



AUSTRALIAN SOCIETY OF ARCHIVISTS 2013 CONFERENCE

Legislation – Archival Legal Frameworks for the Digital Future

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Recordkeeping definitions in legislation: a conceptual step towards smoothing business interaction in the digitally networked world?

Every country has its own legislation system which has been adjusted over time in correlation to national context and its surrounding society (Duranti, 1989-1990, p. 5). Duranti and Goh (2012) provided sound arguments as to why it is important to ensure national archival legislation keeps pace with our digitally networked society with its increasingly blurred borders.

In addition to their own national law, members of the European Union (EU) are obliged to follow EU legislation requirements. There are three types of EU legislation: regulations, directives and decisions. A regulation is applicable in all EU countries. Directives are general rules. A decision is a stipulation of issues of concern for specifically mentioned persons or organisations (European Commission, 2013). Recommendations and statements are not binding, but may, for example, be used by the EU as support in interpretation of EU legislation (Sveriges Riksdag, 2013). Hence, within public organisations, there is a close relation between records, recordkeeping processes, legislation and accountability.

Yet research in Sweden has shown that 24/7 e-service web-interfaces serving e-government strategies and ambitions are sometimes developed without consulting recordkeeping professionals, in ignorance of legal requirements for capture of records, and that preservation issues are rarely considered when acquiring new digital systems (Kallberg, Svärd and Sundberg, 2010). Several other European studies also identify a lack of recordkeeping awareness within public organisations (Barata, 2004; Valtonen, 2007; Shepherd, Stevenson & Flinn, 2009; Riksarkivet, 2010). However, there is currently a strong European political ambition to implement e-government services which aim to promote cross-border business development. On the other hand, this challenges archival thinking to meet business, technological and legal requirements stipulated for each country. Varying legal definitions used can cause major problems for transactions both within a country and across national borders, even in something as seemingly simple as exchanging e-invoices.

Trustworthiness of organisations is dependent not only upon the holistic planning and management of information systems and services, but also upon the maturity and extent of the national legal framework within countries. Furthermore, international harmonisation of legislation is increasingly important because both government agencies and private business these days work across international borders. In the case of government departments, they work with their counterparts in other countries, for example with taxation and pension requirements and payments for citizens living or working in other countries. The movement to use of cloud services means that software and storage services can emanate from or be placed anywhere and change frequently, raising complex legal issues.

Nor is the situation straightforward within national boundaries. There are many laws that require records to be kept, but they may have definitions that are not consistent and are sometimes even conflicting, because the laws have been developed at different times, for varying purposes, or

there is a lack of standardised definitions in the national legislative environment, or both. Thus there is a need to work towards review and harmonisation within national boundaries.

Archivists have not been widely successful in promoting their expertise outside their own professional circles and their expertise is often not acknowledged or understood by other professions. Thus there may well be ignorance of legal requirements for recordkeeping by other professionals (eg managers, IT consultants, information architects or enterprise systems architects, etc) involved in developing e-government or e-business services, and professional recordkeepers may not be consulted when requests for proposals (RFPs) are written and new systems are planned. We need to make a real effort to develop strategies for reaching out to, collaborating with, and educating colleagues in these professions. This is not a new observation. However, without such an effort on our part, there is potential for a never-ending succession of legacy systems containing records that cannot be migrated, because they do not meet recordkeeping standards, or even legislative requirements.

It is increasingly apparent that the archival community needs to consider the extent of the authority of legislative requirements and standards beyond national boundaries. For example, auditing authority and strategies are needed to evaluate and ensure compliance with national and international legislation, standards and requirements and also for certification of repositories as trustworthy according to international standards. There is also a need to establish international watchdogs for access protection and rights and to enter into debate towards defining and safeguarding these rights. Although the International Council on Archives' Principles of Access to Archives is a step in the right direction, there is concern in some Scandinavian quarters that it is too weak. Because the principles are not as strong as current legislative requirements for public access in Scandinavian countries, they could, in a worst case scenario, be used to place limitations on those rights. Although there are no known moves to do so, it is important to be aware of unintended consequences when developing international standards and legislation.

Sweden as an example

Swedish archival law builds on the Freedom of the Press Act (1766; 1949), one of four fundamental constitutional laws. The Freedom of the Press Act focuses on public access to government documents, requiring public accessibility from the time of creation or receipt of a 'public document'. The Archives Act defines what should be archived, defining the archive of an organisation as the whole of the 'public documents' of an organisation. Although the definition is format neutral, it needs updating to meet the needs of modern e-governance. There is also room for misconstruing the meaning of 'documents'. For example, records created in databases are sometimes overlooked.

Riksarkivet, the Swedish National Archives (RA), is the archival agency for the governmental agencies and can regulate information administration and archiving via regulations. Local government in the form of the municipalities do not come under RA authority: each is their own 'archival authority'. However, they usually follow the RA regulations and guidelines, but according to the expertise and resources available. Resources in particular can be problematic for small municipalities. Riksarkivet authority over senior ministerial offices is also limited to some extent.

Differing terminology and concepts

There are two major problems with terminology and concepts in legislation that this presentation highlights:

1. It is always behind the technology, and there is, of course, no solution to this.
2. It is not international. It is limited by jurisdictional boundaries, and these may coincide with linguistic boundaries, or linguistic variations. Furthermore, definitions that have developed within national boundaries differ, even within languages or language variants.

Some languages, including the Scandinavian languages, don't have a word that directly translates the word 'record'. It is sometimes translated in Swedish (although this is now controversial) as 'document' and as noted above, it can be misinterpreted. Instead, Swedish terminology includes 'Handling' or 'Ärende': a case file, closer in meaning to the term 'aggregation' in *MoReq10*, but related to the legal concept of an action. However, it is important to note that this 'case file' should not be equated with the ISO definition of a record.

ICA SAE Multilingual Archival Terminology

The ICA Section for Archival Educators and Trainers (ICA SAE) in a joint project with InterPARES has developed a tool to support archivists, records managers and information managers in the use of records-related terms, from the traditional ones to those related to the preservation of authentic records in digital systems. ICA SAE proposed the project, led by Luciana Duranti, to the ICA Programme Commission (ICA PCOM) in 2010. ICA PCOM redirected the project to the ICA Management Commission for funding, since ICA has long held an interest in developing a multilingual terminology tool and had already set aside some funds for this purpose.

In the initial stage of the project, the research team (composed of the ICA SAE members) chose 300 core archival concepts and identified the corresponding terms in English-speaking countries. This exercise produced 320 English terms. Afterwards, a team composed of archival students at the master's and doctoral level and professional and academic supervisors identified the definitions for the English terms as used in several English-speaking countries, and the corresponding terms and definitions, where they exist, in fifteen other languages. In March 2012, the project was completed and delivered to the ICA for publication and interactive use on the Internet. From 1 August 2013 it is available as a reference tool for professional archivists and researchers as *ICA Multilingual Archival Terminology* at:

<http://icarchives.webbler.co.uk/14282/ica-multilingual-archival-terminology/ica-multilingual-archival-terminology.html>.

The languages now available are: Catalan, Chinese, Dutch, English, Finnish, French, German, Greek, Italian, Japanese, Polish, Portuguese, Punjabi, Russian, Spanish and Swedish. Croatian will soon be added. After InterPARES has added interactive functionalities, the *ICA Multilingual Archival Terminology* will offer ICA members the opportunity to add languages, terms and definitions. Definitions were drawn from standard authorities in each language or country, where such authorities existed, and from common practice and usage. Particularly important initial sources were the *ICA Dictionary on Archival Terminology*, coordinated and edited by Angelika Menne-Haritz, which presented terms and definitions in the five official languages of ICA and *Nordiska Arkivterminologi* (Nordic Archival Terminology), which built on the ICA Dictionary for Danish, Icelandic, Finnish, Norwegian and Swedish. Citations in *ICA Multilingual Archival Terminology* identify the source of each definition. The definitions are presented in the order in which they have been entered—not in authoritative order. There is no hierarchy or implied endorsement in the position of each definition in the list.

It must be stressed that this is a tool, not a solution. *ICA Multilingual Archival Terminology* will not solve this problem by itself: it is *not* a static, authoritative resource that preferences one definition over another. It is designed on the same principles as the *Oxford English Dictionary* aiming to document usage and definitions found in the literature. It provides the necessary basis for comparison, both within and across languages. In time, it should be possible to see how usage develops and possibly changes the accepted understanding of the meaning of terms. Stage 2, funded by InterPARES, will make it interactive, so that the professional community will be able to contribute new terms, additional quotations and definitions. As it grows, it will provide insights into differences arising from varying:

- national or regional archival traditions
- national or regional legal traditions, and
- linguistic representation of recordkeeping concepts.

So far, expressed enthusiasm for the *ICA Multilingual Archival Terminology* has been strong. If the profession continues to work with it and develop it when it becomes interactive, it should provide a conceptual step towards smoothing business interaction in the digitally networked world.

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