The Right to Know, the Right to Forget? Personal information in public archives*

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The author, an internationally renown archivist remembered here with great affection for his contribution to the ASA's 1992 annual conference, discusses the universal issue of personal information and privacy. The vast quantities of such information held by governments are protected in four ways which he describes: legislation, conditions of transfer, researchers' undertakings and physical and practical regulations at the archives. He then explores a fifth 'layer' of professional ethics and approaches to the ethics of closure v. release such as the importance of research affected by closure, and a 'human dignity' test. In the final part, the author examines the factors surrounding whether personal information should be appraised as worth retaining in the first place, drawing in particular on the writing of the Canadian archivists Terry Cook and Heather MacNeil.

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* One of the subjects of my address 'The archivist and the living' at the 1992 convention of the Australian Society of Archivists in Wagga Wagga was access to personal information in public archives. Further reflection led to papers presented at a colloquium on sources and historiography in relation to the Second World War (30 September 1994) and a seminar on access organised by the Royal Society of Archivists in the Netherlands (30 March 1995). The former ('Recht op weten, recht op vergeten? Persoonsinformatie in openbare archieven', in: *Bronnen en geschiedschrijving van de Tweede Wereldoorlog* ('s-Hertogenbosch 1995), pp. 141–152) was adapted for publication in *Archives and Manuscripts*. Translation: Louise Anemaat.

IT BEGINS AT BIRTH: with the preparation of the birth certificate the state begins to record information about its new citizen. But the dossier is not empty: even before birth, the state concerns itself with registration and archiving, e.g. when the district judge has to appoint, after the death of a husband, a guardian for the unborn foetus of the widow. And so it continues throughout the whole of one's life. In a variety of guises the state collects and shapes even multifaceted personal information. Just consider yourself—your driver's licence, passport, library pass, the files relating to your home, your appointment to the public service, the review of your pension entitlement, the notification of your social security number, your tax return. And that is all personal information of which you are aware and which you for the most part provided yourself in official forms, questionnaires or declarations. But do you know what the revenue service preserves in your files: your tax returns, reports about financial investigations, your loan details, records from life insurance companies, banks and other institutions, data from the fiscal investigation department and other units of the revenue service, cuttings from daily and weekly papers (e.g. relating to leasing of rooms or a second apartment), further pieces of information of permanent value relating to matters such as the division of an estate, annuity agreements, subsidy arrangements for one's home, buying and selling of real estate etc. etc. etc.

These files constitute just one government series. But there are thousands more. The Canadian *Personal information index* summarises more than 4 000 series of personal files: agricultural subsidies, ex-servicemen's dossiers, rent subsidies, residential permits and more.[1] All of these series contain personal information and constitute a large and real part of the state's records. A fraction of these, with the passing of time, is transferred to public repositories where they can be used by the citizen seeking justice or proof of something, the state administration or the historical researcher.

But should that always be the case? No, it should not because personal information is, by its nature, information about the personal sphere. The issuing and disclosure of such information is a breach of privacy. But privacy is protected and this protection consists of a number of layers.[2]

The first layer is legislation. Our constitution requires legislation for the protection of the personal sphere with respect to the securing and supplying of personal data. This law is known as the Wet Persoonsregistraties (WPR)—the Personal Data Act. The WPR does not apply to personal archives in an archival repository under the terms of the Archives Act of 1962. Protection of privacy must therefore be ensured through a regime of archival legislation.

This archival legislation states that restrictions on access to archival material in a public repository—national, provincial or local—may only be established with the advice of the keeper of the archive, and only with a view to 'respect for the personal privacy' or 'the prevention of disproportionate advantage or disadvantage to the natural legal persons concerned or to third parties'. In the case of restricted access the archival authority can, after due consultation with the creating agency, give dispensation for access, that is to say lift a restriction at the request of an applicant if the latter's interest in consulting or using the records outweighs the interests served by the restrictions.

The access restrictions must be specified at the time the records are transferred to an archival repository. The conditions of transfer therefore constitute the second layer of primary protection through the regulation of access and of the disclosure of personal information.

The conditions of transfer for personal information often include a protection mechanism approved by the Society of Dutch Archivists in 1984, which was proposed by a committee including, in addition to archivists, also researchers. This regulation stipulates that archives which are sensitive are only accessible to researchers who have signed an undertaking. This undertaking is based on regulations determined by the Council of Ministers in 1973 for the clearance of old minutes of the Council. With his/her signature, the researcher undertakes that

- information obtained from the records will be used only for the specified purpose;
- nothing shall be published or otherwise made public which impinges unfairly on the interests of living persons;
- no data obtained from archival records shall be published without the written permission of the national, provincial or local archivist; and
- additional data which is obtained from the records and for which the researcher has not received permission for publication shall only be used for the purposes of his/her own study and shall not be divulged to a third person.

This undertaking, constituting the third layer for regulating access to and publication of personal information, resembles the 'contractual agreement' procedure which is applied in the states of Michigan and New York. In Michigan it has even been codified: an act stipulates that confidential records from government agencies 'shall be kept confidential pursuant to the terms of a written agreement'.[3] One of the main differences, however, between the Dutch and the American arrangement is, that the latter include a penalty of $1000 for violating the provisions of the agreement. In The Netherlands we

do not need such a penalty, because the researcher-historian or journalist knows the issue at stake: his future research. Because, if he fails to comply, the researcher risks exclusion by virtue of the authority of the archivist to refuse access, if in his opinion the documents 'cannot be safely entrusted to the applicant' (article 18 of the Archives Act). Since this came into force, in 1968, the sanction has been applied in the General State Archives in The Hague only two or three times, out of a 100 to 200 applications per year to get access to confidential records.

The fourth layer of privacy protection is formed by the physical and practical regulations that the archives has in place to prevent personal information being examined by unauthorised persons: storage in secure repositories (sometimes, additionally, in locked cases), careful application and lending procedures, an archives control system (such as Archeion, in use in all state archives in The Netherlands) that alerts whenever a part of a record group may not be issued to a researcher etc.

These four forms of protection—legislation, conditions of transfer, researchers' undertakings, and physical conditions appear sufficient enough. But not quite.

In the first place, experience with the application of these regulations has been gathered principally with respect to the use of personal information from before the War. As the compulsory transfer date for archives of fifty years has now been reduced to twenty years, we are dealing with the deposit of government transactions from the recent past. Far more than previously the deposits contain personal information. And the possibility that the data relates to living persons is increasing because the transferred archival material is more recent. We are realising this now with the preparation for transfer of pre-1975 archives from the Queen's Cabinet, the Cabinet of the Minister President, and other government bodies.

Secondly, the first three protective layers consist partly of elastic, of flexible provisions. For example, how will, in the case of the first and second layers, 'respect for the personal privacy' be substantiated, how does one weigh up the need to restrict the disclosure of personal information against the interests of the researcher who requests exemption, how does one test at the third layer '[whether] the interests of living persons could be unfairly impaired'?

At this point we reach the fifth layer, an area not formally and legally defined: an area where only professional ethics can provide guidance.[4] An area where the borders, however, will be defined, but can be changed by

what society—ultimately through the vehicle of the judge and the legislator will allow. The archivist and researcher must negotiate their own way in this arena. Much remains unclear which is why I have to ask you to help me find the right way.

Before personal information that is destined for permanent retention is transferred to a public repository, it must be determined whether that information is of such a nature that its disclosure and publication would constitute an inadmissible breach of privacy. Not all personal information is sensitive. In consultation with the creating agency, the archivist must evaluate and appraise the personal information. It can then be determined whether one is really dealing with sensitive material and whether, as a consequence, the material may be made available for consultation or not, and when it can, under what conditions. A double test therefore: appraising the value of the personal information and determining the risks.

We will look at this last point first. Privacy is a basic right. The European Treaty on Human Rights allows interference with privacy only if, in the case of a democratic society, it is necessary 'in the interest of national security, public security or the economic well-being of the country, for the prevention of disorderly and criminal acts, or for the protection of the health, well-being or the rights and freedom of others'.

Historical research is not covered by the Treaty. In the case of medical-scientific research, if it is carried out with a view to the improvement of health care, the value of the investigation can be weighed up against any breach of individual privacy. This plays a role in the case of epidemiological research, but also in providing medical advice concerning genetics and for tracing family members who may be at an increased risk of giving birth to children with a genetic disease or infection. These situations raise the ethical question: when should people be confronted with the truth, or the probability of an event occurring? In a French investigation of manic depressives who suffered from a particular form of glaucoma living in Nord-Pas-de-Calais, it was established with the aid of a computer that all were descended from a particular couple who lived 500 years ago. Should, and could, the investigators inform all the living descendants, approximately 30 000 French people, of the risk of blindness which, provided the hereditary condition is detected at an early enough stage, can be prevented? No, says the privacy commission, de Commission Nationale d'Informatiques et des Libertes.[5]

In social-scientific and socio-medical circles there is apprehension that the requirement for the individual agreement of citizens would lead to diminished validity and objectivity in the results of scientific research. Research based on

regional deaths from cancer is at 'the mercy'—the term is from the deputy Privacy Commissioner—of the individual agreement of patients, which may bring into question the representative validity of the survey. Such cases are covered by the Wet Geneeskundige Behandelingsovereenkomst (WGBO)—the Act for Agreement on Medical Treatment. The WGBO allows exceptions to the requirement for individual consent for the benefit of statistical or scientific research in the area of national health, provided the investigation serves a general need and cannot be carried out without the appropriate data[6] i.e. a utilitarian approximation whereby the risks to the individual are deemed to be less serious than the benefits of the research.[7]

Historical research, however, does not lend itself to such a risk-benefit analysis. An alternative is proposed by the American Herbert Kelman.[8] In this proposal consideration is given not to the risks attached to the consequences of the research but rather to the risks of the research itself. According to Kelman's proposal it must be determined whether an investigation which makes use of personal information can be reconciled with human dignity. Here human dignity is meant in the Kantian sense: a person may not be used by another person as a means to an end, but must always be used as a goal. Act, says Kant, such that the principle of your actions can be used as a general principle. Or, in more everyday language, do to others only what you would have happen to you.

That ethical test consists of two questions: which risk accrues to human dignity through the disclosure of confidentially imparted data? Is that risk acceptable in the light of an identifiable advantage for the individual or for society? This 'Kelman Test' should be applied before personal information can be transferred for permanent retention in an archive. If the answers to the test are negative—which should seldom be the case—the dossiers should be destroyed. Even sealing them for a specified period is not justified because the possibility of clearance and, therefore, of the weighing up of the interests served by the restrictions on access, always remains for data which has not withstood the Kelman Test. Often, however, the test will result in a more balanced conclusion: that use of the personal data could be in agreement with human dignity provided that access is restricted. Then we come to the second test, appraisal of the personal information and the circumstances under which it may be used.

In my opinion, use should be made in the future of an appraisal model for personal information which has been developed by the Canadian Terry Cook—one of the top ten archives scholars in the world. His model, intended for the selection of personal information[9] can also play a role in the *use* of

personal information, alongside the Kelman Test to which I have just referred. Cook concentrates on the interaction between state and citizen out of which is formed the precipitant, the personal information. The appraisal model stems from three related factors: the program, the agency and the citizen.

The program is the aim, the idea, even the ideology of a specific government task, partly fixed but often a difference between the intention and the reality. Consider your own tax returns. The greater the gap between the rule and the practice, the more important is the personal information collected at the government's discretion. The nature of the state program, the state's procedures, influences the nature of the personal information. Is it a matter of a formalised, uniform process with little or no possibility for the state or the individual to vary the information, or the possibility to even withhold information? Has the information been given by the individual personally or has it been collected by an agency—openly or without the knowledge of the subject? In my opinion, the value of the source of information for the historical researcher, and access to the source are determined, both by the individual's amount of freedom to provide information about him or herself and by the degree to which the subject had the possibility to control and correct the registered data and its use. In the situation where data is collected about a citizen not because he or she required a government service but because the government considered the information necessary, for me, freedom of access to that information for historical research is limited.

Cook observes that the more space the government program allows for personal opinion and variations, the greater is the chance the returned, collected and processed personal information will have a significance independent from the intended 'picture' of the interaction between state and citizen. The picture, apart from the state's intended task, would also be determined by the government agency which carries out the task. The agency in its turn is influenced by its employees and by the culture and the ideology both within and outside the agency. The intelligence service differs from an employment office and an employment office differs from a tax inspector. The differences influence the manner in which the personal information is collected, processed and used. And used by the historical researcher also, who can only value his or her sources in the historical and institutional context in which the information originated.

The third factor in the interaction between state and citizen is the citizen him or herself. How many of the ideas, emotions and opinions of the individual are to be found in the files? How much of him or herself does the person allow to be seen? How reliable is information obtained from the subject

as opposed to information obtained through a third person? The professional researcher takes these factors into account.

State, agency, citizen—these three variables determine the appraisal of personal information: is it a true representation of the interaction between citizen and state or does it create an uncharacteristic, indirect or dishonest impression?[10] Pure or impure—with all gradations in between. This appraisal of personal information, I maintain, must form the basis for determining under which conditions access to personal information may be permitted—what I earlier called the second layer of privacy protection through regulation of the provision and disclosure of personal information.

Therefore I imagine that, for example, personal information which is freely provided to an agency, acting as a 'licences factory', by the subject him or herself in a regulated process requires less stringent protection than sensitive data which has been gathered through denunciation by, and used by, an intelligence agency without the subject having any recourse to a hearing or an airing of both sides. For the first category protection through the above mentioned researchers' undertaking is sufficient—possibly even without the provision that any intention to publish must be submitted to the archivist. That means, therefore, that responsibility for legitimate use of personal information rests with the researcher who must undertake not to publish anything which would impinge unfairly on the interests of living persons.

But for the category of personal information in the second example, the classic researcher's undertaking is, I believe, insufficient. Not so much because this personal information could be more sensitive, but because in the example given the purity, the integrity of the triangular relationship state—state agency—citizen is significantly diminished. The less that integrity, the stricter the protection imposed on personal information obtained from the triangle. Protection of the integrity of the relationship between citizen and state flows from the responsibility of the archivist to guarantee the integrity of the archive, says Heather MacNeil, another Canadian colleague who devoted her dissertation to the ethics of disclosing personal information in public archives.[11] Integrity, objectivity and impartiality are the key words in the International Council on Archives' draft *International Code of Ethics*. The historians also have a code e.g. the *Standards of Professional Conduct* of the American Historical Association.[12] Integrity is also one of the issues in their code of conduct.

The integrity, the moral purity of the research, must form the basis for strict protection of personal information for which the customary researchers' undertaking is insufficient. This is not a matter of judging the researcher

personally. It is a matter of the object and method of the research. Just as in a criminal proceeding the end does not justify all means, so historical research also has its limits.[13] These should be determined through inter-subjective testing in an ethical review process as is usual in medical research and as has been described by MacNeil for archival research on the basis of American and Canadian practice.[14]

In contrast to MacNeil, however, I do not consider that the testing of historical research through a code of conduct for researchers is the primary task of the archivist. The archivist's role, in my opinion, is limited to appraisal of personal information according to Cook's model. Appraisal of archives is the archivist's specialty. But appraisal of research is not his/her task: that belongs to the professional domain of historians, assisted by the ethicist and jurist. That is not to say that the archivist should not be concerned with the testing of research in that his or her experience is useful in weighing up privacy and disclosure, the right to forget and the right to know.

Their professional code requires archivists to respect privacy especially of persons who have no say in the use or the destiny of archival material. That can only be achieved in a relationship of trust with researchers for whom public archives are maintained, processed and made available for use. From both—archivist and researcher—it is expected that they will know how to deal with the dilemmas which present themselves as the values of individual autonomy and of freedom of research collide.

Endnotes

1. Terry Cook, *The archival appraisal of records containing personal information: a RAMP study with guidelines*, UNESCO, Paris 1991.
2. I have derived this image of layers of protection from: H. Raaska, 'Personal privacy and the archivist' (unpublished paper, NARA Professional Career Training Program), April 1989.
3. R. M. Baumann, 'The administration of access to confidential records in state archives: common practices and the need for a model law', *American Archivist*, vol. 49, no. 4, Fall 1986, pp. 360–366.
4. Anne Cooke, 'A code of ethics for archivists: some points for discussion', *Archives and Manuscripts*, vol. 15, no. 2, November 1987, p. 95 quotes E. W. Russell (1976): on professional ethics 'being of the kind which are too particular to be controlled by law, by-law or regulation but too general to be regarded solely as a matter for the individual judgement of the archivist concerned'. See G. M. Peterson, T. Huskamp Peterson, *Archives & Manuscripts: Law*, Society of American Archivists, Chicago 1985, for the difference between ethical and formal legal responsibilities.
5. 'Spuren im Stammbuch', *Der Spiegel*, no. 30, 1991.
6. The research is only possible in so far as the relevant patient has not specifically stated that he/she is not opposed to the release of the data.

7. H. MacNeil, 'Defining the limits of freedom of inquiry: the ethics of disclosing personal information held in government archives', *Archivaria*, no. 32, Summer 1991, p. 139; H. MacNeil, *Without consent; the ethics of disclosing personal information in public archives*, The Society of American Archivists and The Scarecrow Press Inc., Metuchen, N.J., 1992, pp. 160–161.
8. H. MacNeil, 'Defining the limits of freedom of inquiry: the ethics of disclosing personal information held in government archives', *Archivaria*, no. 32, Summer 1991, p. 140; H. MacNeil, *Without consent; the ethics of disclosing personal information in public archives*, The Society of American Archivists and The Scarecrow Press Inc., Metuchen, N.J., 1992, pp. 164–166.
9. Terry Cook, *The archival appraisal;* E. Ketelaar, 'Archives of the people, by the people, for the people', *South African Archives Journal*, vol. 34, 1992, pp. 5–16.
10. Terry Cook, *The archival appraisal of records containing personal information: a RAMP study with guidelines*, UNESCO, Paris 1991, p. 44.
11. H. MacNeil, *Without consent; the ethics of disclosing personal information in public archives*, The Society of American Archivists and The Scarecrow Press Inc., Metuchen, N.J., 1992, p. 174.
12. Published in *Perspectives*, September 1987, pp. 4–6.
13. H. MacNeil, 'Defining the limits of freedom of inquiry: the ethics of disclosing personal information held in government archives', *Archivaria*, no. 32, Summer 1991, pp. 143-144.
14. H. MacNeil, *Without consent; the ethics of disclosing personal information in public archives*, The Society of American Archivists and The Scarecrow Press Inc., Metuchen, N.J., 1992, p. 201.