Digital records management in public administration

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1. Introduction and background

No matter what kind of legal system, embedded principles are important and commonly worthwhile to investigate. One major issue has to do with normative components and functional features.[1] We find those kinds of principles everywhere in the legal domain: in constitutional law, international legislation, national rules and regulations, decided cases, contracts, etc. Because of the vast amount of data that will be targeted in the study, delimitations are necessary. Here this task is considered by way of a specifying description of privacy protection in the context of personal data processing on the one hand, and the Swedish principle of openness on the other. The overall perspective is furthermore the impact of archives from an organisational point of view and the associated legal implications.

As already mentioned, this contribution is about principles emanating primarily from the Swedish legal system in a digital setting.[2] This might appear quite demanding given the available timespan for this book project, and even tedious given the long historical tradition of jurisdictional analysis in the legal research discipline. Nevertheless, there is much to say in order to truly mirror our comprehensive diversified reality as it comes out in modern society. Principles can in fact be seen as efficient tools for achievement of a good welfare society in which Information Communications Technology (ICT) has an important role to play.[3]

[1] An example of a functional feature could be a legal requirement to use a certain kind of digital signature.

[2] The fact that Sweden is a member state of the EU should also be mentioned.

[3] See for instance the report about Digitalisation in the Welfare State by the Royal Swedish Academy of Engineering Sciences (IVA). Digitalisering i välfärden – dagsläge och framtid Rapport från IVAs projekt Digitalisering – möjliggörare i framtidens välfärd Stockholm: IVA Kungl. Ingenjörsvetenskapsakademien Stockholm 2022.

The normative legal status of a principle may, however, vary a lot. For instance, in terms of being binding or not binding, or having a character as technically neutral or technically specific, etc. Here focus will, as already could be noticed, in particular be on the interplay of the Swedish principle of openness as laid down in the Freedom of the Press Act from 1766 concerning official documents that can be either public or secret or partly in either category. The legislative starting point in this anthology is, however, transparency. The next step to illuminate is how this legislation will serve as a bridge to data regulation and vice versa. In search for an answer, the secrecy (and confidentiality)[4] regulation will of course also apply.[5]

We have so far touched upon two major principles of relevance for citizens and other parties in society. In a broad sense it has to do with privacy and openness. This labelling and differentiation can be drawn from the current legal landscape. That is where these action-oriented concepts may play a central role. Under certain conditions they will require compliance in a formal sense. All in all, this reasoning leads us to something that could be described as a kind of layered legislation.[6] To begin with, the regulations evolve in parallel with each other but thereafter intertwine within a certain area of application. More precisely, it concerns privacy protection based on personal data processing. This major track includes at a principle level also official documents that can be more or less public due to secrecy and confidentiality.

Layered legislation could in practice take place when the same regulatory object, for instance personal data, is recurrently being regulated and complied with. One example hereof is (once again) personal data rules in GDPR[7] combined with the forthcoming EU AI Act.[8] In practice it will become necessary in many situations to carry out what may be referred to as 'multi searches' in several legal sources. It might of course be argued that this is nothing new as such from a methodological point of view. But the character of the legislative environments indicates otherwise. It could very well be quite advanced and include competitive

[4] It is not quite clear how to separate – if at all possible – the terms from each other. Roughly speaking, secrecy is primarily oriented towards that kind of law in different formats here including confidentiality, which is commonly used in business life, etc.

[5] See also Chapter 21 Provision 7 in the Security Act (2009:400) regulating confidential personal data processing.

[6] Expressed in another way we might be able to let the ICT-regulatory development work regardless of its initial shortcomings and lack of impact sector wise in the welfare state, and instead act when so necessary, in society on the whole.

[7] GDPR stands for General Data Protection Regulation (EU) 2016/679.

[8] Proposal for a regulation of the European Parliament and of the council laying down harmonised rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain Union Legislative Acts com/2021/206 final.

sources that need to be taken into consideration.[9] For instance, how does one EU regulation about certain software stand in comparison with another one if the topic area is similar or even identical (compared with applied software, the notion of integrity,[10, 11] etc.). From the above, it follows that a major challenge with layered legislation is its complexity (difficulty) and complicated character (many entities).

Based on the outline so far, the structure of the current study is as follows: first there is a bit more to comment upon as an introduction and background. Then some reasoning at a principle level will follow. The regulatory framework is a next step, and so are a few cases that will be referred to. Quite naturally concluding remarks will wrap it all up prior to a list of references and suggested reading. If we narrow down the perspective a bit, more issues will be possible to comment upon. This is similar to saying that there are both advantages and disadvantages associated with layered regulation. There is no single track of right or wrong, but rather a maze of possibilities, not least when national legislation is not good enough from an efficiency point of view.[12]

2. Regulatory framework

2.1 Privacy in the archives

Archives can be seen as a red thread throughout this study, and at the same time constitute a basis for privacy protection. The regulatory framework surrounding privacy is nothing but huge.[13] This gives rise to a need for an on-going document[14] management strategy in order to

[9] See further Juridisk informationssökning i digitala miljöer In: Finna rätt: Juristens källmaterial och arbetsmetoder. 17th edition. Stockholm: Norstedts Juridik, 2023 (co-authored).

[10] Bear in mind that integrity is not equivalent to privacy. Integrity has instead to do with your behaviour as a good and likeable person, etc. The notion of privacy is discussed elsewhere.

[11] This is the case when the same regulatory object is found in equally regulatory sources. From a European point of view, the EU is of course a driving force for this kind of regulatory management (see title of this study).

[12] In addition to the anniversary of data protection it is worthwhile mentioning that a Working Party for EDP and Law was established already in 1968 (ADBJ) at Stockholm University in Sweden.

[13] It is quite common to reflect upon the size of a data volume associated with the design of a certain digital application. Often it is argued that there is too little regulation in order to state what the law says. In practice though it could very well be the opposite. What could be found is that there are too many rules and regulations to take into consideration. The discussion about layered legislation is one example of when the law makers issue regulation about the same object, and even normative level (embracing constitutional law down to local commands and guidelines). It should once again be emphasised that there is not a complete picture that the reader is provided with here but rather an illustration.

[14] When possible we will use the terms 'document' and 'records' as synonyms (not as homonyms though).

cope with the variety of tasks that need to be taken care of on a daily basis. The processed data must be fresh or at least updated, etc. If neglected, it will be impossible to have an archive of good standards covering both yesterday, at present and future oriented. (Paper based archives must of course also be taken care of although they are not in focus here.) An attempt could be to establish at least some kinds of digital boundaries or fences. The overall purpose would be assessments in Europe and the jurisdiction of European Law as well as European Union legislation (EU).[15] An attempt could furthermore be based on geographical space, however unclear for what good in practice. A challenge is that today's infrastructures are commonly physical ones rather than soft ones. A consequence is therefore that searching for boundaries is not always that fruitful (could very well be the opposite). So far we have noted that there nevertheless is a need for support for records management. Today's modern information society will probably accept what we above refer to as 'layered legislation' and its advanced interpretations and applications in mind. A positive fact is sharing awareness of legislative developments on the whole – a holistic approach that is. Adding to the picture is awareness of the existent layered legislation as such.

How then to relate to the term privacy when there is no associated precision globally available – or maybe it is not even meaningful to come up with a description at all evolving into a quasi-definition?[16] Critical factors and observations in such an approach are at least the following ones: some say that privacy relates to a certain sphere in which individuals have a right to be let alone. Others emphasise different social infrastructures,[17] for example private life or working life. Yet another distinction can be made with regard to whether data can be deemed sensitive or non-sensitive, such as health data. The situation varies of course sector wise. The important point to be made, however, is that if an area of society needs clarifications of what the law says in terms of legislation and decided court cases, there are many different sources. A beginner of legal interpretation might take for granted that it will be sufficient to interpret merely one singular source when reading the law and conclude that it might not be sufficient. Instead, there is a need to analyse a number of governing documents addressing the very same phenomenon or action. And the point is that we can extract a number of

[15] There is much ongoing research addressing territorial issues (including extraterritorial ones).
[16] The expression 'quasi definition' here refers to a stipulative one (i.e. only valid for a short period of time in a given context.
[17] An observation to be made is that existing as well as new infrastructures do not work sufficiently well but need some kind of push when being established in our society. Superstructures may have such potential.

governing documents which in practice will be an extensive homework for the party in question, and this is the context for what we here refer to as 'layer legislation': many pieces of legislation, different hierarchical normative levels and a common regulatory object. It is not a dramatic development of running the digital society but still there to be observed.

Another observation is when there is a need for the data subjects to have enough data saved in order to claim their rights. Yet another aspect has to do with the fact that privacy commonly promotes deletion of personal data during personal data processing of different kinds. On the other hand, archival system represents the opposite viewpoint. In the general debate in society, it has been argued that empty archives instead will decrease the possibility of the data subjects to claim their rights.[18]

2.2 What is an official document

In Sweden we have, as already mentioned, a principle of openness dating far back in time historically. Considering the restricted area available, merely the most important aspects will be mentioned. The right is broad and available for anyone. One part of this regulation concerns a right of access to official documents that are wholly or partly public. For an official document to be public it must be kept by a public agency and either received or drawn up. The document, or rather recording, could be either paper based or electronic, of which there are two kinds: one is a so-called completed recording, and the other one compiled data by means of routine measures (see further below).[19]

To get the context right we will continue by briefly revisiting the notion of archives as a core component in the modern information society, although not yet in an updated digital design and function. The history of archives in our society can be made both long and short. The most adequate assessment is probably that of a modern combination of infrastructures together with a suprastructure. To further illustrate, this

[18] Historically much discussion has been directed towards a so-called lawless internet, but in fact experience rather shows that there have been too many rules and regulations for an end-user to adhere to. Not least the EU has been a leverage for this development. Another reflection is that there is no way to restart public agencies as a figure in Swedish public administration. We match the archives we deserve given the regulatory setting. In other words, system design, development, implementation, and management are critical success factors. Likewise, this calls for skills among staff and collaborators to work within a digital framework. Adding to the picture is the rule of law (sometimes referred to in terms of past, modern and post) and how it can have an impact on various workplaces, coming both from a technical and legal background. Algorithms seem also to be a decisive tool in this context.

[19] To exemplify, a completed recording could be a report or e-mail message, while a compilation could be the result of a number of record linkages.

could apply during a design process of an app for health data management together with one or several applications of specific patient data. The thread of different kinds of infrastructures seems to be rewarding. Considering the incremental character of system design there is no doubt that archives generally speaking have a heavy impact on the life of people. Not so much that every action during a person's life cycle is monitored and surveyed, but not that far away either.

A common saying is that "Big brother" is watching you 'from the crib to the grave'. This is a signal of developments valid also in today's public sector environment. A next step is namely understanding the regulatory framework of, in particular, privacy and archives. Archives will also be a proof of these kinds of reflections. It may result in a situation where digitalisation works as a trigger towards a clash between openness by way of keeping all data including related documentation on the one hand or getting rid of all data and documents on the other. Arguably the Swedish legal system does not seem to be better prepared for this sorting of rights and duties than any other similar legal system – the cultural heritage of the principle of openness still being valid. Expressed in another way, the regulatory framework consists of constitutional rules supplemented by secrecy legislation that in its turn is augmented via archives' subject matters. And then the cultural dilemma appears in connection with personal data processing aiming for privacy.

2.3 What is an archival document?

A brief answer to the question in the heading above is that an archival document is an official document of relevance to activities of a certain public agency. This means that there is no formal definition of an archival document. Before going into more detail into the profile of an archival document in Sweden, it is necessary to share a few principles laid down in the current legislation. The text has previously been translated into English by the public agency, Riksarkivet.

The Archives Act (1990:782) contains general provisions concerning public archiving. The key provisions are those regulating the purpose of archiving. In accordance with the Archives Act, the archives of public authorities shall be preserved in order to:

- safeguard the right of the public to access official documents.
- meet the need for information for public administration and the administration of justice.
- meet the needs of research.

The Archives Act also states that archives are part of Sweden's shared cultural heritage (see below).

Because a public agency merely has a duty to save documents that can be defined as official, there is not least a practical need to draw some lines as to what constitutes what. There has to be a document or recording as a basis. It could be drawn up internally or received externally. Such a recording must furthermore be kept by the agency. This requirement could be fulfilled by physical means (paper) or electronically (via digital network). The time factor now becomes important as there are no time specifications when archiving should take place (immediately) or later on. This data management concerns both registration and documentation of different kinds.

Under certain circumstances a distinction must also be made between so-called fixed (finalised or completed) documents and compilation(s). There are no special rules applicable to, for instance, e-mail messages, reported court cases, etc. But that is not the condition with regards to compilations. An agency is only obliged to create official documents in the format of a compilation if that can be accomplished by so-called routine measures.[20] This could be the situation when there is no need for more than a simple work task, taking quite some time however, but still with limited costs. Finally, a major issue emerges and that concerns whether any of the data contains secret data.

In conclusion, there exist no archival documents as such. Consequently, there is no point in searching for a legal definition. However, it is the official documents that constitute the archive of a public agency, and that information is expected to be kept forever. As a matter of fact it is not only official documents to be taken care of but also documents that[21] do not qualify as official. Documents that are not taken care of are in command of the public agency, but it is rather the official documents that give rise to quite complicated assessments. In order to get rid of – (unlearn) – such an entity there has to be some legal support – decision or regulation. A more simplistic erasure is not good enough. Actually it is a challenge to truly delete or erase electronic documents in digital environments.

And now the problems, or at least challenges, of compliance sets off rather intensely. The archival legislation reads 'yes', save the documents, whereas the data protection legislation reads remove the documents with reference to privacy. We need to have a somewhat closer look at the regulatory framework by way of scrutinising governing rules

[20] See HFD 2015 ref. 25 (Swedish Supreme Administrative Court)

[21] Lately it has in the general debate become common to translate the terms 'delete' and 'erasure' under the notion of 'unlearn'.

with our specific perspective. Have we now mitigated the risk for incorrect personal data processing? The answer would be, 'yes', to a great extent but not completely as we will see through a set of decided cases and other decisions.

3. How data protection and openness intertwine

A common reflection when working professionally with current digital data protection or records management on a long-term basis is what legislation comes first? From a national point of view, it concerns GDPR vs. TF or the other way around (Freedom of the Press Act first, Chapter 2, TF). The answer is, however, that the question is not possible to answer in terms of black or white. This is exactly why the term 'intertwine' is used here.

With regard to privacy, GDPR will be in focus[22], while TF will be the objective for transparency. More precisely, Article. 5 GDPR contains the major principles relating to processing of personal data according to the regulation. Requirements comprise the following: lawfulness, fairness and transparency; purpose limitation; data minimisation; accuracy; storage limitations; integrity and confidentiality; and, finally, accountability.

One by one, each principle adds up to a mix of data protection values that continuously needs attention. Of particular interest are a few lines in Article. 5(c) about how personal data shall be kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed.

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 organisational measures required by this Regulation in order to safeguard the rights and freedoms of the data subject ('storage limitation'); (Discussion to be continued below.)

One minor part of this study is designated a sample of decided cases and other assessments. The underlying reason is to broaden the views of the legal framework. As a matter of fact the interplay of privacy and openness is rather seldom discussed among the general public

[22] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)

as well as among professionals. It is, furthermore, relatively rare that public administration and, for example, (higher) education investigates into problem solving of this kind. The sample of decisions has, in other words, been selected and presented rather broadly. The overall purpose has been to provide the reader with a shortcut into legal investigations of different kinds. For teaching and training the demand for material of this kind has proven to be rather strong.[23] The selection of decisions is rather topical but of course not all inclusive. For the purpose of efficient recall and precision there must be more efforts, not least with regard to coverage of legal issues in the selected material. (A few references have been tagged within brackets, and in Swedish to facilitate the reader.)

See list number one below – decisions

RÅ 1999 ref 36[24] Supreme Administrative Court finds it necessary to apply an explicit action for an official document to be deemed taken care of (omhändertagande för arkivering)

HFD 2015 ref 45[25] The legal status of a backup copy does not change as a result or erasure of the original underlying document even if the erasure was erroneous (säkerhetskopiors rättsliga status)

HFD 2015 ref 71 About lack of a right to complain National Archives' (the agency) decision to reject a request to erase official documents and also about data protection legislation (gallring av arkivhandlingar)

HFD 2018 ref 8 The fact that a document does not fall into the principle of openness does not exclude it from being a search tool in a quest for official documents. (registreringsplikt)

JO 2016-01-05, Dnr 7041-2013 The Parliamentary Ombudsmen appointed by the Swedish Riksdag (parliament) About erasure and the legal status of video recordings

JO 2021-05-20, Dnr 5698-2019 About erasure of official documents from the E-archive of Stockholm without legal support

JO 2022-10-10, Dnr 486-2022 About slow case handling including record keeping

[23] See further the collection compiled by Katarina Fast Lappalainen and Cecilia Magnusson Sjöberg, Stockholm: Norstedts Juridik, 2023.
[24] Final instance for matters brought before the administrative courts.
[25] Final instance for matters brought before the administrative courts.

See list number two below – comparison

As a follow up, a brief overlook of some of the provisions in GDPR in relation to the Swedish Archives Act (1990:782) and how the provisions read.

The Swedish Archives Act contains general provisions concerning public archiving. The key provisions are those regulating the purpose of archiving. In accordance with the Archives Act, the archives of public authorities shall be preserved in order to:

- safeguard the right of the public to access official documents;
- meet the need for information for public administration and the administration of justice;
- meet the needs of research.

The Archives Act also states that archives are part of Sweden's shared cultural heritage.[26]
Adjustment of the archiving functionalities
Based upon archival purposes of a general interest
(*Provision* 1, *Archive Act*)

According to Provision 3 in the Archives Act, an archive in the public sector is based upon the official documents that are associated with activities of a certain public agency. So while public documents do not require a connection (linkage), archival documents do.
(*Provision* 3, *Archive Act*)

Data protection principles relating to processing of personal data
Purpose limitation – Causes no limitation
Further processing – Causes no limitation
Data minimisation – Causes no limitation
Long time storage – Causes no limitation
(*Article* 5, *GDPR*)

Lawfulness of processing
Legitimate interest
(*Article* 6, *GDPR*)

Sensitive personal data
Adequate security measures
Sensitive personal data may be processed with reference to Article 9.2 J GDPR for the purpose of archiving that which is of general interest
(*Article* 9, *GDPR*)

[26] The English text has been translated by the National Archives in Sweden.

Sensitive personal data may be processed for the purpose of archiving that which is of general interest
(*Article 9.2 J GDPR*)

Rights on behalf of the data subjects are primarily oriented towards information duties on behalf of the controller.
Special rules for archive agencies
(*Article 14.5 b, GDPR*)

Simplifications if easier text
Archiving purposes in the public interest
(*Article 15, GDPR*)

Safeguards and derogations relating to processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes
(*Artikel 89.1, GDPR*)

The listing above should be read with care. It would of course be a mistake to indicate that it is possible to categorise provisions in the above manner. The scope of application is much more fuzzy in reality and calls for many more considerations. It can, in any case, be said to be an exercise in order to grasp today's layered legislation.

4. Concluding remarks

Finally we are at the end of this short legal trip. It can metaphorically speaking be described as a speedy fly over of the Swedish digital landscape of records management, addressing both the public and the private sector of society. The here presented concluding remarks are based on a theoretical platform (Law & Informatics) and practical experiences. With regard to regulation in the digital society we can observe the following paradigm shift: ICT adjusted legislation is no more preferably technically neutral, e.g. GDPR, but could very well be (a) technically specific, e.g. the proposal for an AI Act. This reflects the fact that if personal data is removed from a certain app, data base, etc. it makes it difficult, if at all possible, for the data subject to (b) claim his or her rights on behalf of the data controller with the evidence gone, so to speak. Yet another shift of attention emanates from the area of (c) language technologies and research that wish for (d) good information retrieval, precession, and coverage. However, AI makes it possible to find literally everything which used to be a research result, which is no longer the case.

It all boils down to a quest for tech specifications, law as a conceptual model, and consequences of so-called layered legislation. This implies the existence of not only hard and soft infrastructures, but also a wide variety of infrastructural components that could be affected by digitalization. Another way to describe this development is to introduce the notion of suprastructure into the discourse. This expression can simply be explained in terms of a suprastructure's consisting of several infrastructures. The overall purpose with this label is to capture the situation that the already existing understanding of legal infrastructures are not sufficient but need yet a new approach for analysis. Just to give an example, layered law is something we can find when there is merely one layer of legal rules governing personal data processing in parallel with the fully compliable legal rules and regulation directing the management of official documents. Just to illuminate, there is a concept of this kind that we need to take into consideration, namely:

> *archival compilation completed deleted document erased official document openness personal integrity privacy public secret source document transparency*

See list number three below – conclusions

Furthermore, the somewhat fragmented representation of the result may be structured in the following way:

(a) Major conclusion:
Technical neutral legislation is becoming obsolete
For example:
The proposal for an AI Act (Artificial Intelligence)

(b) Major conclusion:
Layered legislation[27] brings about double regulation
For example:
Regulation of personal data processing

[27] See further:
- Types of EU law (europa.eu)
commission.europa.eu/law/law-making-process/types-eu-law_en
- Some information within the area of taxation can also be drawn from
Layered_legislation_Jan17.pdf (publishing.service.gov.uk)

Issues of layered legislation can probably be relevant for deepened future research. A metaphor of peeling an onion might be just one of many starting points.

(c) Major conclusion:
Archives are not sufficiently represented in the digital ECO-system of modern administration
For example:
Teaching activities need to be evaluated

At this stage of the presentation there is a quest for more law addressing legal implications of personal data processing in archives. It applies in particular to the public sector of society when it comes to (very) large volumes of official data. Privacy in archives requires no doubt legal awareness proactively. Just to exemplify, the kinds of concerns have to do with how to differentiate between deletion and erasure in digital environments, how to design digital document management systems that allow for separation of secret and confidential data? Etc. It concerns more precisely the interplay between AI (artificial intelligence), ML (machine learning) autonomous systems, mathematics, statistics, language technologies and so forth, emanating into autonomous systems. Then, but only then might AI offer a potential to become a haven for AI by way of ICT governance covering primarily vagueness, ambiguities, and coverage. Evaluation is of course also important which could be built mainly upon recall and precision. Noteworthy is the fact that Archive Law and ICT Law to a large extent are separated both academically and in practice (primarily commercially).

From a teacher in so-called higher education, it is quite surprising that there has been relatively little attention paid to the interplay of the two disciplines: Law and Archives. There is much to explore both expectedly and surprisingly. Digitalisation could no doubt be a driving force in modernisation. Personally, I would say that at least the Swedish law maker has been skilled by way of not providing a much sought after answer to the simplified question of "what comes first" when comparing GDPR with the Freedom of the Press Act. Instead the answer shows that it is possible to keep both solutions. That is similar to saying that GDPR is present and so are the Swedish rules and regulations within the framework of the national legislation.

This brief written work provides no more than a glimpse of Swedish records' management. Nevertheless, it has shown that there are quite a few areas that would benefit from an inquiry into digital archives in public administration. In future research, it appears especially important to, for instance, clarify some fundamental issues almost of a philosophical kind concerning how to practically and legally destroy/save information that was meant to be kept forever. In terms of legal frameworks

that could undergo some kind of legal screening, freedom of expression is definitely standing in line virtually.

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