THE PROTECTION OF ARCHIVES AND THE RIGHT TO INFORMATION: NEW LIMITS AND CONTRADICTIONS

1. Protection of archives – legal issues

Unfortunately, in our country there has been a longstanding practice whereby archives were neglected. The central archival service was established in 1914, but until 1989 very few departmental archival services had been operating in the country.

This lack of archival care, as could be expected, was both reflected in the relevant legislation and its great deficiencies with regards to foresight for the preservation and utilization of archival heritage as well as in infraction of legislation in force, whenever the latter attempted to cope with major problems, albeit timidly.

Thus, from 1979 and up until the end of the 1980s, presidential decrees were promulgated for the elimination of inactive records belonging to various ministries and regional services, with a view to calling upon the General State Archives to select records for permanent storage. These decrees made provision only for the period during which the records had administrative utility and not for their entire life cycle. The usage of the term “destroyable records” instead of “inactive”, together with the inability on the part of the clerks to distinguish between primary and secondary value, created, and still does in fact, confusion among the creators, who frequently lay claim to jurisdiction so that they, and not the GSA, be the ones to decide which records are of interest to research and which not. Thus, the conditions for the preservation of intermediate (and not infrequently of the active) records are often wretched. Moreover, infraction of the legislation in force as far as inviting the General State Archives is concerned and the destruction of records without the archival service selecting the records for permanent storage first is unfortunately common practice in Greece.

In 1988-1989, the first real restructuring of the archival service took place, which led to the creation of departmental archival services in almost every prefecture of Greece and the provision of skeleton staffing. This restructuring was crystallized with the passing of the new archival law in 1991. This was a law drafted by archivists, generally taking under account the extent possible international experience, and ultimately provided contemporary answers to a series of longstanding problems. However, many basic provisions in this law have still not been implemented.

Among other things, the law makes provision for establishing civil servants responsible for the relations with the State Archives, who are designated by the public sector creators to ensure smooth performance of the task of records survey and stocktaking of the public sector and of monitoring active and intermediate records to prevent loss and destruction of public documents. Nevertheless, despite even the training seminars for public servants in matters of organizing and keeping archives, the Ministry of Interior has never activated this institution.

Albeit this law introduced innovations that were unheard of in Greece until then, it failed to deal with quite a number of problems.

First of all, the possession of public records and archives by individuals is not prohibited. It is far from unusual that public records are found in the hands of collectors without any disciplinary proceedings or a penal search being initiated at least with respect to the liabilities of the public sector creator of these public records. Indeed, there is the recent case of a collector who was vindicated by the Hellenic Courts for possessing a considerable volume of notarial and judicial records of permanent value of the 19th and 20th centuries, which following a complain had been confiscated and deposited at the General State Archives. The archival service was made to return them to the individual, while none of the notaries public or the judicial service whose archives were found in the hands of the individual were held liable. One can easily think of the problems that will emerge in the future, should citizens seek documents from these archives at the public sector creators, given that these specific archival documents establish property rights.

There is no provision made for special sanctions against the public sector creators that violate the legislation on inactive records elimination either due to ignorance (although ignorance of the law is not legitimized) or due to wrongful intention.

The transfer of records that are of permanent value to the General State Archives is optional and not mandatory for the public sector creators, after the lapse of a certain period, which results in the fact that research is deprived of significant sources for reasons to be mentioned below and the relevant records and archives are in danger of being destroyed, owing to the often extremely poor preservation conditions. An example of the situation is the fact that there are several instances of schools whose headmasters refuse to hand over school archives even of the 19th century to the General State Archives. And to think that both schools and the General State Archives come within the jurisdiction of

the same ministry, and therefore a simple departmental memorandum to settle the issue would be sufficient. Let it be pointed out here that not infrequently are there instances of arson in schools where archival material is kept, included in which are the attendance records of pupils (a possible cause for arson).

On the other hand, a positive feature is the obligation prescribed by this law whereby individuals must declare their records and archives at the General State Archives in the form of a descriptive list. Yet, even this article in essence remains inactive.

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The aforementioned problems, together with the many and acute deficiencies in staff, funds and buildings, despite the positive steps taken in recent years and the efforts made by the staff of the General State Archives, hamper the records survey, protection and transfer of the country's archival wealth into the archival service.

2. The right to information - introductory observations

Generally speaking, as it has been highlighted on other occasions, the point at issue is to create a satisfactory balance between the right to access to archives and the need to protect certain categories of information.

First of all, it is well-known that Greek archivists have the task of supervising public records and archives for the whole life cycle of the documents. Hence, whatever is to be presented next concerns access to the current, the intermediate and the inactive records and naturally, to those records that are of permanent value for Administration as well, given indeed that this latter case presents singularities as far as access is concerned.

It is likewise known that Administration deals with archival material using different criteria from Archival Science. Records initially arise from the functioning of Administration and serve the needs for documentation, management, etc. In other words, it is established with a view to its being useful (let us

keep the concept in mind, as it is very important with regards to a series of problems having to do with the law on protecting the individual from processing personal data). *After this,* a part of this material takes on historical value. Consequently, records and archives have a dual nature, *administrative* and *historical* and the activities of archivists develop at both these levels. Administration is primarily interested in the *document,* because it comprises documents of a right. Archival Science is interested in the *file,* because it sheds light on an entire case. Based on these different approaches, legislation formulates everything pertaining to the access to archival material in a different way:

The law that concerns making archival material available to research (Archives Act - law 1946/1991) refers to access to archives, whereas the laws pertaining to the right to access by citizens to record material (laws 1599/1986, 1943/1991, 2690/1999), particularly during the time that the documents are of administrative utility (within the context of transparency of governance), deal with access to *administrative documents*.

3. Scope of legislative regulations concerning the right to access

3.1. Laws 1599/1986, 1943/1991 and 2690/1999

Already in the early 1970s, in Europe a trend was forming to give more leeway to those being administered when dealing with the power of Administration. Although it varied from country to country, overall free access to administrative documents was established, albeit there were certain exceptions to the rule.

In Greece, the first law moving in this direction was law 1599/1986 ("Relations of State – citizen"). Then came law 1943/1991, followed by law 2690 ("Code of Administrative Procedure") in 1999.

The first differentiation brought about by law 2690/1990 in relation to law 1590/1986 had to do with the bodies and persons having the right of access to administrative documents: the term "interested party", namely the individual who has reasonable or justifiable interest, replaces the term "citizen" (Expert Opinion 620/1999 by the State Legal Council).

The second differentiation in relation to law 1599/1986 concerns the scope of the relevant provisions, which is limited by the Code of Administrative Procedure, and basically constitutes a political choice. This was a problem that took on greater proportions after the privatization of many state agencies and organizations.

The privatization process creates a great risk, among others, of depriving research –and not only- of a huge volume of information. The records of privatized agencies cease being *public ones* and

become *private ones.* As a result, they cease to be governed by rules governing public records. In the legislative regulations concerning privatizations there was no provision (Intentionally?) made for the enactment of exceptions and aberrations with regards to the regime governing the archives of these agencies and organizations after their privatization. But such a possibility did exist, considering that these agencies continue to provide a public service under the functional or essential sense. A relevant proposal was already submitted years ago within the framework of the works of a committee processing proposals with a view to improving law 1946/1991 that the Ministry of National Education and Religious Affairs had set up.

3.2. Law 1946/1991

The Archives Act (Law 1946/1991 "General State Archives and other provisions") regulates the issues pertaining to the archival wealth of the country in whole, and thus, its scope is much wider than the laws we have already mentioned hereinbefore.

The Archives Act refers to access to *records and archives* and not *administrative documents.* Moreover, the records and archives of a very wide spectrum of agencies are described as *public archives*.

However, the Act was ignored when both law 2690/1999 and law 2472/1999 were passed. In the expert opinions of the legal services of the various ministries that have to do with access to record material only rarely is mention made of law 1946/1991 (almost exclusively when the General State Archives submit questions), despite the fact that, as already noted, the competences of the General State Archives, as defined by the legislation in force, concern current, intermediate, inactive records, as well as the records of permanent value.

4. Right and restriction to access. Rule and exception

In the majority of countries, at least the European ones, there is blanket legislation prescribing that citizens first of all have the right of access to administrative documents from the very moment they have been created *(rule).*

To this general right, however, there are certain restrictions of access *(exception).*

These restrictions are lifted first of all after the lapse of time period, and for Greece after 30 years have lapsed (*rule*).

For certain categories of documents (*exception*), there is a restriction of access for a specific period that is longer than the general restriction, which in our case is 30 years.

In our country, however, there still has been no codification of legislation or case-law regarding restrictions of access (including the instance of personal data).

In Greece, however, with respect to personal data, in addition to the many other problems, the exact opposite applies: *restriction* to access is the *rule,* whereas the *right to access* is the *exception*.

Furthermore, since for a set of categories of restrictions to access are imposed, there should be specific *deadlines,* after whose lapse these restrictions *should be lifted.* Yet, such deadlines *have not been determined,* but rather, on the contrary, the documents under discussion are bound ad infinitum. For these problems to be dealt with, the following is necessary:

- *The relevant legislation must be codified* immediately. All cases of restrictions to access, the relevant legislative regulations and relevant case-law must be recorded. During this codification, law 1946/1991 must definitely be taken into consideration.
- The regulation providing for a *general deadline for lifting secrecy and restrictions of access of 30 years* must be applied. This regulation should be applied for *ALL records and archives,* just as prescribed in law 1946/1991, *without discrimination* between those that are stored at the General State Archives as well as those that are preserved by the department that either created or possesses the archives.
- Finally, *a list* as detailed as possible must be drawn up, which will include the *types of documents* for which the deadlines for lifting access restrictions (declassification) shall be *greater than 30 years*.

5. The "three ages" of documents and access. Concept of the administrative document. Access to private documents pertaining to the privacy of third parties.

Researchers as well as any interested party who would like to study archival material encounter a succession of problems that differ, depending on whether the material they are interested in is kept at the General State Archives or at the agency that has either created or possesses it.

First of all, I should clarify that when I refer to research, I do not necessarily mean a *time distance* from the subject to be researched. Consequently, we can speak of research *even in the case of current or intermediate* records. This means that the researchers will go to the agency that has either created or possesses the record material they are interested in.

The researchers will also have to go to the same agencies in the case of *records of a permanent value* for Administration as well, which have not been transferred to the General State Archives by virtue of a special protocol.

Subsequently, we are concerned to a great extent whether in the aforementioned cases the necessary conditions exist to facilitate the interested party in carrying out their research without any obstacles.

The answer is basically *negative*, with some exceptions. The researcher shall be faced with issues such as:

- What constitutes an administrative document, what constitutes a private one and to which has he/she access?
- If he has access to administrative documents that pertain to the private and family life of third parties (What is meant by *private*?).
- In general, what the restrictions to access for each category of documents are.
- When the applicable restrictions are lifted.
- Whether the researcher's request is "vague and abusive".

5.1. <u>The concept of the administrative document. Administrative documents in the wider sense.</u>

Law 2690/1999, in comparison to law 1599/1986, *restricts* the concept of the administrative document, and thus the breadth of the spectrum of information to which a citizen has the right of access.

In the Explanatory Memorandum of Law 1599/1986 it was noted that the right to access concerns whatever is found inside the record file. There is abundant case-law regarding the concept of the administrative document, according to which it is not required to have legitimate interest for access to private documents which are incorporated in those drawn up by public services. This case-law, however, was never crystallized in the relevant wording of law 2690/1999, which in reality is just one step behind law 1599/1986, although the preamble attempted to give the impression of the contrary. The Code of Administrative Procedure requires that there be legitimate interest for access to private documents that are found in the records of public services.

Moreover, the prevailing (legal) viewpoint considers as an administrative document or element only that whose process of issuance or at least whose drawing up has been completed and this, because the relevant approaches examine the matter only from the aspect of administrative utility and always within the context of the need for transparency of governance.

5.2. Right of access to private documents and documents pertaining to the private and family life of third parties

I shall not go into what public or private is, nor shall I define privacy, albeit these issues are important. I shall only focus on access to documents that legislation in force describes as private, etc. in order to highlight the problems the researcher encounters when studying record material of the category that has not been transferred to the General State Archives or is of a permanent value for Administration as well.

The concept of the administrative document covers a wide spectrum of documents. As noted, according to the Code of Administrative Procedure, access to private documents that are kept within public services presupposes the existence of legitimate interest, but without mention being made of those cases wherein it is deemed that the private document is incorporated into the administrative document. Public archives contain a plethora of such documents and the researchers, should they overcome the obstacle of the "vague and abusive" request (see below), could very well discover that the department which keeps the record material that they are interested in will refuse to grant the request, because a large part of the documents contained in the relevant files are private documents.

The documents pertaining to the *private and family life of third parties* are excluded from the right to take cognizance thereof. The records that contain such data cover a very wide spectrum. Thus, for example, included in the concept of such documents are those referring to the *address of residence* and, consequently cannot be announced to third parties. The information referring to the *school status of students,* particulars regarding the conduct, grades, etc of students – in other words, particulars included in school registers are likewise deemed to refer to the privacy of students and hence cannot be made known to third parties.

5.3. Vague and abusive

Precisely because the approach to the issue, as already pointed out, is made from the standpoint of Administration and not from that of research, laws only make mention of the citizen's right that must *determine* as best as possible *the isolated documents* that the researcher either wishes to see or be given copies of and not do it constantly.

If this may apply to a citizen in the context of claiming a right or carrying out one's affairs, surely this cannot apply to the researcher, who is not interested in isolated documents, but rather full record files or for a series of documents, to which he must examine more than once. However, in this case,

there is a risk that the administrative service to which a request is submitted may reject it as being *vague and abusive.*

Although the right to research is safeguarded in the Constitution, regulations have not been provided for to safeguard this right with respect to access to archives that are stored in the department that either created or possesses these. Furthermore, the legislation in force places restrictions on access to a wide range of documents, without making provision for a time limit so the restriction can be lifted.

Such problems could be dealt with both by virtue of legislative regulations that would fill any voids as well as by institutions such as the institution of Intermediate Archives (Anglo-Saxon countries) or of the institution of the "Archivistes en Mission" (France). The activation of the institution of the civil servants responsible for the relations with the State Archives would be an important step in this direction for our country.

6. Personal data

By passing law 2472/1997 "on the Protection of Individuals with regard to the Processing of Personal Data", a number of problems arose regarding the management of *a very large portion* (if not the greatest) *of the content of public records and archives*, especially after the lapse of the period during which this material had any administative uitility.

To begin with, the law was drafted without taking into consideration the Archives Act. Moreover, in the composition of the Authority, the archival service is not represented, whereas this is necessary, particularly for the Greek reality, given that the public records and archives comprise the main volume of the country's archival wealth and – primarily - on the other hand, the archivist is the custodian par excellence of information, and indeed through the interdisciplinary handling of the issue. Nor is there representation on this Authority by the community of researchers and especially of historians.

The problem of preserving personal data records that the Data Protection Act attempts is mainly approached from the standpoint of *administrative utility and primary value,* while in essence the secondary value is ignored. With regards to preserving record material that contains personal data after the lapse of the period of its administrative utility, the Authority lays claim to competences, which in actuality lie with the General State Archives. Besides, in all European countries – and not only - the record retention schedules are drawn up by the archival services in cooperation with the Administration. In Greece, the Authority is designated as the one competent to decide what is of interest today or could be of interest tomorrow to research and especially to historical research.

Indicative of what the practice is in other European countries, in contrast to Greece, is the fact that in France, for example, information concerning personal data ceases to be at the disposal of the department generating this info from the moment it is forwarded to the national archival service (decision of the Commission Nationale de l' Informatique et des Libertés). Likewise indicative, if I may just refer to the case of CNIL, is that in the rationale of its relevant decisions, reference is made to the French Archives Act, whereas in the cases of decisions to *destroy* archival material in digital form, *approval from the archival service* is required.

Concerning access, restriction is the norm and the right to access is the exception. The processing of material containing personal data is allowed, according to law 2472/1997, but only *under presuppositions.* With regards to these presuppositions, the questions that can be raised are sundry and grave: what constitutes "public interest" and who determines this, with what criteria do we define "public persons", what are the matters of "public interest", who decides whether anonymity will be maintained, especially if the nature of the research does not permit observance of anonymity, and so on.

A first step to begin dealing with such problems could be by having representation of the community of archivists and researchers in the body of the Authority.

7. Secrecy and destruction

The legislative regulations that are related to the respect of secrecy could, apart from other things, constitute an obstacle to the transfer of specific types of documents to archival services.

The existence of categories of documents for which there is a matter of secrecy does not mean that these documents must be destroyed when they have been rendered inactive, or in other words, when they cease to have administrative value. The Archives Act makes no distinctions. Its provisions pertain to the entirety of records and archives and not just specific types of documents.

Reality, however, is quite different. Characteristic is the case of a large portion of the files of the Public Tax Offices, namely the documents with taxation contents, which, as is well-known, were for a long time – are they still? – kept confidential by the Administration. These documents, according to a decision by the State Secretary of Finance who is certainly not competent in this matter, are described as *lacking historical interest* and, consequently, may be destroyed, without giving the General State Archives, which by definition is the only competent instrument, the chance of selecting archival material for permanent storage. We are talking about the destruction of a very important cultural asset.

In addition to all that has been highlighted, there still is a big problem concerning conditions for accessing archives after they have been taken to the General State Archives. This matter could

comprise the subject of discussion at a different one-day meeting, but also the more general topic for public dialogue whose agenda would be the basic pillars of archival policy in our country at present.

8. Directive 2003/98 on the "re-use of public sector information" and the right to information

The directive for the "re-use of public sector information", as it is called, even before the problems of accessing public archives could be satisfactorily dealt with by all the EU member-states, comes to raise the matter of their commercialization with a sense of urgency, in order to establish an information market that is based on "public sector information".

From the outset, the directive met up with opposition from international organizations, the professionals at libraries, Archives, etc, who expressed their growing concern regarding the main objective of the directive and the very serious consequences that would arise for these bodies as a result of the abolition of exceptions. Nevertheless, even with the current regime of exceptions, the ramifications on the archives, both those that are preserved by the creators as well as those kept at archival services, are serious.

The first and basic consequence has to do with the smooth flow of records from the creators in the state archival service. But, what will be the fate of the records that are to become the object of commercial exploitation after the lapse of the period of their administrative utility? It is possible that these records from the public sector creators will not be transmissed to the state archival service when they cease to be of administrative utility, but instead remain at the creator for commercial exploitation, even after the lapse of the general deadline of 30 years? This concern was raised at the meeting of the European Bureau of National Archivists, which was held in Athens in June 2003 during the Greek EU presidency. As there was highlighted, after the implementation of the Directive, Archives will have competitors and that although the directive does not apply to documents held by Archives a new situation appears, which creates problems. According to the provisions of this directive it is possible current documents not to be deposited in the archives after their retention period, but to be kept in their producing agencies for exploitation and though archives have a period of 30 years delay, after which documents are available to the public, such time limits will not be valid for commercial agencies.

Moreover, according to the wording in par. 2, section e' and f', the directive is not applied to "documents" which are found in the *possession* of cultural and other foundations. Hence, the "documents" that are preserved at these bodies are not excluded, but rather, their possessor is a public body, which is not excluded from the scope of the directive. Thus, according to this formulation, it seems that the archives of permanent value for Administration are not excluded, and are to be stored at the General State Archives of Greece.

A whole chain of problems is raised with respect to public archives in general. Who is to

determine what is to preserve and what is not after the deadline for administrative utility? On what criteria? Only whatever is commercially exploitable? What problems will arise when the aim is not to preserve information in the long-term and its exploitation in various sectors, but rather it is gain (direct) profit from the (profit-making) company? Will the decisions be made with market criteria, based on which categories of information yield profit and which not?

On which records will special weight and priority be given with respect to classification, indexing, ensuring of appropriate conditions for preservation, etc and with what criteria: based on their commercial value or for research, educational and cultural purposes?

How will the records be described? With what standards? By whom? Which will the level of specialization be? The relevant guarantees, etc., given the tendency to assign such tasks to external associates and to acquire know-how, equipment and personnel by the public sector bodies themselves, so that they can become self-sufficient, leading to consistency and qualitative results from this labour?

Charges

As far as charges for the "re-use" are concerned, the directive provides for a "total income not exceeding the cost of collection, production, reproduction and dissemination, together with a reasonable return on investment" (article 6). However, the van Velzen report proposed the deletion of the reference to "a reasonable return on investment", but the amendment, after protestations from the bodies concerned, was not passed. The issue, however, of "the consequences of implementing the principles governing charges" came under revision prior to July 1, 2008.

It has been noted that if the public sector bodies were to abandon the practice of collecting charges for the commercial exploitation of the information, this would yield additional revenue from the taxation of the relevant products, in other words, income greater than the charges paid for the public information. Strange accounts…. One wonders who would bear this taxation!

As far as commercial and non-commercial exploitation is concerned, there is no explicit distinction, nor formulated in an urgent tone, as to how the two cases should be handled. The issue is raised purely for sake of argument:

There is an explicit risk of creating further discrimination regarding access, in other words, in the name of a so-called equality that in the end create greater inequalities.

It is a well-known fact that at many public bodies there are no clearly defined policies regarding the pricing of commercial and non-commercial exploitation. It is likewise known that there is a general tendency of paying for services for which citizens have already been taxed (reciprocal charges, etc.).

If the revenue of public sector bodies that come from the collection of charges for commercial use were to be minimized, combined with the cutbacks in funding for the public sector bodies, the latter, in order to survive, would most probably be forced to generalize the imposition of charges even on categories whose access previously was either free or at a very small cost (researchers, educational

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The first differentiation brought about by law 2690/1990 in relation to law 1590/1986 had to do with the bodies and persons having the right of access to administrative documents: the term "interested party", namely the individual who has reasonable or justifiable interest, replaces the term "citizen" (Expert Opinion 620/1999 by the State Legal Council).

The second differentiation in relation to law 1599/1986 concerns the scope of the relevant provisions, which is limited by the Code of Administrative Procedure, and basically constitutes a political choice. This was a problem that took on greater proportions after the privatization of many state agencies and organizations.

The privatization process creates a great risk, among others, of depriving research –and not only- of a huge volume of information. The records of privatized agencies cease being *public ones* and

become *private ones.* As a result, they cease to be governed by rules governing public records. In the legislative regulations concerning privatizations there was no provision (Intentionally?) made for the enactment of exceptions and aberrations with regards to the regime governing the archives of these agencies and organizations after their privatization. But such a possibility did exist, considering that these agencies continue to provide a public service under the functional or essential sense. A relevant proposal was already submitted years ago within the framework of the works of a committee processing proposals with a view to improving law 1946/1991 that the Ministry of National Education and Religious Affairs had set up.

3.2. Law 1946/1991

The Archives Act (Law 1946/1991 "General State Archives and other provisions") regulates the issues pertaining to the archival wealth of the country in whole, and thus, its scope is much wider than the laws we have already mentioned hereinbefore.

The Archives Act refers to access to *records and archives* and not *administrative documents.* Moreover, the records and archives of a very wide spectrum of agencies are described as *public archives*.

However, the Act was ignored when both law 2690/1999 and law 2472/1999 were passed. In the expert opinions of the legal services of the various ministries that have to do with access to record material only rarely is mention made of law 1946/1991 (almost exclusively when the General State Archives submit questions), despite the fact that, as already noted, the competences of the General State Archives, as defined by the legislation in force, concern current, intermediate, inactive records, as well as the records of permanent value.

4. Right and restriction to access. Rule and exception

In the majority of countries, at least the European ones, there is blanket legislation prescribing that citizens first of all have the right of access to administrative documents from the very moment they have been created *(rule).*

To this general right, however, there are certain restrictions of access *(exception).*

These restrictions are lifted first of all after the lapse of time period, and for Greece after 30 years have lapsed (*rule*).

For certain categories of documents (*exception*), there is a restriction of access for a specific period that is longer than the general restriction, which in our case is 30 years.

In our country, however, there still has been no codification of legislation or case-law regarding restrictions of access (including the instance of personal data).

In Greece, however, with respect to personal data, in addition to the many other problems, the exact opposite applies: *restriction* to access is the *rule,* whereas the *right to access* is the *exception*.

Furthermore, since for a set of categories of restrictions to access are imposed, there should be specific *deadlines,* after whose lapse these restrictions *should be lifted.* Yet, such deadlines *have not been determined,* but rather, on the contrary, the documents under discussion are bound ad infinitum. For these problems to be dealt with, the following is necessary:

- *The relevant legislation must be codified* immediately. All cases of restrictions to access, the relevant legislative regulations and relevant case-law must be recorded. During this codification, law 1946/1991 must definitely be taken into consideration.
- The regulation providing for a *general deadline for lifting secrecy and restrictions of access of 30 years* must be applied. This regulation should be applied for *ALL records and archives,* just as prescribed in law 1946/1991, *without discrimination* between those that are stored at the General State Archives as well as those that are preserved by the department that either created or possesses the archives.
- Finally, *a list* as detailed as possible must be drawn up, which will include the *types of documents* for which the deadlines for lifting access restrictions (declassification) shall be *greater than 30 years*.

5. The "three ages" of documents and access. Concept of the administrative document. Access to private documents pertaining to the privacy of third parties.

Researchers as well as any interested party who would like to study archival material encounter a succession of problems that differ, depending on whether the material they are interested in is kept at the General State Archives or at the agency that has either created or possesses it.

First of all, I should clarify that when I refer to research, I do not necessarily mean a *time distance* from the subject to be researched. Consequently, we can speak of research *even in the case of current or intermediate* records. This means that the researchers will go to the agency that has either created or possesses the record material they are interested in.

The researchers will also have to go to the same agencies in the case of *records of a permanent value* for Administration as well, which have not been transferred to the General State Archives by virtue of a special protocol.

Subsequently, we are concerned to a great extent whether in the aforementioned cases the necessary conditions exist to facilitate the interested party in carrying out their research without any obstacles.

The answer is basically *negative*, with some exceptions. The researcher shall be faced with issues such as:

- What constitutes an administrative document, what constitutes a private one and to which has he/she access?
- If he has access to administrative documents that pertain to the private and family life of third parties (What is meant by *private*?).
- In general, what the restrictions to access for each category of documents are.
- When the applicable restrictions are lifted.
- Whether the researcher's request is "vague and abusive".

5.1. <u>The concept of the administrative document. Administrative documents in the wider sense.</u>

Law 2690/1999, in comparison to law 1599/1986, *restricts* the concept of the administrative document, and thus the breadth of the spectrum of information to which a citizen has the right of access.

In the Explanatory Memorandum of Law 1599/1986 it was noted that the right to access concerns whatever is found inside the record file. There is abundant case-law regarding the concept of the administrative document, according to which it is not required to have legitimate interest for access to private documents which are incorporated in those drawn up by public services. This case-law, however, was never crystallized in the relevant wording of law 2690/1999, which in reality is just one step behind law 1599/1986, although the preamble attempted to give the impression of the contrary. The Code of Administrative Procedure requires that there be legitimate interest for access to private documents that are found in the records of public services.

Moreover, the prevailing (legal) viewpoint considers as an administrative document or element only that whose process of issuance or at least whose drawing up has been completed and this, because the relevant approaches examine the matter only from the aspect of administrative utility and always within the context of the need for transparency of governance.

5.2. Right of access to private documents and documents pertaining to the private and family life of third parties

I shall not go into what public or private is, nor shall I define privacy, albeit these issues are important. I shall only focus on access to documents that legislation in force describes as private, etc. in order to highlight the problems the researcher encounters when studying record material of the category that has not been transferred to the General State Archives or is of a permanent value for Administration as well.

The concept of the administrative document covers a wide spectrum of documents. As noted, according to the Code of Administrative Procedure, access to private documents that are kept within public services presupposes the existence of legitimate interest, but without mention being made of those cases wherein it is deemed that the private document is incorporated into the administrative document. Public archives contain a plethora of such documents and the researchers, should they overcome the obstacle of the "vague and abusive" request (see below), could very well discover that the department which keeps the record material that they are interested in will refuse to grant the request, because a large part of the documents contained in the relevant files are private documents.

The documents pertaining to the *private and family life of third parties* are excluded from the right to take cognizance thereof. The records that contain such data cover a very wide spectrum. Thus, for example, included in the concept of such documents are those referring to the *address of residence* and, consequently cannot be announced to third parties. The information referring to the *school status of students,* particulars regarding the conduct, grades, etc of students – in other words, particulars included in school registers are likewise deemed to refer to the privacy of students and hence cannot be made known to third parties.

5.3. Vague and abusive

Precisely because the approach to the issue, as already pointed out, is made from the standpoint of Administration and not from that of research, laws only make mention of the citizen's right that must *determine* as best as possible *the isolated documents* that the researcher either wishes to see or be given copies of and not do it constantly.

If this may apply to a citizen in the context of claiming a right or carrying out one's affairs, surely this cannot apply to the researcher, who is not interested in isolated documents, but rather full record files or for a series of documents, to which he must examine more than once. However, in this case,

there is a risk that the administrative service to which a request is submitted may reject it as being *vague and abusive.*

Although the right to research is safeguarded in the Constitution, regulations have not been provided for to safeguard this right with respect to access to archives that are stored in the department that either created or possesses these. Furthermore, the legislation in force places restrictions on access to a wide range of documents, without making provision for a time limit so the restriction can be lifted.

Such problems could be dealt with both by virtue of legislative regulations that would fill any voids as well as by institutions such as the institution of Intermediate Archives (Anglo-Saxon countries) or of the institution of the "Archivistes en Mission" (France). The activation of the institution of the civil servants responsible for the relations with the State Archives would be an important step in this direction for our country.

6. Personal data

By passing law 2472/1997 "on the Protection of Individuals with regard to the Processing of Personal Data", a number of problems arose regarding the management of *a very large portion* (if not the greatest) *of the content of public records and archives*, especially after the lapse of the period during which this material had any administative uitility.

To begin with, the law was drafted without taking into consideration the Archives Act. Moreover, in the composition of the Authority, the archival service is not represented, whereas this is necessary, particularly for the Greek reality, given that the public records and archives comprise the main volume of the country's archival wealth and – primarily - on the other hand, the archivist is the custodian par excellence of information, and indeed through the interdisciplinary handling of the issue. Nor is there representation on this Authority by the community of researchers and especially of historians.

The problem of preserving personal data records that the Data Protection Act attempts is mainly approached from the standpoint of *administrative utility and primary value,* while in essence the secondary value is ignored. With regards to preserving record material that contains personal data after the lapse of the period of its administrative utility, the Authority lays claim to competences, which in actuality lie with the General State Archives. Besides, in all European countries – and not only - the record retention schedules are drawn up by the archival services in cooperation with the Administration. In Greece, the Authority is designated as the one competent to decide what is of interest today or could be of interest tomorrow to research and especially to historical research.

Indicative of what the practice is in other European countries, in contrast to Greece, is the fact that in France, for example, information concerning personal data ceases to be at the disposal of the department generating this info from the moment it is forwarded to the national archival service (decision of the Commission Nationale de l' Informatique et des Libertés). Likewise indicative, if I may just refer to the case of CNIL, is that in the rationale of its relevant decisions, reference is made to the French Archives Act, whereas in the cases of decisions to *destroy* archival material in digital form, *approval from the archival service* is required.

Concerning access, restriction is the norm and the right to access is the exception. The processing of material containing personal data is allowed, according to law 2472/1997, but only *under presuppositions.* With regards to these presuppositions, the questions that can be raised are sundry and grave: what constitutes "public interest" and who determines this, with what criteria do we define "public persons", what are the matters of "public interest", who decides whether anonymity will be maintained, especially if the nature of the research does not permit observance of anonymity, and so on.

A first step to begin dealing with such problems could be by having representation of the community of archivists and researchers in the body of the Authority.

7. Secrecy and destruction

The legislative regulations that are related to the respect of secrecy could, apart from other things, constitute an obstacle to the transfer of specific types of documents to archival services.

The existence of categories of documents for which there is a matter of secrecy does not mean that these documents must be destroyed when they have been rendered inactive, or in other words, when they cease to have administrative value. The Archives Act makes no distinctions. Its provisions pertain to the entirety of records and archives and not just specific types of documents.

Reality, however, is quite different. Characteristic is the case of a large portion of the files of the Public Tax Offices, namely the documents with taxation contents, which, as is well-known, were for a long time – are they still? – kept confidential by the Administration. These documents, according to a decision by the State Secretary of Finance who is certainly not competent in this matter, are described as *lacking historical interest* and, consequently, may be destroyed, without giving the General State Archives, which by definition is the only competent instrument, the chance of selecting archival material for permanent storage. We are talking about the destruction of a very important cultural asset.

In addition to all that has been highlighted, there still is a big problem concerning conditions for accessing archives after they have been taken to the General State Archives. This matter could

comprise the subject of discussion at a different one-day meeting, but also the more general topic for public dialogue whose agenda would be the basic pillars of archival policy in our country at present.

8. Directive 2003/98 on the "re-use of public sector information" and the right to information

The directive for the "re-use of public sector information", as it is called, even before the problems of accessing public archives could be satisfactorily dealt with by all the EU member-states, comes to raise the matter of their commercialization with a sense of urgency, in order to establish an information market that is based on "public sector information".

From the outset, the directive met up with opposition from international organizations, the professionals at libraries, Archives, etc, who expressed their growing concern regarding the main objective of the directive and the very serious consequences that would arise for these bodies as a result of the abolition of exceptions. Nevertheless, even with the current regime of exceptions, the ramifications on the archives, both those that are preserved by the creators as well as those kept at archival services, are serious.

The first and basic consequence has to do with the smooth flow of records from the creators in the state archival service. But, what will be the fate of the records that are to become the object of commercial exploitation after the lapse of the period of their administrative utility? It is possible that these records from the public sector creators will not be transmissed to the state archival service when they cease to be of administrative utility, but instead remain at the creator for commercial exploitation, even after the lapse of the general deadline of 30 years? This concern was raised at the meeting of the European Bureau of National Archivists, which was held in Athens in June 2003 during the Greek EU presidency. As there was highlighted, after the implementation of the Directive, Archives will have competitors and that although the directive does not apply to documents held by Archives a new situation appears, which creates problems. According to the provisions of this directive it is possible current documents not to be deposited in the archives after their retention period, but to be kept in their producing agencies for exploitation and though archives have a period of 30 years delay, after which documents are available to the public, such time limits will not be valid for commercial agencies.

Moreover, according to the wording in par. 2, section e' and f', the directive is not applied to "documents" which are found in the *possession* of cultural and other foundations. Hence, the "documents" that are preserved at these bodies are not excluded, but rather, their possessor is a public body, which is not excluded from the scope of the directive. Thus, according to this formulation, it seems that the archives of permanent value for Administration are not excluded, and are to be stored at the General State Archives of Greece.

A whole chain of problems is raised with respect to public archives in general. Who is to

determine what is to preserve and what is not after the deadline for administrative utility? On what criteria? Only whatever is commercially exploitable? What problems will arise when the aim is not to preserve information in the long-term and its exploitation in various sectors, but rather it is gain (direct) profit from the (profit-making) company? Will the decisions be made with market criteria, based on which categories of information yield profit and which not?

On which records will special weight and priority be given with respect to classification, indexing, ensuring of appropriate conditions for preservation, etc and with what criteria: based on their commercial value or for research, educational and cultural purposes?

How will the records be described? With what standards? By whom? Which will the level of specialization be? The relevant guarantees, etc., given the tendency to assign such tasks to external associates and to acquire know-how, equipment and personnel by the public sector bodies themselves, so that they can become self-sufficient, leading to consistency and qualitative results from this labour?

Charges

As far as charges for the "re-use" are concerned, the directive provides for a "total income not exceeding the cost of collection, production, reproduction and dissemination, together with a reasonable return on investment" (article 6). However, the van Velzen report proposed the deletion of the reference to "a reasonable return on investment", but the amendment, after protestations from the bodies concerned, was not passed. The issue, however, of "the consequences of implementing the principles governing charges" came under revision prior to July 1, 2008.

It has been noted that if the public sector bodies were to abandon the practice of collecting charges for the commercial exploitation of the information, this would yield additional revenue from the taxation of the relevant products, in other words, income greater than the charges paid for the public information. Strange accounts…. One wonders who would bear this taxation!

As far as commercial and non-commercial exploitation is concerned, there is no explicit distinction, nor formulated in an urgent tone, as to how the two cases should be handled. The issue is raised purely for sake of argument:

There is an explicit risk of creating further discrimination regarding access, in other words, in the name of a so-called equality that in the end create greater inequalities.

It is a well-known fact that at many public bodies there are no clearly defined policies regarding the pricing of commercial and non-commercial exploitation. It is likewise known that there is a general tendency of paying for services for which citizens have already been taxed (reciprocal charges, etc.).

If the revenue of public sector bodies that come from the collection of charges for commercial use were to be minimized, combined with the cutbacks in funding for the public sector bodies, the latter, in order to survive, would most probably be forced to generalize the imposition of charges even on categories whose access previously was either free or at a very small cost (researchers, educational

community, citizens). Consequently, new discrimination would be established at the expense of free public use of archival material.

Nevertheless, a policy of access that does not provide either the means or the appropriate conditions is meaningless. In other words, what is of importance is the specific content of free access.

Thus, it is likely that we will have two speeds of access and two classes of citizens: Those having access to information for free or at very small cost via the services provided by public sector bodies will end up with poor or at least minimum quality of access, since the inadequacies – as a result of a specific policy in the public sector will not permit it to provide services such as access to online databases, etc - services that are within the scope of these bodies anyways. On the other hand, all those that have the financial means to purchase the products made by the companies based on the "public sector Information" will have access of higher quality.

This will ultimately lead to further downgrading of the public sector bodies that will appear as "having no use", something that would make them even more vulnerable with respect to the preservation of their public role.

In closing, I would like to emphasize once again the need for *an interdisciplinary dealing* of the problems that were noted and the need to develop a fruitful dialogue in the direction of *balancing* between the *right to information* and the unquestionable *need to protect certain categories of information.* Within this framework, the regulations and approaches to the matter internationally and, primarily, the relevant concern prevailing amongst the community of archivists again at an international level must be taken into consideration.

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