in Ukraine are used exclusively for academic purposes. This may be explained by the absence of official court proceedings against the banned Communist Party, and to some extent, by specific attitudes of the Ukrainian mentality such as tolerance, political passivity, and a sense of forgiveness in the broader, global context. But we should not relax our vigilance, because even now current legislation doesn’t provide any specific reasons for interpreting its norms according to one single meaning in favor of protecting a person’s interests.

This legislation is based on a number of norms of the Constitution of Ukraine, which relate directly to the country’s cultural heritage and retrospective documentary information. The basic responsibility of archivists and citizens in the archival realm of activity is the provision of article 34: “Everyone has the right to free gathering, keeping, use and distribution of information”. It is significant that this norm in the Constitution foregoes many of the fundamental rights of a person: to freedom of outlook, meeting, right to property, work, rest, social security, education, health protection and other.

Under conditions of substantial societal transformation, legislation cannot remain static. The seven-year duration of the current archival law has also shown that parts of its provisions merit improvement.

First of all, the 1993 Law should be brought into accord with the Constitution, passed in 1996.

Secondly, some of the norms should be amended, namely those concerning access to archives, according to international legal norms and recommendations.

Thirdly, the experience and expertise of the current state archival system should be taken into consideration, particularly because the first archival law was based mainly on the Soviet archival legacy.

All these objectives were taken into account and included in a new version of the Law "On the National Archival Fond and Archival Institutions" passed by the Parliament on December 13, 2001.

In general, the evolution of Ukrainian archival legislation towards democratization can best be illustrated by the example of the liberalization of norms concerning access to documents in the new interpretation of this law. It should also be noted, that while drafting it, we attempted to adapt the norms and recommendations of the European Council, namely, Recommendations NR (2000) 13 of the Committee of Ministers of EC to member countries concerning European policy of access to archives.

The law considers a wide range of problems, ranging from access to archival documents, to use of retrospective documentary information. They are – intellectual access (searching for necessary information) and physical access (direct access to records); generally declared accessibility of archival information and limitation of access in certain situations; types of limitation: concerned with the content of records, their physical state and other circumstances; restrictions by terms and pattern of use of received information, by categories of users; restrictions, concerned with copyright, ownership and other.

The new wording of the legislation includes the progressive provisions, concerning the openness of the NAF documents, and maintains their accessibility for users from the moment of their (documents) receipt by the archives. It also contains the norm which concerns the equality of right to access for all users, irrespective of their nationality or citizenship.

With the new wording of the Law we have finally regulated the entire registration procedure for using the NAF documents – on the basis of a personal application and identification document of the given person only. At that, the law forbids to request any other documents from a person. It eliminates the differentiation in providing originals or copies of records to users, depending on the purpose of use.

It clearly determines the list of restrictions in access to documents, which belong to governmental or territorial communities:

1. Access may be temporarily (up to one year) restricted, concerning documents, which need to be put in order or improvement of physical condition.

2. Information, which is considered – as stipulated by the law – as a state secret or to that effect, is protected as well.

3. Access to documents, which contain confidential information about the person, or information that may threaten the life or sanctity of the habitation may be also restricted for a period up to 75 years.

4. Archives have the right to refuse access to minors, persons declared by the court as incapable, and persons that severely violated the procedure

of using archival documents. This is the only the reason of refusal when the user is unable to be responsible for meeting his engagements. At that, the user does not have to prove his right to using. This duty is imposed on the archives.

The law provides that in case of refusal of access, the archives have to state it in writing, specifying exhaustive reasons of refusal, since actions of officials, who prevent the realization of legal rights of users, may be appealed in subordinative order or in court.

We have taken additional new steps in favor of the user in a new phrasing of this law. Thus:

1. In case of necessity, it provides the opportunity at the archives' consent, to use not only reference instruments, but also registration documents, namely so called "files of the fonds", which contain information about the history of origin, moving and gaining of the records by the archives. Previously, it was merely insider information, accessible only by the archives' employees.

2. The norm, which obliged the users to make copies of the documents at their own expense in order to acquaint oneself with the documents in case such copies are not available at the archives, was excluded.

3. The procedure of bringing copies of records abroad was simplified. Now the law does not require any special permit, if the archives have certified the copies.

More efficient and concrete regulation of many other archival issues, as well as responsibilities and liabilities of both interacting parties, contributed to the improvement of cooperation between the archives and users of the records.

* * *

At the beginning of 2004 it was published "Principal Rules of Work of State Archives of Ukraine" – a peculiar code of norms, recommendations, regulations for day-to-day work of archivists. (till that time Ukraine used all-union "Rules" of 1984).

Saving tradition of majority of basic issues, the Rules at the same time in many spheres of archival activity provide sufficient reconstruction, and sometimes even subdue of stereotypes. Namely, the Rules include our positions concerning the following modern innovations, which are absent at mentioned normative manual of 1984:

- legal status of documents of National archival fond;
- document as an article of trade; transfer of ownership in archival technological processes;
- securing of national interests in the sphere of archival affairs;
- international codes of ethics of archivists as a component of regulation of professional activity and as an element of integration into the world archival community;
- state archives as an informational system and as a body for management of archival affairs and record keeping;
- archives acquisition area as a sphere of its functional authorities;
- broadening of independence in archives management;

- marketing activity of archives as business subject within specific sphere of services;
- change of approaches to classification features of organization of National archival fond's documents, non-fond's system of documents organization;
- authorities of expert bodies taking into account new functions: money evaluation, determination of category of document's value;
- activity of archives in concern with new principles and technology of National archival fond formation, acquisition of archives and authorities concerning all subjects of record keeping;
- receiving of archival documents for deposition, their stock-taking and state registration of documents of National archival fond;
- centralized state registration of documents of National archival fond, registration of documents of special content, registration of a range of certain situation of documents movement;
- issuing of documents for temporary use outside archives;
- securing of safety while urgent situation, insuring of documents;
- archival description as a process of creation of secondary documentary information;
- annotated register of descriptions as a type of archival reference;
- separation of notions of use and application in informational activity, determination of main principles for use of documents and principles of access to them;
- defining of main directions for informatization archives activity and archival affairs in general.

This is the list of only some key innovations, provided and regulated by the Rules.

One of indisputable results of performed work is continuation of introducing and regulation of archival terminology. Though it was not an end in itself, but sooner a side product, but there are new, for examples, determination of notions of document safety securing or notion of "little- or less contrasting documents. And there are a lot of such examples.

Comparing to foreign analogues (namely, Russian) our Rules have more unitarity and more attention has been paid to methodic of technological processes.

Work on these Rules lasted for almost 12 years. And soon – their experimental introduction and approbation.

* * *

The passing and development of archival legislation had a profound significance not only with respect to the reformation of archival affairs, but with respect to the protection of the sovereignty and national interests of Ukraine in archival matters, and the strengthening of its position in their international legal realm.

Of course, we realize the necessity of its further improvement, and hope for wider familiarization with European archival legislative norms in order to adopt them for national legislation.

**LEGISLATIVE ACTS
ON ARCHIVAL AFFAIRS AND RECORD KEEPING:
SELECTION OF TEXTS**

Restoration of state independence of Ukraine in 1991, dynamic transformational processes in its social-political and economic life sufficiently influenced development of archival affairs. Namely, one of the most acute problems was legal regulation of new social relations in archival sphere, creation of normative-legal base, which would correspond to realities of that time, solving of questions concerning assignees of national archival-documentary heritage. New normative-legal acts in this sphere should correspond to general legislation system of Ukraine, international legal norms and provide opportunity for reformation and development of archival affairs.

One of the important needs of the society became learning of truth about past and, correspondingly, making available of a great deal of archival documents, previously almost inaccessible or hidden at all.

The society considered as a first important step on this way transfer, according to the decree of the Presidium of Verkhovna Rada of Ukraine of August 27, 1991, of documents from archives of Communist party of Ukraine to subordination of Principal archival board at the Cabinet of Ministers of Ukraine. This act ceased parallel functioning of two archival fonds – state and Communist party, founded massive declassifying of archival documents, and contributed to strengthening of resource base of state archives.

Below we provide texts of laws and other normative-legal acts, which formulate principles of public policy in the sphere of archival affairs and record keeping. Of course it includes not all acts of archival legislation of Ukraine, some of them are published only partially. The criterion for selection of texts for translation was the endeavor to give the most complete idea about main legal norms for access to archival documents and archival information in Ukraine.

According to the decree of the Presidium of Verkhovna Rada of Ukraine of September 09, 1991 state archives received from archives of the Committee of State Security of Ukraine some categories of previously classified archival documents: archival-investigation files of repressed persons, who later had been rehabilitated, filtration files for citizens, which were brought out for forced work to Germany and other countries – Germany's satellites – while World War II.

Development of legal bases of informational sphere of society and state in Ukraine began at passing on October 02, 1992 of the Law of Ukraine "On Information". It provided general legal basis of informational relations,

fixed the right of a person for information, defined the system of information, its types, sources, and information access modes. For the first time in modern legal affairs it defined meaning, role and place of documents in informational relations.

This law became basic in informational sphere, its norms have been developed in many further legislative acts.

One of the problems in application of the Law of Ukraine "On Information" was different interpretation of norms concerning collections and accumulation of data about a person, rights of a person for familiarization with information about it, concentrated in various bodies and documents (including archival) and other. Case, concerning official interpretation of corresponding articles of the Law of Ukraine "On Information" was considered by the Constitutional Court of Ukraine and on October 30, 1997 it made a decision on these issues.

Decision of Constitutional Court of Ukraine of October 30, 1997 concerning interpretation of certain articles of the Law of Ukraine "On information" was based on corresponding norms of Constitution of Ukraine, passed by Verkhovna Rada of Ukraine on June 28, 1996.

It is significant that right for information in Constitution of Ukraine precedes most of fundamental rights and freedoms of a person.

Second part of article 34 contains also constitutional basis for organization of archival affairs and activity of natural and juridical persons in this sphere.

Basic in the sphere of archival affairs and record keeping is the Law of Ukraine "On National Archival Fond and Archival Institutions", which first reduction had been passed on December 24, 1993, and the second, which is valid at present – on December 13, 2001.

The matters of storing of documents of National archival fond in librarian and museum fonds, stock-listing of these documents and use of data, contained in them, are regulated by corresponding articles of the Law of Ukraine "On Libraries and Librarian Affairs" and the Law of Ukraine "On Museums and Museum Affairs". In particular, it fixes priority of archival law concerning written commemoratives, other types of archival documents, stored in libraries and museums.

According to article 4 of the Law of Ukraine "On National Archival Fond and Archival Institutions" documents of National archival fond are one of the types of cultural values. Certain situations of their use, and namely questions on their bringing out, bringing in and return to Ukraine, are regulated by the Law of Ukraine "On Bringing out, Bringing in and Return of Cultural Values", passed on September 21, 1999.

Since certain part of archival documents contains data, which constitute state secret, great significance for practical activity of state archival establishments of Ukraine have norms of the Law of Ukraine "On State Secret", which was passed on January 21, 1994.

One of directions of day-to-day informational activity of archival establishments is consideration of applications of citizens with requests to assist in realization of their rights and legal interests, providing citizens

for this purpose with certificates, copies of documents, satisfaction of their informational queries in any other ways.

Legal issues of organization of such activity are regulated by the Law of Ukraine “On Applying of Citizens”, passed on October 02, 1996.

Among numerous applications of citizens to state archival establishments great majority consists of applications of persons, who, in their time, suffered political repression, or their relatives on issues, concerned with sentencing, punishment, other types of repression and rehabilitation according to the Law of Ukraine “On Rehabilitation of Victims of Political Repressions in Ukraine”, passed on April 17, 1991.

Some peculiarities of access of citizens to archival documents on these matters were separately considered by Verkhovna Rada of Ukraine on December 24, 1993.

One more category of citizens, who suffered persecutions of totalitarian regimes, are persons, who suffered Nazi’s persecutions while World War II. Recent years state archives of Ukraine performed a great number of works on documentary confirmation of facts of Nazi’s persecution (imprisonment of civil inhabitants at concentrations camps, ghetto, other places of forced detention, bringing out for forced work to Germany and its allies, and other). The purpose of this work is compensation of the loss, caused to victims, and their social protection according to the Law of Ukraine “On Victims of Nazi’s Persecutions“, passed on March 23, 2000.

According to article 19 of the Law of Ukraine “On National Archival Fond and Archival Institutions” State Committee of Archives of Ukraine determined the procedure for use of documents of National archival fond, owned by the state, territorial communities and stored at corresponding archival establishments.

In the Law of Ukraine “On National Archival Fond and Archival Institutions” archival affairs and record keeping are related to constituents of a single documentary-informational sphere and noted that State Committee on Archives of Ukraine is a specially authorized central executive body in this sphere.

In order to define public policy in the sphere of archival affairs and record keeping, concerning documents making, on May 22, 2003 Verkhovna Rada of Ukraine passed the laws of Ukraine “On Electronic Records and Electronic Records Circulation”, “On Electronic Digital Signature”. The draft of the Law of Ukraine “On Record Keeping” was prepared for submission to consideration by the parliament. After its passing, Ukraine will finish formation of modern legislative basis for work with official documents, starting from the moment of their creation.

EXCERPTS FROM LEGISLATIVE ACTS

CONSTITUTION OF UKRAINE (1996)

Article 34. Every one is guaranteed with the right for freedom of thinking and speech, for free expression of his views and beliefs. Every one has the right for free collection, keeping, use and distribution of information orally, in writing or in any other way – at his own discretion.

Exercising of these rights may be limited by the law in the interests of national security, territorial integrity or public order with the purpose to avoid public disorders or crimes, for protection of health of the population, for protection of reputation or rights of other people, to prevent disclosure of information, obtained in confidential way, or for support of authority or unbiiousness of justice.

LAW OF UKRAINE “ON INFORMATION” (1992)

Article 1. Determination of information

In this Law information means documented or publicly disclosed data about events or phenomena, occurred in society, state and environment.

Article 9. Right for information

All citizens of Ukraine, juridical persons and governmental bodies have the right for information that provides the possibility of free obtaining, using, distribution and keeping of information, which is needed by them for exercising their rights, freedoms and legal interests, performing of their tasks and functions.

Exercising of right for information by citizens, juridical persons and the state should not violate public, political, economical, social, spiritual, ecological and other rights, freedoms and legal interests of other citizens, rights and interests of juridical persons.

Each citizen is to be provided with free access to information, concerning his personality, except cases, provided by legislation of Ukraine.

Article 10. Guarantee of right for information

Right for information is guaranteed by:

obligation of governmental bodies, as well as local and regional authorities, to inform provide on its activity and made decisions;

creation of special information services or systems at governmental bodies, which could provide access to information according to set procedure;

free access of subjects of informational relations to statistical data, archives, libraries and museum fonds;

restrictions of this access are only conditioned by specificity of valuables and special conditions for their safety, provided by legislation;

creation of mechanism for exercising of right for information;

carrying out of governmental control over keeping of laws on information;
providing of responsibility for violation of legislation on information.

Article 14. Main types of informational activity

Main types of informational activity are obtaining, using, distribution and keeping of information.

Obtaining of information is a purchase, obtaining or accumulation according to current legislation of Ukraine of documented or publicly disclosed information by citizens, juridical persons and the state.

Using of information is a satisfaction of informational needs of citizens, juridical persons and the state.

Distribution of information is a distribution, disclosing and realization of documented or publicly disclosed information, according to provided by the law procedure.

Keeping of information is a securing of proper condition of information and its mediums.

Obtaining, using, distribution and keeping of documented and publicly disclosed information are carried out according to the procedure, provided by this Law and other legislative acts in the field of information.

Article 23. Information about a person

Information about a person is a complex of documented or publicly disclosed data about a person.

Main data about a person (personal data) are nationality, education, marital status, religion, health state, as well as address, data and place of birth.

Sources of documented information about a person are issued to its name documents, signed by it documents, as well as information about a person, collected by governmental bodies and local and regional authorities within their competence.

It is prohibited to collect data about a person without its prior consent, except cases, provided by the law.

Each person has the right to familiarize with information, collected about it.

Information about a person is protected by the Law. (See official interpretation to article 23 in Decision of Constitutional Court of Ukraine No. 5-3п (v005p710-97) of 30.10.97).

Article 24. Reference and encyclopedic information

Reference and encyclopedic information is systemized, documented or publicly disclosed data about social, public life and environment.

Main sources of this information are encyclopedias, dictionaries, reference-books, advertisements and announcements, guide-books, cartographic materials and other, as well as references, issued by authorized for that governmental bodies, local and regional authorities, unions of citizens, organizations, their employees and automated informational systems.

System of this information, access to it are regulated by librarian, archival and other branch-wise legislation.

Article 27. Document in informational relations

Document is a provided by the Law material form of obtaining, storing, use and distribution of information by way of its fixation on paper, magnetic, cinema, video and photo film or other media.

Primary document is a document, which contains source information.

Secondary document is a document, which is a result of analytical-synthetic and other processing of one or a few documents.

Article 28. Information access modes

Information access mode is a provided by legal norms procedure of obtaining, storing, distribution and use of information.

According to access mode information is divided into open information and information of restricted access.

The state controls information access modes.

The task of control over information access mode lies in securing of fulfillment of requirements of the legislation as to information by governmental bodies, enterprises, establishments and organizations, and not to allow some data being unreasonably attributed to information of restricted access.

Governmental control over following of set mode is carried out by special bodies, provided by Verkhovna Rada of Ukraine and Cabinet of Ministers of Ukraine.

In the course of control Verkhovna Rada of Ukraine may demand from governmental bodies, ministries, departments reports, which contain data about their activity on providing of information to interested persons (number of refusals to grant access to information, specifying reasons of such refusals; number and grounds for applying of restricted information mode as to certain types of information; number of complaints about illegal actions of officials, which refused to grant access to information, and measures, which were taken concerning them).

Article 30. Information of restricted access

Information of restricted access according to its legal mode is divided into confidential and secret.

Confidential information is an information, owned, used or possessed by certain natural or juridical persons and may be distributed only at their consent and on terms, provided by them.

Citizens, juridical persons, who own information of professional, business, productive, bank, commercial and other nature, obtained at their own expense, or information of their professional, business, productive, bank, commercial and other interests and does not violate provided by the law secret, independently determine the access mode to it, including its belonging to confidential category, and provide protection system (means) for it.

The only exception is information of commercial and banking nature, as well as information, which legal regime has been determined by Verk-

hovna Rada of Ukraine at presenting of the Cabinet of Ministers of Ukraine (on statistical, ecological, banking operations, taxes and other issues), and information, concealment of which may cause threat for life and health of people.

Secret information includes information, which contain data, which constitute state or other provided by the law secret, which disclosure may harm a person, society or state.

Attributing of information to category of secret data, which form state secret, and access of citizens to it is carried out according to the law on this information.

Procedure of secret information circulation and its protection is determined by corresponding public authorities subject to compliance with the requirements of this Law.

Procedure and terms of secret information disclosure are determined by corresponding law.

Information of restricted access may be distributed without its owner's consent, if such information is socially significant, that is it is a subject of civil interest and if the right of society to know this information prevails over the right of its owner for information protection. (Article 30 is supplemented with paragraph according to the Law No. 676-IV (676-15) of 03.04.2003).

Article 31. Access of citizens to information about them

Citizens have the right:

within the period of information collection, to know what kind of information and for what purpose, in what way, by whom and for what reason it is collected;

for access to information about them, reject its correctness, completeness, appropriateness and other.

Governmental bodies and organizations, local and regional authorities, which informational systems contain information about citizens, are obliged to provide it freely and free of charge at the request of persons, whom it concerns, except cases provided, provided by the law, as well as take measures for preventing unauthorized access to it. Should these terms be violated, the Law guarantees protection of citizens from losses, caused by the use of such documents.

Access of unauthorized persons to information about other persons, collected in accordance to current legislation by governmental bodies, organizations and officials, is prohibited.

Keeping of information about citizens should not last longer than it is necessary for legally provided purpose.

All organizations, which collect information about citizens, should, before starting work with it, perform public registration of corresponding databases according to the procedure, provided by the Cabinet of Ministers of Ukraine.

Necessary volume of data about citizens, which may be legally obtained, should be limited to the maximum and may be used only for legally approved purpose.

Denial of access to such information, or its concealment or illegal collecting, use, keeping or distribution may be appealed in court. (See official interpretation of article 31 in Decision of Constitutional Court of Ukraine No.5-3п (v005p710-97) of 30.10.97).

Article 37. Documents and information, which are not subject to be disclosed at requests

Documents, which contain the following, are not subject to be disclosed at requests:

- information, legally determined as state secret;
- confidential information;

- information on operative and investigative activity of bodies of prosecutor's office, Ministry of Interior, Security Service of Ukraine, inquiry bodies and courts in cases, when their disclosure may harm operative measures, investigation or inquiry, may violate right of a person for true and objective judicial consideration of its case, may cause threat for life or health of any person;

- information, which concerns personal life of citizens;

- documents of intradepartmental business correspondence (memorandum, correspondence between branches and other), if it concerns development of establishment activity direction, decision-making process and precede their making;

- information, which is not to be disclosed according to other legislative or normative acts. Establishment, which had received a request, is entitled to reject acquainting with document, which contain information, which is not to be disclosed according to normative act of another public authority, and public authority, which considers the request, has no right decide on its disclosing;

- information of financial establishments, prepared for control financial boards.

Article 39. Information as an article of trade

Informational products and informational services of citizens and juridical persons, which are involved in informational activity, may be objects of trade relations, which are regulated by current civil and other legislation.

Prices and pricing policy for informational products and informational services are to be set by agreements, except cases, provided by the Law.

Article 40. Informational product

Informational product is a materialized result of informational activity, destined at satisfaction of informational needs of citizens, governmental bodies, enterprises, establishments and organizations.

Article 41. Informational service

Informational service is a carrying out of informational activity in provided by the law form, concerning providing of informational products to consumers in order to satisfy their informational needs.

Article 45. Protection of right for information

The law protects Right for information. The state guarantees to all participants of informational relations equal rights and access to information.

No one can restrict rights of a person for selection of form and sources of information obtaining, except cases, provided by the law.

Subject of right for information may demand to eliminate any violations of its right.

It is prohibited to seize printed issues, exhibits, and data banks, documents from archival, librarian and museum fonds and their destruction due to ideological or political reasons.

Article 53. Informational sovereignty

Bases for informational sovereignty of Ukraine are national informational resources.

Informational resources of Ukraine include all belonging to it information, irrespective of its content, form, place and time of information creation.

Ukraine independently forms its informational resources on its territory and freely disposes of them, except cases, provided by legislation and international agreements.

LAW OF UKRAINE**“On Introduction of Changes to the Law of Ukraine
On the National Archival Fond and Archival Institutions” (2001)**

[...]

This Law regulates relations, concerned with formation, stocktaking, preservation and use of the National Archival Fond and other main issues of archival affairs

Article 4. The National Archival Fond

The National Archival Fond, which is a constituent part of native and world cultural heritage and informational resources of society, is under state protection and destined for satisfaction of informational needs of society and the state, realization of rights and legal interests of each person.

Documents of the National Archival Fond constitute cultural valuables, which are permanently kept on the territory of Ukraine or in accordance with international agreements, obligation of which is given by Verkhovna Rada of Ukraine, are to be returned to Ukraine.

Natural and juridical persons are obliged to ensure safety of the National Archival Fond and contribute to its replenishment.

**Article 8. The ownership for documents
of the National Archival Fond**

The documents of the National Archival Fond may be of any ownership form, provided by the Constitution (254k/96–BP) and laws of Ukraine.

The law protects the ownership for the documents of the National Archival Fond .[...]

It is prohibited to exclude the documents of the National Archival Fond from the owner or authorized by him person without their consent, except the cases, provided by Ukrainian laws. Documents of the National Archival Fond, excluded in accordance with the law for holding an inquiry, preliminary (pre-judicial) investigation, carrying out legal proceedings, are to be compulsory returned to the owner or authorized by him person, but not later than within a year after finishing of the case proceeding.

**Article 9. Realization of the ownership
for documents
of the National Archival Fond**

The owner owns, uses and disposes the documents of the National Archival Fond taking into consideration restrictions, provided by the law.

The owner of the documents of the National Archival Fond and other persons, who use the mentioned documents, have no right to destroy, damage them or change their content. [...]

**Article 15. Access to documents
of the National Archival Fond**

Documents of the National Archival Fond and its reference stuff are issued for the use at archival institutions beginning from the time of their receipt for storing, and at private archival collections – on decision of their owners.

The state encourages owners of private archival institutions to increase the access to documents of National archival fond, contributes to publication and exhibiting these documents at shows.

It is prohibited to attribute to state and other provided by the law secret the information about place of keeping documents of the National Archival Fond, owned by the state, territorial communities, as well as create secret archives for keeping such documents.

Citizens of Ukraine have the right to use documents of the National Archival Fond or their copies on the basis of personal application and identification document. Persons, who use documents of the National Archival Fond on official matter, deliver the document certifying their authority.

Foreigners and persons without citizenship, legally staying in Ukraine, enjoy the same rights of access to documents of the National Archival Fond, as well as they have the same obligations as citizens of Ukraine.

It is prohibited to require from users to present documents, which are not provided by this Law.

The user is informed on refusal of access to documents of the National Archival Fond in writing with specification of exhaustive reasons of refusal.

**Article 16. Restriction of access to documents
of the National Archival Fond, owned
by the state and territorial communities**

Archival institutions are entitled to restrict the access to documents of the National Archival Fond, owned by the state or territorial communities, for the term up to one year due to their scientific technical processing, check of their presence, condition and restoration. In case of carrying out of great volume of mentioned activities the term of restriction may be extended by authority of central body of executive power in the sphere of archival affairs and record keeping, but not more than for one year.

Archival institutions are entitled to refuse the access to documents of the National Archival Fond, owned by the state or territorial communities, to minors, persons, acknowledged by the court as incapable, and persons, who severely violated the procedure of archival documents use.

For the sake of information protection, attributed to as state or other provided by the law secret, contained in documents of the National Archival Fond, access to these documents is restricted according to the law until cancellation of decision of attributing this information to state or another secret.

Access to documents of the National Archival Fond, which contain confidential information on a person, or threaten life or inviolability of the home, is restricted for 75 years from the moment of their creation, if the law does not provide the other. Before this term access is possible at consent of a citizen, whose rights and legal interests might be violated, and in case of his death – at his legatee's consent.

In case of transfer of documents of the National Archival Fond, owned previously by state or territorial communities, under the treaty to state archival institutions or archival departments of city councils, conditions of their keeping are to be determined with previous owners in mentioned agreement. The mentioned procedure may be also provided in cases of transfer of documents for keeping without any changes of their ownership.

**Article 17. Restriction of access to documents
of the National Archival Fond,
which belong to other owners**

Archival subdivisions of people associations, religious organizations, as well as of private enterprises, institutions and organizations, archival institutions, founded by physical persons, are entitled to restrict the access to documents of the National Archival Fond in order to secure the safety of documents and protection of rights and legal interests of documents owners or other persons. Restriction is placed at the request of documents owner or other interested persons by written notification to central body of executive power in the sphere of archival affairs and record keeping.

In cases, provided by the law, restrictions, mentioned in the fourth and fifth paragraphs of Article 16 of this law and the first paragraph of this Article, do not concern officers of state archival institutions, courts, law-enforcement, control-revision and tax authorities, who accomplish

official missions. The law may provide other cases, not covered by such restriction.

Article 19. Procedure of use of documents of National Archival Fond

The procedure of use of documents of the National Archival Fond, owned by the state or territorial communities, is determined by central body of executive power in the sphere of archival affairs and record keeping.

The procedure of use of documents of the National Archival Fond, owned by other owners, is determined by the owner and authorized by him person taking into account recommendations of central body of executive power in the sphere of archival affairs and record keeping.

Article 20. Rights of users of documents of the National Archival Fond

Users of documents of the National Archival Fond, owned by the state or territorial communities, have the right to:

1) use at reading hall of archival institution copies of documents from the use fonds, and in case of their absence – originals, if their access is not legally restricted, and in accordance with the law to use documents of limited access;

2) receive from archival institutions certificates on information, contained in documents, access to which is not restricted on legal basis;

3) receive documents or their copies for temporary use outside archival institutions on written approval of archival institutions;

4) use references to documents, and on approval of archival institutions – registration documents;

5) make, including with the help of technical appliances, or receive from archival institutions copies of documents and excerpts from them, if it does not threatens documents condition and does not violate copyright and relevant rights, as well as to require that these copies or excerpts were certified by archival institution;

6) publish, declare, quote and recreate in any other way the content of archival documents referring to the place of their holding and keeping to the terms, provided by legislation.

Rights of users of documents of National Archival Fond, owned by other owners, are determined by the owner of a document taking into consideration recommendations of central body of executive power in the sphere of archival affairs and record keeping.

Actions of the officials of archival institutions, who prevent realization of legal rights of users of documents of the National Archival Fond, may be claimed in subordination order or *ad litem*.

Article 21. Responsibilities of users of documents of the National Archival Fond

Users of documents of the National Archival Fond have to:

1) follow provided by legislation procedure for use of documents, timely fulfil legal requirements of archival institutions workers;

- 2) secure safeness and timely return of documents, issued them for use;
- 3) immediately inform archival institution about discovered damages or insufficiency of documents;
- 4) bar from confusion or falsification of used information, contained in archival documents;
- 5) timely inform owner of documents or authorized by him archival institution on intentions to use contained in documents information with commercial purpose;
- 6) fulfil the duties, provided by agreements, concluded between the user and owner of the documents or authorized by owner juridical or natural person;
- 7) compensate caused by him losses to archival institutions subject to the law or agreement terms.

FINAL PROVISIONS

1. This Law comes into effect on the date of its publishing, except second part of article 25, which comes into effect on January 01, 2003.

[...]

4. Introduce changes to the following legislative acts of Ukraine:

1) in Code of Laws of Ukraine on administrative violations of law (80731-10, 80732-10) (Vidomosti Verkhovnoii Rady of Ukraininskoi RSR, 1984, appendix to #51, p. 1122):

Code of laws should be supplemented with Article 92-1 of the following wording:

“Article 92-1. Violation of legislation on National Archival Fond and archival institutions

Negligent storing, spoiling, damaging, hiding, illegal transfer of documents of the National Archival Fond or documents, which are to be included into it to another person, illegal access to mentioned documents – result in warning or imposing of penalty to citizens from three to seven non-taxable minimal incomes of citizen and warning or imposing of penalty to officials – from five to ten non-taxable minimal incomes of citizen.

The same actions, performed by a person, who within a year had been imposed such penalty for violation, mentioned in first part of this article – result in imposing of penalty to citizens from seven to twenty non-taxable minimal incomes of citizen and to officials – from ten to forty non-taxable minimal incomes of citizens”. [...]

LAW OF UKRAINE

“On Libraries and Librarian Affairs” (2000)

Article 16. Librarian fonds

[...]

Archival documents, collected in library, are a part of National Archival Fond of Ukraine according to the Law of Ukraine “On National Archival Fond and Archival Institutions” (3814-12).

Special regime of protection, keeping and use is applied to documents, which are introduced into or subject to be introduced into State register of national cultural property of Ukraine, and to documents, which constitute unique commemorates of National Archival Fond of Ukraine and are kept in libraries. [...]

LAW OF UKRAINE
“On Museums and Museum Affairs” (1995)

**Article 17. Stock-taking, keeping and use of documents
of National Archival Fond**

Stock-taking, keeping and use of documents of National Archival Fond, which are stored in museums, is carried out according to the Law of Ukraine “On National Archival Fond and Archival Institutions” (3814-12).

(Article 17 in wording of the Law No. 594-IV (594-15) of 06.03.2003)
[...]

LAW OF UKRAINE
“On State Secret” (1994)

**Article 13. Term of validity of decision on referring
of information to state secret**

Term, within which decision on referring of information to state secret, is defined by state expert on secrets taking into account secrecy rate of information, determination criteria for which are provided by Security Service of Ukraine, and other circumstances. It may not exceed: concerning information with “specially important” stamp – 30 years, with “top secret” stamp – 10 years, with “secret” stamp – 5 years.

**Article 15. Classifying and declassifying
of material information media**

Classifying of material information media is carried out by way of providing corresponding document, product or other material information media with secrecy stamp.

Metadata of each material information media should contain secrecy stamp, which corresponds to information secrecy rate, defined by decision of state expert on secrets, – “specially important”, “top secret”, “secret”, date and term of classifying of material secret information media, which is to be defined taking into account terms of validity of decision on referring of information to state secret, provided by article 13 of this Law, signature, its decoding and position of a person, which provided mentioned stamp, as well as referring to corresponding paragraph (article) of Summary of data, which constitute state secret.

[...]

It is prohibited to provide secrecy stamps, provided by this law, to material media of another secret information, which does not constitute state secret, or confidential information.

[...]

**Article 17. Appeal of a decision on classifying
of material information media**

Citizens and juridical persons have the right to make to officials, who provided material media of secret information with secrecy stamp, obligatory for consideration reasonable proposition on declassifying of this information media. Within one month, mentioned officials should provide the citizen and juridical person with the answer on this matter.

Decision on declassifying of material information media may be appealed by citizen of juridical person in subordination order to higher body or official or at court. In case of rejection of a complaint, submitted according to subordination order, citizen or juridical person has the right to appeal decision of higher body or official at court.

[...]

**LAW OF UKRAINE
“On Applying of Citizens” (1996)**

Article 1. Applying of citizens

Citizens of Ukraine have the right to apply to governmental bodies, local authorities, unions of citizens, enterprises, establishments, organizations of any ownership, mass media, officials concerning their functional duties with remarks, claims and propositions, which concern their statutory activity, application or petition for realization of their social-economic, political and personal rights and legal interests and claim about their violation.

[...]

Persons, who are not citizens of Ukraine and legally staying on its territory, have the same right to apply, as citizens of Ukraine have, if other is not provided by international agreements.

**Article 7. Prohibition to reject acceptance
and consideration of applications**

Applications, properly made and legally presented, are to be compulsory accepted and considered.

It is prohibited to reject acceptance and consideration of application referring to political views, belonging to some party, sex, age, religion, nationality of a citizen, or lack of knowledge of its application language.

If questions, touched upon in application, received by governmental bodies, local authority, enterprise, establishment, organization of any ownership, union of citizens, official, are not included in their competence, within five days it should be sent to the proper body or official, on which applying citizen should be informed. In case, when application does not contain data, necessary for making of reasonable decision by the body of official, within the same term it should be returned to the citizen with corresponding explanations. [...]

Article 19. Obligations of governmental bodies, local authorities, enterprises, establishments, organizations of any ownership, unions of citizens, mass media, their managers and other officials concerning consideration of complaints and applications

Governmental bodies, local authorities, enterprises, establishments, organizations of any ownership, unions of citizens, mass media, their managers and other officials within their competence are obliged:

to check applications and complaints objectively, timely and thoroughly;

at citizen's request to invite him to session of corresponding body, which considers its application or complaint; [...]

to inform in writing the citizen on results of application or complaint check and the crux of made decision; [...]

Article 20. Term of consideration of citizens' applications

Applications are considered and solved within not more than one month from the date of their receiving, and those, which do not need additional consideration, – immediately, but not later than within fifteen days from date of their receiving. If it is impossible to solve questions, mentioned in application, within one month, manager of corresponding body, enterprise, establishment, organization or its deputies define necessary term for its consideration, on which applying person should be informed. At that total term of solving of questions, mentioned in application, may not exceed forty-five days. [...]

LAW OF UKRAINE

**“On Electronic Record and
Electronic Records Circulation” (2003)**

Article 5. Electronic record

Electronic record – record, information in which is fixed in the form of electronic data, including compulsory metadata for the record.

Content and procedure of placement of compulsory metadata for electronic records is determined by legislation.

Electronic record may be created, transmitted, stored and transformed by electronic means into visual form.

Visual form of electronic record is display of data, contained in the record, by electronic means or on paper in the form, suitable for perception of its content by a person.

Article 9. Electronic records circulation

Electronic records circulation (circulation of electronic records) – complex of processes of creation, processing, sending, transmission, receiving, storing, use and destruction of electronic records, which are carried out with the use of integrity check and if necessary with confirmation of receiving of such records.[...]

Article 13. Storing of electronic records and archives of electronic records

Subjects of electronic record circulation should store electronic records on electronic media in the form, which allow checking records integrity on these media.

Term of storing of electronic records on electronic media should not be less then the term, provided by legislation for corresponding paper records.

In case of impossibility to store electronic records on electronic media within the term, provided by legislation for corresponding paper records, subjects of electronic records circulation should take measures for duplicating records on several electronic media and perform their periodical duplication according to the procedure of registration and copying of records, provided by legislation. If it is impossible to meet mentioned requirements, electronic records should be kept as paper copies of records (if original paper record is not available). When copying electronic records from electronic media it is obligatory to perform check of data integrity on this media.

When storing electronic records it is obligatory to meet the following requirements:

- 1) information, contained in electronic records, should be available for its further use;
- 2) it must be possible to restore electronic record in the format, in which it was previously created, sent or received;
- 3) if available, information, which allows to determine origin and purpose of electronic record, as well as date and time of its sending or receipt, should be stored.

Subjects of electronic record circulation may secure meeting of requirements concerning storing of electronic records through using of intermediary services, including archival institution, if such institution meets the requirements of this article. Creation of archives of electronic records, submission of electronic records to archival institutions of Ukraine and their storing at these institutions is carried out according to the procedure, provided by legislation.

Mikhail LARIN

**COMPARATIVE REVIEW
OF ARCHIVAL LEGISLATION OF CIS COUNTRIES**

In our professional activity we rely on experience of previous development of archival affairs, develop from joint root, more and more integrate into world informational and archival space. Moreover, we have the common aim. All these matters allow speaking about simultaneity, closeness of forms, as well as of content of archival law.

All laws determine in vivid or indirect form national archival fonds as an integral part of national property, as an important constituent of culture, define archival documents as the source of historical information, distinguish documents according to their ownership, contain articles, which protect rights of owners and possessors of documents, all legislative acts include provisions, which concern obligations of the state as for saving of documentary heritage and principles of archives management.

But not all countries mention in their legislation that archives are a constituent of informational resources of society, and this is important due to development of informational law in all countries, which should correspond to archival law, not all archival laws list the typical content of documents of national archival fonds.

Generalized consideration of legislative practice in the sphere of archival affairs confirms that in all CIS countries archival services carry out significant work in development and improvement of legislative and normative base.

So, in Russia it was prepared the draft of the Law "On archival affairs in Russian Federation".

In Kazakhstan decrees of the Government have approved "Provisions on procedure of bringing out of documents of National archival fond abroad Kazakhstan Republic", "Provisions on State Insurance fond of documents copies", "Principal rules for documenting and documentation management". The President of Republic of Kazakhstan has signed changes and supplements to the law "On National archival fond and archives".

In December of 2001 Ukraine has passed a new reduction of the Law "On National archival fond and archival establishments", which obviously widened the problem branch of legal regulation, further developed the endeavor to strengthen public influence to the sphere of documents storing, vividly strengthened norms concerning providing of security to National archival fond.

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In the sphere of access to documents important innovation was defining of a single procedure of drawing out of document to citizens for using of archives – only on the basis of application and identification document. There appeared also some other provisions, directed at liberalization of access to documents.

New reduction of Ukrainian law more neatly and consecutively displays intensification of influence of state archival establishments to record keeping.

Activating this situation and taking into account the fact that in archival legislation we can not provide sufficient level of influence of archival service to record keeping at departments, we came to a conclusion of necessity to develop a draft of the Law “On documentary maintenance of management activity”.

The most important provisions of this legislative act and the most important condition of its real application is imposing of coordinating function in the sphere of documentary maintenance if management to special authorized federal body.

Archivists of Ukraine also began preparing of draft of the law on general record keeping.

All archival services of CIS countries consider archives as a specific informational system, as a constituent part of informational resource. At the same time legislation in the sphere of informatization weakly considers peculiarities of national archival fonds. That is why there exists a problem of convergence of legal basis of information science and archival affairs.

Special influence in modern world obtains care of archivists about protection and satisfaction of interests of citizens, who are joined long-term connections, concerning obtaining of social, biographical and genealogical information, protection of copyrights and intellectual property, property rights.

One of the complicated aspects of archival legislation of other countries is legal argumentation of acquisition of national archival fonds with documents of non-governmental bodies.

Laws of Republic of Belarus in various articles, but finally fully, documents from personal stuff are protected.

New law of Ukraine also contains a ground for strengthening of control over documents of non-governmental establishments.

Archival legislation of Republic of Georgia, Republic of Tajikistan, Republic of Uzbekistan also contains norms, which impose on owners of archives of non-governmental organizations to provide safety of documents.

This direction is rather perspective, and in countries with completely formed and ancient traditions of democratic legislation, such as England, France, Spain, documents of private non-governmental archives are not staying beyond attention of governmental archival services.

All legislative acts of CIS countries contain articles, which declare freedom of access to archives, including for foreign users.

At the same time freedom of access to archives has a range legal restrictions, which comes from legislation on state secret, rights of citizens for protection of personal life secret, copyrights and right for intellectual property.

Legal norms in this part of acts, obviously, need intergovernmental harmonization, since national archival fonds of our countries were previously constituent parts of State archival fond of the USSR. There is a need to create single procedure for application of citizens to archives, to fix singled and approved terms of inquiries performing, common forms personal data providing.

It is necessary to achieve a single understanding of “personal data” notion, to determine rate and reasons of confidentiality of certain groups of such information.

Legislative practice of our countries in the sphere of archival affairs is determined by principles of equity, by level of understanding of meaning and role of archival affairs national documentary property for self-identification of society and development of state system. Archival acts do not cause domination of interests of certain social groups or departments.

One of necessary conditions for creation of single informational area on the territory of CIS countries is use of single archival terminology.

Decree of inter-Parliamental Assembly of CIS countries of April 1999 approved a model law “On archives and archival fond”, which recommended for use at development of national archival legislation. In our opinion, this law is rather useful.

We would like that training for exchange of experience in legislative activity and application of legal practice was arranged on the basis of international regional center for professional development of archivists.

Hennadii BORIAK

**VOTING FOR OR AGAINST THE ACCESS TO ARCHIVES
OF SPECIAL AUTHORITIES,
RESPONSIBLE FOR VIOLATION OF HUMAN RIGHTS:
REVIEWING LAST DECADE IN UKRAINE**

History of passed XXth century was rather rich in events, which influenced violation of main human rights. Not to mention two awful world wars, it is enough to refer to dictators and totalitarian regimes, which existed within the century worldwide: in Europe, Asia, Africa and South America. Such hard lot probably passed by only Australia, Antarctica and North America together with a few European countries.

Problems, concerned with archives of such representative regimes, especially those, where great deal of human rights violation facts are displayed, take leading place in our forum. I would like to pay attention only to some aspects of these problems, arising from modern archival practice in Ukraine, and namely, to questions of protection and complying with human rights while using archives of repressive authorities of past regime in today's conditions.

These questions do not have specifically Ukrainian coloring. It is obvious that such problems are subject of activity of archivists in Germany, who inherited archives of Gestapo and Shtasi from actually two totalitarian regimes. They are also actual in countries of South America, which got rid of totalitarian regimes within 1980–1990's (Argentina, Salvador, Uruguay and Chile), in many Asian and African countries, including SAR, in all post-Soviet and post-socialistic countries after 1990–1991, and now for today's transient and future democratic government of post-Saddam Iraq.

Ways of solving the problem of access to archives of special services of former totalitarian and repressive regimes in various countries are different. United Germany ran to complete and unconditional unveiling of Shtasi archives, as it was with Gestapo. Democratic governments of Salvador, Chile, Cambodia, and South Africa, which opened archives of former governments in order to initiate the process of national reconciliation, have done the same.

But, according to true observation of famous specialist in human rights protection, American professor Bruce P. Montgomery, "Reconciliation without prosecution of those responsible for committing crimes against humanity, however, has been a highly dubious affair. In the past, accountability and justice have abandoned as the price for maintaining fragile stability¹⁷".

Probably those were the reasons why in Tajikistan, one of Central Asian republics of the former USSR, archives of special services have been totally destroyed. But it had not prevented beginning of civil war in the country and now – establishing of new authoritarian regime.

Let us remind that on the territory of former Russian Empire it was not first destroying of archives of repressive authorities. After February revolution in 1917, which had overthrown czar's regime, archives of "Okhranka" – Guards Department of Ministry of Interior of Russian Empire – had been also burned in Petrograd. At twist of fate, saved documents of czar's punitive authorities were again immediately classified by new Bolshevik power and were actively used by newly created special services – All-Union Extraordinary Commission (VChK), OGPU, KGB. Access to them has been completely granted only in 80 years after Bolshevik October revolution – at the beginning of 1990's.

We also should keep in mind the fate of all-Union archives of repressive services after 1991, after the collapse of the USSR, which still keep the data about violation of rights of not only Russian citizens, but many inhabitants of new independent states (NIS). According to acknowledgement of Russian archivists, there was a kind of "privatization of archival information, based on usurpation of official opportunities"². In other words, there is a struggle around archives of former KGB of the USSR: certain information from them appears in the press, but at the same time there is no complete unveiling of special services' archives.

Special attention of world archival and academic community to mentioned problems is confirmed by the fact of recent international conference in Liverpool (UK). It was held on 22nd–25th of July, 2003 with main topic "Political Pressure and Archival Records" and had rather representative membership from many countries of the world, but unfortunately only one report from "post-socialistic" countries (Slovenia)³. I think that organizers of this conference should have care of inviting reporting representatives at least from Russia and Ukraine, who could illustrate state of matters on mentioned topic in post-Soviet countries.

These examples are given to show complexity of the problem and prove that, in our opinion, still there is no exact and definitive answer to question, posed in the title of my paper. On the contrary, experience shows existence of essential contradictions and even collisions not so much in archival practice as exclusively in national and international legislation.

The essence of these collisions may be formulated very approximately and briefly as follows: on the one hand, providing of as wide as possible access to archives of totalitarian special services and at the same time ensuring the renewal of rights of repressed and persecuted by these services, disclosure of truth about their crimes against mankind and violation of human rights are nor subject to discussion. On the other hand – at the same time ensuring the protection of personal data, which public disclosure is undesirable due to necessity to comply with rights of repressed and persecuted themselves for information about their person, as well as many other people, involved into the terrible millstone of repression machine. Since

under pressure of investigators, under threats and tortures these people sometimes gave evidences, which threatened other people: their familiars, relatives, colleagues, or even unfamiliar people. Nowadays, no one has right to accuse them; thus, to my mind, we are obliged to avoid uncontrolled distribution of the information, which may efficiently harm themselves and their descendants.

Coming back exactly to the practice in our country. The republican special services as branches of such authorities of the USSR were liquidated in 1991. It happened on the 24th of August. Two weeks later, on 9th of September 1991 the Parliament of independent Ukraine has passed a decree “On the transfer of archival documents of KGB of Ukraine to state archives of the republic”⁴. It was mentioned that documents of KGB of Ukrainian SSR “are of great importance for objective evaluation of social and political processes, massive repressions, rehabilitation and guaranteeing of legal interests of citizens”, and obliged to transfer them to central archival authority and its local branches.

Actually, in Ukraine this decree liquidated completely separated and uncontrolled by public authorities archival system of special services, which was founded in 1918. But further developments, unfortunately, had not obtained such radical character, excepted by the decree. Since approved at the end of 1993 National archival law allowed creation of special branch archives of certain authorities for permanent keeping of their documents, then the first one was State archives of Security service of Ukraine, which inherited almost all documents of KGB of Ukrainian SSR. Public archives in Kyiv city and regions received only two categories of documents from the KGB archives: archival-investigation materials of rehabilitated persons and so called “filtration files” of former Ostarbeiters (Eastern workers) and captives of the Second World War, who came through “filtration” in state security authorities after coming back to motherland. Besides, due to insufficiency of place to store these documents state archives of Donetsk and Odesa regions had to rejected completely to carry out the decree of the Parliament.

It is not difficult to notice that archival institutions have received first of all those documents, which were necessary for social protection of citizens and renewal of historical justice concerning unreasonably repressed people. Within 1992–2002 information from these documents has been requested by 1.180.471 persons, including 1.134.902 Ukrainian citizens and 45.569 foreigners (from Russia, Byelorussia, Kazakhstan, Israel, Poland and other). They were given 836.581 positive references, and 343.890 negative answers. There was a great number of rehabilitated citizens, who requested to certify the fact of their being persecuted by totalitarian regime.

But at first steps of using the information from Security Service of Ukraine archives, state archives clashed with the problem of citizens’ interests protection. Mostly those were questions of enclosing of negative information about persons, contained in files of judicial and out-judicial processes, in transcripts of accused persons’ interrogation and other. At their own initiative archivists had to become those “gatekeepers”, described by

famous American archivists and librarian M. Lane, and restrict the access to files, transferred from Security Service of Ukraine, in order to guarantee constitutional rights of citizens, untouchability of persons and private life⁵.

One more aspect of this problem lies in necessity of professional criticism of documents of secret services archives. Since one of the main methods of work of Soviet special services were provocation and deception, then it is evidently that they were widely used in work with arrested people. There were forgery of interrogation transcripts, falsification of evidences and investigation files in whole, distribution of false information, as if it was received during investigation. That is why, each information from archives of special services requires thorough examination, search of acknowledgements from all relating documents, and attempts of “sensational publication” of such documents most likely to do much harm to certain person, but not to obtain historical justice⁶.

Activity of State archives of Security service of Ukraine, created according to decree of the Cabinet of Ministers in 1994, also provides supplying of informational needs of society and the state, assisting in realisation of rights and interests of citizens. This archives inherited all documents, created in the process of activity of republican authorities of national security within 1919–1991, materials of criminal processes, which were not followed with rehabilitation. Access to those of them, which contain information about person, is based on the norms of Constitution of Ukraine, laws “On Rehabilitation of Political Repressions Victims in Ukraine”, “On Information”, “On State Secret” and “On the National Archival Fond and Archival Institutions”.

The question is namely about article 32 of Constitution of Ukraine, which at the same time guarantees to each citizen the right for familiarisation with information about him or her, collected by public authorities in case there are no state or other secret, protected by law. It is also prohibited to use and distribute confidential information about person, except some cases. Article 34 of the Constitution provides that right to free collection, keeping, use and distribution of information may be restricted in interests of national security, territorial integrity, keeping of civil order, for protection of reputation or rights of other people, for prevention of enclosure of confidential information and other⁷. These norms completely correspond to requirements of European convention on protection of main human rights and freedoms of 1950, as main international act on human rights.

These norms of Constitution of Ukraine are realised wider in several laws, mentioned above.

That is why State archives of Security service of Ukraine separately studies each inquiry, concerned with granting of access to archival documents, which contain information about a person, taking into account mentioned juridical norms. Certain decision depends on inquirer’s possession of a right to request such information, correlation of such right with the rights of other people, availability of person’s permit to give information about him or her, regulations of access to this information, provided by norms of the Law “On State Secret”, and other.

According to Ukrainian legislation foreigners may use archival documents as citizens of Ukraine, which corresponds to the norms of international law and confirms our aspiration to adaptation to world democratic legislation. This norm is applied at state archives as well as at branch archives of Security service of Ukraine.

Its documents are widely used. Within the year of 2002 State archives of Security service of Ukraine received 350 applications from research institutions, universities, social organisations, another 550 applications from citizens of Ukraine, 17 – from foreigners. These inquiries are concerned with documents, which contain information about policy of totalitarian regime, massive repression mechanism, and activity of National security authorities.

At the same time, in opinion of specialists of State archives of Security service of Ukraine, one of unresolved issues is the problem of access to archival criminal files, court decision on which came into effect and were not cancelled. To explain the matter, it must be mentioned that mostly political opponents of Soviet regime were accused of criminal offences. Such files, dated on 1919–1960, regardless of any logic, but according to the letter of Soviet law, are not accessible to any citizen, even to relatives⁸. Even now only personnel of prosecutor's office and court can use them, as it is regulated by norms of Criminal-Procedural Code of Ukraine. The question of access to such files should be solved at legislative level. The necessity to introduce changes to the Law of Ukraine "On Rehabilitation of Political Repression Victims in Ukraine" is quite clear, since it was passed in 1991 and deprives the right for rehabilitation of persons, who struggled against Soviet power, though it is vivid that they were real Ukrainian patriots.

So, political processes of the last decade in Ukraine, concerned with disclosing of archives of former secret services, are rather contradictory. On the one hand, society in general, and mostly radical political elite and academic community requires complete knowledge of all restrictions as to using of these archives. Practice of certain legislative and public authorities is destined at keeping of balance between level of revelation of crimes of totalitarian regime and guarantees of human rights, first of all at securing of confidentiality of personal data, collected by former regime, since uncontrolled use of such data may harm certain persons and their descendants. Under such circumstance archivists, including archivists of Security service of Ukraine, have very responsible task to become "gatekeepers" and guarantors of human rights protection. Execution of these functions needs strong legislative base, which is not completely perfect in Ukraine yet.

¹ Montgomery Bruce P. "The Iraqi Secret Policy Files: A Documentary Records of the Anfal Genocide", *Archivaria*, 52 (Fall 2001), p. 71 – 72.

² Maksymova Ella. "Prodavtsy sensatsii iz arkhiva Prezidenta", *Izvestiia* (July 13, 1994).

³ See: http://www.liv.ac.uk/lukas/Political_pressure_files/draftprog.htm

⁴ See: *Arkhivy Ukrainy*, 1991, No. 5–6, p. 6.

⁵ Hyka V.M. "Z dosvidu roboty volynskykh arkhivistiv po pryiomu ta obliku dokumentiv arkhivno-slidchykh sprav ta vyrishenniui problemy iikh vykorystannia", *Arkhiv-*

no-slidchi spravy represovanykh: Naukovo-metodychni aspekty iikh vykorystannia, Kyiv, 1998, p.132–133.

⁶ Pyrih R.Ia., Hrankina O.V. “Arkhivno-slidchi spravy represovanykh iak istorychne dzherelo: naukovo-metodolohichni aspekty vykorystannia” *Ibid.*, p.2–28.

⁷ Konstytutsiia Ukrainy (1996), article 32, 34.

⁸ See: Bilokin S. “Masovy teror iak zasib derzhavnoho upravlinnia v SRSR (1917–1941)”, Kyiv, 1999, p. 37.

Kostiantyn NOVOKHATSKY

**LEGAL REGULATION OF RESPONSIBILITY
FOR VIOLATION OF ARCHIVAL
LEGISLATION IN UKRAINE**

In the process of constituting of variety of ownership, rendering of new meaning to rights and freedoms of citizens, relations in the sphere of archival affairs may be regulated only on legislative basis.

This, in fact, determines evident growth of the role of normative-legal regulation in activity of the State Committee on Archives of Ukraine. Performing of such regulation is of second importance task of the Committee, after producing of offers on formation of public policy in archival sphere.

Norm creating, including law creating, activity of the State Committee on Archives is carried out on various levels and simultaneously at several directions. First of all, this is work on creation and improvement of basic laws, which regulate the sphere of archival affairs and record keeping.

On December 13, 2002 it was passed a new reduction of the Law of Ukraine "On National archival fond and archival establishments", which was in effect since 1993. Numerous innovations extend the sphere of its application and provide conditions for more complete realization. At that they do not exclude from agenda questions on necessity to pass more extended law on archival affairs. New reduction of the law on NAF has fixed the necessity of development and passing of one more law – on record keeping.

Simultaneously with work on these principal laws on archival affairs and science of documents we make offers concerning taking into account and protection of our interests in other laws, where archival connections may be noticed. Till now we have more than thirty of such laws.

The State Committee on Archives performs actions of analogue character in concern with drafts of normative-legal acts of other levels: decrees of the President, decrees and regulations of the government, acts of other central executive bodies.

It is worth to mention social protection of archivists: providing of main categories of specialists in central state archives with state employee status, rises and long service bonuses, bonuses for use of ancient languages.

Almost this year main block of sub-law acts, on the basis of worked out legal norms consolidation, has been transferred to archival technologies level in Principal rules of activity of state archives.

Problems of improvement of legal regulation in general, including in archival affairs, have several aspects. First of all this is a producing of certain norms, their legalization with further mastering by law subjects and,

finally, securing of their practical realization in day-to-day activity. The last one also greatly depends on presence of necessary sanctions for violation of approved norms at this or that system of legislation.

Ukrainian legislation provides various forms of responsibility for lawbreaking in this sphere depending on scale, character of violations and other circumstances. First of all, the law on NAF itself contains an article, which provides such responsibility, and the list of violations. They are negligent storing, damage, destroying, falsification, concealment, stealing, illegal bringing out Ukrainian territory, illegal transfer of NAF documents to another person, illegal access to such documents. At that it is important that responsibility occurs not only concerning documents, which are already included into NAF, but also those, which are to be included into it. Another important moment: provided in the law list is not complete, it is conditioned also that “other violations of legislation on National archival fond and archival establishments” are also to be punished. And finally, third moment – sanctions are imposed not only for direct violation of the law, but legislation as well, that has rather wider significance.

New reduction of the law is supplemented with the article on compensation of losses, suffered due to violation of legislation. It means that application administrative penalties or criminal punishments does not release guilty person from compensation of caused losses.

Crimes in archival sphere may be conditionally divided into groups. First – property crimes: stealing, pillage, robbery, blackmailing, swindle and other. Here documents of NAF and wider – archival document – are qualified as a type of movable property. Several articles of Criminal code are dedicated to crimes concerning cultural values. And the rest, third group – protection of documents as information media and information itself.

In practical activity of archival establishments, of course, more often we can see law-violations, which can not be classified as criminal. Due to that Code on administrative violations was supplemented with a new article, specially dedicated to archival documents, 92’ – “Violation of legislation on National archival fond and archival establishments”, which provide warning or imposing of penalty at the rate from three to forty nontaxable minimal profits of a citizen (about from 10 USD to 150 USD). Correspondingly, provisions on state archival establishments provide right to cause an issue on calling of lawbreakers to an account.

Besides, a range of sanctions for violation of certain requirements of legislation, first of all on providing of safety of documents of NAF, are stated in text of archival law itself. In particular, archival establishments have the right to refuse documents access to citizens, who severely violated procedure of documents’ use.

Providing such sanctions, the law defines also mechanisms for consideration of disputes, appealing against made decisions. So, actions of officials of archival establishments, who prevent realization of legal rights of users, may be appealed at subordination order or at court. Disputes, concerned with ownership, compensation of losses, referring of documents to NAF and excluding from it, are to be settled only at court.

At the same time we have no any basis to speak unambiguously about perfection of existing legal regulation of responsibility for violation of archival legislation in conditions of growing threat to archival documents. In particular, rather problematically can be imagined calling to an account of natural persons – owners of the documents – for their non-providing for carrying out of their value expertise. On our opinion, it would be more effective to use here not incentive, but forcing stimulus.

In deciding of many problems concerned with national archival building, conducting and development of archival affairs, including its legal regulation, invaluable basis is studying and mastering of foreign and international experience.

Gary M. PETERSON

**INTERNATIONAL ARCHIVAL
LEGAL ISSUES IN A DIGITAL AGE***

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INTRODUCTION

It is obvious that we live in a digital world. It is also obvious that the use of the computer is increasing and this use is shrinking the world. In the past twenty years we've experienced a change from the tradition of writing everything on paper to the new custom of electronic communication with the computer. This change challenges traditional legal concepts such as copyright, authenticity and privacy and calls into question the adequacy of existing legislation.

The International Council on Archives (ICA) recognizes these challenges. At the XIVth Congress in Seville, Spain, the Congress approved four recommendations regarding electronic records and information technology. The recommendations were that:

1. Archivists ensure continuing access to the content and functionality of authentic electronic records, recognizing that they cannot be preserved in their original physical format;

2. National Archivists, with full understanding of the urgent need to preserve the electronic records of governance, should provide leadership to ensure the preservation and accessibility of records to secure the rights of citizens;

3. Archivists, welcoming the enhanced access to archives provided by advances in technology, ensure that all citizens, whether or not able to use modern communications technology, have equal access and equal opportunity to use their documentary patrimony;

4. The committee on Archival Legal Matters of ICA (ICA/CLM) should continuously monitor the development of copyright questions, in particular with regard to the development of copyright of electronic material, and should provide studies and professional assistance to the profession.¹

The ICA Committee on Archival Legal Matters is addressing these recommendations.

* Posted on the CLM web page:
<http://www.ica.org/biblio.php?pbodycode=CLM&pubtype=pub&plangue=eng>

COMMITTEE ON ARCHIVAL LEGAL MATTERS (CLM)

The CLM is one of numerous ICA committees. Members of the committees are appointed by the President of ICA every four years at the Congress. Thus, the current committee was appointed at the Seville Congress in September 2000. The committee is chaired by Claes Granstrom of Sweden. Jean LePottier and Gary Peterson are the secretaries.² The committee has 25 members (18 full members and 7 corresponding members)³ representing North America, Europe, Middle East, Africa and Asia. In addition to an organizational meeting in Seville, the committee has met in Basel in April 2001 and in Brussels in April 2002. The next meetings will be in Macao in December 2002, Poland in May 2003, and the XVIIth Congress in Vienna in 2004.

During the Basel meeting the committee formed working groups to deal with the recommendations of the Seville Congress. Working groups were formed to study and report on authenticity of electronic records, copyright, principles for archival legislation, archival claims, and access and data protection. Interim reports were due at the Brussels meeting and final reports will be ready for the Poland meeting. The committee will give an account of the past four years' work at the Vienna Congress and will present seminars on the topics.

WORKING GROUP ISSUES

1. Authenticity of records in the electronic environment

"Archivists should protect the authenticity of documents during archival processing, preservation and use."⁴ As a result of the Code of Ethics stressing the authenticity of electronic records, the CLM, in 1997, established a working group to study the legal issues surrounding creating authentic, reliable and valid records in the electronic environment. The working group prepared a draft report that was discussed at the Seville Congress. The authenticity working group is currently led by Josef Zwicker of the Staatsarchiv Basel-Stadt. The task of this working group is to answer the question, "What is an authentic electronic record?"

In furtherance of this task, in the last year, ICA and UNESCO asked the CLM to identify issues that archivists and records keepers must keep in mind to ensure the authenticity of electronic records in the case of migration of the materials and in the case of transfer of the materials to the archives. The problems of authenticity relate to the fact electronically recorded information is volatile – there are more weak points threatening authenticity than there are for conventional documents and more complex measures are necessary to preserve authenticity in an electronic environment. A final report was sent to UNESCO in April 2002. The report explained authenticity, illustrated technology's impact on authenticity, reviewed other studies dealing with the authenticity of electronic records, and finally made some recommendations for future action.

The report to UNESCO had six recommendations:

1. Archivists understanding of the need to preserve authentic digital records must be improved. UNESCO should promote programs that educate and raise the awareness of archivists on the issue of preserving authentic electronic records.

2. UNESCO should conduct a survey of the archives of the world on the status of the authenticity of electronic records.

3. There is not a common agreement among archival professionals on the meaning of terminology. UNESCO ought to promote an agreement on terminology.

4. There have been so many studies on how to preserve authentic electronic records that some summing up and conclusions are necessary. UNESCO should back the development of guidelines on preserving authentic electronic records.

5. UNESCO should take an initiative to make governments aware of the special archival problems in preserving electronic records in authentic form.

6. Recognition of the need for adequate resources and organization to preserve digital cultural heritage is paramount. UNESCO should develop the criteria and models for such an organization.

It is too early to say what action will be taken by UNESCO on these recommendations.

The CLM working group will have a final report ready for Vienna.

2. Archives and copyright in the information society

The copyright working group was created at the CLM Spoleto meeting in 1997. Gary Peterson volunteered to head the working group. The group was formed as a result of the recommendations of the 1996 Beijing Congress and the December 1996 World Intellectual Property Organization (WIPO) Copyright Treaty. Basically, the WIPO treaty amends the Berne Convention on Copyright to include computers and databases which were not covered by the convention. The group reported at the Seville Congress and the report has been published in *Comma, International Journal on Archives*.⁵

The report was updated in July of 2001 to reflect the EU Copyright Directive of May 2001 and was sent to all EU national archivists. The report warns that countries will have to amend their copyright laws to comply with the WIPO treaty and EU Directive and must do so within 18 months (December 2002). Fair dealing (fair use) is non-compulsory in the WIPO and the EU directive. This means that in drafting new copyright legislation it is not necessary to include fair use for computer records. As a result, there is a risk that fair use will not be applied in the digital arena. As the article published in *Comma* states, "In reviewing new computer records copyright legislation archivists must insure that access to and reasonable copying of computer information is not impaired." The working group is monitoring developments as the WIPO is ratified and will report as necessary. Training on copyright is scheduled for both the Macao and Poland meetings. A session for the Vienna Congress is also planned.

3. Principles for archives and current records legislation

The CLM began developing a consensus on principles of archival legislation in 1993. The committee presented its finding at the 1996 Congress in Beijing and the report was subsequently published in *Janus*, 1997, 1. The principles addressed were only the most basic legislation such as definitions of records and archives; inalienability and imprescriptibility of state records; records of the private sector; reporting responsibility; records management; appraisal and destruction; arrangement and description; access; and sanctions. Interpretation and application of the law was left to regulations drafted to reflect each particular states legal tradition. The report contained examples of model legislation taken from existing national legislation from different nations.

Sarah Choy, Public Records Office of Hong Kong, heads the working group updating the principles. Primarily the group is adding more current examples of model legislation. The working group presented a draft paper in Brussels and will have a final ready for publication in Poland. It is a sad commentary that many nations still do not have adequate archives laws for the 20 th century let alone for the 21 st . It is anticipated that archivists and government administrators working on archival legislation will use these principles in lobbying, informing, and training.

4. Archival Claims

This working group is headed by Wladyslaw Stepniak, State Archives of Poland. The purpose of this group is to produce a paper on the status of archival claims. Archival claims are of immense interest to newly formed or newly freed nations and are also of interest to counties attempting to recover items taken during war or occupation.

The group presented a review of the international laws on archival claims at the Brussels meeting. It appears from the report that no new laws are needed, but education on and enforcement of existing laws is necessary. A final report will be ready by the Poland meeting and a program will be presented at the Vienna Congress.

5. Access and Data Protection

Rolande Depoortere, Archives de l'Etat en Region de Bruxelles-Capitale, chairs the access and data protection working group. Access to government information is important for a number of reasons. Access creates confidence in government administration, advances the legitimacy of government decisions, encourages effective government administration, and reduces corruption. The other side of access is privacy or data protection.

These two subjects, access and privacy, are of great interest to European archivists at this time. The first reason for this interest is the EU Directive 95/46/EC 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. The second reason is EC Regulation No. 1049/2001, adopted on 20 May 2001

regarding public access to European Parliament, Council and Commission documents. This regulation is basically the EU's freedom of information act. The regulations became effective on 3 December 2001.

The group presented a report at the Brussels meeting. A member of the group, Eljas Orrman, National Archives of Finland, presented a paper entitled "Legislation Concerning Access and Secrecy of Official Records and Archives and Personal Data in the Nordic Countries." Jay Butler, Genealogical Society of Utah, proposed preparing a paper on the legal and policy issues in transnational electronic publication of archival data regarding individuals. Butler noted that electronic publication knows no national boundaries and is largely beyond sovereign control. He asserts that "These and other unresolved issues affecting access to data, individual rights of privacy and the interest of public archives in preserving the integrity of archival data and preventing its unauthorized distribution are of great importance to archival administrators throughout the world..."⁶ This paper as well as the final report of the working group will be presented at the Vienna Congress in 2004.

As technology changes, pressure will increase to provide speedy access to public information. Additional burdens will also be imposed by the privacy considerations surrounding electronic records. Archivists will be challenged to provide access but must keep in mind that, "Archivists are committed to the principle that everything in their holdings will eventually be available for reference use, but archivists equally cling tenaciously to the idea that a balance must be struck between the public's right to know and the need for confidentiality."⁷

CONCLUSION

U.S. archivists must care about the issues that the CLM is studying for at least two reasons:

1. Supranational legislation is growing to be more common and this necessitates supranational cooperation (e.g. copyright). Archivists must participate in this action or be resigned to the results.

2. The archival world is increasingly embracing standards for practice. The two international standards for description are now being incorporated into U.S. practice. The international standard for records managements has been adopted by the International Standards Organization and is now the point of reference for records managers around the world. As more standard practices evolve, in areas such as those being discussed by the CLM, they will affect the practices of U.S. archivists.

The CLM will continue to address archival legal issues and report to the profession.

These reports will only be effective if archivists around the world take action

¹ Recommendations of the XVIth International Council of Archives Congress, Seville, Spain, September 2000.

² Minutes of the CLM meetings are written in both French and English which are the working languages of the committee.

³ Full members are expected to attend meetings and participate in working groups. Corresponding members are welcome to attend meetings but are kept informed of the committee's work only via e-mail.

⁴ Code of Ethics, adopted by the ICA General Assembly, Beijing, 6 September 1996.

⁵ New Technology and Copyright: the Impact on the Archives, by Gary M. Peterson. *Comma, International Journal of Archives*, 2001-1/2, p 69-76.

⁶ Unpublished memo by Jay W. Butler, dated 24 April 2002, submitted to CLM in Brussels in the possession of the author.

⁷ Archives and Manuscripts: Law. By Gary M. Peterson and Trudy Huskamp Peterson. The Society of American Archivists, Chicago, IL 60605, 1985.

PRINCIPLES FOR ARCHIVES AND RECORDS LEGISLATION

**Draft paper presented by Viktoras Domarkas
at pre-congress seminar in Elbląg**

Draft paper presented at pre-congress seminar in Elbląg*
(May 2003)

1. INTRODUCTION

Legislation is a set of binding principles and rules stipulated through formal mechanisms to grant power, confer rights and specify limits that regulate the conduct and behaviour of a society. Archives and records legislation establishes the legal and administrative base that allocates functions, power and responsibilities among accountable bodies within the country, and expresses the rights and expectations of citizens with respect to recorded information and documentary heritage.

Archives and records legislation establish preconditions [framework] for management and maintenance of archives and records, provides the mandate of the archival authority, sets out the rules for its operation, defines what part of the collective memory of the country should be retained and preserved, and for whom and under what conditions the preserved records could be made available. Although some may argue that legislation does not necessarily ensure compliance, without the elements of an archival authority being clearly established by law, the identification, preservation and access to archival heritage will not be certain.

The varied history, legal tradition and experience in different countries have no doubt created differences in the content, interpretations and applications of archives legislation. However, we all have the same need for clear, updated and workable legislation to protect and provide access to archives, and to cater for new development and changes such as technological innovations, new social or business orientations and new records related laws that have competing priorities and emphasis.

This paper is an update of a document, which bears a similar title prepared by CLM/ICA in 1996. It is written as a response to the rapid growth of electronic records and information, the heightened demand for government transparency and ready access to recorded information, and the enactment of various new records related legislation in many parts of the world. Despite the changes taken place, we assume that it is the shared mission of every National Archives to ensure the creation, identification and preservation

* Extended version of the paper presented at Pre-Congress Seminar in Elbląg (May 2003). Published in: Archives in the Society. ICA Pre-Congress Meeting – Vienna 2004: Papers of the International Conference. Elbląg, May 22–24, 2003. Edited by Władysław Stępnia. The Head Office of State Archives, Warszawa, 2003, p. p. 115–131.

of authentic, reliable and usable records of enduring value, and make them accessible to the largest possible extent according to the interests of the country and its citizens. The archival principles to be discussed in the following paragraphs aim to give effect to this shared mission.

We do not intend to offer a model of a perfect Archives Act. Our intention is just to point out on what aspects attention should be drawn when drafting archives and records legislation.

Although the focus of the article is succinct archives and records legislation addressing the fundamental issues essential for establishing and maintaining a national archival authority, many of the archival principles outlined are of general application to Archives at provincial level. Each country, having regard to its own history, legal tradition, administrative culture and social and political reality, may have its own ways to achieve the entirety or part of these archival principles. Whether in reviewing existing archives legislation or drafting a new law, it is recommended that only the most essential principles and practices should be firmly stated in law. The more flexible and easily amended regulations and policies may be used to facilitate interpretation and application of the law.

In this paper unless the context otherwise refers –

“**access**” includes the meaning of access and use.

“**archives**” includes records and documents appraised to have enduring value for permanent preservation.

“**Archives**” mean the organization responsible for managing archives and/or records.

“**documents**” and “**records**” carry the same meaning as recorded information generated in business activities that are kept as evidence of the activities.

“**National Archives**” refers to a national organization with the authority to take care of archives and /or records.

“**public records**”, “**state records**” and “**official documents**” have the same meaning indicating those records created, received and maintained by government agencies or other institutions within the public domain as opposed to private records from non-government agencies, institutions, families or individuals.

“**state**” is equivalent to a country as a political entity.

2. ARCHIVES LEGISLATION OR RECORDS ACTS

A country may choose to tackle issues relating to records and archives in a single piece of legislation or in several laws but the statutory provisions and definitions should always be clear and consistent.

Archives and records legislation is closely associated with the management of current records and decisions about their creation, maintenance, access and disposal. This is especially true in dealing with electronic records whose authenticity, reliability, usability and durability hinge upon proper system planning even before the records are created and sound management throughout their life cycle. A country may choose to tackle issues relating

to records and archives in a single piece of legislation or in several laws. Some may extend the mandate of the National Archives to include certain management aspects of records in their active stage. Others may prefer an integrated approach by establishing a National Records Administration with jurisdiction over the management of records in continuum. Regardless how the legislation is shaped, the factors to be addressed demand clarity and consistency. To ensure that the archives legislation is accurately interpreted, it should also include clear definitions of all the technical terms used, as well be compatible with related national legislation such as on freedom of information, data protection, legal procedures, evidential value of record, public administration etc.

3. DEFINITION OF RECORDS AND ARCHIVES

There is no single definition for records and archives. These terms must be defined and used without ambiguity in the archives legislation, and they must also be compatible with other related law.

Depending on national legal and administrative tradition, legislation may make a distinction between records and archives or may cover entire life cycle of records. Records may sometimes be synonymous with documents. In some countries, records are defined as recorded information regardless of its form or medium created, received and maintained by an agency, institution, organization or individual in pursuance of its legal obligation or in the transaction of business that they take part or provide evidence. Archives may refer to records under the control of the authority designated by the archives legislation or as records selected for permanent preservation because of their continuing value. A generic term may sometimes be used for both records and archives with a distinction made between current and historical records.

Examples

Whenever records and documentary material are mentioned in this Act, it refers to any kind of records, written as well as in any other form, which contain information and have their origin in the functions performed by an institution or an individual, whether written records, maps, plans, photographs, films, slides, sound recordings, machine-readable material, tapes or any parallel material. (Iceland, Section 3)

Les archives sont l'ensemble des documents, quels que soient leur date, leur forme et leur support matériel, produits ou recus par toute personne physique ou morale, et par tout service ou organisme public ou prive, dans l'exercice de leur activite. La conservation de ces documents est organisee dans l'interet public tant pour les besoins de la gestion et de la justification des droits des personnes physiques ou morales, publiques ou privees, que pour la documentation historique de la recherche (France, Section 1).

“Public records”, “state records” and sometimes, “official documents” are used interchangeably in archives legislation indicating those records created, received and maintained by government agencies or other institu-

tions within the public domain as opposed to private records from non-government agencies, institutions, families or individuals. As the right and ways of access to records and archives often depend upon how these terms are defined in the legislation, consistent and clear definitions are essential, and as far as possible, they should also be compatible with the terms used in related laws.

The definition of a public or state record under archives legislation should meet the essential criteria of provenance, purpose and value. It should cover recorded information created, received, and maintained by a government organization or any organization performing public functions and services on behalf of the government as evidence of such functions and services. It should preferably include any aids and supplementary data necessary to understand and use such information. An enumeration of different kinds of documents that are considered to be records/archives may illustrate, but not replace a proper legal definition. The definition needs to remain valid regardless of the form or medium of the record. An enumeration of possible forms of a record tends to become obsolete when technology develops a new media.

Example

“Records” included all books, paper, maps, photographs, machine readable materials, or other documentary materials, regardless of physical forms or characteristics, made or received by an agency of the United States Government under federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legislative successor as evidence of the organization, functions, policies, decisions, procedures, operations or other activities of the Government because of the informational value of the data in them.” (US Federal Legislation)

Document in the meaning of this Act shall be recorded information, regardless of medium, received or produced in the performance of the public duties of the Confederation, and all aids and supplementary data necessary to the understanding and use of such data. Archives shall mean documents taken into safekeeping by the Federal Archive or independently archived by other bodies according to the principles of this Act. (Swiss Federal Act, Section 1)

It is my personal opinion that today especially in Europe, with existing trend on transparency in administration, it is better to use the definition of records in continuum, without separation on “records” and “archives” in order to avoid a danger of inconsistency of legal acts.

4. SCOPE

Archives legislation must define the scope and extent it applies. Apart from government bodies, considerations should be given to include organizations that perform public functions.

Legislation must define the scope of the bodies to which it applies. Legislation for records or archives should make clear whether it covers

the head of government and all the bodies, with or without exceptions, that discharge the legislative, judicial and administrative functions of the country, and if it also extends to include public corporations, quasi-government agencies and others that perform public functions. For the latter, a further elaboration of the scope of the public bodies and quasi government agencies should be included. Further, provisions regarding dissolved public institutions and the extension of statutory control to new public bodies should also be considered.

Depending on tradition of the country, in the scope of the Act could be included and private legal entities with intention to protect cultural heritage, public interest and human rights.

Example

Records in any form whatsoever received or created by an administrative authority...or by an institution or person whose rights or duties have passed to an administrative authority...(and an) administrative authority is an organ of a legal person established under public law, or, any other person or body in whom or in which some public authority is vested. (Netherlands, Section 1)

In the legislation of the United Kingdom, public bodies included, “their staff, together with public services, enterprises and institutions and their respective staff” and “public bodies before or after the entry into force of this Act”. The specific inclusions provide clarifications of the definition of public record and the breadth of the law. Sometimes there may be a need to exclude from the legislation certain bodies or certain records. These should be clearly specified in the legislation. Another important consideration is how easy it should be to extend the coverage and exclusion under the legislation, and how it should be carried out. If it is the intention to alter ambit in the future without resorting to amending the legislation or enacting new laws, the legislation should provide a mechanism to include or exclude bodies and records that it intends to cover.

Examples

A Commonwealth institution, or a person having to act on behalf of a Commonwealth institution, may, with the concurrence of the Director-General, determine that a Commonwealth record, or each record in a class of Commonwealth records, being a record or class of records in the possession of the Commonwealth institution or relating to the functions of the Commonwealth institution is

- (a) a record that is not required to be transferred to the custody of the Archives under section 27; or
- (b) a record to which the Archives is not to be entitled to have access under section 28 or is not to be entitled to have access under that section otherwise than on specified conditions to be observed by the Archives... (Australia, Section 29).

Without prejudice to the Lord Chancellor’s power of making orders under paragraph 4 of this Schedule, Her Majesty may by Order in Council

direct that any description of records not falling within the foregoing provisions of this Schedule (not being Welsh public records) as defined in the Government of Wales Act 1998) shall be treated as public records for the purpose of this Act but no recommendation shall be made to Her Majesty in Council to make an Order under this sub-paragraph unless a draft of the Order has been laid before Parliament and approved by resolution of each House of Parliament (United Kingdom First Schedule Section 7(1)).

5. INALIENABILITY AND IMPRESCRIPTIBILITY OF PUBLIC RECORDS AND ARCHIVES

The National Archives should have the right to inspect, replevin, recover and instruct protection of public records which are or believed to be estrays through an established mechanism.

Public records and archives of a country should be taken as public property in the public domain through a process governed by law. Records and archives relinquished from official custody without lawful authority or if the authority is subsequently revoked should not lose their quality as public property. The National Archives should have the right to inspect, replevin, recover and instruct protection of public records which are or believed to be estrays. It may be useful to include provisions for reproduction of estrays where return of records is not feasible.

Given the world-wide trend of privatization, corporatization and outsourcing of government functions and services, archives and records legislation may require explicit records disposal before such administrative or organizational changes happen to ensure that records created before such changes retain their public nature unless provided otherwise in law. Some legislation incorporate provisions that prohibit or impose controls on the export of records which are considered to be or once have been considered archives in the legislative framework concerning cultural property. In short, it is important for the National Archivist to be given the right and a mechanism to “declare” or “schedule” records he or she considers to be or have been public archives with retrospective effect and take appropriate recovering or protection measures.

Example

Les archives publiques sont insaisissables, inalienables et imprescriptibles.

Lorsqu'il est établi que des archives sont d'origine publique et détenues par les personnes physiques ou morales, l'Etat les revendique sans limitation de temps (Algeria, Section 6).

6. RECORDS FROM THE PRIVATE SECTOR

The National Archives should be given responsibility and flexibility to acquire archives from private sources for proper preservation or to enrich its collection through legal means.

Archives and records legislation should identify the responsibility of the National Archives for the acquisition and care of private records that warrant permanent preservation. While the responsibilities may or may not be extensive, the National Archives should be given the flexibility to acquire archives from private sources for proper preservation or to enrich its collection through legal means. The degree to which the National Archives acquires private records partly hinges on the division of collecting responsibilities among cultural institutions in each country. The manner in which the enabling legislation is exercised will also be determined by the kind and extent of intervention in the private economy chosen by each government. Regardless, the archives legislation should encourage communication and cooperation to preserve private records of national, regional and local significance.

Archives legislation in some countries imposes explicit controls on private archives, which are of main public interests. While the controls may not affect ownership, the idea is to ensure proper preservation and thus the owner may not be allowed to destroy, change or export the archives without approval of the National Archives. Sometimes, the National Archives may have the right or the priority to either copy or buy the archives at a price fixed by the owner if the latter has the intention to export the archives.

Example

"Private archives or records (...) may, by agreement made with the owner, be accepted for preservation and maintenance with the National Archives (Finland, Section 20).

7. ESTABLISHMENT, RESPONSIBILITIES AND STRUCTURE OF THE ARCHIVES INSTITUTION

Archives and records legislation should provide for the establishment of a National Archives with clear mission and broad functions that enable it to play a key part in making policies for and management of records throughout their entire life cycle.

Legislation should provide for the establishment of a National Archives and state its mission and major functions in acquiring and preserving the society's documentary heritage and making it available for public access and use. Regardless of how the National Archives is structured, it must be designated [entitled] to play a key part in the overall management of records and information of the public administration. Its statement of mission in legislation should be comprehensive and broad with the major functions listed to illustrate a mission but not to limit the mandate. A too detailed enumeration of specific functions and responsibilities may restrict the evolution of the Archives as the environment changes.

To ensure that adequate, reliable and authentic records are created, maintained and preserved, and to avoid duplication in management efforts, National Archives should participate, at the front end, in planning, policy-making and developing the infrastructure of electronic records and information systems, and implementing appropriate recordkeeping rules and

practices. With the increasing reliance on electronic records in documenting decisions and conducting business transactions, the need for establishing a close link between the National Archives and records creators, managers and users is becoming more imminent than ever. The collaboration or integration of records management and archival activities is sometimes effected through restructuring or extending the role of the National Archives to become a National Records Administration with jurisdiction over records throughout their entire life cycle.

The formal authority to take action on professional issues about records should be vested with the senior professional, usually the National Archivist, acting under the overall constitutional responsibility of the government represented by a Minister or higher. The mandate of the National Archivist should include not only areas of acquisition, preservation, access and use of archival records but also the creation and maintenance of adequate, accurate and usable records in agencies covered by the legislation.

Although it is not the task of legislation to define internal organization or detailed administrative arrangements, it is essential that the legislation authorizes the appointment of the head of the National Archives and defines the statutory duties and responsibilities. If it allows national legal framework, in order to ensure quality management of archives and records, the recruitment, training, promotion and the professional qualifications of middle and senior archivists, and the classification of records staff both in the National Archives and working in government agencies should be addressed in specified regulations or staffing standards.

Examples

The objects and functions of the National Archives of Canada are to conserve private and public records of national significance and facilitate access thereto, to be the permanent repository of records of government institutions and of ministerial records, to facilitate the management of records of government institutions and of ministerial records, and to encourage archival activities and the archival community. (Canada, Subsection 4.1)

The Authority (State Records Authority) has the following functions:

- (a) to develop and promote efficient and effective methods, procedures and systems for the creation, management, storage, disposal, preservation and use of state records,
- (b) to provide for the storage, preservation, management and provision of access to any records in the Authority's possession under this Act,
- (c) to advise on and foster the preservation of the archival resources of the State, whether public or private,
- (d) to document and describe State archives in their functional and administrative context,
- (e) such other functions as are conferred or imposed on the Authority by or under this Act or other law.

(New South Wales, Section 66)

8. REPORTING RESPONSIBILITY

The National Archives should be established within the main stream of public administration under an influential minister or above to lead and control records and information management in departments and agencies.

As modern National Archives are accountable for the selection and preservation of relatively recent records of the country and they also have a central role to play in managing current records, legislation should place the National Archives within the main stream of departments and agencies. The National Archives should be under the jurisdiction of an influential minister or above with suitable authority to lead and control records and information management in departments and agencies. The legislation should provide the level of responsibility within the state structure that enables the National Archivist to intervene directly with the heads of other departments and agencies. Placement of the Archives outside of government or as a purely cultural institution may not be desirable, as it will not involve the Archives adequately in the ongoing programs and decision making of government.

Examples

The Archivist of the United States shall be appointed by the President by and with the advice and consent of the Senate (US Federal Legislation, Section 2103).

The Lord Chancellor may appoint a Keeper of Public Records to take charge under his direction of the Public Record Office and of the records therein and may, with the concurrence of the Treasury as to numbers and conditions of service, appoint such other persons to serve in the Public Record Office as he may think fit. (United Kingdom, Subsection 2.1)
The National Archivist of Canada shall be appointed by the Government in Council and shall have the rank and salary and all the powers of a deputy head of a department (Canada, R.S., c.1 (3rd Supp). 3(2).

9. ADVISORY BODY

An advisory body may be created to strengthen relationships with the government and private groups to ensure that the National Archives remains responsible to public needs.

Enabling legislation should permit the archival institution to create an advisory body that is useful in strengthening relationships with public and private groups that have an ongoing interest in the evolution of the institution. Responsibilities of the advisory body should not extend beyond the provision of advice as the direct responsibility and accountability of the archival institution is to the state of which it is a part. The role of the advisory body is to ensure that the institution remains responsive to its communities.

10. NATIONAL ARCHIVAL COORDINATION

National Archives should be given a leadership role within the community of archival institutions, both inside and outside governments (public and private sector) to facilitate the development of a national archival system or network.

Legislation regulating an National Archives system should take into account the structure of the country and the degree of autonomy enjoyed by authorities within the country. In some circumstances, there may be the need to have a coordinated national system, in which, public archives services are linked to different levels of government, provincial or municipal, etc. Provisions should also be considered in legislation for any responsibilities assigned to the National Archives for management of the archival operations of other authorities such as those enabling the National Archives to play a leadership role within the community of archival institutions, both inside and outside governments (public and private sector). These will facilitate the development of a national archival system or network. Under this umbrella, policies can then evolve to strengthen the national archival system.

Example

Au cadre de l'activite du Directeur General des Archives de l'Etat appartient la coordination de l'activite archivistique sur le territoire de l'Etat (Poland, Section 21).

11. RECORDS MANAGEMENT

Archives and records legislation should direct the National Archives to develop, approve and review advisory and mandatory standards and regulations for adequate and accurate recordkeeping in departments and agencies, and audit their management of records from creation to ultimate disposition against mandatory requirements to ensure authenticity, integrity and usability.

The quality of a record, regardless of its physical form, depends to a large extent on how it was generated and maintained by the records creating agency. Legislation should direct the National Archives to develop, approve and review advisory and mandatory standards and regulations for adequate and accurate recordkeeping and other management functions of records from creation to ultimate disposition to ensure their authenticity and integrity and usability.

The prominence of electronic records with their inherent physical attributes is an important factor favouring legislated authorization for the above. To ensure the ongoing preservation and accessibility of electronic records through time, the requirements of archival functions must align with the recordkeeping requirements even before such records are created. Without proper management and control of records at the front end of their life cycle, their authenticity, reliability, usability and durability cannot be assured, and those of archival value will not be readily identified and safeguarded.

The delivery of advice and instructions from the National Archives may be through other central agencies of the government, but the role of the National Archives in establishing standards and regulations for records held by public administration should be granted in law. Further, the archives legislation should establish the authority and role of the National Archives to inspect, instruct, and report on the creation, maintenance and use, retention, and disposal of records held by the public administration to ensure compliance with the mandatory records standards and regulations. It is useful to clarify the role and responsibilities of other government agencies or bodies covered by the act in respect of records management.

Examples

The Director shall conduct research and studies, develop and establish standards and procedures, for record making and record keeping, selective retention of records, scheduling of records for disposal, storage, security and preservation of records and their retirement to records centre or the National Archives. (Nigeria, Subsection 8.3)

The Federal Archives shall advise Federal agencies designated in paragraph 1 on the management of their records. (Germany, Subsection 2.10)

Each public office must make and keep full and accurate records of the activities of the office. Each public office must establish and maintain a records management program for the public office in conformity with standards and codes of the best practices from time to time approved... (New South Wales, Section 12 (1) and (2)).

12. APPRAISALS AND DISPOSAL

Archives and record legislation should stipulate that no public records should be transferred, migrated, altered, deleted or destroyed without the consent of the National Archives. The respective roles of the National Archives and government departments in appraisal and appropriate disposal of records should be defined and the ultimate authority specified.

All archives legislation should define the respective roles of the National Archives and the various government departments for continuous appraisal and appropriate disposal of records. The latter should involve not only destruction of records but also their transfer (custody and/or ownership) within and outside government jurisdiction, migration, alteration and deletion. The legislation should specify the objectives and formal responsibilities for records appraisal and disposal, and define the ultimate authority for these functions, which preferably should rest with the National Archives or the authority responsible for the National Archives. Archives legislation should unequivocally oblige all bodies creating state records not to dispose of such records without the consent of the National Archives.

Examples

No record under the control of a government institution and no ministerial record shall be destroyed or disposed of without the consent of the Archivist (Canada, Subsection 5.1).

The Federal Archives, after consultation with the offering agency, shall decide on the permanent value of the documents for the research in or the comprehension of German history, the protection of the rightful concerns of citizens or the provision of information for legislation, administration or jurisdiction (Germany, Section 3).

The law may also specify particular types of records, which are not to be eliminated, for example records dating from or before a certain date.

13. TRANSFER OF ARCHIVES

Legislation should require government agencies and public organizations to timely and systematically transfer archival records to the National Archives or relevant institutions as the National Archives directs. The National Archives may assume the role for the proper management, control and preservation of archival records regardless of their custody.

Legislation should require that government agencies and public organizations covered, in due course, transfer archival records to the National Archives or relevant institutions as directed by the Archives. Exemption for certain departments or certain types of records from the normal transfer arrangement may be included as necessary for reasons of costs, technology, statutory provisions or long-term operational needs, etc. with mandatory consent of the National Archives.

Systematic transfer of records of permanent value to the National Archives or organizations it designates should be accomplished according to agreed retention periods and transfer dates, and methods and rules prescribed by the archives. Transfer according to a fixed period of years after records creation defined in legislation may not be practical because of the rapidly evolving environment surrounding records creation and use. The timely transfer and preservation of electronic records has become particularly important because of the fragile nature of the medium on which such records are maintained and the necessity of acquiring related information that permits use of the records.

Examples

Upon the conclusion of a President's term of office, the Archivist of the United State shall assume responsibility for the custody, control, and preservation of, and access to, the Presidential records of that President. (US Federal Legislation, Section 2203 f.1)

Documents shall be deemed no longer constantly required and hence must be offered to the Federal Archive... no later than ten years after the last addition to the records. Special categories of documents shall be... transferred immediately after drafting or signature... The Federal Archives' instruction shall govern the details. (Swiss Federal Act, Section 2)

Le Conseil superieur des archives decide souverainement du transfert aux Archives historiques nationales de tous les documents qu'il juge avoir une valeur historique, qu'il s'agisse d'un ministere ou d'une autre administration publique (Egypt, Section 5).

Further, if an agency is defunct and the functions have not been transferred to an ongoing institution, the records of a defunct agency should also be transferred to the National Archives. The legislation may also provide for the proper management, control and preservation of records appraised to have permanent value by the National Archives whether or not they are to be transferred to the National Archives or its designated places.

Example

The Archivist shall be entitled from time to time to inspect any public records that are for the time being in the possession or under the control of any Government office and give such instructions as to their safe preservation and such advice as to their efficient and economical administration and management as he considers necessary (Fiji Islands, Section 9).

14. ARRANGEMENTS AND DESCRIPTION

The National Archives should be given the leadership in developing and promulgating archival arrangement and description standards.

The National Archives should be assigned a leadership role in developing and promulgating arrangement and description standards for the management of archives regardless of physical medium to facilitate their access and use. Detailed provisions are often left to regulations, instructions or internal manual.

Example

The National Archives may issue regulations concerning...archives descriptions and archives inventory... (Sweden, Section 11).

15. ACCESS

Access to public records, subject to prescribed conditions and exemptions for the protection of privacy, copyright and official secrets should be granted as a right preferably in a single legislation. Restrictions to record access should not be forever. A specified authority may grant exceptional access to closed records or change the closure period.

The freedom and liberty of access to records, subject to prescribed conditions, should be provided in legislation as a right of every citizen and foreigners may have equal access right. It will be desirable to have a single legislation or a single set of regulations that governs access to all official records including archives throughout a country. If such harmonization cannot be achieved, the archives legislation should take into account existing legislation on access to information, protection of privacy, data protection, and copyright with the aim to establish clarity and certainty, and ensure no erosion of access rights already exist. If the archives and records legislation does not override conflicting provisions in other laws, it will help to specify that the archives legislation prevail unless there is express repeal or specific action taken to avoid that result.

Access considerations should not determine the institutional location of the record or the transfer date of the record to the archives. The same

access conditions should preferably apply to records whether they are archives under the control of the National Archives or whether they are current records under the control of other departments and agencies of the administration.

While access may be refused in circumstances where archival records are in bad material condition, for protection of national security, public interests and privacy or in respect of individual donor agreements, such restrictions, however, should not last forever. Legislation should permit access to records at the earliest possible date, based on the impact of release, the application of fixed time periods for specific categories of records or certain attached conditions on the use of the information contained. The access date may vary for different categories of archives.

Legislation should also specify an authority, which may grant exceptional access to closed records or decide upon extending closure for an exceptional longer period. The authority may be vested with the minister responsible for the records and archives and/or delegated to the National Archivist. This power should be exercised within a process that provides a further opportunity for citizens to appeal the decision. Legislation should specify the authority that can remove restrictions in accordance with law. Legislation on access must be developed and implemented with a balance that ensures that records continue to be created, preserved and available for use.

The archives legislation should establish provisions in respect of copyright in records in the National Archives if no equivalent provisions exist in the copyright law. The provision should permit the Archives to make records available for inspection and to provide copies for research and study without breaching private copyrights that may subsist in them.

Examples

In order to encourage the free interchange of opinion and the enlightenment of the public, every Swedish subject shall have free access to official documents. The right of access to official documents may be restricted only if restriction is necessary having regard to (exceptions)... (Sweden, Sections 1 & 2).

Tout fonctionnaire ou agent chargé de la collecte ou de la conservation d'archives en application des dispositions de la présente loi est tenu au secret professionnel en ce qui concerne tout document qui ne peut être légalement mis à la disposition du public (France, Section 2).

Documents, which already in the public domain before transfer to the Federal Archive, shall remain in the public domain (Swiss Federal Act, Section 3).

16. PRESERVATION

Legislation should recognize the role of the National Archives in proper preservation and conservation of records and archives by providing it with appropriate resources, equipment and facilities, and allowing it to prescribe necessary standards and instructions to government or public offices.

Preservation should be defined as one of the most basic functions of the National Archives in storing and protecting archives to ensure their authenticity, reliability, usability and durability. Proliferation of electronic records and their susceptibility to easy modification and erasure make the task more complicated than ever. Legislation should recognize the role of the National Archives in proper preservation and conservation of records and archives by providing appropriate resources, equipment and facilities, and prescribing necessary standards and instructions to government or public offices to protect physical and intellectual security of records in their custody.

As the right to data rectification by the data subject is granted by most data protection laws, archives legislation may include provisions to guard against erasure or blocking of personal data in archival records, whose authenticity should be preserved whether or not the information contained therein is verifiable.

Example

If an affected person becomes aware that the archived documents contain information about him or her, which he or she considers incorrect, he or she may have this noted but shall not correct the data...The note of objection shall be added to the documents at the appropriate point. (Swiss Federal Act, Section 5)

In addition, if the copyright law does not provide for the National Archives to make copies of copyrighted material for preservation purpose, an equivalent provision should be included in the archives legislation.

17. SANCTIONS

Sanctions to enforce the fundamental principles of archives protection and preservation should be provided by law.

Archives legislation or other related laws should provide for sanctions to enforce the fundamental principles of archives protection and preservation. Most archives legislation contains a general clause prohibiting the damage, mutilation, destruction, removal from custody, etc. of public archives. Sometimes, it is left to the responsible authority to provide any regulation for penalties.

Example

Celui qui, ayant une obligation particuliere de proteger les documents d'archives, procede a leur endommagement ou destruction, est soumis a une peine d'emprisonnement jusqu'a trois ans. (Poland, Section 52)

Władysław STĘPNIAK

**CONTROVERSIES AROUND LEGAL GROUNDS
FOR THE SETTLEMENT OF INTERNATIONAL
ARCHIVAL CLAIMS***

The Vienna Convention on succession of States in respect of State property, archives and debts was adopted on 8 April 1983 at the international UN Conference¹. Thus, a long-lasting and extremely complicated process of codification of the international public law in the area of State succession has been completed². One could expect that it would be a turning-point in resolving dozens of international claims regarding archive materials. The UN International Law Commission, comprising most outstanding scientific authorities in that domain, conducted profound analyses of practices exercised by States in that respect, submitting proposals of relevant legal regulations, referring to the achievements of UNESCO and the International Council on Archives.

Tradition of many centuries and international practice, constituting the grounds for norms of international law hitherto applicable in respect of archives, were the starting point for the UN ILC in work on the aforementioned codification. In compliance with the principle *lex retro non agit*, it is to refer to future acts of succession, occurring upon its entry into force. In view of the above, its significance might have been perceived mostly as the confirmation of currently binding norms and practices of international law, which have thus been given a significant legal authority.

However, it soon turned out that the success of the UN International Law Commission was definitively opposed by the ICA Secretariat. The French Ministry of Foreign Affairs requested that international professional organization of archivists formulate an opinion on the Vienna Convention of 1983. That is the origin of one of most special documents in the history of ICA – a letter of its Secretary General dated 24 January 1984 to all the Member States, with an attached opinion on the said Convention³. Professor Marco Mozzati referred to that document analyzing the French-Algerian archival dispute, stating that the professional advice of ICA on that matter was a manoeuvre of the French Government in its efforts to deprive Algeria of a significant advantage in its hands that is the Vienna Convention of 1983⁴. That was a very grave accusation replied to by Dr. Charles Kecskeméti, the former Secretary General of ICA⁵. No one doubts

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the significance of reasons which determined the pronouncement of that opinion on behalf of ICA, developed by the team comprised of Leopold Auer (Austria – representative of ICA to the UN Conference at which the Convention was adopted), Eckhardt G. Franz (CITRA Secretary), Oscar Gauye (former President of ICA), Charles Kecskeméti (Secretary General of ICA), Eric Ketelaar, Evert van Laar and Peter Walane (as representatives of ICA research committees).

The evaluation of the UN Vienna Convention act of 1983 formulated by the above mentioned persons, referred to as the “professional advice”, was surprisingly unanimous: the text of the Convention does not provide sufficient basis to deal with problems of the succession of States in respect of archives. Therefore, all members of the experts’ team claimed that States interested in those issues should follow the arrangements included in the report of the Director General of UNESCO presented at the 20th Session of that organization in 1978⁶.

Those recommendations of UNESCO of 1978, although they had been published several times, have never been professionally evaluated in the literature to the subject. They were based on an extensive study developed as a result of cooperation between UNESCO and ICA, in major part written by Ch. Kecskeméti⁷. The document was prepared during the period of unusual activity of ICA in that respect, related to the significance of those problems, often referred to in the activities of UN and UNESCO. A report of the General Director of UNESCO of 28 August 1978 has a character of a strictly professional document, presenting the principles of archival sciences in respect of the restitution of archive materials in international relations. The starting point for the development of those principles of international distribution of archive materials was the acknowledgement of their direct connection with the sovereignty of any State involved in archival claims. Thus, problems regarding the ownership and transfer of archive materials in international relations are of legal nature and should be resolved by way of negotiations and international agreements, with the use of norms of international public law related to the succession of States. One should also consider the status of archive materials determined by national legislation of States involved in the claim, and apply the retroactive principle of sovereignty in respect of States liberated from colonial slavery. The retroactive principle of sovereignty was applied due to the lack of sufficient precedents related to the settlement of claims for the’ distribution of archive materials between former colonial powers and new States that would allow for the identification of any principles of conduct.

In the opinion of UNESCO, the following situations are connected with the emergence of archival claims, and consequently determine the substantive scope of recommendations:

- a. change of sovereignty on a given territory, not connected with the establishment of a new State,
- b. transfers of archive materials during wars and occupations,
- c. establishment of new States as a result of divisions of others,
- d. fall of the colonial system.

Recommendations directly regarding the way of dealing with archive materials during the settlement of claims refer, first of all, to the observance, to the highest extent possible, of the principle of provenance, understood as respect for the integrity of any archival fond, in accordance with which archive materials produced by a given administrative body should be preserved as indivisible units remaining at the disposal of that body or its legal successor. The only exception from the above presented principle may be justified in reference to the principle of functional pertinence, often incorrectly referred to in the literature to the subject as the principle of territorial pertinence. In this case, functional pertinence signifies the obligation to transfer to the successor State archive materials requisite for the execution of authority in a given territory, indispensable for administrative purposes. It is obvious that authors of this conception assumed the possibility of its application only to a very limited, really indispensable extent.

A conception of the joint archival heritage as presented in the recommendations of the UNESCO Director General is very interesting. In the situation when due to territorial changes between States, the archival holdings or a majority of archive materials produced by administrative bodies, the successors of which are two or more States, may not be divided without the impairment of their legal, administrative and historical value, the appropriate solution seems to be just the aforesaid idea of the joint heritage. Thanks to that idea, a given archival fond or archival holdings would remain in the territory of one of the States, as an integral whole, making for the part of its archival legacy. That State would assume the responsibility to administer and protect such materials, and its rights to the contents of those materials would be the same as the rights of the remaining, involved States.

Recommendations of 1978 include one more significant conclusion regarding the right to the historical continuity of nations, which goes beyond the issues of international distribution of archive materials and refers to their availability in international relations. That conclusion is based on the statement that any national community is entitled to preserve its identity developed in the course of historical processes, and the international solidarity requires supporting nations in their endeavours aimed at determining the historical truth.

The General Director of UNESCO expressed his opinion that the basic condition for successful settlement of international claims, in compliance with the above mentioned recommendations, would be a wide-scale international cooperation, filled with the spirit of mutual understanding, and the observance of specific legal norms and moral principles.

The UN International Law Commission considered the arrangements included in the above presented UNESCO document, except for the conception of the joint heritage, in the draft of the Convention developed by the Commission and adopted at the Vienna Conference in 1983⁸. Considering the above, what were the reasons for such an explicit “disqualification” of the Vienna Convention of 1983 by the group of ICA experts? Was it done, as Professor Mozzati claims, because of the interest of the ICA hosting State, or of some other States, or perhaps due to strictly substantive reasons?

The basic objection formulated by experts consisted in the statement that during the Vienna Conference, the political approach of States prevailed over substantive reasoning, thus leading to the adoption of mistaken provisions. This assessment refers to several issues, the first one being the omission in Art. 28 of the Convention, regarding new, independent States, of a statement on the primacy of a bilateral (or multilateral) agreement between the States that this type of the succession of States refers to. For example, it would be worthwhile to quote the provision of Art. 27.1 which refers to this issue (type of succession: transfer of a part of the territory of a State): "... If a State assigns a part of its territory to another State, the transfer of State archive materials of the predecessor State to the successor State is regulated pursuant to the agreement concluded between those States"⁹. Art. 28, which refers to a new independent State, really does not provide for that solution, listing specific regulations to be strictly observed by States acceding in the Convention. In the experts' opinion: "Such a conception disregards the very nature of archives as well as the rationale of an international Convention on the succession of States in respect of archives"¹⁰.

This statement finds its justification in the recognition of the fact that each State participating in resolving such claims must take into account provisions of its national legislation while making obligations on an international arena. Therefore, it would be reasonable to maintain the primacy of a bilateral (or multilateral) agreement also in respect of new independent States. In 1983, that was not possible due to the relationship between former colonies and their colonial powers. New independent States doubted the effectiveness of the execution of their rights by way of bilateral negotiations. Therefore, that was really very unfortunate that former colonial powers did not stand up to ensuring the conditions that would allow for taking up substantive discussions with nations enslaved by them in the past. We are of the opinion that there is no need to indicate which parties to that dispute should be deemed wronged in the colonial period and thus entitled at least to a partial compensation. To evaluate properly the reasons for the situation that occurred in Vienna, it is necessary to present in a comprehensive way the policy of colonial powers towards new independent States, which clearly exceeds the scope of the present considerations. Concluding the above, the position of experts on neglecting the principle of the primacy of a bilateral agreement in Article 28 should be deemed justified and reasonable, distancing, however, from the statement that this Article, instead of mitigating controversies in respect of archives, will contribute to the increase of such controversies and claims. That is to happen because former powers and new independent States, which might have been satisfied with the exchange or delivery of copies of documents based on bilateral agreements, pursuant to Article 28, have to transfer originals. The above statement requires further comments. In accordance with Art. 28, paragraph 1, archive materials related to the sovereignty of a new independent State should be transferred to that State as original documents (i.e. in compliance with the UNESCO recommendations of 1978 specified in the Article referring to functional pertinence), while paragraph 2 provides that: "Transfer or

adequate reproduction of some State archive materials of the predecessor State, other than those referred to in paragraph 1, of material significance for the territory covered with the succession of States, shall be regulated by way of an agreement between the predecessor State and a new independent State to such an effect that each of them will be able to use those parts of State archive materials of the predecessor State to the possibly widest and fairest degree¹¹.

The position of the group of experts also includes information on the “proper”, in their opinion, construction of the Convention, the main article of which, in its part related to State archive materials, should be the provision regarding the primacy of a bilateral or multilateral agreement, in subsequent articles providing details on further principles and criteria as specified in the Convention¹².

They agreed that archive materials subject to transfer should be those requisite for the predecessor State to administer the territory, as provided for under the Vienna Convention in respect of all types of the succession of States, opposing, however, to transferring any other archive materials which exclusively or principally refer to the territory of the successor State. The reason for that objection was deeming the principle of territorial pertinence incompatible with UNESCO recommendations and the principle of provenance. This position finds its explanation in the statement that the origin of a document and not its contents must decide about its ownership. A definition proposed by the working group, does not, however, reject the entire provision set forth in the Convention, aiming at its more clear wording: “the part of State archives of the predecessor State created by the transactions of administrations and institutions responsible exclusively or principally for the affairs of the territory to which the succession of States relates”. In that provision, we perceive the recognition of the force of the binding principle of functional pertinence, as defined in the UNESCO recommendations, and a reasonable amendment made in respect of the contents of the Convention that relates to State archives.

An absolute novelty, however, also in view of the UNESCO recommendations, is the demand to supplement the above provision with archival consequences of population displacements: “...in case where, in the process of change of sovereignty, a significant part of the population leaves the territory of successor State, this fact shall be taken into account when negotiating the succession of States in respect of archives”.

Archive sciences have been confronted with such an approach for years in relation to German archives. Archival consequences of population displacements have not been yet, however, raised in works of international bodies and institutions. Under such circumstances, one can hardly resist the impression that the ICA expertise was used to introduce to international dealings, somehow through the “back door”, a German thesis on the necessity to take into account the consequences of mass displacements while making decisions related to the succession of States in respect of archives¹³. Another statement related to this type of archive materials, that their definition, unless otherwise agreed by partners, does not include records produced by mili-

tary occupying authorities, confirms the “bow” of experts towards German theses. This statement had to be treated very cautiously by the authors of the evaluation, as one should differentiate records of military units, forced to operate with significant mobility under the war conditions, from records of occupant’s administration closely connected with a given territory.

Another category of archive materials mentioned in archival clauses of the Vienna Convention, are those belonging to a territory. The wording applied with respect to this category by the UN International Law Commission was considered by experts as not sufficiently precise. Experts proposed more explicit and precise wording: “the archives constituted within the territory before it became dependant from the predecessor State and subsequently integrated in the state archives of the predecessor State whether preserved in situ or removed from the territory and entrusted to custodian institutions (archives, libraries, museums) located within the territory of the predecessor State”¹⁴.

Referring to the unsuccessful initiative of the Swiss delegation, aimed at incorporating into the text of the Vienna Convention of an article related to the joint heritage, experts confirmed the justifiability of the application of that measure in international relations, in the events when all the parties have equal rights to certain archive materials, and any division thereof would be harmful. In their opinion, an article related to the joint heritage could ascertain that States declare joint heritage based on the agreement concluded that should determine their rights and responsibility for records¹⁵.

The group of experts raised no reservations as to Articles 21, 23, 24 and 26 of the Convention. As regards Article 25 (Maintenance of the integrity of fonds of State archives), it found an evident mistake in translating into English of the following phrase: *Sauvegarde de l’integrité des fonds d’archives d’Etat*¹⁶. It, however, raised no objections as to Article 27, paragraphs 3–5, Article 28, paragraphs 3–7, Article 29, Article 30, paragraphs 2–5, and Article 31, paragraphs 2–5. They almost exclusively refer to the accessibility and delivery of copies of archive materials related to the succession of States. The above also indicates the direction of ICA activities, preferred by the Group of Experts, in respect of issues related to the settlement of international archival claims.

One might indicate the lack of consequence in qualifying individual clauses of the Vienna Convention, or any parts thereof, as acceptable or unacceptable. What was the reason for recognizing Article 27 paragraph 1 (“Transfer of a part of the territory of the State”), which reads as follows: “If one State assigns a part of its territory to another State, the transfer of State archives of the predecessor State to the successor State is regulated pursuant to the agreement concluded between those States”¹⁷ as unacceptable if it follows the intentions of authors of the expertise striving for the recognition of the primacy of a bilateral agreement?

Expressing the opinion on that Article, it may be worthwhile to remind that it was adopted almost unanimously, with only one vote against, at the UN Conference in Vienna in 1983¹⁸. One can hardly resist the impression, that current voices of criticism result, first of all, from the omission in the

Article of issues connected with the displacement of population from the territory subject to assignment. This problem was not raised during the UN Vienna Conference proceedings in 1983, and the International Law Commission had recognized before that displacements of population introduced no changes to the norms of international law related to the succession of archive materials¹⁹. Thus, the initiative of the French Ministry of Foreign Affairs was used to take this problem up, similarly as the one of records produced by military occupying forces, which under regular conditions of the international public law codification had no chance to succeed. Unfortunately, that confirms the instrumental character of the document presented herein, published on behalf of ICA.

According to Ch. Kecskeméti, in the end of March/or beginning of April, 1984²⁰, it was obvious that the Vienna Convention of 1983 was dead, the fact which lawyers and politicians reconciled themselves with, and archivists are still to oppose. Pursuant to Article 50 of the Convention, it will enter into force on the thirtieth day upon the submission of the fifteenth document of ratification or accession. Until now, 10 States have done so (Algeria, Argentina, Croatia, Egypt, Estonia, Georgia, Yugoslavia, Niger, Peru and Ukraine). This process proceeds really slowly, which is caused not only by reasons related to inheriting of archive materials. To an equal extent, the Convention refers to State property and debts, thus entering the scope of general codification of legal problems related to the succession of States. The first legal act in that respect was the Vienna Convention on the succession of States in respect of treaties²¹, which faced similar problems. The conclusion that the Vienna Convention of 1983 has no chance to enter into force, seems, however, premature and risky.

The authorities of the international professional organization of archivists, among the members of which States wronged as a result of historical processes prevail in number, including new independent States, were aware of the significance of the decision made regarding the evaluation of the Convention. That was the action that could ruin the codification of international public law developed by the UN related to the succession of States in respect to matters other than treaties. Consequently, that had to result in the increased activity of ICA in the area discussed. Those problems were dealt with at the XXX and XXXI International Conferences of the Round Table on Archives, held in 1994 and 1995 in Thessalonika and Washington²². Those Conferences, however, gave no specific effects and proposals, which could contribute to solving the key issue regarding the existence of specific rules and principles acceptable by States, members of the contemporary international community. Furthermore, many presentations delivered within the frames of CITRA seem not to bring us any closer to counteracting the confusion caused upon the adoption of the Vienna Convention on the succession of States in respect of State property, debts and archives.

The above also finds its expression in the last document adopted by ICA at the meeting of the Executive Committee on 10–13 April 1995 in Guangzhou (China). This document (Position Paper) was entitled: “The view of the archival community on the settling of disputed claims”. From the formal

point of view, this document should be considered as presenting the current formal position of ICA on matters related to archival claims. I am of the opinion that CLM should deal with that document with particular care, as it aims not only at summing up our current achievements in this area, but also at indicating directions for future action. Several issues in this document arouse critical comments. Firstly, one may not agree with the opinion that archival claims were satisfactorily settled until the outbreak of the Second World War, while afterwards, the existing principles and methods of acting were abandoned to a dramatic extent. Although the Executive Committee of ICA calls for return to traditional methods of settling claims, it itself significantly complicates the situation, promoting ideas incompatible with the basic principle of functioning of the international community, i.e. the priority of international public law over the legislation of individual States. In view of the above, the attempt to impose the principle of inalienability of title to public archives under the conditions of the succession of States without the consent of the State that produced those records, arouses firm objections. That conclusion of the Executive Committee reads as follows: "National laws agree in conferring the status of inalienable and imprescriptible public property on public records. The transfer of ownership of public archives especially in the case of succession of States can therefore only occur through a legislative act of the State which created them". One could generally assume, that this stipulation so conflicting with the international public law, is just a misunderstanding resulting from the lack of competence of the organ that adopted it. This is not the case, however, as we have to do with activities wilfully aimed at reduction, to a maximum degree, of the transfer of original archive materials in international relations substituting it with the transfer of copies, ensuring general access to records for all interested parties and introducing the conception of the joint heritage.

The attention should also be drawn to substantive mistakes in the evaluation of the process of restitution of archive materials after the Second World War, which was said to be non-existent! That is another example of either ignorance of historical facts or adapting them in order to justify the main thesis, i.e. that the transfer of original archive materials in the course of international claims settling is anachronic and harmful. First of all, one may not agree with the statement that the lack of a peace treaty with Germany after the Second World War was one of the reasons of this state of affairs. Several decisions made by powers which exercised sovereign authority over that State upon its unconditional capitulation and carried out extensive restitution activities to the benefit of plundered States or were transferring archive materials to neighbouring States, according to new German borders, contradict that statement. Those legal grounds for activities of Allied authorities automatically became a part of the national legislation of both German States after 1948.

One may not exclude the possibility that the position presented by the Executive Committee in 1995 became an incentive to take up actions aimed at dependence of the fulfilment of international obligation in respect of the restitution of archive materials on provisions of the national law. The

Parliament of the Russian Federation proved the above in the law enacted on 15 April 1997 on cultural values transferred to the USSR as a result of the Second World War and currently located in the territory of the Russian Federation²³. International community was very distinctly forced to face the consequences of the way of reasoning in accordance with which national laws of one country would determine the scope and terms of the restitution of cultural values in international relations. In 1999, the Constitutional Tribunal of the Russian Federation mitigated, to a significant degree, those provisions of that legal act of the Russian Parliament which were most contradictory to international public law, still, a very severe precedent had been made.

Under those conditions, we should treat with due consideration that part of the Position Paper of Guangzhou in which the Executive Committee announces counteracting the existing situation referring to the need to apply traditional methods of settling international archival claims in currently carried out negotiations and to take up practical actions leading to the adoption of a new international convention. Therefore, CLM will have to assume very important duties related to preparing proposals of specific solutions. The first one should consist in the attempt to describe traditional practices of States in settling international archival claims. Let me present the following proposition in that respect:

Principles of international legal protection of archive materials were being shaped throughout ages. The problem of archives in international relations belongs to the category of issues related to public property and it appears in treaties regarding mostly territorial changes. Therefore, problems of archives were included within the scope of political decisions regarding changes of sovereignty in a given territory, being directly connected with the problem of the succession of States. The complexity of those problems, and, on the other hand, its practical significance, made the theory of the succession of States one of most basic issues of international public law. With respect to problems discussed in this paper as regards the succession of States, the basic rule states that everything that is in the territory of the State, shares its fate (*Quod est in territorio, es etiam de territorio*). State property fully shares the fate of the territory, therefore, it passes over to the successor.

The practice of settling problems related to international inheritance of archive materials based on treaties, reaching back to early Middle Ages in Europe, had very significant impact on the development of that rule. Clauses on archives incorporated into treaties, apart from decisions related to international distribution of archive materials, are often connected with the restitution of archives in the case of plunders or various types of transfers.

Protection of archive materials under the conditions of armed conflicts significantly precedes the time of privileged treatment of other types of movable property, including cultural values. This privileged treatment of archive materials was gradually extended to cover other cultural values, in

particular in the 19th century, including the recognition of the principle of territorial provenance of cultural values, obviously, archives above all.

Legal protection of cultural values under the conditions of armed conflicts became the institution of international public law as a result of acts codifying the law of war. The subject of a declaration which initiated this process of codification, adopted at an international conference held on 27 August 1874 in Brussels, included the protection of cultural values, of interest for us here. Article 8 of this declaration recommended equal treatment of cultural values with private property, i.e. on a privileged basis. Destruction, seizure or profanation of such values should be punishable. In order to create proper conditions for protection of cultural values, they should be properly marked already at peacetime, and above all, should not be used for war purposes.

Solutions proposed in the Brussels Declaration were later on applied in conventions adopted at international conferences in 1899 and 1907 in the Hague. Twelve conventions drawn up as a result of the proceedings of the second conference, which constituted the repetition and development of resolutions of the first one, became the basic and most comprehensive set of laws of war. The most important convention among those signed in 1907 in the Hague referred to laws and practices of a land war (so called 4th Hague Convention). Article 56 of "Regulations on laws and practices of a land war", being the integral part of that convention, stipulates as follows: "Property of communes, church, welfare, educational, scientific institutions, institutions of fine arts, although belonging to the State, will be treated as private property. Any seizure, destruction or wilful profanation of such institutions, historical monuments, works of art and science shall be prohibited and should be punishable". Articles 27 and 46 of the Regulations provide for saving "sanctuaries, buildings serving the purposes of science, art and welfare, historical monuments" in the course of military operations, and stipulate that "Private property is not subject to forfeiture".

Provisions on the protection of cultural values under the conditions of armed conflicts, of analogous contents as those of Article 56 of Executive Regulations of the 4th Hague Convention, were incorporated into the 9th Hague Convention of 1907 in respect of bombardments by naval forces during the war (Article 5). Those Hague Conventions constituted the basis for legal protection of cultural values during two world wars. Experiences resulting from those two wars, first of all, the scale of plunders and destruction made by Germans in the years 1939-1945 in German-occupied countries of Europe, contributed to considering problems of legal protection of cultural values in armed conflicts as the subject of further and improved codifying efforts. The Hague Convention on the protection of cultural values in the event of armed conflicts, with executive regulations and the protocol attached regarding problems of restitution, was the result of those efforts. The Convention was elaborated under the auspices of UNESCO, and it was signed on 14 May 1954.

This Convention, with all related legal acts, supplements legal norms binding until its development and adoption by many States, as included,

first of all, in the Hague Conventions of 1899 and 1907. The definition of cultural values is one of its most significant provisions. Cultural values, regardless of their origin and owner, were deemed including, among others, important collections of archive materials and archival repositories (archives). The above terms should be understood as archival holdings and buildings in which they are preserved (Article 1).

The scope of international legal protection of cultural values, in compliance with Article 2 of the Hague Convention of 1954, includes due care exercised by the State which owns them and due respect for them on the part of the State exercising control over them during an armed conflict. Detailed legal provisions pertaining to such protection are set forth in Articles 3, 4 and 523.

The aforesaid Convention, in its entirety, confirms the principle of territorial provenance of cultural values, making it a legal norm of international public law. The Convention provides even for penal sanctions in the event of infringements of this norm.

The Hague Convention of 1954 was generally considered as a legal act of critical importance for international legal protection of cultural values. It also had a decisive impact on legal regulations in respect of issues discussed in this paper, developed after its adoption. The codification process of international public law in that respect grew to the size allowing to ascertain the fact of the existence of international cultural law.

Legal regulations prepared after 1954 within the frames of codification of that law include the following documents: I and II Additional Protocol to the Geneva Convention of 12 August 1949 on the protection of war victims and convention on measures aiming at prohibiting and preventing illegal transport, export and transfer of ownership rights to cultural values, adopted on 14 November 1970. Another legal act which extends the legal protection of cultural values under peacetime conditions is the convention on the protection of world cultural and natural heritage, adopted on 21 November 1972. All those legal acts assume as a starting point, in compliance with the provisions of the preamble to the Hague Convention of 1954, that: “any damage made to cultural values, regardless of the nation they belong to, is the loss for the cultural heritage of entire humanity, as any nation has its share in the development of the world culture”. The Paris Convention of 1970 relates to international co-operation of States under peacetime conditions in respect of the protection of cultural values. Its authors should be fully aware of the fact that this co-operation should protect cultural output of any State.

Legal institutions of international protection of cultural values do not exhaust all measures of this protection in respect of archive materials; as archive materials, apart from features covered by the definition of “cultural values”, play many other functions determining the specificity of legal regulations applied in respect of them. Long-lasting practices of settling archival disputes arising due to territorial changes between States on the basis of treaties, relatively early allowed to determine the principles of dealing with them – in reference to the situation in the 17th century on an all-European

scale, and much earlier in the Polish practice of treaties, as the principle of transferring all archive documents related to a given territory together with that territory was generally observed there. However, apart from this solution consisting in the return of all archive materials pertaining to a given territory, another clause simultaneously emerged. It sanctions leaving archive materials – as well as other movables – in those places where they were located at the moment of signing the treaty. Since then, both solutions have been applied in treaties. The principle of territorial provenance of archive materials was developed based on treaty settlements of that type. In the application of that principle in practice, the fate of archive materials created and preserved in the territory which was changing its State affiliation was not disputable. Those archive materials share the fate of this territory as *quod est in territorio, est etiam de territorio*. However, archival holdings of the successor State, and registries of its offices, first of all central ones, include archive materials created as a result of administering this territory. Those archive materials were also often provided to the successor State. At present, such approach would be compliant with the scope of the definition of the principle of functional pertinence.

The principle of territorial provenance of archive materials always used to favour victorious States. After 1918, in Europe, enormous changes had to take place in respect of the contents of archival holdings of many States. Victorious States, which suffered great territorial losses, defended themselves against the principle of territorial pertinence of archive materials as the binding principle in resolving problems of succession of archive materials in international relations.

For that purpose they referred to the principle of indivisibility of an archival fond (principle of provenance) applied in archive sciences in Europe from mid 19th century, in particular from 1910. Advocates of the principle of territorial pertinence of archive materials, which allowed the States building the foundations of their statehood almost from the scratch to organize public and cultural life in an optimum way, used to assume an attitude towards this principle as accurately expressed by Józef Paczkowski: “the principle of provenance covers the arrangement of records within the borders of a given state and usually within the frames of certain archives, having no applicability beyond those borders [...]”²⁴.

On the basis of above outlined studies, it was possible to determine that *com-munis opinio doctorum juris*, in respect of the subject of interest, resolves itself to the following statements:

- official records kept in archives belong to the territory they refer to;
- in the case of changes of state borders, archive materials share the fate of their seats, and the State which owns the seat becomes the owner of those archive materials. Records pertaining to territories located on the same side of the border are owned by the State that those territories belong to, which takes over those archive materials regardless of the location of the seat of the archives they are kept at. Records pertaining to territories located on both sides of the border are possessed by the State on the territory of which the seat of archives is situated. In such events, the neighbouring State has an

unrestricted right to use such archive materials. Sometimes the co-ownership of records is agreed upon. They may also be delivered to the neighbouring State, if they refer to the territory of that State to a greater degree than to the State on the territory of which the seat of archives is situated;

– there is an absolute obligation to return archive materials taken in the past out of the territory being the subject of succession;

– records must be returned to the successor regardless of the title by virtue of which they were acquired, if their origin is known;

– lapse of time from the moment of coming into the possession of archive materials is of no practical significance and influence on the change of the ownership title thereto;

– archival consequences of territorial changes between States also include separating and transfer of records of central authorities (offices) related exclusively to the territory subject to succession (introduction of chronological limits in respect of the division of records of central authorities is a frequent phenomenon). Records of that type constitute archival fonds for a given territory regardless of the place of operations of the office;

– in the case of private archives the will of their owner is decisive.

¹ See: W. Stępnia, *Sukcesja państw dotycząca archiwaliów* (Succession of States in Respect of Archives), PWN, Warszawa-Lódź, 1989.

² A convention regarding succession of States in respect of treaties was developed earlier.

³ i.e.: Professional advice formulated in 1983 on the Vienna Convention on succession of States in respect to State property, archives and debts, part III (articles 19–31) in: Reference Dossier on Archival Claims, Council of Europe, Strasbourg, January 1997, pp. 39–47.

⁴ M. Mozzati, *La battaglia degli archivi*, in: *La modernizzazione in Asia e Africa. Problemi di storia e problemi di metodo. Studi offerti a Giorgio Borsa*, Pavia 1989; argued by: Ch. Kecskeméti, *Activities of UNESCO and ICA since 1976* in: *CITRA 1993–1995. Interdependence of Archives*, International Council on Archives, Dordrecht 1998, pp. 81–82.

⁵ *Sovereignty. Disputed Claims. Professional Culture. Essays on Archival Policies* by Charles Kecskeméti, Brussels 2000, pp. 247–253.

⁶ Study regarding problems involved in the transfer of documents from archives in the territory of certain countries to the country of their origin (document UNESCO 20C/102), in: Reference Dossier on Archival Claims, pp. 25–32. See: *Zalecenia UNESCO w zakresie międzynarodowego rozmieszczenia archiwaliów* (UNESCO Recommendations in Respect of the International Distribution of Archives), in: *“Archiwista”*, Vol. XIX, No. 3/4 (74/75), Warszawa, 1983, pp. 11–29.

⁷ Preliminary study on the principles and criteria to be applied in negotiations, in: *Sovereignty. Disputed Claims. Professional Culture...*, pp. 25–60.

⁸ During the proceedings of the Vienna Conference, the Swiss delegation raised the proposal to incorporate that conception into the Convention. That motion, however, was not considered by the majority of States, afraid that it could restrict their rights to take over original archival documents.

⁹ Vienna Convention, in: W. Stępnia, *op.cit.*, p. 64.

¹⁰ Reference Dossier..., p. 41.

¹¹ Vienna Convention..., in: W. Stępnia, *op.cit.*, p. 65.

¹² The proposal reads as follows: “In all cases of succession of States, the passing of State archives from the predecessor State shall be settled by agreement between them.

The agreement shall conform to the principles and criteria set in articles [] to [] of the present Convention". (Reference Dossier on Archival Claims ..., p. 42). This proposal would signify departing from the typology of the succession of States as developed by the UN ILC, being the basis for the entire codification of international law in that respect.

¹³ Klaus Oldenhage claimed that the principle of functional pertinence may be used to the best interest of German DPs (Richtlinien und archivische Grundsätze der UNESCO zur Beilegung von internationalen Konflikten um Archivalien), "Der Archivar", 1983, No. 2, cols. 173–176, which may be interpreted as the statement applicable only to records regarding specific persons.

¹⁴ Reference Dossier..., p. 43.

¹⁵ Proposed wording of this article: "Archive groups created by administrations, functions of which are shared between the predecessor State and the successor State or States, as a result of the succession of States, may be declared in the special archival agreement «Joint heritage». Rights and responsibilities connected with the custody of and access to the joint archival heritage shall be specified in the agreement" (ibidem, p. 44).

¹⁶ It might be worthwhile to quote the wording of this article as proposed by experts: "In the settlement of the succession of States archives, the predecessor State and the successor State shall observe, as far as possible, the principle of respect for the integrity of archive groups" (ibidem).

¹⁷ Vienna Convention..., in: W. Stepniak, op.cit., p. 64.

¹⁸ See: W. Stepniak, op.cit., p. 44.

¹⁹ Ibidem, pp. 40–41.

²⁰ The author refers to the correspondence of the ICA Secretariat with UN not quoting its contents.

²¹ See: R. Szafarz, *Sukcesja państw w odniesieniu do traktatów we współczesnym prawie międzynarodowym (Succession of State in Respect of Treaties in the Contemporary International Law)*, Warszawa-Wrocław 1982.

²² See: CITRA 1993–1995. Interdependence ..., op. cit.

²³ The law which aroused objections on an international arena and serious doubts in Russia itself, was submitted for evaluation to the Constitutional Tribunal of the Russian Federation which in 1999 ordered to differentiate regulations regarding the property of former enemy States and former Allies of the former Soviet Union. However, it is still an example of using national legislation for purposes of public settlement of problems related to transferred cultural values in the manner contrary to provisions of international public law.

²⁴ J. Paczkowski, *La remise des actes en connexion avec les changements de frontières entre les Etats*, [w:] *La Pologne au V Congrès International des Sciences Historiques Bruxelles 1923, Varsovie 1924*.

Heorhii PAPAKIN

**DISPLACED ARCHIVES:
THE HERITAGE OF DIVIDED WORLD**

(Abstract)

1. History of our civilization within last 3–4 thousand years, that is writing era period, is the chronicles of constant destructions, invasions and forced migrations of archival Records. Just like due to World War II citizenship obtain the notion of “*displaced persons*”, so archivists should talk about and remember that practically any archival fond contains more or less *displaced archives*. Such heritage, which was inherited from thousand-year existence of divided world, from those times, when there existed a traditional-primitive dualism scheme: we and aliens; we and barbarians; free world and totalitarian society; socialistic and capitalistic worlds; developed society and third world and other.

2. The problem of *displaced archives* regardless of current opinion exists not only at Eastern Europe, Asia and Africa. Successful civilized countries of Western Europe and Northern America also have at their archives “foreign fonds” and search for own archives, which have been deported from historical motherland due to various historical reasons.

3. That is why such historical heritage of divided world hangs over all of us. But practically neither country acknowledges at legislative level and considers the problem of displaced archives thoroughly and objectively. This is confirmed by analysis of published national archival legislation of all countries.

4. At international level we have to acknowledge that world society at least recognized existence of mentioned problem (to tell the truth, considering it as actual only for certain world regions – first of all Eastern Europe, Newly Independent States appeared, and former Asian and African colonies of European countries), and mostly for World War II period. The result of a search for compromise way, if not solving, then at least its mutually agreed acknowledgement, is formulated by UNESCO and International Council on Archives conception of “Common Archival Heritage”.

5. But the mentioned concept does not pretend to solving and is not able to solve the whole complex of problems, concerned with *displaced archives*. On our opinion, the most actual among them are the following (they are also steps to solving of the problem of *displaced archives*):

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a) definition and introduction of “*displaced archives*” notion into wide application at international and national level.

Those, obviously, should be all archives (fonds, collections, certain groups of Records and certain archival documents), which from time of their creation have been displaced over state or administrative border and at present are kept not at the place of their creation. At that such definition does not have principally depend on reasons of such displacement (legal or illegal at that time or whether they are acknowledged legal or illegal at present). Obviously, such definition will require common efforts of lawyers, archivists and historians of each country.

b) necessity to acknowledge the fact of existence of certain list of *displaced archives*.

It is completely obvious that such acknowledgement should be multilateral: by international archival society, as well as by certain states, which own them, and those, which were deprived of mentioned archives in the past.

c) recognizing of *displaced archives* as an object of mutual interest of above mentioned countries.

d) strict separation of displaced archives topic from the circle of *restitution* problems (since this context does not mean physical return of archives) and from the block of *archival claims*, the last one is concerned with juridical argumentation of state litigations concerning archives return.

e) bringing up of question on *displaced archives* at any intergovernmental negotiations, which concern cooperation in archival sphere.

6. We consider that constituting of “*displaced archives*” notion will positively display on solving of the problems of archival restitution and transfer of the archives. Since it is understood that universally recognized as displaced archives need final decision of their destiny and, finally, transformation from displaced into usual archives.

However, ways of this process introduction may be different: from physical return to historical motherland (original documents, as well as micro-, photo- or digitizing copies) to creation of joint archival informers, guides and other finding aids. Such ways are already defined by International council of archives in a range of its documents.

7. Brought up questions have discussion character and destined at primary aim – in conditions, when the world is involved in globalization and integration processes, when finally it may be considered as united, but not divided, we should eliminate one of the last parts of divided world’s heritage – *displaced archives*.

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AUTHENTICITY OF ELECTRONIC RECORDS

**Report prepared for UNESCO
by the International Council on Archives Committee
on Archival Legal Matters***

November 2002

1. Introduction

*Archivists must ensure continuing access to the content
and functionality of authentic electronic records, recognizing
that they cannot be preserved in their original physical format.*

Recommendation of the XIVth International Council on Archives Congress,
Seville, Spain, September 2000.

The International Council on Archives (ICA) at the XIVth International Congress in Seville, Spain emphasized that archivists must ensure continuing access to the content and functionality of authentic electronic records, and called upon National Archivists to provide the leadership to ensure the preservation and accessibility to authentic records to secure the rights of citizens in public information. UNESCO, likewise, has initiated several international conventions and recommendations regarding the preservation and accessibility to authentic records. Examples of UNESCO's interest in this area include the Convention for the Protection of the World Cultural and Natural Heritage, and the Memory of the World program, a program specifically aimed at preservation of and access to documentary heritage. Clearly, standard setting to preserve authentic electronic records in the field of culture and information is an important and universally valued task of UNESCO that is central to its mission.

Plainly, long term storage of authentic electronic information is a strong interest of both ICA and UNESCO. With this interest in mind, ICA and UNESCO have entered into an agreement for ICA to study the issue. ICA is to report to UNESCO and "formulate recommendations for further studies and concrete projects in this matter with a view to establishing legal and technical procedures for ensuring the legal evidence of electronic documents

*Posted on the CLM web page:
<http://www.ica.org/biblio.php?pdocid=92>

in (the) case of migration of these materials---and in (the) case of transfer to archival institutions.”

In order to prepare the report, ICA established a working group within the Committee on Archival Legal Matters (CLM), with Claes Granstrom as Chair. Other members of the working group are Gary M. Peterson, Maria Pia Rinaldi Mariani, Udo Schafer and Josef Zwicker. Additionally, Torbjorn Hornfeldt, Archives of Sweden, was added to the group as IT specialist. The working group also consulted with the ICA committee on Electronic Records in the preparation of this report. The working group first met in Rome, Italy on 4 to 7 August 2001. Granstrom, Peterson and Zwicker also met in Geneva Switzerland on 23 and 24 January 2002.

The focus of this report is to identify the issues that archivists and records keepers must keep in mind to ensure the authenticity of electronic records. First, authenticity will be explained. No one country's law will be used – the discussion will be general. Next, technology's impact on authenticity will be illustrated and national laws and other studies dealing with authenticity of electronic records will be examined. Finally some recommendations for future action will be discussed.

2. Authentication

Authentication – The determination that a document or a reproduction of a document is what it purports to be.

Peter Walne, Ed. Dictionary of Archival Terminology,
2nd edition. Munich: KG Saur, 1988

Authentication is a rule of evidence that determines whether an item introduced into evidence in a legal proceeding is authentic. In the evidence example, authentication means that the item is what the party seeking to introduce it claims it is. The easiest way to authenticate a document is to have a witness state that it is what it is claimed to be. This rule of evidence was developed for paper and did not consider electronic records. Today's question is, "What is an authentic electronic record?"

Recent events in the field of records management have addressed the issue of authenticity of an electronic record. On 15 September 2001, the International Organization for Standardization (ISO) published ISO 15489-1, Information and documentation – Records Management. The standard was developed so "...that appropriate attention and protection is given to all records, and that the evidence and information they contain can be retrieved more efficiently and effectively, using standard practices and procedures." The Standard in clause 7.2.2 defines authenticity:

“An authentic record is one that can be proven

- a) to be what it purports to be,
- b) to have been created or sent by the person purported to have created or sent it, and
- c) to have been created or sent at the time purported.

To ensure the authenticity of records, organizations should implement and document policies and procedures which control the creation, receipt,

transmission, maintenance and disposition of records to ensure that records creators are authorized and identified and that records are protected against unauthorized addition, deletion, alteration, use and concealment.”

The Standard in Part 2: Guidelines, recognizes then need to maintain electronic systems to protect authenticity. Clause 5.3 of ISO /TR 15489-2 states:

“Records managers need to be aware of the potential for legal challenge when documents are presented in evidence to a court of law. If the integrity or authenticity of a record is called into doubt in court by suggestions of tampering, incompetence, improper system functionality or malfunction, the evidential weight or value put on the document by the court may be lost or, at least, reduced, to the detriment of the case.

The records managers need to have readily available evidence to demonstrate and prove the organization’s compliance with legislation, policies and procedures throughout the life of the system. It should also be possible to show that the system was operation as intended in accordance with the organization’s normal business practices. This evidence would be available from records of the monitoring and auditing of system processes.”

These new ISO standards clearly have an impact on archives and if authentic records are to be created and preserved as archival electronic records, archives must participate in the system creation, even before records are created. This is especially important because continued access to electronic records not available in another form has become the norm. Also, electronic records are at risk because of technical obsolescence as newer formats replace older ones. The new technology presents new challenges to the archivist to preserve authentic electronic records.

3. New Technology’s Impact on Authenticity

The first and most fundamental reason for creating archives is to prove legal rights. Secondly, archives serve as instruments for the administration of an organization. Finally, archives are cultural heritage and they are one of the preconditions for social and political accountability. All these purposes can be served only with authentic documents, that is with documents that are reliable not only at the moment when they are created but remain reliable for a long time to come. That means that those documents must be preserved from destruction and from alteration. If electronic archives are compared to “conventional” archives a range of special problems with keeping authentic electronic documents becomes obvious.

“Conventional” documents, once created in an orderly way, are rather static and stable objects (physically and chemically), they are “things”, entities perceptible by the senses. Only relatively few people are involved in the process of creating, transmitting, retaining and producing “conventional” documents. They are processed in a more or less closed circle as far as both professional qualifications and work routines are concerned.

The difference with electronic records is striking. Electronically produced documents actually are not objects at all but rather, by their nature, products that have to be processed each time they are used. There is no

transfer, no reading without a re-creation of the information. Electronically recorded information is volatile and many persons with different skills are needed to implement electronic systems. Processing electronic documents therefore is technically much more complicated than processing “conventional” ones.

In short, in an electronic environment there are more weak points threatening authenticity than there are for “conventional” documents and more complex measures are necessary to preserve authenticity in an electronic environment. Migrating the electronic information from one media to another is an example of the more complex preservation problems. This more complex processing of documents endangers their authenticity and requires that more be done to protect it.

Today we live in a digital world. The daily use of the computer is expanding geometrically and the daily use is just as rapidly shrinking the world. We have experienced a change from a five hundred year tradition of the printed word to the new tradition of an electronic one. This rapid change puts pressures on such traditional legal values as authenticity. Nations and archivists need to adjust to these pressures.

4. National Legislation and Authenticity

Archivists should protect the authenticity of documents during archival processing, preservation and use. Archivist should ensure that the archival value of records, including electronic or multimedia records is not impaired in the archival work of appraisal, arrangement and description, and of conservation and use.”

Code of Ethics, adopted by the ICA General assembly in its XIIIth session in Beijing, 6 September 1996.

As a result of the Code of Ethics stressing the authenticity of electronic records, the ICA Committee on Archival Legal Matters (CALM), in 1997, established a working group to study the legal issues surrounding creating authentic, reliable and valid records in the electronic environment. The working group prepared a draft report for discussion at the August 2000, ICA Congress in Seville, Spain, and is now preparing a final report that will be presented to the Vienna Congress in 2004. Because the legal framework and the record keeping culture and circumstances of countries vary widely, the working group decided to first conduct a survey of the members of the CALM on the authenticity of electronic records in their respective countries. It was the intention of the working group to use the answers to the survey questions to prepare internationally useful and appropriate guidelines for creating and managing authentic records in an electronic environment.

The survey questions had a number of purposes. The first purpose was to investigate the extent to which the terms or concepts of authenticity, validity and reliability are used in the profession in referring to electronic records. The second purpose was to ascertain whether archival and/or other legislation defines those terms. The final purpose of the survey was to discover what countries are doing to address the authenticity of electronic records and what issues or problems are being encountered in the process.

In January of 1999 the members of the CALM were asked to respond to five questions pertaining to the authenticity of electronic records. The questions were:

1. Do archives in your country use the terms “authenticity,” “reliability” or “validity” in relation to records/electronic records? If yes, please provide definitions.

2. Does archival legislation in your country define “authenticity,” “reliability” or “validity” in relation to records/electronic records? If yes, please provide definitions and the citation of the legislation.

3. Does any other legislation (for example, electronic commerce legislation, digital signature act, etc.) in your country define “authenticity,” “reliability” or “validity” in relation to records/electronic records? If yes, please provide definitions and the citation of the legislation.

4. What are archives in your country doing/planning to do to ensure that electronic records are reliable and authentic?

5. Do archives in your country identify any issues/problems in succeeding? If yes, please tell us what they are.

Members were asked to update the survey in 2001. In all, thirteen countries responded (Andorra, Australia, France, Germany, Italy, Lithuania, Mexico, Slovakia, South Africa, Sweden, United Kingdom, and the United States). It must be noted that the authenticity of electronic records is a fast changing area and the survey merely represents a snapshot of the situation at the time of the answers and is most certainly out of date upon receipt of the answers. Also, since the survey was only of the members of CALM, it is not statistically reliable. The CALM, however, believes from the members experience that the answers are reflective of the profession generally.

The first question was “Do archives in your country use the terms ‘authenticity,’ ‘reliability’ or ‘validity’ in relation to records/electronic records? If yes, please provide definitions.” Six countries responded in the affirmative and seven in the negative. With less than half of the respondents answering “yes,” it is apparent that there is no uniformity across the profession in the usage of these concepts as they relate to electronic records. The fact that these concepts as they relate to electronic records are not widely accepted may be a result of the fact that the issues on the authenticity of electronic records are in flux. It was clear from the responses that there is agreement on the definition of “authenticity” and “reliability,” and that the term “validity” is not used or is used synonymously with either “authenticity” or “reliability.” Based on the survey, it is generally accepted that “authenticity” means that a document is what it purports to be and that “reliability” means that a document is trustworthy.

The second question was “Does archival legislation in your country define ‘authenticity,’ ‘reliability’ or ‘validity’ in relation to records/electronic records? If yes, please provide definitions and the citation of the legislation.” Sadly, the answer was a uniform “no.” One of the reasons for this negative answer may be that archival legislation predates the concerns about electronic records. Given the silence of archival legislation on the matter of authenticity, reliability and validity, the next question was “Does any other

legislation (for example, electronic commerce legislation, digital signature act, etc.) in your country define ‘authenticity,’ ‘reliability’ or ‘validity’ in relation to records/electronic records? If yes, please provide definitions and the citation of the legislation.” Seven countries answered affirmatively and six answered in the negative. From the answers it appears that authenticity has been addressed in laws relating to evidence, electronic signature and e-commerce.

From the answers to these two questions, it is clear that a patchwork of national laws may touch on the creation and maintenance of authentic electronic records. Where laws do address electronic records they do not provide a coherent records keeping regime in the electronic environment and these gaps in national legislation must be filled.

The draft report from Seville, based upon the answers to the first three questions, came to the following conclusion:

In the absence of legislative imperatives to create authentic, reliable and valid records the pressure on archives and archivists is increased. Firstly, they need to assess whether archival and records keeping legislation requires revision – always a protracted process. Secondly, they need to be vigilant about whether other legislation in their jurisdiction is pronouncing on record keeping matters and they need to assess whether such legislation is adequate. Thirdly, in the absence of any or adequate legislation, they must identify and employ other tactics to ensure that adequate electronic records are created. This can be achieved through the development of international or national standards or organizational policy. The issues of concern are that such documents may not have the force of legislation and assessing or auditing compliance is a much more difficult task.

The fourth question was “What are archives in your country doing/planning to ensure that electronic records are reliable and authentic?” Of the thirteen countries answering, ten stated that they were doing or planning something to ensure that electronic records are reliable and authentic. Among the activities reported are issuing regulations, providing guidance and training, preparation of standards for electronic documents, and influencing legislation. It appears that all approaches to authenticity regarding electronic records start with records creation unlike paper records where some archives only deal with authenticity upon receipt of the records.

The final question was “Do archives in your country identify and issues/problems in succeeding? If yes, please tell us what they are.” As the question relates to authenticity, the responses pointed to problems in developing and implementing records creation and records keeping standards, electronic signatures, and migration. It is best summed up by Australia’s answer that the authenticity of good electronic record keeping requires ensuring that electronic business process routinely involve the capture of the records necessary to document them; designing electronic systems that will capture authentic records; ensuring that the integrity of electronic records is securely maintained; ensuring that electronic records created and captured now will remain accessible and useable for as long as they are needed; and building a culture of record keeping among managers and workers. Finally almost

all responses mentioned allocating existing resources wisely, obtaining additional resources and developing partnerships so that others collaborate in achieving the archivists' aims.

5. Ongoing Projects and Legislation

There are many studies going on all over the world investigating how to keep electronic records in a way that will guarantee their authenticity. Most of these studies are being done by archives or library experts. Because e-commerce has become such an active business tool, commercial enterprises and governments are now focusing on the authenticity of electronic records and electronic signatures and laws and regulations are being proposed and approved to govern authenticity.

On the international level, an example of new laws is the Directive of the European Union on electronic signatures, adopted on 30 November 1999. This Directive has now been implemented in all of the member states of the Union. Paradoxically, the Directive makes no provisions for long-term preservation in the archival sense. The United Nations General Assembly has approved the UNCITRAL Model Law on Electronic Commerce which contains provisions on electronic signatures. In the pharmaceutical industry, the US Food and Drug Administration has issued a regulation on electronic records and electronic signatures that is forcing the industry to deal with the issues of authenticity. For instance, the regulation requires that records created electronically must be kept electronically. Again, the archival implications of the regulation have been ignored.

Issues surrounding preserving authentic electronic records are not new, just recent. There has been a great deal of research done on the subject in the past ten years. This report makes no attempt to analyze the research. A few of these projects are reviewed to show the great interest that the digital era has prompted in authenticity. These are merely examples that have been chosen out of the many projects underway.

1. University of British Columbia. The Preservation of the Integrity of Electronic Records Project at the University of British Columbia defined authenticity as a record's reliability over time. It linked authenticity to the record's status, mode and form of transmission and the manner of its preservation and custody. The Project developed a series of templates identifying the characteristics of an electronic record that is authentic. The InterPARES Project is also at the University as an ongoing study on the permanent preservation of authentic records created in electronic systems. Further information about this project can be found at www.interpares.org.

2. University of Pittsburgh. The Functional Requirements for Evidence in Record keeping Project at the University of Pittsburgh identified authentic records as those which an authorized records creator must have originated. The Project identified functional requirements for creating authentic records. Interestingly the Project found that electronic records should not be transferred into archival custody as the act of transferring across custodial boundaries wrenches them from their record keeping context. Further information about this project can be found at rcox@mail.sis.pitt.edu.

3. Digital Preservation Testbed. The Digital Preservation Testbed is a three year research project initiated by the Dutch Ministry of the Interior and the Ministry of Education, Culture and Science. The project started in October 2000. The project goal is to establish the best strategy for the long term preservation of digital objects. The project's web site may be found at www.digitaleduurzaamheid.nl/.

4. Model Requirements for the Management of Electronic Records (MoReq). The MoReq Specification is a model specification of requirements for electronic records management systems (ERMS). It was designed to be applicable throughout Europe. The model specification was commissioned by the IDA Program of the European Commission and was prepared by Cornwell Associates plc. Further information on the specification can be obtained at www.cornwell.co.uk/moreq.html/.

5. Monash University. The Record keeping Metadata Project of the Records Continuum Research Group at Monash University views records as agents of action and active participants in the business process. The Project aims to "...specify and codify record keeping metadata in ways that enable it to be fully understood and deployed both within and beyond the records and archives profession." The project identified authentication of records as one of the purposes of metadata. More information about the project can be found at <http://rcrg.dstc.edu.au>.

6. Cedars Project. The Cedars Project was established by the Consortium of University Research Libraries. The Project studied "...the issues surrounding digital preservation and the responsibilities that research libraries would have to assume to ensure continued accessibility to digital materials." The project defines authenticity of a document "that it is the same as that which a user expected based on a prior reference." See www.leeds.ac.uk/cedars/.

Given all the legislative and research going on, there is not enough cooperation or links between the legislator and the researcher. This means that the legislator cannot benefit from the results of these projects.

6. Conclusions and Recommendations

The collective memory of the peoples of the world is of fundamental importance to preserve. Documentary heritage in the form of records or documents (archives) is an essential part of this memory and is also becoming vital when discussing indispensable human rights such as freedom of opinion and expression, where the right to seek, receive and impart information is included. The establishment of freedom of information laws around the world is evidence of the importance of these records.

Preservation and access to electronic records in electronic form is an important and difficult issue. There is unquestioned preservation of records such as cuneiform clay tablets, Latin medieval parchment letters, or 19th century paper correspondence. These are kept in the original. In the future records will be only in electronic form and will have no automatic longevity by themselves as the records mentioned above. The reasons to provide preservation and access remain unchanged, but the conditions to do so have

changed dramatically. Archival institutions have a distinctive mission—to give guidance on these problems to the creators of electronic records, to receive transfers of the electronic records, and to preserve and give access to authentic records for now and the centuries to come.

Archivists are thus responsible for the identification and preservation of authentic digital heritage. To accomplish this responsibility requires that the preservation of authentic electronic records be given the highest priority by archivists. Responsible archivists must make themselves aware of the problems in their country surrounding electronic records and make contact with international organizations to get resources to resolve the problems. It is obvious that in order to accomplish this, archivists must cooperate with other professions and archival institutions and must receive the necessary resources to carry out these new tasks.

As has been discussed above, there is a great deal of research into the authenticity of electronic records underway. It would be a wasteful redundancy to embark on yet another study on how to preserve authentic electronic records. What is needed now is an evaluation of the research completed and a transfer of the knowledge from the researcher to the archivist. Much of the research is going on at local, national and super-national levels and must be harmonized to prevent serious inconsistent treatment of electronic records to ensure their authenticity. This harmonization must be done while, at the same time, keeping in mind the different national legal traditions and cultures. It must be realized, however, that a loss of authentic electronic records is a cultural loss and a loss of the digital heritage of nations. UNESCO is in a unique position – as a part of the Memory of the World Program – to prevent this loss and to take a number of actions to preserve the digital heritage of nations.

1. Archivists and archival institutions, in both the public and private sectors, are still in the paper age and are concerned with preserving authentic paper records. Their understanding of the need to preserve authentic digital records must be improved. UNESCO should promote programs that educate and raise the awareness of archivists on the issue of preserving authentic electronic records. All types of training and archival education should be pursued.

2. The CLM, as noted above, has completed a survey of its member on the status of the authenticity of electronic records in the committee member's country. While the information from this study is informative, it is not necessarily reflective on the archives of the world. UNESCO should conduct a similar survey of the world on the status of the authenticity of electronic records.

3. In preparing this report it had become obvious that there is not common agreement among archival professionals on the meaning of the terminology. Careless use of terminology leads to confusion. UNESCO ought to promote an agreement on terminology.

4. There have been so many studies on how to preserve authentic electronic records that some summing up and conclusions are necessary in order to move forward with preserving authentic electronic records. Guidelines on

preserving authentic electronic records would be very useful to archivists and UNESCO should back the development of the guidelines.

5. UNESCO should take an initiative to make governments aware of the special archival problems in preserving electronic records in authentic form. UNESCO should convene a conference of high ranking representatives from world governments and introduce the problem of preserving digital cultural heritage in an authentic manner.

6. Recognition of the need for adequate resources and organization to preserve digital cultural heritage is paramount. UNESCO should develop the criteria and models for such an organization.

Finally, the goal of archivists must be "...to preserve (digital) records in an intellectual sense (as we can understand them), as they were when they played a role in the business process (authenticity), over time (in a usable way and despite changing technology)." The recommendations above will strongly support this goal.

APPENDIX

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GLOSSARY

appraisal

A basic records management/archival function of determining the value and thus the DISPOSITION of RECORDS based upon their current administrative, legal, and fiscal use; their EVIDENTIAL and INFORMATIONAL VALUE; their ARRANGEMENT and condition; and their relationship to other records

archives

1) The DOCUMENTS created or received and accumulated by a person or organization in the course of the conduct of affairs, and preserved because of their continuing value

2) The building or part of a building in which ARCHIVES(1) are preserved and made available for consultation; also referred to as an archival repository

3) The agency or program responsible for selecting, acquiring, preserving, and making available ARCHIVES(1); also referred to as an archival agency, archival institution, or archival program

authentication

The act of verifying that a DOCUMENT or a REPRODUCTION of a DOCUMENT is what it purports to be

See also: **certification**

business process re-engineering

(also business process redesign) (abbrev.: BPR) *noun* [mass noun] the process of restructuring a company's organization and methods, especially so as to exploit the capabilities of computers.

case papers/files

FILES relating to a specific action, event, person, place, project, or other subject. Case files are sometimes referred to as project files or dossiers. In UK usage, particular instance papers; in Canadian usage, transactional files

certification

The act of attesting the official character of a DOCUMENT or of a COPY thereof

context

noun the circumstances that form the setting for an event, statement, or idea, and in terms of which it can be fully understood and assessed: *the proposals need to be considered in the context of new European directives*. the parts of something written or spoken that immediately precede and follow a word or passage and clarify its meaning. -PHRASES: **in context** considered together with the surrounding words or circumstances: *the complex meaning of irony is only graspable in context*. **out of context** without the surrounding words or circumstances and so not fully understandable: *the article portrayed her as domineering by dropping quotes from her out of context*. -DERIVATIVES **contextual** *adjective* **contextually** *adverb*. -ORIGIN late Middle English (denoting the construction of a text): from Latin *contextus*, from con- 'together' + *texere* 'to weave'.

deletion *noun* **1** [mass noun] the action or process of deleting something: *deletion of a file*. **2** Genetics: the loss or absence of a section from a nucleic acid molecule or chromosome.

disposal

The actions taken with regard to NONCURRENT RECORDS following their APPRAISAL and the expiration of their retention periods as provided for by legislation, regulation, or administrative procedure. Actions include TRANSFER to an ARCHIVES(3) or DESTRUCTION. In the United States, DISPOSAL is also known as disposition

destruction

The DISPOSAL of DOCUMENTS of no further value by methods as incineration, maceration, pulping or shredding

document

- 1) Recorded information regardless of MEDIUM or characteristics
- 2) A single ITEM

document management system

An organized means of creating, indexing, searching, and accessing DOCUMENTS or INFORMATION

dossier

See: **case file**

evidence

noun [mass noun] the available body of facts or information indicating whether a belief or proposition is true or valid: *the study finds little evidence of overt discrimination*. Law: information given personally, drawn from a document, or in the form of material objects, tending or used to establish facts in a legal investigation or admissible as testimony in a law court: *without evidence, they can't bring a charge*. signs; indications: *there was no obvious evidence of a break-in*. **verb** [with obj.] (usu. be evidenced) be or show evidence of: *that it has been populated from prehistoric times is evidenced by the remains of Neolithic buildings*. -PHRASES: give evidence Law: give information and answer questions formally and in person in a law court or at an inquiry. in evidence noticeable; conspicuous: *his dramatic flair is still very much in evidence*. turn King's (or Queen's or US state's) evidence Law: (of a criminal) give information in court against one's partners in order to receive a less severe punishment oneself. -ORIGIN Middle English: via Old French from Latin *evidentia*, from *evident-* 'obvious to the eye or mind' (see *evident*).

internal evidence *noun* [mass noun] evidence derived from the contents of the thing discussed.

1. hearsay evidence *noun* [mass noun] Law: evidence given by a witness based on information received from others rather than personal knowledge.

2. negative evidence *noun* [mass noun] evidence for a theory provided by the non-occurrence or absence of something.

3. primary evidence *noun* [mass noun] Law: evidence, such as the original of a document, that by its nature does not suggest that better evidence is available. first-hand historical evidence about an event rather than that based on other sources.

4. secondary evidence *noun* [mass noun] Law: something, in particular documentation, which confirms the existence of unavailable primary evidence.

5. state's evidence *noun* [mass noun] US Law: evidence for the prosecution given by a participant in or accomplice to the crime being tried.

6. Queen's evidence *noun* [mass noun] English Law: evidence for the prosecution given by a participant in or accomplice to the crime being tried: *what happens if they turn Queen's evidence?*

7. King's evidence *noun* in the reign of a king, the term for Queen's evidence.

evidential value

The worth of DOCUMENTS/ARCHIVES for illuminating the nature and work of their creator by providing evidence of the creator's origins, FUNCTIONS, and activities.

Evidential value is distinct from informational value

See also: administrative value, fiscal value, informational value, legal value, intrinsic value

file

1) An organized unit (folder, volume, etc) of DOCUMENTS grouped together either for current use by the creator or in the process of archival ARRANGEMENT, because they relate to the same subject, activity, or transaction. A FILE is usually the basic unit within a record SERIES

2) A series of FILES(1)

3) In DATA PROCESSING, two or more RECORDS(2) of identical layout treated as a unit. The unit is larger than a RECORD(2) but smaller than a data system, and is also known as a data set or file set

genuine

adjective truly what something is said to be; authentic: *each book is bound in genuine leather.* (of a person, emotion, or action) sincere: *she had no doubts as to whether Tom was genuine | a genuine attempt to delegate authority.* -DERIVATIVES genuinely *adverb* genuineness *noun.* -ORIGIN late 16th cent. (in the sense "natural or proper"): from Latin *genuinus*, from *genu* 'knee' (with reference to the Roman custom of a father acknowledging paternity of a newborn child by placing it on his knee); later associated with *genus* 'birth, race, stock'.

integrity

noun [mass noun] 1 the quality of being honest and having strong moral principles; moral uprightness: a gentleman of complete integrity. 2 the state of being whole and undivided: upholding territorial integrity and national sovereignty. the condition of being unified, unimpaired, or sound in construction: the structural integrity of the novel. internal consistency or lack of corruption in electronic data: [as modifier] integrity checking. -ORIGIN late Middle English (in sense 2): from French *intéégritéé* or Latin *integritas*, from *integer* 'intact' (see *integer*). Compare with *entirety*, *integral*, and *integrate*.

metadata

DATA describing DATA and data systems; that is, the structure of DATA BASES, their characteristics, location, and usage

migrate

verb [no obj.] (of an animal, typically a bird or fish) move from one region or habitat to another, especially regularly according to the seasons: *as autumn arrives,*

the birds migrate south. (of a person) move from one area or country to settle in another, especially in search of work: *rural populations have migrated to urban areas.* move from one specific part of something to another: *cells which can form pigment migrate beneath the skin.* Computing: change or cause to change from using one system to another. [with obj.] Computing: transfer (programs or hardware) from one system to another. – DERIVATIVES migration *noun* migrational *adjective* migrator *noun* migratory *adjective*.

–ORIGIN early 17th cent. (in the general sense “move from one place to another”): from Latin *migrat-* ‘moved, shifted’, from the verb *migrare*.

record

1) A DOCUMENT created or received and maintained by an agency, organization, or individual in pursuance of legal obligations or in the transaction of business

2) In DATA PROCESSING, a grouping of inter-related data elements forming the basic unit of a FILE(3)

reliable

adjective consistently good in quality or performance; able to be trusted: *a reliable source of information.* *noun* (usu. reliables) a person or thing with such trustworthy qualities: *the supporting cast includes old reliables like Mitchell.* –DERIVATIVES reliability *noun* reliableness *noun* reliably *adverb*.

retention period

The length of time, usually based upon an estimate of the frequency of use for current and future business, that RECORDS should be retained in offices or RECORDS CENTRES before they are transferred to an ARCHIVES(3) or otherwise disposed of

signature, digital

signature, electronic

signature

noun **1** a person’s name written in a distinctive way as a form of identification in authorizing a cheque or document or concluding a letter. [mass noun] the action of signing a document: *the licence was sent to the customer for signature.* a distinctive pattern, product, or characteristic by which someone or something can be identified: *the chef produced the pâtée that was his signature* | [as modifier] *his signature dish.* **2** Music: short for key signature or time signature. **3** Printing: a letter or figure printed at the foot of one or more pages of each sheet of a book as a guide in binding. a printed sheet after being folded to form a group of pages. **4** N. Amer. the part of a medical prescription that gives instructions about the use of the medicine or drug prescribed. –ORIGIN mid 16th cent. (as a Scots legal term, denoting a document presented by a writer to the Signet): from medieval Latin *signatura* ‘sign manual’ (in late Latin denoting a marking on sheep), from Latin *signare* ‘to sign, mark’.

text

noun **1** a book or other written or printed work, regarded in terms of its content rather than its physical form: *a text which explores pain and grief.*

a piece of written or printed material regarded as conveying the authentic or primary form of a particular work: *in some passages it is difficult to establish the original text* | *the text of the lecture was available to guests on the night*. [mass noun] written or printed words, typically forming a connected piece of work: *stylistic features of journalistic text*. [mass noun] Computing: data in written form, especially when stored, processed, or displayed in a word processor. [in sing.] the main body of a book or other piece of writing, as distinct from other material such as notes, appendices, and illustrations: *the pictures are clear and relate well to the text*. a script or libretto. a written work chosen or set as a *subject of study*: *too much concentration on **set texts** can turn pupils against reading*. a textbook. a passage from the Bible or other religious work, especially when used as the subject of a sermon. a subject or theme for a discussion or exposition: *he took as his text the fact that Australia is paradise*. **2** (also text-hand) [mass noun] fine, large handwriting, used especially for manuscripts. //

transfer

- 1) The act involved in a change of physical CUSTODY of RECORDS/ARCHIVES with or without change of legal title
- 2) RECORDS/ARCHIVES so transferred

valid

adjective actually supporting the intended point or claim; acceptable as cogent: *a valid criticism*. legally binding due to having been executed in compliance with the law: *a valid contract*. legally acceptable: *the visas are valid for thirty days*.

-DERIVATIVES

validity *noun*

validly *adverb*. -ORIGIN late 16th cent.: from French *valide* or Latin *validus* ‘strong’,

from *valere* ‘be strong’.

legal value

The worth of RECORDS/ARCHIVES for the conduct of current or future legal business and/or as legal evidence thereof

Josef ZWICKER

**SOME PROBLEMS OF AUTHENTICITY
IN AN ELECTRONIC ENVIRONMENT***

INTRODUCTION

Archives and authenticity

The first and most fundamental reason for creating archives is to prove legal rights. Secondly, archives serve as instruments for the administration of an organisation. Information held in archives are tools or means to do the job in an efficient way. Thirdly, archives are one of the preconditions for political and social accountability. Finally, archives are cultural heritage. All those purposes can be served only with authentic documents, that is with documents that are reliable not only at the moment when they are created but remain reliable for a long time to come. This means that those documents must be preserved from both destruction and alteration.

Even with a superficial knowledge of IT it becomes clear that electronic documents are easy to be manipulated, either by intention or by incident. So it is the duty of archivists to tackle the problem. But it is not only our duty, it is our genuine function as archivists: to keep authentic records for practical, legal purpose, for historical research and for transparency. Archivists are trained to do this job, they know what is needed. Archivists have learned to discern an authentic document. That is what diplomatics (not to be confounded with diplomacy) are dealing with, diplomatics as a scientific discipline.

For me the most inspiring publication of Luciana Duranti still remains *Diplomatics: New Uses for an Old Science* published in "Archivaria" 1989–1991. There, in fact, she has made the link between classical diplomatics (Jean Mabillon, etc.) and the problems of authenticity of electronic records: "Diplomatics and paleography were born as a science arising from the need to analyze critically documents considered to be forgeries". "The origin of diplomatics is strictly linked to the need to determine the authenticity of documents ..."¹. That is our business too when dealing with electronic records.

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Diplomatics as archivists' business was born as a science arising from practical needs, that is "to analyse critically documents considered to be forgeries ... the methodology of its textual criticism was utilitarian in nature. It was used as a legal weapon before the courts"².

The problem

If electronic archives are compared to "conventional" archives, a range of special problems with keeping authentic electronic documents becomes obvious.

"Conventional" documents, once created in an orderly way, are rather static and stable objects (physically and chemically), they are "things", entities perceptible by the senses. Only relatively few people are involved in the process of creating, transmitting, retaining and producing "conventional" documents. They are processed in a more or less closed circle as far as both professional qualifications and work routines are concerned.

The difference with electronic records, i.e. electronically recorded information, is striking. Electronically produced documents are not actually objects at all but rather, by their nature, products that have to be processed each time they are used. No transfer, no reading without re-creation of the information.

Electronically recorded information is volatile. Many persons of quite different professions are needed to implement electronic systems, i.e. both hardware, software and procedures. Furthermore, means for processing electronic data are ephemeral. (Look at the time span for writing off both hardware and software in many European countries: three years!).

To illustrate the difference between handling electronic documents and dealing with conventional ones, it is enough to remind oneself of the different grades of complexity of the infrastructure needed for writing a letter and writing an e-mail.

Processing electronic documents therefore is technically much more complicated than processing "conventional" ones, the management of creating and handling of records included.

In short, in an electronic environment there are much more weak points, regarding number, variety and frequency, threatening authenticity, than there are for "conventional" documents. Much more complex measures are therefore to be taken for preserving authenticity in an electronic environment. The more complex the processing of documents, the more authenticity is endangered and the more has to be done to protect it. (To try to implement self-authentication in electronic systems in order to get rid of the problems may prove to be an illusion).

One quite basic difficulty with electronic documents should be mentioned – we could call it a problem of culture: the handling of such documents itself is a new phenomenon. Compared to the long and vast experience in dealing with conventional ways of retaining information, processing it electronically has not got a tradition yet. In a sense, even the most professional archivists (and IT-specialists) – in the longer run – may look naive

in dealing with these problems, leaning too much on technical aspects and not caring enough about questions of ergonomics, management and culture. Certain short-terminism in the electronic world still seems to prevail.

Principles about how to regulate by law the relationship between different private and public parties are applied in many fields of society. They might also serve as guidelines regulating the electronic environment both in the private and public interest. Even if no fundamentally new legislation may be necessary, one should be aware that, because of the possibilities and the latent flaws of electronic systems, new interactions between different fields of legislation may appear and have to be taken into consideration.

A practical example

To illustrate the fact that authenticity in an electronic environment is a real problem, I would like to give two examples, for the first of which I refer to Anne-Marie Schwirtlich, for the second to Luciana Duranti.

“Many countries keep a record of who their citizens are and when they were granted citizenship. There are at least four important elements that must be recorded if a country wants to maintain an accurate record of citizenship over time. These elements are:

- name of the citizen,
- unique certificate number,
- date that citizenship was granted, and
- name/position of the decision maker.

Assume that this information was recorded electronically. As the amount of information increased, and as computing systems improved, imagine that this office changed from system to system to maintain these records. Suppose one of the earlier systems was discovered to have a major software malfunction. This resulted in it doing two things – it was no longer preserving the link between the name of the citizen and the unique certificate number – it was mixing them up. In some cases, it was confusing the name of the citizen with the name of the decision-maker. If you looked at the system on-line or printed a copy of a certificate it would look correct because it had a number, the name of the citizen, the date and the decision-maker. However, the record is not reliable.”³³ – That is what happened in Australia several years ago.

E-business and authenticity

E-business means, as you know, not only buying and selling via Internet but also production, advertising and services via electronic telecommunication. It has to do with business to business commerce but also with business to consumer transactions. It is of course not possible to deal here with all the technical and legal problems connected with e-business. But it may be helpful to remember that some of those questions are the same as those archivists have to deal with, when thinking about authenticity. First, business does presuppose the unequivocal, indubitable identification of the partners involved in a business transaction. Hence the importance of the

reliability of signature, i.e. digital signature. Experience has proved that this is quite a difficult problem.

Second – and this is exactly the problem of authenticity – partners involved in a business transaction have to be absolutely sure that a document received is still exactly the same one as the one sent by the business partner, that no third person has made any alteration either of content of the document or of date of signature. It is obvious that some doubts still exist about the reliability and authenticity of documents in e-business. This is one of the reasons why e-business in the last years, although being, from a purely economic point of view, very interesting, did not grow as fast as predicted. And for the same reason, in many countries both legal and technical measures including standardization and voluntary agreements are taken. All this, i.e. more security about reliability and authenticity, is necessary to stimulate e-business.

E-government can be considered as a specific case of e-business. It includes both transactions between the agencies of a government or administration and the contacts between the government and the citizens and the public. It is obvious that identification of the partners involved and non alteration of the documents sent and received are of the outmost importance in e-government, exactly as in e-business, with the same problems concerning authenticity.

Definitions

Until now I have used the term “authenticity” as it is used in colloquial speech, that is: “of undisputed origin; genuine” (genuine = “really coming from its stated, advertised or reputed source”)⁴. We should not – for the moment – insist too much on archival terminology concerning electronic documents. But it is certainly useful to explain some elementary terms briefly.

Most important is the distinction between “authenticity” and “reliability”. “Reliability” refers to the past, in the sense that the facts related in a document are true, are deserving trust – at the very moment of the creation of the document. So examination of reliability means examination of the creation of the document. To quote Duranti/Eastwood: Reliable Records are “records endowed with trustworthiness. Trustworthiness is conferred to a record by its degree of completeness and the degree of control on its creation procedures and/or its authors reliability”⁵.

“Authenticity” refers to the connection between past and present, i.e. to the transmission of the record from the past time to the present. It is obvious that control of the transmission of a document from its creation to the use in present time is more difficult in an electronic environment than with records on paper.

To sum up we can say in Luciana Durantis and Terry Eastwoods words: Authentic records are records “that can be proven to be genuine. Authenticity is conferred to a record by its mode, form, and/or state of transmission, and/or manner of preservation and custody. ...”⁶.

How to ensure authenticity

If control of reliability is connected with the creation of records, it becomes obvious that archivists will have to care about the creating processes and that legal regulations will have to be established about the creation of records.

The nature itself of the electronic environment demands intervention from the very start of the process of creation of the record, or more precisely, from the design of the application that will produce records.

Reliability and authenticity presuppose control of the creation and transmission of records. Record-keeping has a lot to do with both creation and transmission of records. So record-keeping too is to be regulated by law.

Dealing with the use of a printout of an electronic record as evidence in legal proceedings Ken Chasse describes in a seminal article the dependence of authenticity and reliability on both organization and technical procedures, on both the “usual and ordinary course of business” and system integrity.

“An organization or a person wishing to use a printout of an electronic record as evidence in legal proceedings must be able to prove:

- 1) the integrity of the electronic record system in which that particular record was recorded or stored;
- 2) the authenticity of that record; and,
- 3) its “usual and ordinary course of business” with regard to making, processing and retaining electronic records.

The “electronic record” provisions of the Evidence Acts in Canada (federal, provincial and territorial) state that proof of the integrity of an electronic record is established by proof of the integrity of the electronic records system in which the record was recorded or stored. Such “system integrity” can be proved by:

- a) evidence that the computer system was operating properly;
- b) evidence that the electronic record was recorded or stored by a party to the proceedings who is adverse in interest to the party seeking to introduce it as evidence; or
- c) evidence that the electronic record was recorded or stored in the usual and ordinary course of business by a person who is not a party to the legal proceedings and who did not record or store it under the control of the party seeking to introduce the record as evidence”⁷.

The most comprehensive text dealing with the problems of authenticity is probably the InterPARES report published recently⁸.

To ensure reliability and authenticity in the sense of archives we need

- legal norms
- technical means
- adequate management and organization.

Adequate management and organization is paramount. If archives take no part in the design of IT applications, if they are not present in the deciding committees that coordinate IT activities, if they are not present

in the office responsible for general questions of administration be it the government or a city council or a company, then it is not possible to ensure reliability and authenticity. Technics is important, including standards such as ISO 15489 about records management, but technics in itself does not solve any problem.

“... The reliability and authenticity of electronic records are best ensured by embedding procedural rules in the overall records system and by integrating business and documentary procedures. ...”⁹. That is a very important and necessary condition to ensure authenticity but not a sufficient one. Personal presence and activity is still and continuously needed. The importance of organization and of management is often underestimated.

Legislation

There are laws about specific activities which include legal norms about authenticity for the sphere they deal with. What is going on in Switzerland may illustrate this fact.

The chapter regarding accountability and book-keeping in the Corporation Law has recently been revised, in order to accept electronic records as fully valuable and legally acceptable both for the creation of book-keeping files and for their retention. This is very important because in the Swiss legal system, those paragraphs in the Corporation Law work as a standard for all legal norms concerning retention, that is for retention of tax records, but also as evidence of files to be produced in court or in administrative procedures. (Further details concerning the revision of this Law will follow in the next chapter.)

An official draft of a Law on e-Commerce has been published two years ago. The Law on e-Commerce deals with the validity of electronic signatures for Contract Law, but furthermore it should help to protect the rights of the consumers in an electronic environment.

In some countries the Law on Criminal Procedure may be very important by defining authenticity for a specific sphere, so important that these norms by analogy may be valid for other spheres of activities. Of course in the case of criminal procedure and similarly for orderly book-keeping authenticity is considered as a necessary condition for evidence. (Authenticity and evidence are not exactly the same thing. A short investigation about the meaning of the two terms and about their interdependence could be of some interest).

An Evidence Act and an Act on Electronic Signature are of a more general nature. An Evidence Act (such as the Canadian or Australian ones for instance) stipulates rules for all kind of evidence and for all - or at least for several -spheres in which evidence is of some importance.

The same is true for an Act of Electronic Signature. Even if in the ongoing legislation it appears often in the context of laws on e-commerce, legal norms concerning electronic signatures try to cope with the use of electronic signature in different spheres of activities, e-government and others included.

Unfortunately Laws on Electronic Signatures are not fully successful in Europe, mainly because they require rather complicated procedures that do not fit to the real way how business is done in everyday life. In Switzerland therefore the draft of this Law has been withdrawn at the moment¹⁰.

The elementary archival legal framework is about

- competences
- legal definitions

Competences:

1) Archivists must have or be given the competence to examine all projects of new IT-applications and all major changes of existing applications from the point of view of authenticity, that is reliability over time. This competence to interfere in IT-applications concerns of course systems for record-keeping and document management systems but also specific applications.

2) The second competence that should be ascertained to archives by law is to establish rules about how the record creating bodies have to deal with electronic documents and records in the administrative process.

As regards definitions, it seems obvious that archives, records – or recorded information – documents cover all kind of recorded information, whatever the data carrier may be. This definition must also be fixed by law. This way everybody creating documents in public administration will be aware of the fact that these records are or have to become archives and have to be passed to the responsible archival institution, no matter what the data carrier is. And a definition of the term “document” itself should be given by law.

Of course in order to control the creation, management and transmission of records and of record-keeping, these elementary paragraphs have to be specified either in the law itself or in an ordinance.

Legal norms can help to implement what has to be done. But we should not forget that legal norms have to be enforced in order to be integrated into business routines. And that – in our case – is not possible without changes in the administrative organization, and – of course – we need technical means, which also translates into: money.

Commercial law and archival legislation

The new Swiss legislation concerning orderly book-keeping – in force since June 2002 – and its significance/or record-keeping and archival legislation.

The business sector, of fundamental importance for society and the State, needs a legal framework which defines the parameters within which the business community operates. Only within these parameters can business be conducted in an orderly fashion, where business partners are able to rely on one another. It is precisely because the business sector is of such great importance for the whole of society and for the State that the State creates legislation stipulating how business should be transacted, even in capitalist countries, where most members of the business community are individuals between whom most commercial transactions take place.

The State therefore sets standards and enacts laws that ensure the solidity of commercial activities. This solidity is checked not least using information on a company's finances (transparency). The State therefore issues regulations stipulating how a company's financial health should be checked and verified. These regulations are established in the legal provisions governing orderly commercial accounting.

A company's financial health can only be checked if the financial information is authentic and reliable, i.e. correct at the time it is recorded, and complete and unchanged until the time it is used.

This is precisely the problem we face as archivists: the problem of acquiring documents that are authentic and will remain reliable.

The problem arising in respect of the regulations concerning orderly accounting, where transactions and accounting are handled electronically, corresponds to the problem we face as archivists. The new electronic accounting regulations – which in Switzerland accompany the revised version of the relevant articles of the Commercial Law – offer useful advice on how archivists can tackle the problems of authenticity in an electronic environment.

Revision of the Swiss Commercial Law 32nd title¹¹. Since the late 1990s, ever-increasing use has been made of electronic media for transaction processing and accounting. The legal norms in existence at the time could not be applied to the new technology and actually restricted its use. The revised law should therefore improve the regulatory framework for the business sector. The comments to the bill stated: "This will serve Swiss business and, in particular, its chances in the global arena ..." But future use of the new technology should not result in impaired:

- accuracy of documents
- completeness
- security
- checkability.

Technology dating back to the days when companies kept paper accounts has proved to be unsuitable in an electronic environment for two main reasons.

Firstly, there are problems with the term "original" and secondly, it is difficult to distinguish between "managing" and "storing" books.

To put it simply, Swiss legislators consider the term "original" to be unsuitable in an electronic environment because what appears on the screen of the person producing the data is a copy of something which exists only in the computer's central processing unit. The legislators therefore refrained from using the term "original".

Similar considerations also led them to refrain from distinguishing between "managing" and "storing" books. Where electronic data carriers are used, there is no clear distinction between "managing" and "storing" information.

The revised law allows companies to keep books, book-keeping vouchers and commercial correspondence in a purely electronic or "comparable" format. (By contrast, companies must continue to prepare their financial statements and balance sheets in the conventional manner.)

If using electronic media, they must meet certain requirements set down in an ordinance¹², for example:

- Generally, companies must adhere to the principles of orderly data processing. (This means state-of-the-art processing as set out in generally accepted regulations and industry recommendations).

- The organization, responsibilities, processes and infrastructure of the IT applications must be documented in such a way that the documents can be understood.

- The documents must be stored in such a way that they cannot be changed without the change being detectable.

- It must be possible to read the electronic records at any time. Any necessary aids must be provided by the company.

- The ordinance stipulates which data media may be used, setting out the requirements to be met with regard to “modifiable data carrier”.

- The ordinance also prescribes regular checks on the integrity and readability of the data carrier.

- Finally, the ordinance contains basic requirements with regard to data migration.

Throughout the ordinance, particular attention has been paid to “archived information” – “archived” in the commercial accounting sense of the word, meaning “no longer immediately current”. The Commercial Law requires companies to store such information for a minimum of 10 years.

“Archived information” must be

- separated from current information or appropriately labelled so that it can be distinguished from current information,

- accessible within a useful period of time,

- systematically inventoried, and

- protected against unauthorized access.

Furthermore, responsibility for archiving must be clearly specified and organized.

I must admit that when studying the documents on the revised Commercial Law, I was very surprised by the extent to which the problems of managing accounts in an electronic environment coincide with those faced by archivists. We archivists can undoubtedly learn something if we keep the parallels in mind.

CONCLUSIONS

The important thing with archives in an electronic environment is that – in some sense – there is no space, no recognizable time between the different aspects of dealing with records such as creating, management, transmission, keeping and preserving.

If all the necessary measures of making sure that all these activities will be possible for a long time, are not taken at the very beginning, i.e. when the instruments for creating records are designed, then archives as a rational and systematic construction of public memory will no longer exist.

With the spreading of IT into nearly all fields of economy, mainly in services such as commerce and banking, authenticity and reliability of

electronic documents have become issues of utmost impact on economy, on the wealth and the welfare of people.

Authenticity and reliability has become a question of practically everyday life. We archivists have allies – maybe allies who are more powerful in influencing politics and society than we are. And we archivists can contribute a specific know-how needed to solve these practical problems.

In my opinion getting in touch, cooperating with the responsible for the above mentioned laws, concerning, for instance, e-commerce, criminal or civil procedure, evidence, is of the utmost importance for archivists dealing with legal aspects of authenticity in an electronic environment.

“... archivists become allies of the legal community, auditors, accountants, and managers in organizations whose increasing reliance on electronic information to support decision-making, programme delivery, and accountability raises concerns about the survival of their records and the preservation of corporate memory. Accountable managers share with archivists concern for documenting decisions adequately, determining the legal status of electronic information, finding effective strategies to ensure long-term preservation and future retrieval, and maintaining sufficient descriptive and contextual information about electronic records to establish their authenticity and accurately interpret their content”¹³.

To pursue their function archivists need to ally with those people. And so archivists are fully back in the practical life: reliability and authenticity of records concern all of us, in everyday life and in the traces we leave in everyday life.

¹ L. Duranti, *Diplomatics. New Uses for an Old Science* [I], “Archivaria” 28 (Summer 1989), p. 12 and 17. (The text is re-published as part of: Luciana Duranti, *Diplomatics: New Uses for an Old Science*, The Scarecrow Press, Lanham, Maryland, and London, 1998).

² L. Duranti, op.cit. pp. 12–14.

³ ICA, Committee on Archival Legal Matters: *Creating Authentic, Reliable and Valid Records in the Electronic Environment – Issues for Archives*, Prepared for discussion in August 2000, ICA Congress, Sevilla [by Anne-Marie Schwirtlich] (AMS 2000), p. 16.

⁴ *The Concise Oxford Dictionary*, 9th ed., 1997.

⁵ L. Duranti, T. Eastwood, *Protecting Electronic Evidence: A Progress Report on a Research Study and its Methodology*, in: “Archivi & Computer” (3) 1995, p. 246.

⁶ L. Duranti, T. Eastwood, op.cit., p. 241.

⁷ K. Chasse, *Electronic Records as Evidence: From “Paper-Originals” to “System-Integrity”*, p. 1, http://www.tsacc.ic.gc.ca/content/documents/archived/joint_open_fomm_2001/ken_chasse.pdf (at the moment, March 2001).

⁸ The Long-term Preservation of Authentic Electronic Records: Findings of the InterPARES Project, mainly part one “establishing and maintaining trust in electronic records” and part three: “trusting to time: preserving authentic records in the long term” with the corresponding appendices (online version September 2002, <http://www.inter-pares.org/book.htm>, to be published as book in 2003).

⁹ ICA, Committee on Archival Legal Matters: *Creating...*, p. 29.

¹⁰ The bill has just been adopted (4th June 2003) by the House of Representatives, one of the two Chambers of the Federal Parliament. As far as the promotion of the elec-

tronic signature is concerned a *paradox* catches the eye: on the one hand it is said that in an electronic environment everything is new – technology, methods, procedures, organization – and on the other hand the electronic signature in a sense uses the same methods and the same means as used in a conventional environment, i.e. attaching a seal or reproducing the physical act of signing. Long-term preservation of recorded information in an electronic environment doesn't any longer mean storage of objects but the ability to recreate the information. It is about processes not about objects. Although in an electronic environment there doesn't exist an original, the electronic signature has been devised in a kind of thinking which is fundamentally determined by metaphors from the world of conventional physical documents. Some subtle and critical contributions concerning electronic signature were made at the DLM-Forum 2002, mainly in the workshops 2, 'The use and implication of digital signatures', and 3, 'The legal admissibility of digital storage'. Probably the most interesting of them is from Per Furberg: *Digital Storage – the Need for an Overall Solution Observing Different Legal Fields* (pp. 547–553 in: *Proceedings of the DLM-Forum 2002, @ccess and Preservation: Best Practices and Solutions*, Office for Official Publications of the European Communities, Luxemburg 2002). Furberg's starting point '*functionality* (instead of objects). He states "that the once-for-all-solution, pointing out the electronic document concept, fit for each application, does not exist." "The determining factor will be whether the document can offer the same functionality in electronic form" (p. 549). As far as *long-term preservation of electronic signatures* is concerned, it has become more and more obvious, in my opinion, that long-term preservation of this kind of signature is not possible. "It is clear that the archival of <qualified electronic signatures> was not taken into account when writing the [European Union] e-signature directive" (Jos Dumortier and Sofie van den Ende, *Electronic Signatures and Trusted Archival Services*, in: *Proceedings of the DLM-Forum 2002*, p. 524).

¹¹ Opinion communicated to the Swiss Parliament no 99.034, 31 March 1999, "Federal Bulletin of the Swiss Confederation" 1999, pp. 5149 – 5172 (in German).

¹² "Systematic Collection of Swiss Law Reports" No. 221, 431.

¹³ Margret Hedstrom, cit. in: L. Duranti, *The Thinking on Appraisal of Electronic Records: its Evolution, Focuses, and Future Directions*, in: "Janus" 1997, 2, p. 55.

Terry EASTWOOD

**THE APPRAISAL OF ELECTRONIC RECORDS:
WHAT IS NEW?**

In contemporary times, the technology of computers and communication have been combined to make instantaneous access to information a routine matter in the conduct of affairs in every sector of society. People value the latest, supposedly best information, and continually obtain the latest technology to acquire and manage it. Some of this information is closely connected with the actions taken during the conduct of affairs, but a great deal of it is simply part of the social ambience. In such circumstances, it is often difficult to distinguish records or archival documents, the two terms meaning the same, from other stores of data and information. It is also difficult to manage records so that they remain uncorrupted in an environment that puts a premium on the capability to communicate and manipulate information to increase productivity. Such an environment contrives in innumerable ways to defeat the archival goal of long-term preservation of authentic records.

As MacNeil (2000a) puts it, “the authenticity of a record is assessed in relation to its identity (i.e., was it written by the person who purports to have written it?) and its integrity (i.e., has it been altered in any way since it was created and, if so, has such alteration changed its essential character?).” In the traditional environment of stable physical media like paper, assessments of authenticity have relied on the enduring existence of physical objects. In the electronic environment, we lose the obvious assurance of authenticity that can be gleaned from examining the physical aspects of the record. In the digital world, as Ken Thibodeau (2000) remarks, “strictly speaking, it is not possible to preserve an electronic record. It is only possible to preserve the ability to reproduce an electronic record. It is always necessary to retrieve from storage the binary digits that make up the record and process them through some software for delivery or presentation.” In every twist and turn of the technology, even in its ordinary operation, exact replication in every case is not guaranteed. In such circumstances, what needs to be done if we are to give electronic records a measure of trust such that they will serve us in the ways traditional records have?

The InterPARES Project

To address these vexing difficulties, the InterPARES project set itself the goal of developing the theoretical and methodological knowledge essential to the permanent preservation of electronically generated records, and on the basis of this knowledge to formulate model strategies, policies,

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and standards capable of ensuring their preservation. InterPARES is an acronym standing for International Research on Permanent Authentic Records in Electronic Systems. The project, an international, interdisciplinary, collaborative research initiative, began work in January 1999, and is scheduled to complete its first phase at the end of 2001. Further information on the background, organization, researchers, objectives, and methodology of the project is available at <www.interpares.org>. The project's researchers are divided into three task forces investigating the conceptual requirements for preserving authentic electronic records (the Authenticity Task Force), appraisal criteria and methods for authentic electronic records (the Appraisal Task Force), and methods for preserving authentic electronic records (the Preservation Task Force.) In the latter stages of the project, the results of the work of the three task forces will be integrated in the work of the fourth task force, called the Strategies Task Force. It is important to note that the work on appraisal is dependent on the Template for Analysis developed by the Authenticity Task Force (see<www.interpares.org/documents/TemplateforAnalysis_071100.pdf>), and on its work to specify the conceptual requirements for authenticity of electronic records. Readers may also refer to the glossary of archival and diplomatic terminology available on the project's website (<http://www.interpares.org/documents/Glossary>). This article reports the preliminary findings of the Appraisal Task Force.

Aims of the Appraisal Task Force

The goal of the Appraisal Task Force is to determine whether the evaluation of electronic records for permanent preservation should be based on theoretical criteria different from those for traditional records and how digital technologies affect the methodology of appraisal. Before the Task Force started work, a number of research questions in its domain were set out. They were:

- What is the influence of digital technology on appraisal?
- What is the influence on appraisal of retrievability, intelligibility, functionality, and research needs?
- What are the influences of the medium and the physical form of the record on appraisal?
- When in the course of their existence should electronic records be appraised?
- Should electronic records be appraised more than once in the course of their existence, and, if so, when?
- Who should be responsible for appraising electronic records?
- What are the appraisal criteria and methods for authentic electronic records?

The author of this paper is Chair of the Task Force. The other members are Barbara Craig of the Faculty of Information Studies at the University of Toronto, Phil Eppard, of the Faculty of Information at The University at Albany of the State University of New York, Gigliola Fioravanti of the Italian Central Direction of Archives, Norman Fortier of the National Archives of Canada, Mark Giguere of the National Archives and Records Administration of the United States, Ken Hannigan of the National Archives

of Ireland, Peter Horsman and Agnes Jonker of the School of Archival Science and Research in the University of Amsterdam, and Du Mei from the central archives administration in China.

Background of the Question of Appraisal of Electronic Records

We began our work by reviewing the literature in English on appraisal of electronic records (Eastwood et al, 2000). Archivists have been concerned with the challenge of appraising electronic records for over twenty years, through several phases in the evolution of technology, from the period dominated by mainframe computers, to the introduction and spread of isolated desktop personal computers, to the present with its organizational intranets and the Internet. Much of the literature dwells on the difficulties of defining what a record is in the electronic environment and of identifying and extracting records of long-term value (or data or information for that matter) from live systems. In addition, celebrated court cases like *Armstrong v. Executive Office of the President* and *Public Citizen v. John Carlin* in the United States implicitly raised questions about the trustworthiness of records maintained in systems subject to few procedural controls. MacNeil (2000b, 77-85) summarizes the significance of these cases. Rather than discussing appraisal as such, many writers in the 1980s and 1990s fell to exhorting organizations to make provision for effective electronic records keeping, including procedures for disposition, in the processes of systems design and implementation. For example, an American archivist (Kowlowitz, 1991) maintained that "the most pressing issues facing electronic records appraisal today are not narrowly technical and methodological but broad program development and information management issues." Most writers of the time believed that archivists had to be involved in the design of systems to build into them procedures for the appraisal and disposition of records. A Canadian archivist (Bailey, 1989-90) asserted that archivists cannot wait until inactive electronic records are offered to them for appraisal, as they might have for paper records; too many computer records have vanished by then, and the documentation necessary for their proper appraisal has been lost, destroyed, or is hopelessly outdated. The sheer volatility of electronic records should be a powerful inducement for archivists to accept increased involvement in the scheduling process, beginning at the systems design stage. Again, however, this is not an issue of new or revised theory or principle, but merely one of timing and strategy.

Australian (Acland, 1991 and O'Shea, 1991), Dutch (Hofman, 1994 and Horsman, 1997), and American (Dollar, 1992) writers, as well as a publication by the International Council on Archives (1997) take a similar stance. These difficulties explain in part why so few archival services have actually appraised and taken electronic records into custody. In the circumstances, it is not surprising that few writers discuss the difficulty of preserving authentic electronic records, and how those difficulties can in part be addressed during the process of appraisal. The aim of our work, then, is to demonstrate how during appraisal actions can be taken to initiate the process of preservation of authentic electronic records.

Modeling the Selection Function

To further its work, the Task Force decided to engage in the exercise of developing a function model of the various activities undertaken during appraisal as a way of isolating the various theoretical and methodological questions that arise. A function model represents the various activities of a functional process in a series of structured diagrams. The diagrams and associated definitions are accessible at <http://www.interpares.org/draft_reports.htm>. Rather than review the diagrams, I shall summarize the conclusions to which our modeling exercise is leading us.

We began with two important assumptions. First, we assumed that the function at issue is selection of electronic records. Second, we viewed selection from the perspective of the entity responsible for long-term preservation of records of an organization, which for simplicity's sake we call the preserver. That entity may be an archival institution like the archives of a national, provincial or municipal government, or it may be an archival program of an organization such as a church, a university, or a corporate body like a business firm. The assumption is that the same activities occur in any organizational context where selection is performed. Although we did not examine directly the question of appraisal of electronic records created by natural persons or organizations wishing to assign custody of their electronic records to an external archival institution or program, it is quite clear to us that many of the same activities will have to take place, whatever differences between the two situations there may be.

The Scope of Activities Involved in Selection

We see the archival function at issue as being broader than appraisal. Selecting electronic records involves appraising them and carrying out their disposition. Carrying out disposition acts as a bridge between the activities of appraisal and those of preservation. Information about electronic records amassed during their appraisal is vital to the actions taken to determine and carry out their disposition and then, later on, to the actions taken to preserve them. Nevertheless, it is important to note that, in most instances, responsibility for the actions of carrying out disposition will probably be shared between the creating body, for simplicity's sake the creator, and the preserver. There is no doubt that the organization's policies and procedures will have to sort out the responsibilities that fall to the creator and those that fall to the preserver as part of the disposition rules guiding transfer of records.

This first activity is therefore to establish, implement and maintain a framework for the selection function. Managing the selection function sets the rules and conventions of the preserver that govern appraisal and disposition. The two outcomes of managing selection are the appraisal strategy and disposition rules. Appraisal strategy is a convenient term covering such matters as criteria for appraisal, guidelines on how to apply authenticity requirements, procedures for carrying out appraisal, and procedures for reporting on appraisal activities and their results. Disposition rules cover

such matters as procedures for carrying out disposition, including guidelines for writing terms and conditions of transfer, and procedures for reporting about disposition activities. The reports about appraisal and disposition activities provide information that feeds back into the management process as the framework is revised and refined in the light of experience. In general terms, managing the selection function for electronic records parallels that for traditional records.

Another activity is to monitor electronic records selected for preservation. Many of the problems that occur in the archival treatment of electronic records come from the effects of changes in their technological and other contexts that occur during their lifetime. These changes mean that the preserver must regularly monitor what is happening to electronic records destined for preservation. We see this as a distinct activity, one that ensures that up to date information about records destined for long-term preservation is compiled and appraisal decisions updated accordingly or, where there is a need, revisited. To a large extent, monitoring electronic records selected for preservation is our answer to the research questions about the timing of appraisal. In cases where appraisal is built into design of electronic systems, such as by records scheduling, or where it is conducted sometime after a system has been in operation, monitoring records selected for preservation and making adjustments as needed is part of the process of selection. By contrast, appraising electronic records long removed from the active system in which they were generated is usually made difficult because the relevant information about their technological and other contexts is often no longer available or difficult to obtain.

Three monitoring scenarios appear to be possible. In the first, relatively minor changes may lead to a relatively inconsequential revision to an appraisal and/or determination of disposition. That is, one can live with the main lines of the original appraisal and determination of disposition. In the second, significant changes may require one to redo the appraisal to take account of changes in, for instance, work processes or the technological context. In the third, drastic changes, such as introduction of a completely new system, may trigger a disposition under terms of the existing appraisal and disposition, and, then, of course, a new appraisal of records in the new system when it is determined to make one. Monitoring change and determining its effects on selection decisions is nothing new. The need for it is just heightened in the electronic environment.

To sum up, the main activities of selection are (1) managing the selection function, (2) appraising electronic records, (3) monitoring electronic records selected for preservation, and (4) carrying out disposition of electronic records. I think I have said enough about managing the framework and monitoring the evolving situation of electronic records. I will now concentrate on appraising records, with a few remarks at the end about carrying out their disposition.

Selecting electronic records for long-term preservation, like selecting records in general, responds, broadly speaking, to societal needs and the creator's needs to continue to have reference to them. It also responds,

explicitly or implicitly, to certain legal requirements, that is, to the concepts, principles, and specific statements in law relevant to the selection of the records in question. All the activities of selection are conducted with an understanding of the theory, methodology, and practice of archival science, including the requirements for ensuring authenticity of records. Societal needs, creator's needs, legal requirements, and archival science and authenticity requirements all condition or influence the process of selection. How they influence actions and decisions from juridical system to juridical system or for any preserver is something that the national teams of InterPARES will address in the final phase of the project in order to put the findings in context. Nevertheless, it seems obvious that managing the selection function is largely a matter of taking these conditioning factors into account when developing policies, strategies, procedures, and standards. Since our goal is to come up with a model of selection that applies in any context, we have deliberately avoided specifying the values, criteria, and the like that will be employed in favour of identifying and describing the processes involved.

It hardly needs saying that to effect selection of electronic records requires knowledgeable persons, certain facilities, and computer equipment and software. These are the necessary instrumentalities of selection. Every institution or program will need them. On this score, it is perhaps worth remarking that the need is imperative. In every sphere of activity, some records of long-term value are nowadays born digital or electronic and must remain so, for there is no possibility of creating a paper representation of the record. There is no doubt that solving the theoretical and methodological issues is a precondition to sensible expenditure on resources, but no doubt the two will have to go hand in hand. New concepts must be tested and proved effective for the overall problem to be solved.

Broadly speaking, selecting electronic records means identifying those for transfer to the preserver for continuing preservation. From among the electronic records produced by an organization some will be selected and transferred to the preserver and some will not. The outcome in any given case will either be a transfer of electronic records selected for preservation or a designation of electronic records not selected for preservation. It is a matter of organizational policy whether or not the preserver plays a role in the disposition of electronic records not selected for preservation. In any event, an outcome or result of selection is that electronic records both destined and not destined for continuing preservation are identified.

The work of the Task Force has confirmed something that is implicit in the literature on appraisal of electronic records but is not spelled out clearly. In large measure, selection of electronic records depends upon a gathering and assessment of information about the context of a given body of records or from the records themselves, and then associating relevant information compiled during the process with the records so that they can be managed effectively by the preserver and generously understood by future users. Obviously, a great deal of information about the context of electronic records exists while they are in active use, because it is needed for the continuing

management of the records. This information often disappears or is difficult to assemble once records are removed from the active system in which they were generated. This is a strong argument to begin appraisal while records are still “live” in a system, and to monitor each phase of their existence to keep appraisal decisions relevant and disposition plans practicable.

In particular, information about the technological context of electronic records comes into play at two vital stages of selection. It is needed when assessing records’ authenticity, and when determining the feasibility of preserving authentic electronic records. The other (juridical-administrative, provenancial, procedural, and documentary) contextual information tends to be relevant when assessing the continuing value of records, that is, judging their capacity to serve the continuing interests of society and their creator. The juridical-administrative context is the legal and organizational system in which the creating body exists. The provenancial context is the creating body, its mandate, structure and functions. The procedural context is the business procedure in the course of which the records are generated. The documentary context is the fonds to which a record belongs, and its internal structure. Internal structure refers to the relationships among records in a fonds. For the most part, appraisers of both traditional and electronic records draw inferences about the continuing value of records from an understanding of the records and these various contexts.

The information that issues from the process of appraisal and as a result of it is of two kinds. On the one hand, there is information about the appraisal decision itself, and on the other information about the electronic records selected for preservation that will later be “packaged” with them as part of a transfer from the creator to the preserver. The latter is the necessary information about electronic records to maintain them continuously in authentic form, and includes the terms and conditions of transfer, to which the preserver may have to refer from time to time, such as when determining that a transfer contained the actual records designated to be transferred in a given case. We have defined terms and conditions of transfer as “a document that identifies, in archival and technological terms, electronic records to be transferred, together with relevant documentation to accompany them, and that identifies the medium and format of transfer, when the transfer will occur, and the parties to the transfer.”

Appraising Electronic Records

Appraising electronic records breaks down into four activities in our view. The first phase compiles information from electronic records and about their contexts to generate the relevant information to be assessed in determining their value and the feasibility of preserving them in authentic form. The outcome of assessing value, or valuation information, whether communicated in a schedule, appraisal report or other instrument, and the feasibility information provide the basis for deciding the disposition of a given body of records. In fact, as we see it, there are three outcomes of the process of appraisal. There is the appraisal decision itself, that is a determination of which among a given body of records are selected for long-term

preservation and which are not. There is, then, information about the appraised electronic records accumulated during the process of their evaluation, including the terms and conditions of transfer. Finally, there is a report about the appraisal decision for management purposes, containing information that feeds back into the process of managing the selection function. Although these steps in the process may not have always been explicit and their outcome carefully recorded when appraising traditional records, they were all probably implicit in the thinking of the archivist carrying out the appraisal. Effective long-term preservation of authentic electronic records will not allow us to avoid compiling the relevant information, assessing it, and reporting the results to guide disposition and facilitate future use and understanding of the records.

Assessing the value of electronic records means assessing their capacity to serve the continuing interests of their creator and society, on the one hand, and analyzing and judging the grounds for presuming the records to be authentic, on the other. With traditional records, the second step in the assessment of value is rarely explicit. For the most part, appraisers, knowing facts about the custody of the records and the degree to which their creation and maintenance were controlled, simply assume the records to be authentic without further ado. Given the volatility of electronic records, this is a step that must be made explicit. The outcome of this second step is an assessment of authenticity, which we define as “a record or records stating the reasons for presuming electronic records to be authentic in terms of the benchmark requirements for authenticity.” The Authenticity Task Force developed the benchmark requirements as part of the “Requirements for Assessing the Authenticity of Electronic Records.” This document is accessible at <http://www.interpares.org/draftreports.htm>. The statement of the “Benchmark Requirements” is reproduced in Appendix I.

In short, with electronic records, we need to establish the grounds for presuming that the records are what they purport to be, and that they have not been altered by accident or tampered with on purpose. It is our supposition that this assessment must be made as part of appraisal because years hence the information on which to make it will have disappeared or be exceedingly difficult to obtain. To sum up then, the assessment of continuing value and authenticity go together to determine the value of electronic records. The resulting valuation information, duly recorded, must be a permanent record of the preserver, which can always be associated with the records and assessed by anyone concerned to question why the decision about continuing value was made or the grounds for presuming them to be authentic. It also serves as a record that may be consulted to account for the reasoning behind the disposition decision. Once again, despite some relatively recent exhortation to the contrary, accounting of our reasoning has usually been brief or non-existent, and rarely entertained assessment of authenticity directly, which must be done for electronic records.

The Task Force has elaborated the activity of assessing authenticity. It involves compiling evidence supporting the presumption of authenticity, measuring that evidence against the benchmark requirements, and, where a

need for verification arises because the grounds for presuming authenticity are very weak or non-existent, going to the extra length of verifying authenticity, for instance, by comparing them with copies preserved elsewhere, with backup tapes, or through textual analysis of the record's content or study of audit trails. The process of verification simply assembles evidence for the presumption of authenticity where it is otherwise lacking. Traditionally, we have left testing authenticity to future users. Even in cases, where we have supposed time and circumstance have affected the trustworthiness of records, we left it to users to verify authenticity. By contrast, with electronic records, we may feel obliged to do so ourselves in some cases of appraisal in order to give some measure of assurance to future users that the records are authentic by providing them with evidence very unlikely to be available to them to judge the trustworthiness of the records.

Another important aspect of the question of authenticity of electronic records is addressed when determining the feasibility of preserving them. Nothing has been more complicated to characterize conceptually than determining the feasibility of preserving authentic electronic records. Nothing like it occurs with traditional records. Essentially, we see this activity as having three stages. The first stage is to determine or identify the record elements that need to be preserved to establish the identity and integrity of the record. By elements we mean the extrinsic and intrinsic elements of form according to diplomatics. They are essentially those elements that are enumerated in the first two benchmark requirements for ensuring the authenticity of electronic records (see Appendix I). The second stage involves identifying how the record elements that need to be preserved are manifested in the electronic environment. In many cases, these elements are manifested as attributes of the record, but as we in the Appraisal Task Force look at it, this identification is not simply a matter of identifying that a particular element is manifested but rather how it is manifested as a digital component. To some extent, we find ourselves between the conceptual concern of the Authenticity Task Force with conditions and circumstances that establish the identity and demonstrate the integrity of the record and the practical concern of the Preservation Task Force to know which digital components must be preserved so as not to impair identity and integrity. The Preservation Task Force has come up with a definition of what it means by a digital component. A digital component is "a digital object that is part of an electronic record, or that contains one or more electronic records, and that has specific methods for preservation and reproduction." If a digital component is a digital object, we may well want to know what a digital object is. I know I did, so I spent half an hour on the Web being told about digital object identifiers and being warned to beware of digital objects within digital objects, and generally getting the idea that a digital object was whatever one wants or needs to deal with in the digital environment. This vagueness about the character of digital objects only highlights the importance of identifying what one must preserve in order to perpetuate the elements conferring identity on the record. The details and results of this part of the process are at the heart of appraising electronic records, for they determine specifically in technological terms what needs to be preserved.

We definitely see it as a responsibility of appraisal to identify how the record and its elements are manifested in a digital thing or things that need to be preserved. In doing so, appraisers establish preservation requirements by identifying which digital things need to be preserved in order to ensure preservation of the authentic record. The next stage is to reconcile these preservation requirements with the preserver's preservation capabilities. Does the preserver currently have or can it expect to obtain the knowledge, hardware and software to deal with these particular digital things? The outcomes are information about the digital things to be preserved and information about the cost and technical capability required for continuing preservation of a given body of electronic records in authentic form, the feasibility information I already mentioned, which together with the assessment of continuing value make up the appraisal decision. It need hardly be said that the whole exercise falls down if the preserver lacks the capacity to preserve electronic records, which is still a condition more common than the obverse in much of the archival world.

Carrying Out Disposition

Carrying out the disposition of electronic records becomes much more sophisticated than has been the case for most traditional records. Appraisal proposes, someone must eventually dispose, that is, effect disposition according to the appraisal decision. This is no easy task. Among other things, it often means rousting officials in the creating body from the natural lethargy having to take a disposition action seems to induce in them, and convincing them to follow the terms and conditions of transfer to do the initial work to process electronic records for disposition to the preserver. As we see it, preparing records for disposition means copying and formatting records selected for preservation so as to prepare them physically for transfer, or, if the preserver must supervise or oversee the matter, to prepare those not selected for preservation for destruction, alienation to another entity, or such other disposition as determined in the appraisal decision.

The next step, one that either the creator or the preserver may take or they may take together, is to package the records selected for preservation with the necessary information for their continuing preservation, including the terms and conditions of transfer, identification of the digital components to be preserved, and associated archival and technical documentation needed for their treatment. The point here is that you cannot simply give all the information accumulated in the various records of the appraisal process to preservation specialists, and expect them to extract that which is relevant to their task. Transmitting electronic records, then, means sending them prepared for transfer, with the accompanying information necessary for continuing preservation clearly identified, to the office responsible for the preservation function.

Conclusion

Selection of electronic records differs little in the aspect of assessing continuing value as we have come to understand it for traditional records. However, the nature of the technological context brings an additional evaluative dimension, always latent with traditional records, into the foreground of appraisal of electronic records: the assessment of authenticity and the determination of the means to preserve electronic records in authentic form. As I have outlined, this is largely a matter of working out a very detailed process, highlighted by more intensive documentation procedures than most archivists are familiar with, rather than adoption of revolutionary theoretical ideas. Archivists will have to work harder to comprehend the wrinkles in the process needed to accommodate the twists and turns of the technology, and to document the facts about the records and their context that need to be communicated to posterity. One thing is clear, the range of selection activities together comprise the first vital step in the process of long-term preservation of authentic electronic records.

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Appendix I

Benchmark Requirements Supporting the Presumption of Authenticity of Electronic Records

Preamble

The benchmark requirements are the conditions that serve as a basis for the preserver's assessment of the authenticity of the creator's electronic records. Normally, these requirements will be taken into account by the appraiser in making an assessment of the authenticity of the records in any given case of appraisal. Satisfaction of these benchmark requirements will enable the preserver to infer a record's authenticity on the basis of the manner in which the records have been created and maintained by the creator.

Within the benchmark requirements, Requirement A.1 identifies the core information about an electronic record that will enable the preserver to establish its identity and infer its integrity. Requirements A.2-A.8 identify the kinds of procedural controls over its creation and maintenance that support a presumption of its integrity.

Benchmark Requirements

To support a presumption of authenticity the preserver must obtain evidence that:

Requirement A.1: Expression of Record Attributes and Linkage to Record	the creator has ensured that the value of the following attributes are explicitly expressed and inextricably linked to every record. These attributes can be distinguished into categories, the first concerning the identity of records, and the second concerning the integrity of records
	A.1.a identity of the record:
	A.1.a.i Names of the persons concurring in the formation of the record (that is, the names of the author, writer, addressee, originator)
	A.1.a.ii Name of action or matter
	A.1.a.iii Date (that is, document, archival and transmission dates)
	A.1.a.iv Expression of archival bond (for example, classification code, file identifier)
	A.1.a.v Indication of attachments'

	A. 1 .b	integrity of the record:
	A. 1 .b.i	Name of handling office ²
	A.1.b.ii	Name of office of primary responsibility ³ (if different from handling office)
	A.1.b.iii	Indication of types of annotations ⁴ added to the record
	A. 1 .b.iv	Indication of technical modifications ⁵
Requirement A.2: Access Privileges		the creator has defined and effectively implemented access privileges concerning the creation, modifica- tion, annotation, relocation, and destruction of re- cords;
Requirement A.3: Protective Procedures: Loss and Corruption of Records		the creator has established and implemented proce- dures to prevent, discover, and correct loss or corrup- tion of records;
Requirement A.4: Protective Procedures: Media and Technology		the creator has established and implemented proce- dures to guarantee the continuing identity and in- tegrity of records against media deterioration and across technological change;
Requirement A. 5: Establishment of Documentary Forms		the creator has established the documentary forms of records associated with each procedure either ac- cording to the requirements of the juridical system or those of the creator;
Requirement A.6: Authentication of Records		if authentication is required by the juridical system or the needs of the organization, the creator has es- tablished specific rules regarding which records must be authenticated, by whom, and the means of authentication;
Requirement A.7: Identification of Authoritative Record		if multiple copies of the same record exist, the creator has established procedures that identify which record is authoritative;
Requirement A. 8: Removal and Transfer of Relevant Documentation		if there is a transition of records from active status to semi-active and inactive status, which involves the removal of records from the electronic system, the creator has established and implemented procedures determining what documentation has to be removed and transferred to the preserver along with the re- cords.

¹ The term attachment refers to those documents that constitute an integral part of the whole record, notwithstanding the fact that they exist as linked, but physically separate,

entities. For example, all the documents that accompany the application for a patent for an invention are part of a single record, that is, the application.

² The handling office is the office (or officer) that is formally competent for carrying out the action to which the record relates or for the matter to which the record pertains.

³ The office of primary responsibility is the office (or officer) given the formal competence for maintaining the authoritative record, that is, the record considered by the creator to be its official record.

⁴ Annotations are additions made to a record after it has been completed. Therefore, they are not considered elements of the record's documentary form.

⁵ Technical modifications are any changes in the digital components of the record as defined by the Preservation Task Force. Such modifications would include any changes in the way any elements of the record are digitally encoded and changes in the methods (software) applied to reproduce the record from the stored digital components. That is, any changes which might raise questions as to whether the reproduced record is the same as it would have been before the technical modification. The indication of modifications might refer to additional documentation external to the record that explains in more detail the nature of those modifications.

COUNCIL OF EUROPE. COMMITTEE OF MINISTERS

**RECOMMENDATION NO. R (2000) 13
OF THE COMMITTEE OF MINISTERS
TO MEMBER STATES ON A EUROPEAN POLICY
ON ACCESS TO ARCHIVES**

(Adopted by the Committee of Ministers on 13 July 2000,
at the 717th meeting of the Ministers' Deputies)

The Committee of Ministers, under the terms of article 15.b of the Statute of the Council of Europe,

Considering that the aim of the Council of Europe is to establish closer union between its members and that this aim can be pursued by common action in the cultural field;

In view of the Convention for the Protection of Human Rights and Fundamental Freedoms, in particular Articles 8 and 10, and of the Convention for the Protection of Individuals with regard to the Automatic Processing of Personal Data (ETS No. 108);

In view of Recommendation (81) 19 of the Committee of Ministers to member states on access to information held by public authorities and Recommendation (91)10 of the Committee of Ministers to member states on the communication to third parties of personal data held by public bodies;

Considering that archives constitute an essential and irreplaceable element of culture;

Considering that they ensure the survival of human memory;

Taking account of the increasing interest of the public for history, the institutional reforms currently under way in the new democracies and the exceptional scale of changes which are taking place in the creation of documents;

Considering that a country does not become fully democratic until each one of its inhabitants has the possibility of knowing in an objective manner the elements of their history;

Taking account of the complexity of problems concerning access to archives at both national and international level due to the variety of constitutional and legal frameworks, of conflicting requirements of transparency and secrecy, of protection of privacy and access to historical information, all of which are perceived differently by public opinion in each country;

Recognising the wish of historians to study and civil society to better understand the complexity of the historical process in general, and of that of the twentieth century in particular;

Conscious that a better understanding of recent European history could contribute to the prevention of conflicts;

Considering that in view of the complexity of the issues connected with the opening of archives, the adoption of a European policy on access to archives is called for, based upon common principles consistent with democratic values, Recommends that the governments of member states take all necessary measures and steps to:

- i. adopt legislation on access to archives inspired by the principles outlined in this recommendation, or to bring existing legislation into line with the same principles;
- ii. disseminate the recommendation as widely as possible to all the bodies and persons concerned.

APPENDIX TO RECOMMENDATION NO. R (2000) 13

I. DEFINITIONS

- 1) For the purposes of the present recommendation:
 - a. the word “archives” has the following meanings:
 - i. when it is written with a lower case “a”: the totality of the documents regardless of date, form or medium, produced or received by any individual or corporate body during the course of their business and transmitted to the Archives for permanent preservation; unless otherwise stated, the present recommendation is only concerned with “public archives”, that is, those produced by official authorities;
 - ii. when it is written with an upper case “A”: the public institutions charged with the preservation of archives;
 - b. the word “access” has the following meanings:
 - i. the function attributed to Archives to make available to users the holdings they have in their custody;
 - ii. the fulfilment of this function;
 - c. “access to archives” means the possibility of consulting archival documents in conformity with national law. This notion of access does not cover the exploitation of documents leading to derived products which shall be subject to specific agreements;
 - d. “user” means any person who consults the archives, with the exception of the staff working in the Archives;
 - e. “protected personal data” means any information relating to an identified or identifiable individual (data subject) which the law, regulatory texts or courts consider cannot be the subject of communication to the public without risking injury to the interests of that person.

II. LEGISLATIVE AND REGULATORY TEXTS

2) In European countries, the responsibility for setting out the general principles which govern access to archives lies with the legislature and, therefore, shall be governed by an act of parliament. Practical arrangements will be divided between acts and regulations, according to the laws of each country.

3) Acts and regulations concerning access to public archives should be co-ordinated and harmonised with the laws concerning related areas, in

particular with that on access to information held by public authorities and that on protection of data.

4) The criteria for access to public archives, defined in law, should apply to all archives throughout the entire national territory, regardless of the Archives responsible for their preservation.

III. ARRANGEMENTS FOR ACCESS TO PUBLIC ARCHIVES

5) Access to public archives is a right. In a political system which respects democratic values, this right should apply to all users regardless of their nationality, status or function.

6) Access to archives is part of the function of public archive services, for which, as such, fees should not be charged.

7) The legislation should provide for:

a. either the opening of public archives without particular restriction;

or

b. a general closure period.

7.1. Exceptions to this general rule necessary in a democratic society can, if the case arises, be provided to ensure the protection of:

a. significant public interests worthy of protection (such as national defence, foreign policy and public order);

b. private individuals against the release of information concerning their private lives.

7.2. All exceptions to the general closure period, whether relating to the reduction or to the extension of this period, should have a legal basis. Responsibility for any closure or disclosure lies with the agency which created the documents or with its supervisory administration, unless national legislation assigns this responsibility to a particular Archive. Any closure beyond the usual period should be for a pre-determined period, at the end of which the record in question will be open.

8) Finding aids should cover the totality of the archives and make reference, should the case arise, to those which might have been withheld from the description. Even when finding aids reveal the existence of closed documents, and as long as they do not themselves contain information protected by virtue of legislation, they shall be readily accessible so that users may request special permission for access.

9) The applicable rules should allow for the possibility of seeking special permission from the competent authority for access to documents that are not openly available. Special permission for access should be granted under the same conditions to all users who request it.

10) If the requested archive is not openly accessible for the reasons set out in article 7.1, special permission may be given for access to extracts or with partial blanking. The user shall be informed that only partial access has been granted.

11) Any refusal of access or of special permission for access shall be communicated in writing, and the person making the request shall have the

opportunity to appeal against a negative decision, and in the last resort to a court of law.

IV. ACCESS TO PRIVATE ARCHIVES

12) Wherever possible, *mutatis mutandis*, attempts should be made to bring arrangements for access to private archives in line with those for public archives.

EXPLANATORY MEMORANDUM

INTRODUCTION

Archives form an essential and irreplaceable part of the cultural heritage. They preserve the memory of nations and the survival of human memory in large part depends on them.

This idea is particularly important in Europe for a number of reasons:

i. the increasing interest of the public in history and in seeking historical documents, as shown by the growing frequentation of archives and the rapid growth of research undertaken in the most recent periods of history;

ii. the institutional and economic reforms taking place in the new democracies, which call to mind the importance of archives in the process of the democratisation of a State;

iii. the exceptional scope of the changes which are taking place everywhere in the creation of records, as a result of the growing complexity of the areas subject to intervention by public authorities, on the one hand, and of the developments in technology on the other hand.

Since it is generally accepted that no country belongs fully to the democratic world as long as all its inhabitants do not have the possibility of being acquainted, in an objective manner, with the elements of its history, it is essential that this principle be applied, through European co-operation, at the international level with a view to creating a stronger awareness of the common heritage constituted by the archives of the countries of Europe.

In view of this, the Council of Europe concluded that the time has come to examine the field of archives and, in particular, the basic issue of access to them and then to draft a set of principles with a view to harmonising the relevant national legislation of the member States.

Studies carried out in 1995 to 1996 by teams of expert archivists, historians and lawyers highlighted the complexity of the issue. At the national level, it derives from the multiplicity of entangled rules governing access contained in various regulatory texts and from the conflicting requirements of transparency and secrecy. At the international level it is a result of the variety of constitutional and legal frameworks. Another conclusion of the studies was that the problem of access to archives is an inherent part everywhere of the general cultural context, and that public opinion perceives it in its own way in each country.

If the complex nature of the problem makes any attempt at uniformity of legislation and rules illusory, it brings out strikingly the immense need

for a joint effort to formulate a set of principles, in order to inspire a policy of the member States with respect to access to archives. Such principles shall accord with democratic values and be compatible with constitutional arrangements of each State.

This Recommendation adheres to the same principles as the international conventions promoted by the Council of Europe in related fields, and in particular:

- the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 as amended by Protocol N° 11 and takes into account Article 8 concerning the right to respect for private and family life and Article 10 concerning the right to freedom of expression;
- the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS N° 108);
- Recommendation (81) 19 of the Committee of Ministers to member States on the access to information held by public authorities;
- Recommendation (91) 10 of the Committee of Ministers to member States on the communication to third parties of personal data held by public bodies.

The current Recommendation underlines the necessity of:

- ensuring coherence, at the different levels in the hierarchy of legal norms, between rules relating to access to archives and all other measures relating to matters concerning access to information;
- being strongly based upon the principle of proportionality and balance, in order to respect the different interests involved in the matter of access;
- building in procedural guarantees sufficient to safeguard the interests of all individuals and corporate bodies concerned.

The Recommendation therefore bears on the principles and procedures directly connected with access to archives.

The following issues are excluded: the analysis of related questions, such as the right of individuals to request the correction of official records and the commercial by-effects resulting from the possible publication of archives; other questions of a technical nature, such as the types of finding aids most suited to facilitating the work of users; the management of microfilming and digitalisation programmes; the specific features of the processing and use of electronic archives and, of course, restrictions to access based upon the physical condition of the documents.

It should nevertheless be recalled that however liberal the access rules prescribed in legislation may be, the actual access to archives depends primarily on the facilities and on the human and financial resources which an archives service possesses for the preservation and the processing of its holdings. Uncontrolled destruction of archives, impossibility of proceeding to their arrangement, absence of buildings permitting their physical maintenance in proper conditions, constitute common impediments to access by the public to the records that may be of interest to them. If the State budget does not provide for the operation of archive services, the law will be ineffective, since it will not be possible to apply the measures concerning access to archives.

COMMENTARY ON THE PROVISIONS OF THE RECOMMENDATION

I. DEFINITIONS

Article 1

The definitions proposed in this Recommendation are based on the numerous works of terminology undertaken by archivists at international and national levels, and in particular on the dictionary of archival terminology of the International Council on Archives.

In the generally accepted professional terminology, the word “archives” written with a lower case “a” covers the documents still in use or retained in the creating agency, those stored in intermediate centres, as well as those transferred to Archives. In view of the objective of the present Recommendation, the definition proposed in Article 1, paragraph a(i), is limited to the holdings placed under the responsibility of Archives.

II. LEGISLATIVE AND REGULATORY TEXTS

Article 2

The purpose of this article is to recall that in view of their paramount importance, the general principles concerning access to archives should be embodied in a statutory text; on the other hand, practical arrangements for implementation may be specified in regulatory texts.

This Recommendation deals only with the general principles which concern access to archives.

Article 3

The purpose of this article is to emphasise that the drawing up of legislative and regulatory texts concerning access to archives should not be undertaken without taking into account:

- a. on the one hand, the constitutional provisions specific to each country, that is to say, according to circumstances, its written constitution or its unwritten constitutional principles;
- b. on the other hand, the legal texts which cover a number of areas related to rules governing the access to archives; in particular:
 - i. texts on access to official records based upon the principle of immediate access to information by the public; in view of legislation on administrative transparency, records which may be consulted in the creating agency should remain accessible after their transfer to Archives;
 - ii. the draft Recommendation undertaken by the Council of Europe Group of Specialists on Access to Official Information (DH-S-AC);
 - iii. texts relating to the use of computer files containing personal information which aim to protect the personal privacy of individual citizens, whilst avoiding the risk of loss of collective memory which the destruction of these files at the end of their period of administrative use would involve.

In this connection the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS N° 108) and Directive No. 95/46/CE, Article 6.e of the European Parliament and of the

Council of 24 October 1995 on the protection of individuals in relation to the processing and free circulation of personal data are recommended for guidance;

iv. legal texts defining the different levels of data protection in such specific areas as health, taxation, public security or national defence;

v. legal texts concerning the protection of personal privacy; these have a particular importance for Archives since they define categories of protected information, the period of protection for each category and the categories of persons who can benefit from such protection. It goes without saying that public officials should not prevent access to public records produced in the course of their own administrative duties by claiming respect of their own privacy;

vi. instruments concerning the protection of intellectual property, which may affect access to, and use of, public archives, including audio-visual and electronic records, if it applies, in accordance with Directive 96/9/EC of the European Parliament and Council (11 March 1996) on the legal protection of databases.

Article 4

The purpose of the current article is to underline the fact that public liberties and the principle of equality of citizens require identical application of rules for access to public archives across the country and regardless of the constitutional arrangements for the state and the extent of the competence of the central government.

This requirement, although it is in conformity with the operation of democratic institutions, may be in contradiction to constitutional provisions determining the rights and prerogatives of constituent states in a federal system or other types of autonomous authorities.

For this reason it is recommended that those European states concerned should reconcile these two contradictory democratic imperatives according to the possibilities offered by their constitutional laws.

III. ARRANGEMENTS FOR ACCESS TO PUBLIC ARCHIVES ARTICLE 5

The purpose of the current article is to avoid any measure which would permit preference to any category of users on the basis of their nationality, level of education, the nature of their research or any other criterion whatsoever. The law should not make any distinction between categories of users.

Article 6

The current article underlines the fact that the freedom of access without charge to the consultation of records and to finding aids constitutes a basic principle underlying any policy in favour of access to archives.

The charging of fees and taxes may nevertheless be authorised on chargeable value adding services, such as the issue of copies or the use

of particular technical equipment. Archives services may in the same way share in the profits from the publication or exploitation of the records for the custody of which they are responsible.

Article 7

In certain countries, public archives are accessible without particular restriction except where the right to access is limited by the need to maintain confidentiality concerning aspects of national defence, foreign policy, public order or the privacy of individuals. No general closure period is applicable.

When this is not the case, in order to balance the right to historical knowledge and the protection of the interests of the State and of the privacy of individuals, a range of appropriate access deadlines can be noted. They are as follows:

- a. a general closure period, which does not usually exceed twenty or thirty years, and which applies automatically to documents or groups of documents where making them available for access cannot harm either the interests of the State or of individuals;
- b. a longer closure period, which normally does not exceed fifty years, for documents or groups of documents relating to foreign affairs, defence and the maintenance of public order;
- c. a variable closure periods (for example from 10 to 70 years after the closing of the file, or from 100 to 120 years after the birth of the individual concerned) for documents or files containing confidential legal, taxation, medical or other details concerning private persons.

Article 8

The definition of finding aids includes both those created by the agencies of origin (for example registers, indexes, files, docket books) as well as catalogues or repertories produced by archives services. The latter should indicate rules on access which apply to the documents described.

Article 9

The competent authority for the granting of special permissions for access, should be, according to circumstances, the creation agency after consultation with the Archives service, the administration of the Archives on the advice of the creating agency, or a single authority responsible for issuing authorisations for the whole country.

In defining the rules to be followed for granting special permission for access, the following aspects of the problem should be taken into account:

- i. Access for research purposes:

Special permission for access may be given according to two different procedures, *ad actum* or *ad personam*. *Ad actum* means that the documents made available as a result of special permission are permanently disclosed and become freely available.

Ad personam means that the documents made available by dispensation to a specified user retain their closed status, so that every user wishing

to consult them should request special permission. However, in the case of the second procedure, it is necessary, as is underlined by the Recommendation, that for the same document, special permissions for access should be granted under the same conditions to all users who request it.

Legislation should provide for both possibilities, that is to say, disclosure before the access date provided by law and access by special dispensation. However it is desirable that when dealing with requests for special permission for access, the Archives administration should be authorised to recommend disclosure of the documents which are being requested.

ii. Access to documents containing personal data by the individuals concerned or their authorised representatives:

In this context. Archives administrations should apply the regulations prescribed by freedom of information and data protection legislation. If such laws do not exist, rules on special permission for access should be applied.

iii. Responsibility of users under private and criminal law:

If special permission for access is granted, users may be asked to sign a declaration under which they make an undertaking not to make public any information likely to bring injury to public or private interests, and that they accept full responsibility in case of legal proceedings.

It is the responsibility of the courts to decide upon the admissibility of such declarations in the case of a dispute.

Article 10

“Access to extracts” refers to the act of extracting from a file, before access is permitted to a user, of certain documents for which authorisation for access does not apply. The user does not therefore have access to the complete file, but only to an extract from it.

Access with partial blanking consists of making available to a user the totality of the records requested, having blanked out certain information.

Partial access, whether to extracts or with blanking, does not always permit a complete understanding of the document by the user. It may derogate the integrity of the file and by the

act of extraction, reduces the exactitude of the information contained in the file. That is why the present recommendation requires that the user be informed of the partial nature of the access granted.

Article 11

It is desirable that it should be possible to address the first recourse against a refusal for special permission for access directly to the supervisory administration of the agency refusing access, prior to envisaging, if the case arises, an appeal to the courts.

In some countries, judicial recourse may be preceded by an appeal before a body set up for this purpose: a collegial commission, or an independent authority such as the ombudsman or parliamentary commissioner.

Article 12

As well as its official archives, the archival heritage of a country includes private archives (business, family, associations, religious, etc.) whose

importance is equally fundamental to the establishment of the memory of the nation.

The activity of the state in relation to private archives should ordinarily have for its main aim the assurance of their protection and their good physical preservation. The arrangements for such action will vary according to the customs of each country.

The intent of the current article is to point out that arrangements for access to private archives should not be disregarded since this constitutes the ultimate purpose of their preservation.

COUNCIL OF THE EUROPEAN UNION

**COUNCIL RESOLUTION OF 6 MAY 2003 ON ARCHIVES
IN THE MEMBER STATES (2003/C 113/02)**

THE COUNCIL OF THE EUROPEAN UNION,

1) RECALLING the Council Resolution of 14 November 1991 on arrangements concerning archives¹ as well as the Council Conclusions of 17 June 1994 concerning greater cooperation in the field of archives²,

2) RECALLING the Report of the group of experts on the coordination of Archives in the European Union published in 1994,

3) TAKING INTO ACCOUNT the on-going activities related to public access to documents and archives of the European Union,

4) STRESSES the importance of archives for the understanding of the history and culture of Europe,

5) STRESSES that well kept and accessible archives contribute to the democratic functioning of our societies, particularly during a period of major change in Europe,

6) CONSIDERS that special attention should be paid to the challenges for archive management in the context of the enlargement of the Union,

7) CONSIDERS that further development is needed in ICT applications and solutions in the field of archives,

8) INVITES THE COMMISSION to convene a group of experts representative also of acceding countries, appointed on the proposal of the relevant national Authorities, to address the following:

a. the situation of the public archives in the Member States of the European Union including various aspects of the probable evolution of archives over the forthcoming years, taking into particular account the enlargement of the European Union;

b. the consequences of the developments which have occurred in recent years in the field of archives, including particularly the development of new technologies;

c. promotion of concrete activities, such as

– the encouragement of appropriate measures to prevent damage to archives through catastrophes like flooding and to restore such documents and archives, and

– the strengthening of Europe-wide collaboration on the authenticity, long-term preservation and availability of electronic documents and archives;

d. enhancing coordination, information sharing and exchanging of good practice between the archives services;

e. possibilities of further integration of the work of this expert group with other relevant activities in this field at the European level, in particular the Action Plan Europe.

9) INVITES THE COMMISSION to submit a report on this work, including orientations for increased future cooperation on archives at the European level, to the Council before the middle of 2004.

¹ OJ C 314, 5.12.1991, p. 2.

² OJ C 235, 23.8.1994.