

# Debunking the Myths of GDPR for your Archives

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## Possible myths for archives?

Myth #1: GDPR prevents you from archiving personal data.

Myth #2: You must have a legal obligation to archive.

Myth #3: You cannot archive personal information without the data subject's consent.

Myth #4: You cannot provide research access to records containing information about living individuals.

Myth #5: Accountability provisions do not apply to small organisations.



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In general, 'archiving' which complied with the 1998 Data Protection Act will continue to be permitted under the new law. No drastic change is required.

## Data Protection Law



- General Data Protection Regulation (GDPR) (Regulation (EU) 2016/679)
- Data Protection Act 2018
- Law Enforcement Directive (Directive (EU) 2016/680)
- Brexit – European Union (Withdrawal) Act 2018

## Archives and Data Protection

- Data protection law applies to the personal information of living individuals contained in records held in an archive.
- The law applies to digital information and to information held in some manual filing systems.
- GDPR recognises that there is a public interest in permitting the permanent preservation of personal data for the long-term benefit of society.
- There is a specific provision for processing for 'archiving purposes in the public interest' which can apply to archiving by public, private or voluntary bodies.



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**Manual filing systems – where personal data are accessible according to specific criteria.**

**There is a new explicit concept of 'archiving purposes in the public interest' in the regulation rather than all archiving coming under the historical research provisions, as it did under the 1998 Act. Processing for archiving purposes in the public interest is not defined within GDPR itself although it is described in a recital. Processing data for archiving purposes must be distinguished from processing that supports daily business, as the exemption does not apply in those cases – for example, data gathered for marketing purposes. It also needs to be transparent.**

## Myth #1:

GDPR prevents you from  
archiving personal data

## Article 5 – Data Protection Principles

**(a) lawfulness, fairness and transparency**

personal data shall be processed lawfully, fairly and in a transparent manner

**(b) purpose limitation**

collected for specified, explicit and legitimate purposes; not further processed for purposes that are incompatible; **further processing for archiving purposes in the public interest, research purposes or statistical purposes allowed**

**(c) data minimisation**

adequate, relevant and limited to what is necessary

**(d) accuracy**

accurate and, where necessary, kept up to date; reasonable steps taken to rectify or erase inaccurate data without delay



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The new legislation has refreshed the language and presentation of [the Data Protection Principles](#). The main substantive differences relate to additional requirements for transparency and accountability of processing. Data subject rights and transfers outside the EEA are covered elsewhere in the Regulation Adaptations to purpose limitation and storage limitation

## Article 5 – Data Protection Principles

### (e) storage limitation

kept in a form which permits identification of data subjects for no longer than is necessary; **personal data may be stored for longer periods for archiving purposes in the public interest**, research and statistical purposes

### (f) Integrity and confidentiality

processed in a manner that ensures appropriate security, including protection against unauthorised or unlawful processing, accidental loss, destruction or damage, using appropriate technical or organisational measures

The controller must be able to demonstrate compliance with these principles



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## Archiving under GDPR

Archiving purposes includes the selection of records/data for permanent preservation.

The activities described in Recital 158 are:

- acquisition and selection
- accessioning
- storage and preservation
- arrangement and description
- provision of access for all types of research through inspection and publication



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**The provision distinguishes the activities involved in archiving from the use of the data by the public or others for research and other purposes involving freedom of expression and information in the future. This might include activities such as historical research, journalism, academic, artistic and literary purposes. (See GDPR article 85 and 89(2).)**

## Article 89(3) – Derogations for archiving

- Individuals have greater rights over their data, including the so-called ‘Right to be Forgotten’.
- Article 89(3) allows Member States to provide for derogations from the rights referred to in Articles 15, 16, 18, 19, 20 and 21
- DPA 2018 Schedule 2 Part 6 para 28 provides these exemptions
- Article 17(3) provides that right to erasure shall not apply for archiving purposes in the public interest



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Data subject rights:

**Not absolute exemptions. GDPR places greater emphasis on transparency.**

**The right to be informed for indirectly collected personal data where it would be impossible or involve disproportionate effort;**

Article 14 5(b) “the provision of such information proves impossible or would involve a disproportionate effort, in particular for processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes, subject to the conditions and safeguards referred to in [Article 89\(1\)](#) or in so far as the obligation referred to in paragraph 1 of this Article is likely to render impossible or seriously impair the achievement of the objectives of that processing. In such cases the controller shall take **appropriate measures to protect the data subject’s rights and freedoms and legitimate interests, including making the information publicly available**”

Myth #2:

You must have a  
**legal obligation**  
to archive

## Recital 158 – Processing for Archiving Purposes

“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 authorised to provide for the further processing of personal data for archiving purposes, for example with a view to providing specific information related to the political behaviour under former totalitarian state regimes, genocide, crimes against humanity, in particular the Holocaust, or war crimes.”

Recital 41 says that “where this regulation refers to a legal basis or legislative measure, this does not necessarily require a legislative act adopted by a parliament”

## Recital 158 – Processing for Archiving Purposes

- Archiving in the public interest should serve the public good and not purely for personal or corporate interest and private gain.
- This does **not** mean that only public bodies are covered by the legislation.
- The government supports the continuation of archiving by private as well as public bodies and individuals.
- Likely to apply to wide variety of community archives

## Recital 158 – Processing for Archiving Purposes

- In the UK, most archives operate on a permissive basis under the general provisions of common law or statutory permissive powers
- “Where there are no clear permissive powers, organisations may still be able to point to funding agreements, management agreements or constitutional documents which set out the purposes of the archive, particularly if the failure to adhere to such purposes could have legal or quasi-legal effects, for example for a body’s charitable status. Although this may not amount to a statutory obligation to archive, it would give organisations a legal basis upon which to rely.”  
*From Parliamentary Question reply to what is meant by the term Archiving Purposes in the Public Interest*
- The term ‘public interest’ is used in many contexts and does not have a legal definition in the UK.

## Archiving in the public interest

“There is a risk that over-cautious or inaccurate interpretation may lead to the weeding, anonymising or destruction of files containing personal data that would otherwise be passed to the archive service with managed access over time. An archive service’s ability to permanently retain personal and special categories of personal data for the purposes of archiving in the public interest should therefore be made clear internally and to potential depositors. The law contains the necessary safeguards to permit archiving.”

*The National Archives, Guide to archiving personal data*



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**From The National Archives’ Guide to Archiving Personal Data**

## Myth #3:

You cannot archive  
personal information  
without the data subject's  
consent

## Lawfulness of Processing

The lawful bases for processing are set out in Article 6 of the GDPR:

- (a) Consent
- (b) Contract
- (c) Legal obligation
- (d) Vital interests
- (e) **Public task**
- (f) **Legitimate interests**

For special category data you also need an Article 9 condition:

(j) processing is necessary for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) based on Union or Member State law which shall be proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject.



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processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.

## Myth #4:

You cannot provide  
research access  
to records containing  
information about living  
individuals

## Article 89(1) – Safeguards for archiving

- Safeguards must be met which minimise any adverse impact on living individuals.
- “Processing for archiving purposes in the public interest...shall be subject to appropriate safeguards...for the rights and freedoms of the data subject. Those safeguards shall ensure that technical and organisational measures are in place in particular in order to ensure respect for the principle of data minimisation.”
- Measures may include pseudonymisation or de-identification.
- DPA 2018 section 19(2) says safeguards are not met if processing “is likely to cause substantial damage or substantial distress to a data subject.”



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Safeguards must be met to use the exemption which minimise any adverse impact on living individuals.

### **What is meant by “substantial damage or distress”?**

The Act does not define this. However, in most cases:

- substantial damage would be financial loss or physical harm; and
- substantial distress would be a level of upset, or emotional or mental pain, that goes beyond annoyance or irritation, strong dislike, or a feeling that the processing is morally abhorrent

**If a data subject complains of distress, archive services should consider if the following is appropriate to make processing fair, especially if the data is available to search engines and the data is inaccurate:**

- **Reclosure / takedown (removal from public access);**
- **Adding a supplementary statement to the record;**
- **Amending or adding metadata or catalogue description.**

## Applying the Safeguards

- Records involving special categories of personal data are closed for the lifetime of individuals which is assumed to be 100 years.
- Records containing other types of personal data may be closed for shorter periods.
- Data minimisation – restrict entries containing personal information from public access catalogues and finding aids.
- Carrying out a Data Protection Impact Assessment (DPIA) may be appropriate. A DPIA is a good framework to work in so that privacy issues can be identified and mitigated.



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**Given the large number of individuals commonly featuring in archive collections, archive services will not be in a position to ascertain whether they are still alive. If it is not known whether a data subject is alive or dead, the following working assumptions can be used. Adult – close for 84 years, child - close for 100 years** (if the age of an adult data subject is not known, assume that they were 16 at the time of the records. If the age of a child data subject is not known, assume person was less than 1 at the time of the records).

TNA guidance on closure periods:

<https://www.nationalarchives.gov.uk/documents/information-management/closure-periods.pdf>

Online catalogues and finding aids made available to the public are covered by the Data Protection Act 2018 if they include entries containing personal information. Manual finding aids will also be covered if they hold personal information in a sufficiently structured format or are held by an FOI body.

## Research Access

- NRS fact sheet on [Research use of personal data in archival records](#) provides guidance on the terms of access and the responsibilities of researchers.
- NRS asks researchers to sign an undertaking that they will comply with their obligations under data protection laws.

## Myth #5:

Accountability provisions  
do not apply to small  
organisations

## Accountability – Records of processing activities

- Name and details of organisation, other controllers and data protection officer
- Purposes of the processing
- Description of the categories of individuals and categories of personal data
- Categories of recipients of personal data
- Details of transfers to third countries including documentation of the transfer mechanism safeguards in place
- Retention schedules
- Description of technical and organisational security measures

## Records of processing activities

Article 30(5) says:

“The obligations referred to in paragraphs 1 and 2 shall not apply to an enterprise or an organisation employing fewer than 250 persons unless the processing it carries out is likely to result in a risk to the rights and freedoms of data subjects, **the processing is not occasional**, or the processing includes special categories of data as referred to in Article 9(1) or personal data relating to criminal convictions and offences referred to in Article 10.”

# Records of processing activities

ICO [guidance](#) and template for documenting processing activities

	A	B	C	D	E
1	Name and contact details		Controller		
2			Data Protection Officer (if applicable)		Representative
3	Name		Name		Name
4	Address		Address		Address
5	Email		Email		Email
6	Telephone		Telephone		Telephone
7					
8					
9	Business function	Purpose of processing	Name and contact details of joint controller (if applicable)	Categories of individuals	Categories of personal data
10					
11					
12					
13					
14					
15					
16					
17					
18					
19					
20					



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## Do you need a Data Protection Officer (DPO)?

- A DPO is required for public authorities and public bodies; large scale, regular and systematic monitoring of individuals; large scale processing of special categories of data or data relating to criminal convictions and offences.
- You can still appoint a DPO even if you aren't required to. If you decide to voluntarily appoint a DPO you should be aware that the same requirements of the position and tasks apply had the appointment been mandatory.
- Regardless, you must ensure that your organisation has sufficient staff and resources to discharge your obligations under the GDPR

## Key Messages

- Data Protection law shapes archiving of personal data.
- It supports it and does not prevent it.
- The law contains the necessary safeguards to permit archiving.
- The new archiving in the public interest purpose adapts the operation of various principles and maintains exemptions from data subject rights provided safeguards are met.



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In general, 'archiving' which complied with the 1998 Data Protection Act will continue to be permitted under the new law. No drastic change is required.

## Resources

The National Archives, working with government archiving policy leads, including NRS, and ARA, has produced a guide to assist those working with the provision and exemptions for archiving found in the new data protection law.

[Guide to archiving personal data](#)

TNA has also published further guidance, including frequently asked questions, about data protection law in the UK and how it affects archives.

[Archives and data protection law in the UK](#)

The European Archive Group (EAG) has also published guidance on data protection which is intended to help archives services in Europe apply the GDPR.

[Guidance on data protection for archives services](#)



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## Questions

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