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FAQs: Data Protection Regulations and Archival Access to Holocaust Collections

Recital 158 and the GDPR

Introduction

The General Data Protection Regulation (GDPR) is a regulation that harmonizes national data privacy laws throughout the EU and enhances the protection of all EU residents with respect to their personal data. This harmonization creates new rights for individuals and a set of stronger and clearer rules for businesses.

This set of FAQs is intended to provide a starting point for policymakers to initiate discussions with other stakeholders, such as data protection officers and heads of archives in their countries, on the issue of open access to Holocaust documentation as it relates to the GDPR.

Understanding the impact of data protection regulations on archives and historical research is important to ensuring open access to Holocaust collections. The relationship between these regulations and institutions varies from country to country, and even within blocs like the EU under the GDPR. It depends not only on the wording of legislation, but also on how legislation is implemented on the ground.

The GDPR is aimed at countries within the EU and EEA, which the IHRA (International Holocaust Remembrance Alliance) was involved in drafting, therefore these FAQs have an EU focus. However, much of the information provided here can also be used to spark conversations on how to ensure that data protection regulations support historical research outside the EU as well.

Frequently Asked Questions:

Why is it important to have access to Holocaust collections?

The Nazis and their collaborators not only murdered Jews, Roma, Soviet POWs, political enemies and others; they did so with the intention of erasing all traces of their existence. Every document pertaining to life before, during, and after the Holocaust is therefore extremely valuable. Such material tells us not only about the victims, but also about the perpetrators. More than 75 years after the end of the Second World War, it remains difficult to locate and gain access to documentation related to the Holocaust. Access to Holocaust collections helps foster open and democratic societies that deal openly and accurately with the past. Open access means researchers and the public can find and use Holocaust-related documentation for commemoration, education, research, genealogical, and personal family inquiries. Open access does not supersede privacy regulations, but rather encourages archives to implement these prudently where Holocaust documentation is concerned.

How does data protection legislation impact access to Holocaust collections?

At the EU level, the GDPR is a set of uniform rules and principles relating to the collection, processing, and storing of personal data. EU Member States have also adopted national data protection legislation, which complements the GDPR.
Such legislation is an important response to the requirements of an increasingly global and rapidly changing digital landscape. However, this legislation is general in scope and may have unintended consequences in other areas – including historical research.
Because archival fonds may contain personal data, such legislation may impact the ability of archives to make archival materials accessible. Data protection legislation should therefore be drafted, implemented, and updated with the impact on access to Holocaust collections in mind, making sure "that personal data protection is balanced against the right to justice, the right to truth and the right to remedy and reparation for victims of gross violations of human rights." [1]

Likewise, archival legislation should be updated to reflect the most current data protection regulations.
The GDPR provides some guidance on how to strike this balance in Article 89(2), (3) and (4). When personal data protection seriously impairs or makes it impossible to process personal data for (1) scientific or historical research purposes, (2) statistical purposes, or (3) archiving purposes in the public interest, EU Member States have the option to make use of "facultative specification clauses." These allow them to derogate from the GDPR in their national laws, provided they do so with the necessary conditions and safeguards in place. In the case of conducting historical research, for example, these safeguards might take the form of pseudonymization, in other words making it no longer possible to identify the person, provided the research can still be carried out. More information on safeguards can be found in Article 89(1) GDPR.

[1] European Archives Group, "Guidance on data protection for archive services. EAG guidelines on the implementation of the General Data Protection Regulation in the archive sector," October 2018, p. 12.

Why and how did the IHRA get involved in the drafting stage of the GDPR?

From 2012–2015 the IHRA was concerned with the potential impact of the GDPR on Holocaust research. While the IHRA supported the EU decision to ensure the protection of personal data, the organization has always maintained that it is crucial that the right to be forgotten does not conflict with the responsibility to remember.

The IHRA's founding document, the Stockholm Declaration, to which all Member Countries are committed, underlines the unprecedented nature of the Holocaust and obliges countries to "take all necessary steps to facilitate the opening of archives in order to ensure that all documents bearing on the Holocaust are available to researchers."

Despite the draft GDPR making exemptions for historical records and records of public interest (Article 89) and stating that it would not apply to the deceased, the broad language utilized in the draft Regulation unintentionally threatened Holocaust research.

In 2015, following many consultations with the IHRA, the Luxembourg Presidency of the Council of the European Union proposed an amendment to the draft GDPR that offered a solution to the issue, by including a direct reference to the need to ensure access to records that bear on the Holocaust, as well as on other genocides, crimes against humanity, and war crimes.

On Friday 18 December 2015, the EU came to an agreement on a version of the GDPR that included a recital making specific reference to the Holocaust. (For more information on recitals, see below.)

Recital 158 of the GDPR reads:

"Where personal data are processed for archiving purposes, this Regulation should also apply to that processing, bearing in mind that this Regulation should not apply to deceased persons. Public authorities or public or private bodies that hold records of public interest should be services which, pursuant to Union or Member State law, have a legal obligation to acquire, preserve, appraise, arrange, describe, communicate, promote, disseminate and provide access to records of enduring value for general public interest. Member States should also be authorized to provide that personal data may be further processed for archiving purposes, for example with a view to providing specific information related to the political behavior under former totalitarian state regimes, genocide, crimes against humanity, in particular the Holocaust, or war crimes."

Although the introduction of Recital 158 played a significant role in ensuring that the GDPR would not inadvertently threaten Holocaust research, the recital alone has not been enough to ensure full and open access in the EU. To secure open access to Holocaust collections, Recital 158 now needs to be reflected in the GDPR implementation legislation of EU member states.

What is a recital and what role do recitals play in the GDPR?

The GDPR is made up of 99 articles and 173 recitals. The recitals are found at the beginning of the document and provide context to help facilitate the interpretation of the legal requirements outlined in the articles of the GDPR.
Recital 158, for example, provides context and helps interpret Article 89 on “Safeguards and derogations relating to processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes.”
The recital helps make clear that EU Member States can allow for personal data to be further processed for archiving purposes “related to the political behavior under former totalitarian state regimes, genocide, crimes against humanity, in particular the Holocaust, or war crimes.”

Who should I contact to understand how the GDPR is implemented in my country?

Implementing the GDPR as it pertains to archives and historical research requires cooperation between the relevant heads of public and private archives, and relevant policymakers as well as ministries dealing with education, culture, and research policy. The national Data Protection Authorities (DPA) are in charge of supervising and enforcing the GDPR.
Find the contact information for your Data Protection Authority (DPA) through the European Data Protection Board (EDPB).
DPAs may oversee multiple archives, or even multiple sectors. One of the tasks of the EDPB is to issue guidelines that clarify how the GDPR applies in specific sectors. The guidelines can be found here: https://edpb.europa.eu/our-work-tools/general-guidance/guidelines-recommendations-best-practices_en

Individual archivists, who represent those closest to the collections by sorting, documenting, and preserving materials, as well as researchers (not limited to scholars, students, and academics, but including jurists, journalists, genealogists, and interested members of the public) also have a role to play. They must be made aware of how the GDPR regulates archival research and supports archives in enforcing fundamental rights.

What are some of the other legal factors that impact archival access in the EU?

Archival access is impacted by many factors:

- Each Member State can take advantage of the opportunity to implement **facultative specification clauses** to a greater or lesser extent. These allow Member States to further specify the application of the GDPR in a limited number of areas – like scientific or historical research purposes, or statistical purposes.

- When personal data are processed for scientific or historical research purposes, or statistical purposes, or archiving purposes in the public interest,[2] Member States can restrict the rights of individuals to **object** to[3] or to request the **restriction** of[4] the processing of their personal data. Some national legislation explicitly includes exemptions to these rights in order to balance them with the archiving purposes in the public interest. Some also provide guidance to archives on how to strike this balance. However, not all do, and national legislation cannot cover all eventualities. Archivists must often make such decisions on a case-by-case basis. This balance may be affected by a country's **Freedom of Information** legislation.

- **Closure periods** for documents containing certain sensitive personal information also play a role, although the GDPR does not define specific closure periods. Closure periods therefore vary from country to country depending on the type of information included and can be, for example, as long as 100 years after the death of an individual. The GDPR instead provides for the general principle of "**storage limitation**" enshrined in Article 5(1)(e) GDPR according to which "personal data may be stored for longer periods insofar as the personal data will be processed solely for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) subject to implementation of the appropriate technical and organizational measures required by this Regulation in order to safeguard the rights and freedoms of the data subject."
- **National archival legislation** may not have been updated to reflect the GDPR and the derogations it allows under Article 89 (2), (3) and (4) GDPR.

[2] Article 89 (2), (3) and (4).

[3] Article 21 GDPR.

[4] Article 18 GDPR.

How can policymakers support open access to Holocaust collections?

- Review your country's data protection laws.
  - How does your country implement the specification clauses of the GDPR?
  - Does your national legislation take advantage of opportunities to provide derogations related to data subject rights for the processing of personal data for historical research (Article 89)?
  - Does your national legislation allow for further processing of data for archiving purposes related to the political behavior under former totalitarian state regimes, genocide, crimes against humanity, in particular the Holocaust, or war crimes (Recital 158)?
- Review your country's laws governing archives. Do they reflect up-to-date privacy regulations?
- Identify state archives and understand their missions.
- Set up meetings with heads of archives in your country on the impact of data protection legislation on research. Discuss Article 89 and Recital 158 of the GDPR with them.
- Educate Data Protection Officers and offer training to archivists on the definition of Holocaust-related materials in line with the GDPR and Recital 158.
- Send the IHRA's Guidelines for Identifying Relevant Documentation for Holocaust Research, Education and Remembrance to your country's Data Protection Officers and heads of archives.
- Follow up on IHRA decisions pertaining to archival access.

For more information about the GDPR and guidance on data protection for archive services, please refer to the guidelines which were drafted by the European Archives Group in 2018.
They can be found online: https://commission.europa.eu/system/files/2018-10/eag_draft_guidelines_1_11_0.pdf

In case of any further questions, please contact the IHRA Permanent Office:
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