



## **D.2.2.1 Advice to Archives arising from “E-ARK Legal Issues Report: European Cultural Preservation in a Changing Legislative Landscape”**

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<sup>1</sup> **Disclaimer:** The advice given in this document, is simply advice, and as such should NOT be treated as legally definitive.

## 1. Introduction

The adoption by the EU of the Data Protection Directive (95/46/EC) marked a pivotal moment in the history of European personal data protection. Two decades later, the fundamental principles around which the Directive was structured continue to be relevant, but the ever-increasing pace of technological change, and globalisation have undoubtedly presented challenges for data protection that the original Directive is ill-equipped to address. The world of the early 21st Century is the world of social networking, apps, cloud computing, location-based services and smart cards. It is almost impossible for individual citizens to go about their daily business, or to buy goods and services without leaving digital footprints. Without effective control over how this information is stored and used, the potential for adverse consequences is obvious.

With the introduction of the “General Data Protection Regulation”<sup>2</sup>, the European Commission has modernised the EU legal system for the protection of personal data. One of the key policy objectives behind the revisions was to make more consistent the implementation and application of the protection of personal data in all areas of the Union's activities. Anticipated benefits included the strengthening of the rights of individuals, reduced administrative overhead, and an improved flow of personal data within the EU and beyond.

The new regime introduces new concepts, and revises the understanding of those drawn from earlier data protection regulation. Not everything has changed, but a great deal has, and nothing should be taken for granted. In the E-ARK deliverable D2.2 “E-ARK Legal Issues Report: European Cultural Preservation in a Changing Legislative Landscape”<sup>3</sup>, readers will find a section by section comparison of the existing regulation with the text of the GDPR. The purpose of the current document is to supplement that analysis with a very abbreviated set of discrete recommendations targeted, primarily, at the archives community.

In what follows suggestions are made under five key areas:

- The Obligations and Liabilities of Data Controllers
- Consent
- Personal Data Breach Notification
- Transfers of personal data
- Legal enforcement & Penalties

Where advice is offered, it is couched in terms of:

- what one should Ensure happens
- what one should Monitor
- what one should Consider

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<sup>1</sup> Graphic taken from: [https://commons.wikimedia.org/wiki/File:Warning\\_icon.svg](https://commons.wikimedia.org/wiki/File:Warning_icon.svg)

<sup>2</sup> Regulation (EU) 2016/679

<sup>3</sup> Available from the E-ARK website at <http://www.eark-project.com/resources/project-deliverables/33-d22-legal-issues-report-european-cultural-preservation-in-a-changing-legislative-landscape>

## 2. Specific recommendations to the archival community arising from the GDPR<sup>4</sup>.

### The Obligations and Liabilities of Data Controllers



**Ensure:** that any data processing carried out using “legitimate interests” as a justification remains lawful under the changes introduced by GDPR.

**Ensure:** that all decision-making which involves striking a balance between the interests of the controller and the rights of data subjects is fully documented.

**Ensure:** that careful and documented consideration is given to the balance of children’s interests against the interests of your organisation when processing children’s data.

**Ensure:** compliance with the new GDPR rules covering the processing of sensitive data, especially with respect to “genetic” and “biometric” data where this is used to uniquely identify a person.

**Ensure:** processes, procedures, training, and data formats are adequate to deal with the new access and portability rules.

**Ensure:** that every element of supporting information is made available.

**Ensure:** data (and metadata) can easily be exported in structured, machine-readable formats.

**Ensure:** that individuals are told about their right to object in an intelligible manner, clearly, and separately from other information, they receive.

**Ensure:** staff training is adequate to equip staff to recognise, and respond appropriately to, data erasure requests.

**Ensure:** explicit consent exists for all automated decision-taking based on consent.

**Ensure:** explicit consent exists for all automated decision-taking based on sensitive data.

**Ensure:** explicit consent exists for all automated decision-taking involving children.

**Ensure:** that the purposes for which personal data are collected are specified at the time of data collection

**Ensure:** that all existing information notices are reviewed and updated where necessary.

**Ensure:** that appropriate and timely notice is given in cases where data is collected indirectly.

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<sup>4</sup> In addition to relying on E-ARK deliverable D.2.2 “E-ARK Legal Issues Report: European Cultural Preservation in a Changing Legislative Landscape”, the recommendations here draw on a number of third party sources. The most important of these is Bird & Bird’s extremely valuable guide to the General Data Protection Regulation. See <https://www.twobirds.com/en/hot-topics/general-data-protection-regulation>. See also Allen & Overy’s “The EU General Data Protection Regulation”, available from <http://www.allenoverly.com/SiteCollectionDocuments/Radical%20changes%20to%20European%20data%20protection%20legislation.pdf> and the various factsheets and other advice available from the European Commission at [http://ec.europa.eu/justice/data-protection/reform/index\\_en.htm](http://ec.europa.eu/justice/data-protection/reform/index_en.htm)



**Monitor:** which records are covered by the GDPR portability rules

**Monitor:** data protection notices and policies, and practices, including those delivered by third party organisations.

**Monitor:** the extent to which automated decision-taking is used.



**Consider:** using a legal basis other than “legitimate interests” for data processing

**Consider:** discontinuing some areas of data processing activity altogether.

**Consider:** using interoperable systems where possible, to facilitate data portability.

## Consent



**Ensure:** compliance with the new GDPR rules covering obtaining consent.

**Ensure:** that consent is provably “active” (documentation).

**Ensure:** that consent to processing (other than that which is absolutely necessary) is not a condition of the supply of services.

**Ensure:** that data subjects are made aware of their right to withdraw consent at any time, without undue difficulty.

**Ensure:** that each distinct processing operation, has a corresponding distinct consent.

**Ensure:** consent is active, and does not rely on silence, inactivity or pre-ticked boxes;

**Ensure:** consent is not relied on as a justification for data processing where there is a clear imbalance between the data subject and the controller (especially if the controller is a public authority).

**Ensure:** that services offered directly to children contain notices written in plain language, adapted to a child’s understanding.



**Monitor:** all relevant codes of conduct.



**Consider:** the extent to which the GDPR rules on children affect you.

**Consider:** which national rules need to be followed when obtaining the consent of children.

### Personal Data Breach Notification



**Ensure:** that your organisation has clear lines of responsibility, and a sufficient budget, for data protection compliance.

**Ensure:** a proper record is kept of data processing activities.

**Ensure:** that your organisation has a complete compliance program, covering processes, procedures, and training.

**Ensure:** internal breach notification procedures comply with GDPR.

**Ensure:** appropriate technical and organisational measures exist to render data unintelligible in case of unauthorised access.

**Ensure:** insurance policies provide adequate cover in light of the new GDPR enforcement regime.

### Transfers of personal data



**Ensure:** that all proposed transfer of personal data is GDPR compliant.



**Monitor:** Review and map key international data transfers for both data controllers and data processors.



**Consider:** whether existing data transfer mechanisms are adequate under GDPR

## Legal enforcement & Penalties



**Ensure:** each controller and processor and, if any, the controller's representative, maintains documentation of all processing operations under their responsibility.

**Ensure:** All personal data breaches are reported to the data controller, and that the content and format of such reports is GDPR compliant.

**Ensure:** everyone involved with data processing operations understands their data protection obligations.

**Ensure:** risk registers are kept up to date.

**Ensure:** insurance policies provide adequate cover in light of the new GDPR enforcement regime.

### **3. General Recommendations to the archival community.**

Clearly, the introduction of the GDPR presents a challenge to archives. Not only is the GDPR wide ranging and fairly complex in and of itself, but it is only one of a number of legal and regulatory instruments the requirements of which archives must address. Within the Archives community, discussion around the GDPR has brought into focus the need to develop robust and accessible support mechanisms to assist archivists navigate the legal and regulatory landscape. This was discussed at length at the DLM Forum meeting held in Oslo during November 2016, and a number of recommendations were made under the general headings of Analysis, Inventory, Professional Contacts, Expert Groups(s), and Visibility.

#### **Recommendation 1: Analysis**

The community, working through organisations such as the DLM Forum and the International Council on Archives, should develop, circulate, and maintain information sources on the detailed legal and regulatory instruments in force at any given time. An example of this sort of resource is this report, but similar analyses need to be developed for the full range of laws and regulations which apply to archives and archiving, particularly those which apply at the European Community level (as National law is subordinate to European Community Law).

Where possible, these analyses should draw out, and make clear to the community, any tensions (or contradictory requirements), within individual laws or regulations, as well between different statutory or regulatory instruments applying to the same, or related, area of activity. These are precisely the issues which give rise to the greatest difficulty in applying legislation or regulation effectively, and understanding where difficulties are likely to arise is very beneficial to practitioners. Additionally, understanding where laws or regulations have not been drafted consistently is key both to formulating an appropriate action plan, and to informing community feedback to legislators and regulators.

A clear understanding of the requirements of current legislation and regulation is of undoubted value, but it is also important for the community to carry out 'horizon scanning', so that we may alert in advance practitioners to changes in the regulatory and legal framework which have not yet come into force, but are likely to do so in the foreseeable future. Being in possession of information about the intended direction of travel with respect to legislation and regulation, enables the community to engage better with the process of developing new controls, and to participate more effectively in a dialogue with legislators and regulators.

We are a community of practitioners, therefore where possible, it is helpful to provide 'real-life' examples, rather than theoretical analysis alone.

#### **Recommendation 2: Inventory**

The archival community should develop a knowledge base of past and present problems encountered in applying legislation and regulation, together with a record of both the formal and informal approaches taken.

Judicial decisions often involve interpretation, and in cases where there is no applicable legislation, the decisions of courts serve to establish legal norms, which may come to affect future legislation and/or regulation. It is therefore important that we also maintain a database of case law as it applies to the legal

control of archiving. Since so much of our activity is involved with the use of computers, it is important to include ICT-related cases as part of our overall knowledge base.

### **Recommendation 3: Professional Contacts**

It is vital that archives should not simply become spectators as legislation and regulation is conceived and implemented. In order both to shape legislation and regulation, as well as to comprehend fully how it applies to the archiving sector, we need to be fully engaged. This may be accomplished through personal contacts at a senior institutional level, as well as by engaging with a variety of bodies such as Digital Preservation Expert Groups, and the national data protection authorities<sup>5</sup>.

Under the current arrangements, representatives of the national data protection authorities (DPA), the EDPS and the European Commission, comprise the so-called “Article 29 Working Party”, the remit of which is to:

“To provide expert opinion from member state level to the Commission on questions of data protection.

To promote the uniform application of the general principles of the Directives in all Member States through co-operation between data protection supervisory authorities.

To advise the Commission on any Community measures affecting the rights and freedoms of natural persons with regard to the processing of personal data and privacy.

To make recommendations to the public at large, and in particular to Community institutions on matters relating to the protection of persons with regard to the processing of personal data and privacy in the European Community.”<sup>6</sup>

With the introduction of the General Data Protection Regulation (EU) 2016/679 (GDPR), the organisation of national data protection authorities will be changing. In 2018, this will become the European Data Protection Board (EDPB), and on 2<sup>nd</sup> February 2016 the Article 9 Working Party released a work programme<sup>7</sup> which laid out the activities they have planned to ensure that the EDPB works effectively from day one. During this interim phase, it is particularly important to monitor closely the work of the Article 9 Working Party.

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<sup>5</sup> A full list of the contact details for the national data protection authorities, and their Article 29 Working Party representatives, is appended to this report as Appendix 1. Last updated; 13<sup>th</sup> February 2017.

<sup>6</sup> [http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/tasks-art-29\\_en.pdf](http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/tasks-art-29_en.pdf)

<sup>7</sup> [http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2016/wp235\\_en.pdf](http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2016/wp235_en.pdf)

#### **Recommendation 4: Expert Group(s)**

The archival community, represents a considerable body of expertise in its own right, and this would be deployed more effectively through the establishment (or extension) of both formal and informal digital preservation professional groups and bodies.

In addition to engaging with groups such as the EDPB, we should not hesitate to give our expert opinion on problems, indeed we should actively seek out opportunities to make the voice of the archival community heard. We should therefore develop a formal process through which to issue recommendations both to the archival community, as well to legislators and regulatory authorities.

#### **Recommendation 5: Visibility**

One of the noticeable differences between the archival community and the library counterpart, is a relative lack of visibility.

It is important, in the context of the application of legislation and regulation of our activities, that we make every effort to raise the profile of archives and bring to the attention of regulators and law-makers the issues that affect us most significantly, as well as any areas where the impact of legislation and regulation is not immediately obvious. It is also important that we speak to, and involve, the wider archival community.

This may, in part, be accomplished through panel sessions and presentations at digital preservation conferences, and archival fora. Additionally, conventional publications, interviews, blogs and tweets help to raise our profile and to engage the wider community.

In all of this, organisations such as the DLM Forum Foundation, and the International Council on Archives have a significant role to play.

#### 4. Appendix: National Data Protection Authorities

##### Appendix 1: National Data Protection Authorities (Feb 2017)<sup>8</sup>

###### European Data Protection Supervisor

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1047 Bruxelles/Brussel  
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Tel. +32 2 283 19 00  
Fax +32 2 283 19 50 e-mail: [edps@edps.europa.eu](mailto:edps@edps.europa.eu)  
Website: <http://www.edps.europa.eu/EDPSWEB/>

Art 29 WP Member: Mr Giovanni BUTTARELLI, European Data Protection Supervisor

###### Austria

Österreichische Datenschutzbehörde  
Hohenstaufengasse 3  
1010 Wien  
Tel. +43 1 531 15 202525  
Fax +43 1 531 15 202690  
e-mail: [dsb@dsb.gv.at](mailto:dsb@dsb.gv.at)  
Website: <http://www.dsb.gv.at/>

Art 29 WP Member: Dr Andrea JELINEK, Director, Österreichische Datenschutzbehörde

###### Belgium

Commission de la protection de la vie privée  
Rue de la Presse 35  
1000 Bruxelles  
Tel. +32 2 274 48 00  
Fax +32 2 274 48 10  
e-mail: [commission@privacycommission.be](mailto:commission@privacycommission.be)  
Website: <http://www.privacycommission.be/>

###### Bulgaria

Commission for Personal Data Protection

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<sup>8</sup> Taken from [http://ec.europa.eu/justice/data-protection/article-29/structure/data-protection-authorities/index\\_en.htm](http://ec.europa.eu/justice/data-protection/article-29/structure/data-protection-authorities/index_en.htm)

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e-mail: kzld@cpdp.bg  
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Art 29 WP Member: Mr Ventsislav KARADJOV, Chairman of the Commission for Personal Data  
Art 29 WP Alternate Member: Ms Mariya MATEVA

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e-mail: azop@azop.hr or info@azop.hr  
Website: <http://www.azop.hr/>

Art 29 WP Member: Mr Anto RAJKOVAČA, Director of the Croatian Data Protection Agency

### **Cyprus**

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Art 29 WP Member: Ms Irene LOIZIDOU NIKOLAIDOU Curriculum vitae(230 kB)  
Art 29 WP Alternate Member: Mr Constantinos GEORGIADES

### **Czech Republic**

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Art 29 WP Member: Ms Ivana JANŮ, President of the Office for Personal Data Protection  
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### **Denmark**

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Website: <http://www.datatilsynet.dk/>

Art 29 WP Member: Ms Cristina Angela GULISANO, Director, Danish Data Protection Agency (Datatilsynet)  
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Art 29 WP Member: Mr Viljar PEEP, Director General, Estonian Data Protection Inspectorate  
Art 29 WP Alternate Member: Ms Kaja PUUSEPP

### **Finland**

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Art 29 WP Member: Mr Reijo AARNIO, Ombudsman of the Finnish Data Protection Authority  
Art 29 WP Alternate Member: Ms Elisa KUMPULA, Head of Department

### **France**

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### **Germany**

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e-mail: [poststelle@bfdi.bund.de](mailto:poststelle@bfdi.bund.de)  
Website: <http://www.bfdi.bund.de/>  
The competence for complaints is split among different data protection supervisory authorities in Germany. Competent authorities can be identified according to the list provided under [https://www.bfdi.bund.de/bfdi\\_wiki/index.php/Aufsichtsbeh%C3%B6rden\\_und\\_Landesdatenschutzbeauftragte](https://www.bfdi.bund.de/bfdi_wiki/index.php/Aufsichtsbeh%C3%B6rden_und_Landesdatenschutzbeauftragte)

Art 29 WP Member: Ms Andrea VOSSHOF, Federal Commissioner for Freedom of Information  
Art 29 WP Alternate Member: Prof. Dr. Johannes CASPAR, representative of the federal states

### **Greece**

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Art 29 WP Alternate Member: Mr Endre Győző SZABÓ Vice-president of the National Authority for Data Protection and Freedom of Information

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Art 29 WP Member: Ms Helen DIXON, Data Protection Commissioner

Art 29 WP Alternate Members: Mr John O'DWYER, Deputy Commissioner; Mr Dale SUNDERLAND, Deputy Commissioner

## **Italy**

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## **Latvia**

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Art 29 WP Alternate Member: Mr Ian DEGUARA, Director – Operations and Programme Implementation

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Art 29 WP Member: Mr Aleid WOLFSEN, Chairman of Autoriteit Persoonsgegevens

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Art 29 WP Member: Ms Edyta BIELAK-JOMAA, Inspector General for the Protection of Personal Data

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