



Compatibility of GDPR & the National Archives Act, 1986

Niamh McDonnell
Senior Archivist, Current Records

IRMS & ARA,I Seminar

Royal Irish Academy

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- Background: National Archives Act, 1986, Regulations 1988.
- Obligations of Departments of State under the National Archives Act, 1986 & Regulations, 1988.
- Questions arising from introduction of GDPR.
- Implications for National Archives resources.
- Records Management & the Civil Service.
- GDPR: A force for good?
- Future Developments.
- Further information.



National Archives Act, 1986

- No legal provision for preservation of records of institutions of central government established after independence until 1986. (PRONI 1923)
- Records of Departments of State (departmental records) eligible for **transfer** to the National Archives when **30 years old** to be made available for public inspection (Section 8).
- **Departmental records include all records regardless of format “made or received, and held in the course of its business, by a Department of State”.**
- The Act applies to all government departments, all court offices, 61 bodies listed in the schedule to the Act and committees, commissions or tribunals of enquiry appointed by Government, a member of Government or by the Attorney General.
- National Archives Act, 1986 Regulations, 1988 – procedures for appointing officers within Departments, transfer, withholding of records



National Archives (Amendment) Act, 2018

- Signed into law in July 2018.
- National Archives (Amendment) Act, 2018 reduces the 30 year rule to 20 years for four departments for Anglo-Irish records only: Department of the Taoiseach, Department of Foreign Affairs, Department of Justice and Equality & Office of the Attorney General.
- To be introduced on a phased basis – 2 year transfers at a time.
- Ministers must apply to the Minister for Culture, Heritage and the Gaeltacht to transfer records less than 30 years old. Minister must agree to the request.



Obligations of Departments of State under the National Archives Act, 1986

- National Archives Act is part of a legal framework for the management of records of state – both paper and digital.
- Framework also includes DP, FOI and legislation specific to different areas of work.
- Data Protection cannot be viewed in isolation.
- NAA only applies to records over 30 years old, except for applications for disposal under section 7 of the Act.



Questions Arising: NAA & GDPR

Which takes precedence NAA or GDPR?

- **National Archives Act takes precedence over all other legislation in the archival management of Departmental records, including the destruction, retention or withholding of records.**
- This means regardless of the content of the record the procedures set out in the NAA must be followed with regard to the retention, disposal or transfer of records (Sections 7 and 8).
- Records deemed worthy of permanent preservation as archives must be retained regardless of whether they contain personal data.
- For records more than 30 years old provisions under section 8(2) & 8(4) for withholding, retention, abstraction may be used – distress to living persons.
- No disposal of any Departmental records can take place without the permission of the Director of the National Archives.



Questions Arising: NAA & GDPR

Does GDPR not state that all records containing personal data must be destroyed once their original purpose no longer exists?

- GDPR makes provision for the retention of records beyond the purpose for which the personal data was originally collected in Article 5 in a number of specific cases, including historical and scientific research and archiving purposes in the public interest for all records, regardless of whether they are State records or not.
- This is set out in Article 89 of GDPR (recitals 156-163) which allows member states to introduce derogations from rights referred to in Articles 15, 16, 18, 19, 20 and 21 for archiving purposes in the public interest in section 3.
- The Data Protection Act, 2018 introduced derogations for archiving purposes in the public interest in section 42 and archiving of special categories of data in section 54.
- Section 55 allows for the processing for archiving purposes in the public interest by a public authority of records relating to criminal convictions.



Questions Arising: NAA & GDPR

What is meant by archiving purposes in the public interest?

- No definition of ‘archiving purposes in the public interest’ in GDPR.
 - Open to interpretation and possible case law over the coming years.
 - Custom and practice – may differ in EU member states.
 - Administration of national collections by its nature is in the public interest.
- No definition of ‘warrants preservation’ in the NAA.
 - Interpretation based on professional assessment, whether records support core functions (evidential & legal), international best practice.
 - Custom and practice – legal records (Public Records (Ireland) Act, 1867).
 - Current interpretation has never been challenged.



Questions Arising: NAA & GDPR

When is retention for archiving purposes allowed?

- Article 30 of GDPR – Records of processing activities – active management of records for organisations with more than 250 employees or all organisations that process special categories of personal data – written retention/access policies.
- Article 5 of GDPR allows for retention of data ‘for longer periods’ for archiving purposes in the public interest.
 - No definition of ‘longer periods’
 - Should be based on overall records management/retention policy that takes account of legal basis and business need for retention of such data
- Departments of State should have a documented records management policy in place that demonstrates:
 - Why records were created
 - The business function they support (Statutory functions)
 - Legal basis for the creation and retention of records
 - Information they contain & security measures in place
 - Who the information is shared with



Questions Arising: NAA & GDPR

Who is legally responsible for records containing personal data?

- Departments of State remain legally responsible for all records until they are transferred to the National Archives and a certificate for the release of records to the public signed by the Certifying Officer.
- Records deemed worthy of permanent preservation as archives must be stored securely and maintained by Departments of State until their transfer to the National Archives after 30 years or permanent retention within Department (disposal certs, personnel records).
 - Securely stored – secure paper storage/restricted access to servers/databases
 - No additions to closed records or deletion/disposal of records
 - Cannot be used for any other purpose than transfer to the NA
- Any further processing of records deemed worthy of preservation may be a breach of article 5 of GDPR.
- Raises issues regarding transfer of digital records – no capacity within NA at present to accession born digital records.



Questions Arising: NAA & GDPR

How can records that do not warrant retention be disposed of?

- Section 7 of the NAA allows for the disposal of records that do not warrant preservation as archives before they are 30 years old.
- Section 7(7) stipulates that Departments of State must facilitate access by officers of the National Archives to undertake appraisal of records for which disposal is sought.
- Report prepared for Director with recommendations – disposal/retention.
 - Certificate for disposal issued – confidential disposal authorised.
 - Disposal rejected – records to be retained and transferred to NA.
- Disposal of any departmental records without authorisation by the Director is a breach of section 7.



Questions Arising: NAA & GDPR

Can Departments of State dispose of records where a request has been received under article 17 (Right to Erasure)?

- No. The Right to Erasure (Right to be Forgotten) is a qualified right in accordance with the decision of the ECJ as set out in the Google Spain determination.
- Where a request is received the Department should refer to their retention policy.
- Where a record series has been identified as warranting permanent preservation in accordance with the National Archives Act, 1986 the exemption for archiving purposes in the public interest as set out in Article 89 of GDPR will apply – possible appeal to DP Commission, case law.
- Disposal of any departmental records without authorisation by the Director is a breach of section 7 of NAA.



Questions Arising: NAA & GDPR

Are applications for disposal obligatory and will Departments be in breach of GDPR if there is a delay in processing applications for disposal?

- NAA does not place any obligation on Departments to dispose of records but failure to manage records will breach GDPR.
- Once a Department of State can demonstrate they are actively managing their records and applying for disposal of records that do not warrant preservation as archives they will not be in breach of GDPR.
- Delays inevitable due to staffing resources in NA – potential for challenge.
- Report prepared for Director with recommendations – disposal/retention.
 - Certificate for disposal issued – confidential disposal authorised.
 - Disposal rejected – records to be retained and transferred to NA.



Weaknesses of NAA: Scheduled bodies

- NAA currently lists 61 scheduled bodies – CSO, OS, VO, AGO etc.
- NAA does not apply to bodies created since 1986
 - Approximately 160 bodies listed in the current IPA Yearbook have no legal protection for their records
 - National Archives has no role in how their records are retained or disposed of.
 - No legal protection for cross-border bodies established under Good Friday Agreement.
- NAA does not apply to bodies that were named in the schedule but may have new functions – PRA – Registry of Deeds/Land Registry
 - Disposal cannot be given on an ongoing basis, only to records inherited from scheduled bodies.
- No legal mechanism for the transfer or disposal of records – appointment of Certifying Officers, regulations 1988.



Weaknesses of NAA: Records Management & the Civil Service

- NAA only applies to records over 30 (20) years old.
- National Archives is not responsible for records management within Departments of State under existing legislation:
 - Except for the management of disposal authorisations under Section 7 of NAA.
- Section 19 of NAA allows for the introduction of records management regulations by the Minister for Public Service (now DPER):
 - No regulations introduced – no standardised approach to RM, unnecessary retention, unauthorised disposal of records.
- No sanctions for non-compliance.



Departmental transfers

- High level of non-compliance with the National Archives Act, 1986.
- Backlog of files dating from the 19th Century to 1987.

2017 Transfers

Departments of State	Scheduled Bodies	Courts
6 (17)	2 (61)	0 (All levels)

2016 Transfers

Departments of State	Scheduled Bodies	Courts
7 (17)	6 (61)	0 (All levels)



GDPR as a tool for good

- GDPR has increased the profile & importance of records management & archives in Departments of State.
- Departments of State have begun to recognise their legal obligations as a result of potential risk posed by fines/retention of personal data.
 - Data audits of both paper and born digital records
 - Recognition of dependence on commercial storage for records that should not be retained or should be transferred to NA.
- Transparency & accountability (audit trail upon which disposal/retention of records is based – very significant for GDPR compliance – Article 30).
- Compliance with the NAA is crucial for auditing under GDPR and justification for the retention of records beyond business needs.



GDPR as a tool for good

- Increased number of queries to NA in the absence of RM procedures within the Civil Service:
 - Retention periods
 - Filing practices – Is it necessary to review what documents are requested/filed – formal policy
 - Transfer of records (Transfer training provided by NA)
 - Disposal authorisation (Increase in requests)
 - Scheduled bodies created pre/post-1986: legal issues re application of NAA & legal protection for records (Requests for inclusion in schedule through Statutory Instrument mechanism)
- Preparation of backlogs for transfer to NA over the coming years.
- Development of Information Management units – coordinated/standardised approach to disposal/transfer.



Parliamentary Questions

Private storage of government files cost €9m in past three years

TD calls for review of fragmented system to create more effective model

🕒 Tue, Jan 24, 2017, 16:40

Updated: Tue, Jan 24, 2017, 16:41

State spent €26m on storing files in the past three years

Catherine Murphy calls on Government to hire archivists to cut long-term storage costs

🕒 Mon, Feb 6, 2017, 01:00



National Archives: Our own compliance

- Data audit of business records underway – Corporate Services.
- Development of retention policy for business records.
- Coordination with CNCI on retention of similar records – reader data, document tracking – review of existing system.
- Documenting existing access policies for restricted collections: hospital collections, consular files, family law cases.
- Appointment of a Certifying Officer for the National Archives – disposal.



Future Developments

Public Service Records Management Plan

- 3 year project funded by DPER – Office of the Government Chief Information Officer – managed by National Archives.
- Attempt to standardise approach to records management across the Civil Service for both paper & digital records – reduce money spent on commercial storage, data storage.
- RFT issued in June – no capacity within NA to undertake a project of this scale. Project to begin in Autumn 2018.
- Project to develop classification schemes, expanded retention and disposal schedules, compliance frameworks for digital records management, training, e-Archive.
- Steering group to oversee implementation across the Civil Service.



Archive Repository Project

- Purpose built archive on site of NA warehouse.
- Warehouse cleared November 2018.
- Site investigation early 2019.
- Building commenced Autumn 2019.
- New repository ready 2022 – capacity for c350,000 archival boxes.



Useful Sources

Guidance note on NA website:

http://www.nationalarchives.ie/wp-content/uploads/2018/05/20180319GDPRNAA_GuidanceNote_3.pdf

Guide to Archiving Personal Data: National Archives (UK)

<http://www.nationalarchives.gov.uk/documents/information-management/guide-for-public-comment.pdf>

<http://www.nationalarchives.gov.uk/archives-sector/advice-and-guidance/managing-your-collection/archives-data-protection-law-uk/>

Upcoming:

European Archives Group – Guidelines for archiving personal data (Autumn 2018)

ARA – Code of Conduct (Autumn 2018)



Contact details

nmcdonnell@nationalarchives.ie

Tel: 01-4072349

Archives & Government Services
National Archives
Bishop Street
Dublin D08 DF85



@NARIreland



Thank you for your attention