

THE NATIONAL ARCHIVES

COMPARATOR REPORT



An Chartlann Náisiúnta
National Archives

Martin Bradley BL

September 2023



ARCHIVES IRELAND

25 Herbert Place, Grand Canal Dock, Dublin 2 D02 AY86

Tel +353 86 022 5183

www.archives.ie

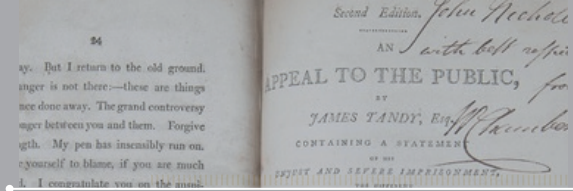
info@archives.ie


ARCHIVES
IRELAND



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READING ROOM, THE NATIONAL ARCHIVES



// EXECUTIVE SUMMARY

The National Archives (**NA**) commissioned Martin Bradley BL, Director, Archives Ireland, to undertake this report to situate the National Archives Act, 1986 (**The Act**) in the context of archival legislation in a number of international comparator jurisdictions. This report provides several recommendations to ensure that the NA's statutory positioning and authority as defined within the Act meet the evolving role and requirements of a 21st century National Archive.

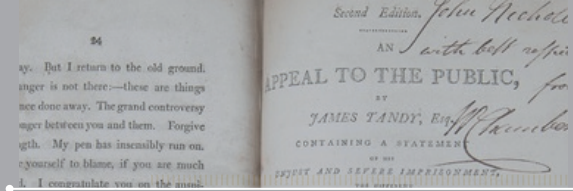
This report was prepared by a combination of desk-based legal research, questionnaires and in-person and virtual meetings. The jurisdictions that were selected for review were the Czech Republic, Denmark, Estonia, Hungary, New Zealand, Scotland, and Spain. Jurisdictions were selected by NA on the basis of population size, recent amendment of archival legislation to facilitate digital preservation or being identified as a model of international best practice.

Many jurisdictions, specifically including those referred in this document, have reviewed or are in the process of reviewing their archival legislation to address the universally acknowledged challenge presented by the need to manage Government records in a context where they are increasingly in electronic form.

At its establishment in 1986 the NA operated under the aegis of the Department of the Taoiseach, recognising the transversal statutory functions of the NA across government. Following the establishment in 1995 of a Minister for Culture and the subsequent enactment of the National Cultural Institutions Act, 1997¹, the perceived role of the NA changed to that of a Cultural Institution predominantly responsible for historical records, rather than an institution with responsibility for preserving the records of State and ongoing records management across government, as originally envisaged in its foundational legislation.

The Act, while generally fit for purpose, requires updating to adapt to changes in how records are created and stored, to bring the NA in line with its international comparator institutions and to ensure that the NA can continue to provide its key role in safeguarding the records of the State on behalf of all of its citizens.

¹ The NA is not listed in the Second Schedule of the National Cultural Institutions Act, 1997, but the Director of the NA sits on the Council of National Cultural Institutions under Part 3 of the Heritage Fund Act, 2001 and as a result is commonly referred to as a "Cultural Institution".



1. POSITIONING



NATIONAL ARCHIVES

NA

- A “business unit” of the Department of Tourism, Culture, Arts, Gaeltacht, Sport and Media
- Funded by the Department of Tourism, Culture, Arts, Gaeltacht, Sport and Media



An Chartlann Náisiúnta
National Archives



NATIONAL ARCHIVES OF THE CZECH REPUBLIC

NACR

- An “independent organisational unit of state”
- Funded by the Ministry of the Interior



Národní archiv



DANISH NATIONAL ARCHIVES

DNA

- Collective name for a system of archives under the Ministry of Culture
- Funded by direct state funding



Rigsarkivet



NATIONAL ARCHIVES OF ESTONIA

NAE

- A government authority within the Ministry of Education and Research
- Funded by the Ministry of Education and Research



REPUBLIC OF ESTONIA
NATIONAL ARCHIVES



HUNGARIAN NATIONAL ARCHIVES

HNA

- A “public collection”
- Funded by the Ministry of Culture and Innovations



NATIONAL RECORDS OF SCOTLAND

NRS

- A Non-Ministerial Department within the portfolio of the Cabinet Secretary for Economy, Fair Work and Culture
- Funded by direct state funding



SPANISH STATE ARCHIVES

SSA

- A system of archives under the Ministry of Culture and Sport
- Funded by direct state funding

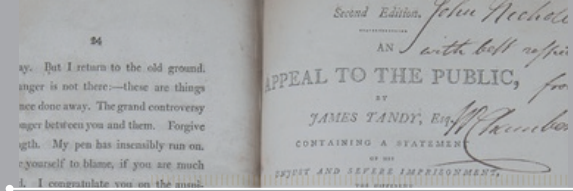


ARCHIVES NEW ZEALAND

ANZ

- A business unit of the Department of Internal Affairs
- Funded by the Department of Internal Affairs





EXECUTIVE SUMMARY

The NA is a “business unit” of the Department of Tourism, Culture, Arts, Gaeltacht, Sport and Media, from which it receives its operational funding and administrative support in terms of HR, finance, corporate as well as the Director reporting to an Assistant Secretary in the Department.

Of the comparator jurisdictions only ANZ functions as a business unit, but here the Chief Archivist exercises “statutory independence, independent of the influence of executive government or Ministers...”, powers that are not enjoyed by the Director of the NA.

RECOMMENDATION

The NA should be positioned in a manner which reflects its role in safeguarding the records of the State on behalf of all its citizens, and the fact that its statutory function demands that it provide services, including records management services, across central government – rather than acting solely as a cultural repository for historical records.





2. RECORDS MANAGEMENT



RECOMMENDATION

To bring the NA in line with comparator jurisdictions examined it should be given statutory authority for setting records management standards, systems and procedures across the civil service for both electronic and hard copy records. The NA should work with DPER in this regard given DPER's current statutory role to set regulations for records management.

CONTROL OF APPROVED FILE FORMATS

NO



PREPARED BY



The NA has statutory authority under the Act to accept transfers of digital Departmental records once they have reached thirty, or in some cases, twenty years old. It is not currently capable of accepting transfers of any records in born digital formats.

At present the National Archives does not have a digital repository for the preservation or access of digital or digitised records. There is no formal national digital repository under the Digital Ireland Framework for departmental and State records.

RECOMMENDATION

The NA should be given statutory authority for the design and/or approval of Electronic Records Management Systems and control of approved file formats for transfer.

A national digital repository for the management, storage and preservation of digital Departmental records will need to be resourced, staffed, developed and maintained by the NA.

The NA should work in partnership with DPER in relation to development of a national digital repository given DPER's current statutory role to set regulations for records management, and with the Office of the Government Chief Information Officer in its role leading the digital agenda across government, working in collaboration with government departments and agencies across the Civil and Public Service.

Work on Electronic Records Management Systems, control of approved file formats for transfer and development of a national digital repository should be multidisciplinary, with the NA assigned a statutory lead role.

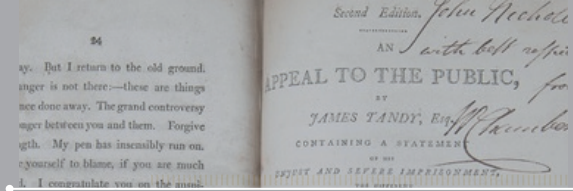
DEDICATED STAFF WITHIN TRANSFERRING BODIES TO EFFECT TRANSFERS TO NATIONAL ARCHIVES

YES

NO



Note: National Records of Scotland assigns direct responsibility for transfer to the Senior Executive of each transferring body



At present NA staff support government departments at the record transfer stage as required. Staff from the NA have recently worked on site within the Department of Foreign Affairs and the Department of Justice to assist in meeting their requirements for transfer under the Twenty Year Rule as set out in the National Archives (Amendment) Act, 2018 with a similar process in place now relating to departmental records that will ultimately transfer to the NA as part of the new National Centre for Research and Remembrance.

RECOMMENDATION

Transferring bodies should be required by statute to have dedicated fulltime staff to ensure that they are able to meet their statutory requirements under the Act, and to meet the record keeping requirements of the transferring bodies themselves.

There is no provision within the Act for penalties for non-compliance with transfer requirements under s 8 of the Act, or unauthorised disposal of Departmental records under s 7.

There are currently records over one hundred years old in many transferring bodies. Many of these situations have arisen due to a lack of prioritisation of the transfer of records and the absence of enforcement and sanctions mechanism.

RECOMMENDATION

Statutory penalties for non-compliance with transfer requirements and / or destruction of records, and / or the issuing of compliance notices should be considered. The NA should be given enforcement powers over any such penalties and the power to issue compliance notices.

PENALTIES FOR NON-COMPLIANCE

YES

NO





3. LEGISLATIVE INTEROPERATION



In the **Czech Republic** archival legislation takes a comprehensive approach to the protection of personal data, providing for exemptions for the archival sector from the GDPR and providing exemptions from the protection of personal and sensitive personal data for the purpose of coping with the totalitarian past.



In **Denmark** under the National Archives Act there is no public access to records containing personal data without permission before a period of 75 years expires.² The Danish Data Protection Agency must be consulted before the DNA can give access to public digital archives which include sensitive personal data. The DNA is also subject to GDPR.



The **Estonian Archives Act** states that access to archival records preserved in the National Archives is unrestricted, unless restrictions established by Regulation (EU) 2016/679 of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data³ imaging is also subject to copyright law.



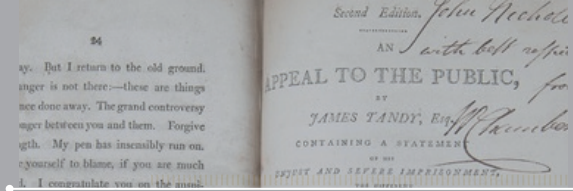
In **Hungary** Based on Section 12 (1) of the Archives Act, the National Archives takes over records of permanent value 15 years after their creation, and makes them open for consultation 30 years from the date of creation. Research in records containing personal data is governed by GDPR.



Scottish primary archival legislation, PRSA, is independent of other information legislation such as data protection, freedom of information and open data. The NRS has dedicated Data Protection and FOI Officers who sit within business areas of the organisation such as Information Governance and Security Branch. Scotland operates a 20 year rule for the release of government records.

² "Over the first 20 years, no one can receive access to your data without your consent. Following that, it is the Danish National Archives that determines whether to give access to your data. If your data contains personal data, the Danish Data Protection Agency must always approve whether other researchers and users may access it. Users are only able to access your material without applying for permission after 75 years." - <https://en.rigsarkivet.dk/transfer-and-submit/creating-research-data/personal-data-in-research-data/>

³ Archives Act § 10.



The **Spanish State Archives**, as they are attached to the Ministry of Culture and Sport, have a data protection delegate from the Ministry itself, who is the head of the Sub-directorate General for Citizen Services, Documentation and Publications. There is also a data protection officer, who is the Director General of Cultural Heritage and Fine Arts.



In **New Zealand** access is provided through the Public Records Act rather than the Official Information Act. The Privacy Act 2020 “specifies codes of practice and privacy principles for agencies to manage their information appropriately but decisions regarding the disposal of the information remains with the Chief Archivist.”

The Act does not refer to FOI, GDPR, the Data Protection Act 2018 or the Open Data Regulations.

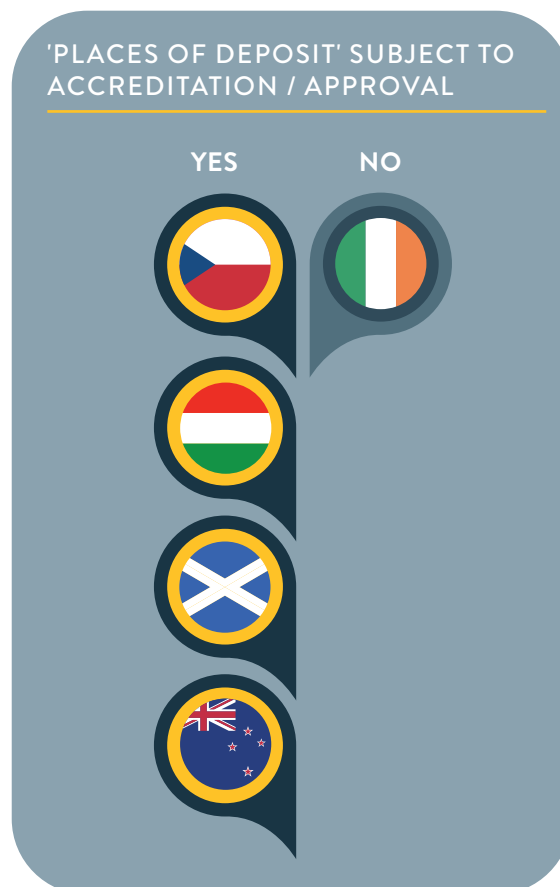
RECOMMENDATION

The interoperation of FOI, Copyright, GDPR, DPA and Open Data legislation in relation to record keeping should be clearly defined in any new iteration of **The Act** to strengthen the ability of the NA to collect and manage departmental and state records, including those containing personal data. Standardised access rights and closure periods should be defined in relation to records held by the NA considering the various exemptions explored in detail in “*Legislative Framework*” in the body of this report.

The role of the Director of the NA as either data processor or data controller for collections containing personal data should be defined for Departmental records and non-Departmental records, depending on their provenance as transferred records, gifts, deposits or the records of bodies that deposited records which are now defunct and where a successor body cannot be identified.



4. PLACES OF DEPOSIT / THIRD PARTY OBLIGATIONS

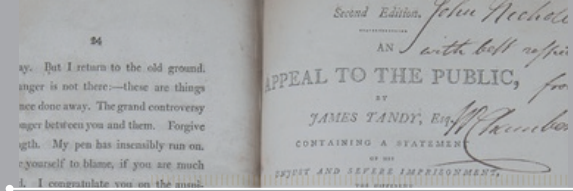


In Ireland S 14 of the Act allows that:-

The deposit of specified Departmental records in any place that may from time to time be approved by the Taoiseach after consultation with the Director shall constitute a transfer to the National Archives for the purposes of this Act.

RECOMMENDATION

The powers of the NA to set standards for arrangement, indexing, cataloguing, storage and environmental conditions in any designated places of deposit and statutory authority of inspection and sanction of such places of deposit should be clearly defined in any new iteration of the Act, with the role of the Director in granting and maintaining approved place of deposit status clearly defined.



01 / EXECUTIVE SUMMARY

There is no provision under the Act to define the obligations of Third Parties carrying out functions of the state utilising state funding in relation to their records.

RECOMMENDATION

Any new iteration of the Act should define the obligations of Third Parties carrying out functions of the state utilising state funding, such as education or health services, in relation to the management, storage, preservation and provision of access to their records. This should be applied with retrospective effect.

Any such definition of obligations should also take care to define the classes of records referred to. For instance, the Birth Information and Tracing Act 2022 has considered this issue under very specific circumstances for records relating to the adoption of boarding out of children in Ireland.

Obligations should include a requirement for Third Parties to return all records generated during the lifetime of state contracts to the contracting authority or department. Consideration should also be given to the issue of orphan records, similar to the provisions of the Historic and Archaeological Heritage Bill 2023, which gives clarification of the legal protection afforded to archives of Third Parties – for instance if they encounter trading difficulties or move location.

RECORD KEEPING OBLIGATIONS ON THIRD PARTIES

YES

NO



Note: National Archives of Estonia did not respond to this query



02 / HISTORY OF THE NATIONAL ARCHIVES

// HISTORY OF THE NATIONAL ARCHIVES

The National Archives (**NA**) was established on 1 June 1988 following the amalgamation of the State Paper Office (**SPO**) and the Public Record Office of Ireland (**PROI**).

The SPO was established in 1702 as a repository for records relating to the administrations of the various Lords Lieutenant (the English monarch's representative in Ireland) who until that date, had taken all of their records with them on leaving office. The SPO was situated in Dublin Castle until 1990.

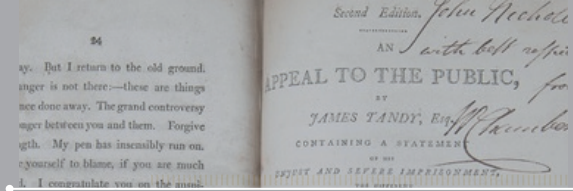
The PROI was established under the Public Records (Ireland) Act, 1867 to acquire administrative, court and probate records over twenty years old. The PROI building in the Four Courts was seized during the Civil War. The repository building was destroyed by fire in June 1922, along with most of the records, some dating back to the 13th century.

Following the establishment of the modern Irish state in 1922, the PROI and SPO continued to function until the enactment of the National Archives Act, 1986 (**The Act**), which transferred their functions and holdings to the newly established NA, which also defined the role of Director of the NA. Under this legislation, records of Government Departments and their agencies are transferred to the National Archives when they are thirty years old.

In 1989, the Government assigned premises at Bishop Street in Dublin to the NA. The premises of the former SPO in the Record Tower at Dublin Castle were vacated in August 1991 and the headquarters of the NA moved from the Four Courts to Bishop Street in September 1992.

The National Archives (Amendment) Act, 2018 amended s 8 of The Act to allow the Minister for Culture, Heritage and the Gaeltacht⁴ to make an order requiring the transfer of a class or certain classes of Departmental records which are less than thirty years old but more than twenty years old.

⁴ The Department of Culture, Heritage and the Gaeltacht is now the Department of Tourism, Culture, Arts, Gaeltacht, Sport and Media.



02 / HISTORY OF THE NATIONAL ARCHIVES

TIMELINE OF THE NATIONAL ARCHIVES

1702

SPO established as a repository for records relating to the administrations of the various Lords Lieutenant. SPO situated in Dublin Castle.

1867

PROI established under the Public Records Act 1867 to acquire administrative, court and probate records over 20 years old. The PROI building in the Four Courts was seized in the Civil War.

1922

June 1922: PROI building destroyed by fire, with the loss of most records, some dating back to the 13th century.

**1922**

1922: Irish State established.

1986

1986: Enactment of the National Archives Act, which transferred the functions and holdings of the SPO and PROI to the newly established National Archives.

1989

1989: Government assigns premises at Bishop St Dublin to the NA.

1991

August 1991: Premises of the former SPO in the Record Tower at Dublin Castle vacated in August 1991.

**1992**

September 1992: Headquarters of the NA moved from the Four Courts to Bishop St.

**2018**

2018: The National Archives (Amendment) Act, 2018 allows the Minister for Culture, Heritage and the Gaeltacht to make an order requiring the transfer of Departmental records which are less than 30 years old but more than 20 years old.



// TERMS AND DEFINITIONS

This report uses a number of terms which are specific to the work of the NA. Where terms used in this report have a meaning defined in The Act, these are outlined below.

This report also uses a number of industry-specific terms which are not defined in The Act.

Any references in this report, including in quotations from other sources, to the terms listed below should be construed to have the meanings as set out, unless otherwise noted.

Archives are defined at s 2 (1) of The Act as:-

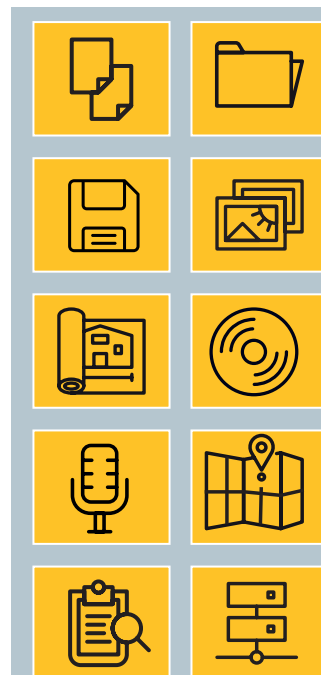
- (a) such records and documents (and copies of them) as are, at the commencement of this Act, held in the Public Record Office of Ireland or the State Paper Office,
- (b) Departmental records transferred to and accepted for preservation by the National Archives under this Act,
- (c) other records or documents (and copies of them) acquired permanently or on loan by the National Archives from public service organisations, institutions or private individuals,
- (d) all public records held at the commencement of this section elsewhere than in the Public Record Office of Ireland under an Act repealed by this Act.

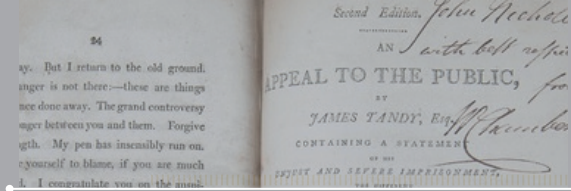
Born-digital

See: *Digital.*

Departmental records are defined at s 2 (2) of The Act as:-

books,
maps,
plans,
drawings,
papers,
files,
photographs,
films,
microfilms and other micrographic records,
sound recordings,
pictorial records,
magnetic tapes,
magnetic discs,
optical or video discs,
other machine-readable records,
other documentary or processed material,





made or received, and held in the course of its business, by a Department of State within the meaning of section 1 (2) or any body which is a committee, commission or tribunal of enquiry appointed from time to time by the Government, a member of the Government or the Attorney General, and includes copies of any such records duly made, but does not include—

- (i) grants, deeds or other instruments of title relating to property for the time being vested in the State, and
- (ii) any part of the permanent collection of a library, museum or gallery.

Department of State is defined at s (2) (b) of The Act:-

- (b) In this Act (other than in paragraph (c)), references to a Department of State include, where appropriate, references to a court and also include references to a *Scheduled Body*, and the definition of “*Departmental records*” in section 2 (2) shall be construed accordingly.

Digital Records or Archives are those which are created digitally and can be viewed in electronic form such as on a computer screen, whether that be a desktop, laptop, tablet or mobile phone.

Digital Repository describes the overall commitment to the stewardship of Digital materials; this requires not just software and hardware, but also policies, processes, services and people, as well as content and Metadata. Repositories must be sustainable, trusted, well supported and well managed in order to function properly⁵.

See also : OAIS.

Digitised Records or Archives are those which are created in *Hard/paper copy* and subsequently converted to a *Digital* format by a process of digitisation and can be viewed on a computer screen, whether that be a desktop, laptop, tablet or mobile phone.

Disposition is the final stage of the *Records Life-Cycle* at which point records are either destroyed or transferred to a National Archives.

Document is a single archival, record or manuscript item. Usually physically indivisible.

EDRMS *Electronic Document and Records Management System*. Software for managing the *Records Life-Cycle* of *Digital Documents*.

Electronic

See: *Digital*

ERMS *Electronic Records Management System*. Software for managing the *Records Life-Cycle* of *Digital Records*.

See also: *Electronic Records Management*

⁵ Definition from Robert Allan “*Virtual Research Environments From Portals to Science Gateways*”, Chandos Information Professional Series, 2009



Hard copy Records or Archives are those that are created in a physical format, such as paper or film.

See: *Paper*

Member of the Government is defined at s (2) (c) of The Act:-

- (c) In this Act, except in subsection (1) and section 2, any reference to a member of the Government shall be construed, as appropriate,—
- (i) in relation to the Office of the Secretary to the President, the Office of the Attorney General, the Office of the Comptroller and Auditor General or the Office of the Director of Public Prosecutions, as a reference to the President, the Attorney General, the Comptroller and Auditor General or the Director of Public Prosecutions,
 - (ii) in relation to a court, as a reference to the Minister for Justice, and
 - (iii) in relation to a Department of State or a scheduled body (other than an office specified in subparagraph (i) of this paragraph), as a reference to the member of the Government having responsibility for that Department or scheduled body.

Metadata is information that characterises another information resource, especially for purposes of documenting, describing, preserving or managing that resource. Commonly used to refer to descriptive information about *Digital Records* and *Archives*.

OAIS Open Archival Information System: an organisation of people and systems designed to preserve *Digital Records* and make them available to researchers or other users. May also refer to the ISO 14721 OAIS Reference Model which aims to facilitate a consensus on the requirements for an archive or repository to provide long-term preservation of *Digital* information. It was also intended to support the development of additional *Digital* preservation standards.

Paper Records or Archives

See: *Hard copy*

Places of Deposit are defined at s 14 of The Act:-

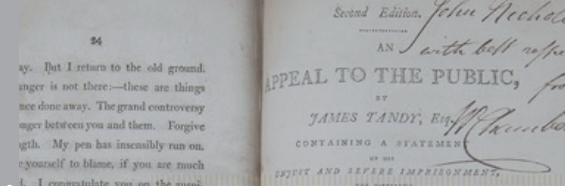
The deposit of specified Departmental records in any place that may from time to time be approved by the Taoiseach after consultation with the Director shall constitute a transfer to the National Archives for the purposes of this Act.

Public Service Organisation is defined at s 1 (1) of The Act as:-

a local authority, a health board or a body established by or under statute and financed wholly or partly by grants or loans made by a member of the Government or by the issue of shares taken up by a *Member of the Government*.

Records Information created, received, and maintained as evidence and information by an organisation or person, in pursuance of legal obligations or in the transaction of business.

See Also: *Departmental Records*



Records Life-Cycle describes the process from the creation of a document through its use in its place of creation or receipt, to its eventual destruction or transfer to a National Archives.

Records Management describes processes which ensure that the *Records Life-Cycle* results in complete, usable and reliable records that are capable of supporting the functions and activities of the creating body and ensure future accountability.

Records Management Policy defines the policies and procedures which ensure that the *Records Life-Cycle* results in complete, usable and reliable records that are capable of supporting the functions and activities of the creating body and ensure future accountability.

Retention Schedule defines the length of time records should be retained to comply with legal or business functions, or permanent retention as archives.

Scheduled body is defined at section (2) (a) of The Act:-

In this subsection "a scheduled body" means a body, institution, office, commission or committee referred to in the Schedule to this Act.

Thirty Year Rule the transfer of records to the National Archives thirty years after their creation date by a *Transferring Body*.

Twenty Year Rule the transfer of records to the National Archives twenty years after their creation date by a *Transferring Body*.

Transferring Body Any Department of State that transfers records to the NA under The Act.





// LEGISLATIVE FRAMEWORK

The National Archives Act 1986 operates as part of a legislative framework, and interacts with among others, GDPR, the Data Protection Act 2018, the Copyright Acts, the Freedom of Information Acts and the Open Data Regulations⁶.

THE NATIONAL ARCHIVES ACT 1986

The National Archives Act 1986 (The Act) is the primary statute that applies to the management of Departmental records, including regulations relating to their disposal or transfer and retention as archives within the NA.

The National Archives Act 1986, Regulations, 1988, are to be read in conjunction with The Act and sets out specific definitions, regulations and forms to be used in relation to, among others; the calculation of the age of records; transfer of Departmental records to the NA; disposal of Departmental records; retention of records and withholding records from public inspection; retention and withholding of part or parts of records, review of a record or part or parts thereof, review of archives which were formerly Departmental records, temporary requisition of archives by officers of Departments, making of entries in and additions to archives; and, reproduction and publication of archives.

The National Archives Act, 1986 (Authentication of Documents), Regulations, 1988 sets out regulations for the authentication of copies and extracts of archives in the custody of the NA by the affixing of the seal of the NA by the Director or by an officer of the National Archives designated by the Director for that purpose. Regulations are also set out for the certification of documents not in the custody of the NA.

The National Archives (Amendment) Act, 2018 amended s 8 of The Act to allow the Minister for Culture, Heritage and the Gaeltacht⁷ to make an order requiring the transfer of a class or classes of Departmental records which are less than 30 years old but more than 20 years old.

THE NATIONAL CULTURAL INSTITUTIONS ACT, 1997

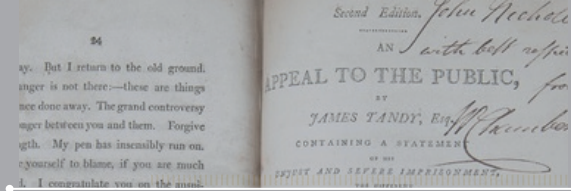
The National Cultural Institutions Act, 1997 (NCI) contains four sections in relation to the NA.

S 47 (1) allows the Director of the National Archives (with the consent of the National Archives Advisory Council) or any other cultural institution designated by order by the Minister, to lend to, transfer, borrow from, or exchange with any other institution referred to in that subsection or standing designated for the time being under subsection (3) any cultural objects in the collection of the institution on such terms and conditions as may be determined by the institutions concerned.

S 49 (1) relates to the restriction on export of articles to which the NCI applies, including:-

⁶ This section is intended as an overview of the legislative framework under which the NA operates. It is not Legal Advice.

⁷ The Department of Culture, Heritage and the Gaeltacht is now the Department of Tourism, Culture, Arts, Gaeltacht, Sport and Media.



- (a) any document (other than a document wholly in print) which is not less than 70 years old of a value exceeding such an amount (if any) as may be specified by order made by the Minister
- (c) any document declared by an order made by the Minister under subsection (2) to be an article to which this Part applies,

S 49 (2) empowers the Minister to, by order, declare any document, which is in his or her opinion of national, historical, genealogical or literary interest, to be an article to which this Part applies. S 49 (7) states that it shall not be lawful for any person to export or attempt to export or sell for export any article to which this Part applies unless such person is the holder of a licence authorising the export of the article.

S 50 sets out procedures for the granting of Export licences. S50 (2) states that where an application is made to the Minister for a licence in respect of an article referred to in section 49 (1) (d):-

- (a) in the case of an article that for an uninterrupted period of 5 years before the commencement of this section was in the care of an institution specified in the Second Schedule *or in any other institution owned or funded wholly or substantially by the State or by any public or local authority*⁸ [emphasis added], the Minister may, at his or her discretion, grant or refuse to grant the licence and any such licence may be subject to such conditions and restrictions as the Minister determines and specifies in the licence,
- (b) in the case of a cultural object that comes into the care of an institution referred to in paragraph (a) after the commencement of this section and remains in such care for an uninterrupted period of 10 years, the Minister may, at his or her discretion, grant or refuse to grant the licence and any such licence may be subject to such conditions and restrictions as the Minister determines and specifies in the licence,
- (c) in any other case, the Minister shall grant the licence and any such licence may be subject to such conditions and restrictions as the Minister determines and specifies in the licence including the condition that the object shall not be exported before the expiration of one year from the date of the application for the licence.

Under S 51 (1) The Minister may by order delegate such one or more of his or her functions as he or she specifies in the order—

- (a) under section 50 —
- (iii) in relation to documents, to the Board of the Library, the Heritage Council or the Director of the National Archives,

S 67 states that The Minister may direct a Board, the Director of the National Archives or the Governors and Guardians from time to time as occasion requires to make available to the Heritage Council such advice as it may require to assist it in the performance of its functions.

⁸ The NA is not listed in the Second Schedule of the NCI, but the Director of the NA sits on the Council of National Cultural Institutions under Part 3 of the Heritage Fund Act, 2001



GDPR⁹

The General Data Protection Regulation came into application on 25 May 2018 and following the principle of “direct effect” is directly applicable in Ireland, while allowing for issues to be given further effect in national law. In Ireland, the Data Protection Act 2018 (**2018 Act**) was enacted for the purpose of giving effect to GDPR. The 2018 Act gives effect to the limited areas of flexibility permitted under the GDPR. The 2018 Act also provides for a number of amendments to the 1988 and 2003 Data Protection Acts as a result.

Under GDPR, “personal data” is data that relates to or can identify a living person either on its own or together with other available information. The data subject (person to whom the personal data relates) has certain rights under GDPR, including a right of access as well as the right of rectification or correction of inaccurate personal data.

Article 15 of the GDPR gives individuals the right to request a copy of any of their personal data which are being processed or used in any way by data controllers. These requests are often referred to as data subject access requests, access requests or DSARs.

S 61 of the 2018 Act restricts the rights of data subjects where processing of data is for “*archiving purposes in the public interest*”. The rights restricted under this section are the rights to access, rectification, restriction of processing, data portability and the right to object.

Article 5 of GDPR sets out that personal data must be processed lawfully, fairly and transparently, that it must be collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes. Article 5 allows an exemption that personal data processed for “*archiving purposes in the public interest, scientific or historical research purposes or statistical purposes*” is not considered to be stored for a purpose incompatible with the purpose for which it was originally collected.

Article 5 further allows for the personal data to be stored for longer periods, in accordance with Article 89(1). This exemption is given effect under s 42 of the 2018 Act.

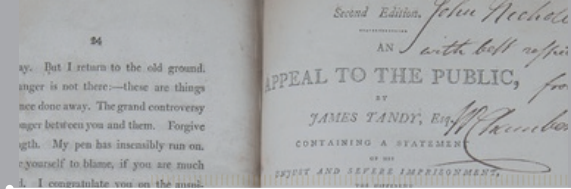
S 71 (6) (a) of the 2018 Act allows for the processing of data collected by another controller for “archiving purposes in the public interest”.

S 90 (4) (b) limits the right to access categories of information detailed at s 90 (2), such as the purpose for which personal data is intended to be processed, the period for which data is to be retained and the legal basis for the processing of the data where “in the case of archiving purposes in the public interest... the provision of the information proves impossible or would involve a disproportionate effort”.

Under s 3 (1) of the 2018 Act:-

An appropriate authority (within the meaning of the Civil Service Regulation Act 1956) may, as respects all or part of the personal data kept by the authority, designate a civil servant in relation to whom it is the appropriate authority to be a controller and while the designation is in force the

⁹ Information in this section taken from Browne, “The Law of Local Government” 2nd Ed. 2020, Thompson Reuters Professional



civil servant so designated shall, other than for the purposes of sections 105 (3) and 141 (2) and (3), be deemed, for the purposes of this Act and the Data Protection Regulation, to be the controller in respect of the data concerned.

Article 30 of GDPR states that each data controller must maintain a record, in writing, of processing activities under its responsibility.

A data controller must conduct a data protection impact assessment where the processing of data is likely to result in a high risk for the rights of individuals, having regard to the “nature, scope, context and purposes” of the processing of that data.

Under GDPR public bodies that handle personal data are obliged to appoint a Data Protection Officer (**DPO**).

COPYRIGHT¹⁰

The main legislation to govern copyright in Ireland is the Copyright and Related Rights Acts (**CRRA**), 2000 to 2019.

Section 17 of the CRRA 2000 details copyright protection as follows:-

- (1) Copyright is a property right whereby, subject to this Act, the owner of the copyright in any work may undertake or authorise other persons in relation to that work to undertake certain acts in the State, being acts which are designated by this Act as acts restricted by copyright in a work of that description.
- (2) Copyright subsists, in accordance with this Act, in—
 - (a) original literary, dramatic, musical or artistic works,
 - (b) sound recordings, films, broadcasts or cable programmes,
 - (c) the typographical arrangement of published editions, and
 - (d) original databases.
- (3) Copyright protection shall not extend to the ideas and principles which underlie any element of a work, procedures, methods of operation or mathematical concepts and, in respect of original databases, shall not extend to their contents and is without prejudice to any rights subsisting in those contents.

A “*Literary work*” means any written or printed composition. The requirement for originality relates to the expression of something in writing or print rather than the ideas expressed. In this sense the majority of the records held by the NA are assumed to be literary works for copyright purposes.

Departmental records created before 1922 and before the foundation of the Irish State are Crown Copyright. Departmental records created after 1922 and after the foundation of the Irish State are Government Copyright.

¹⁰ Information in this section taken from O’Doherty, “Internet Law” 2020, Bloomsbury Professional



Records held by the NA that are not departmental records are the copyright of the author, unless these rights are specifically transferred as part of a deposit agreement.

The term ‘author’ is defined in s 21 of the CRRA 2000. In relation to litigation brought for copyright infringement, the CRRA 2000 presumes that copyright exists in a work until otherwise proven, and that the plaintiff is the holder of the copyright unless the contrary is proven. In most circumstances, copyright will expire in a work 70 years after the death of the author.

Section 37 of the CRRA 2000 provides for the nature of the rights possessed by the copyright holder, and that anyone who performs one of these acts without the permission of the copyright holder is guilty of an infringement. The rights under s 37(1) are:-

- (a) to copy the work;
- (b) to make available to the public the work;
- (c) to make an adaptation of the work or to undertake either of the acts referred to in paragraph (a) or (b) in relation to an adaptation, and those acts shall be known and in this Act referred to as ‘acts restricted by copyright’.

Section 39 of the CRRA 2000 details copying a work, as described in s 37(a), under the heading of “*reproduction right*”, and states that copying will be construed as meaning “*storing the work in any medium*”.

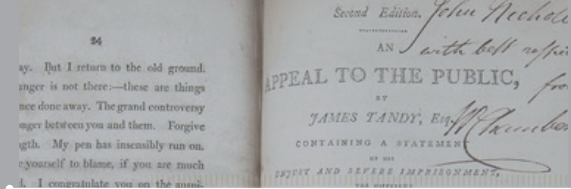
Section 40 of the CRRA 2000 expands on what constitutes making a work available under s 37(b):

- (a) making available to the public of copies of a work, by wire or wireless means, in such a way that members of the public may access the work from a place and at a time chosen by them (including the making available of copies of works through the internet)
- (b) performing, showing or playing a copy of the work in public
- (c) broadcasting a copy of the work
- (d) including a copy of the work in a cable programme service
- (e) issuing copies of the work to the public
- (f) renting copies of the work
- (g) lending copies of the work

Copying by libraries and archives is addressed at s 66 (1) of the CRRA 2000, which states that a librarian or archivist may make a copy of a work:-

- (a) for the purposes of obtaining insurance cover for the works concerned;
- (b) for purposes of security;
- (c) for the purposes of compiling or preparing a catalogue;
- (d) for exhibition in the library or archive; or
- (e) for the purposes of informing the public of an exhibition,

without infringing any copyright in the work, in any illustrations accompanying the work, or in the typographical arrangement.



S 67 (1) of the CRRA 2000 states that:-

The librarian or archivist of a prescribed library or prescribed archive may, where the prescribed conditions are complied with, make and supply a copy of a work or part of a work which has not been lawfully made available to the public from any work in the permanent collection of the library or archive without infringing the copyright in the work or in any illustrations accompanying the work or in the typographical arrangement.

The Copyright and Other Intellectual Property Law Provisions Act 2019 amends the CRRA 2000 by the insertion of the following section after section 68:

68A. (1) Subject to subsection (2), it is not an infringement of the rights conferred by this Part where the librarian or archivist of a prescribed library or prescribed archive makes, or causes to be made, a copy of a work, in the permanent collection of the library or archive, in a different form to that which the copy takes if—

- (a) that librarian or archivist lawfully uses the means used to make the copy, and
- (b) the copy is made solely for preservation or archival purposes where those purposes are neither directly nor indirectly commercial.

The Copyright and Other Intellectual Property Law Provisions Act 2019 amends the CRRA 2000 by the insertion of the following section after before section 70:

69A. (1) Without prejudice to the generality of section 50(1), the communication, by the librarian or archivist of a prescribed library or prescribed archive, to members of the public of copies of works in the permanent collection of the library or archive, by dedicated terminals on the premises of the library or archive, shall constitute fair dealing with the works for the purposes of that section where the communication is—

- (a) undertaken for the sole purpose of education, teaching, research or private study, and
- (b) accompanied by a sufficient acknowledgement.

(2) Without prejudice to the generality of section 50(1), the brief and limited display of a copy of a work—

- (a) either—
 - (i) in a prescribed library or prescribed archive or by the librarian or archivist of a prescribed library or prescribed archive, or
 - (ii) during the course of a public lecture given in a prescribed library or prescribed archive or given by the librarian or archivist of a prescribed library or prescribed archive,
- (b) undertaken for the sole purpose of education, teaching, research or private study where such purpose is neither directly nor indirectly commercial, and
- (c) accompanied by a sufficient acknowledgement,

shall constitute fair dealing with the work for the purposes of section 50(1).



The Copyright and Other Intellectual Property Law Provisions Act 2019 amends the CRRA by the insertion of section 235A which allows for the communication, by a librarian or archivist of a prescribed library or prescribed archive, to members of the public of recordings of performances in the permanent collection of the library or archive, by dedicated terminals on the premises of the library or archive under conditions similar to those outlined at s 69 (a).

FREEDOM OF INFORMATION¹¹

The Freedom of Information Act 2014 (**FOI Act**) provides a legal right of access to government records, predominantly those created after 1998. That right is subject to a number of exclusions and exemptions. The inspection right in The Act, which applies mainly to documents which are more than 30 years old, complements the access rights provided for in the FOI Act since the latter is largely concerned with records created after 1998.

S 15 (2) (a) of the FOI Act excludes records from the scope of the FOI Act where they are available for inspection by members of the public. The right of access provided for under the Act is expressed in terms of the making available of records for the inspection of the public and is therefore within the terms of s 15 (2) (a) of the FOI Act.

For records covered by the right of inspection in The Act the access rights conferred by The Act must be used and the FOI Act cannot be used to access such records.

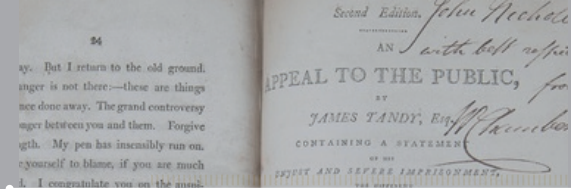
The FOI Act definition of a record is started at s 2 (1) as:-

- (a) a book or other written or printed material in any form (including in any electronic device or in machine readable form),
- (b) a map, plan or drawing,
- (c) a disc, tape or other mechanical or electronic device in which data other than visual images are embodied so as to be capable, with or without the aid of some other mechanical or electronic equipment, of being reproduced from the disc, tape or other device,
- (d) a film, disc, tape or other mechanical or electronic device in which visual images are embodied so as to be capable, with or without the aid of some other mechanical or electronic equipment, of being reproduced from the film, disc, tape or other device, and
- (e) a copy or part of any thing which falls within paragraph (a), (b), (c) or (d)

S 8 (4) of The Act gives an authorised officer of a department the power, with the consent of an authorised officer of the Department of the Taoiseach, to certify in relation to particular records or particular classes of records which are more than 30 years old that making them available for inspection by the public:-

- (a) would be contrary to the public interest;
- (b) would or might constitute a breach of statutory duty, or a breach of good faith on the ground that they contain information supplied in confidence; or

¹¹ Information in this section taken from McDonagh, "Freedom of Information Law" 3rd Ed 2015, Round Hall



- (c) would or might cause distress or danger to living persons on the ground that they contain information about individuals, or would or might be likely to lead to an action for damages for defamation.

S 8 (11) (b) of the FOI Act confers on the Minister for Public Expenditure and Reform the power to introduce regulations providing for the management and maintenance of records held by FOI bodies. Before introducing such regulations, the minister must consult with the Information Commissioner and with the Director of the NA.

S 41 of the FOI Act provides for the refusal of access requests made in respect of records to which non-disclosure provisions of other enactments apply. Records in respect of which certificates have been issued under s 8 (4) are therefore exempt from disclosure under FOI. This exemption does not apply to lists of file titles and reference numbers, following *Unwin v Department of Justice, Equality and Law Reform*.

The National Archives Act 1986 (Prescription of Classes of Records) Order 1997 prescribes certain classes of record for the purposes of s 8 (2) or s 8 (4) of The Act, regardless of which department, scheduled body or court they emanate from. Other classes of records are prescribed relating to particular departments, scheduled bodies or courts, including details relating to personnel, pensions, wages, and salaries paid.

Records over the age the age of thirty years, or in some instances twenty years, can be withheld from public inspection under S 8 (4). An officer of a Department of State authorised for the purpose of this subsection may, with the consent of an officer of the Department of the Taoiseach so authorised (except in relation to records of the Department of the Taoiseach), certify, in relation to particular Departmental records, or a particular class or classes of Departmental records prescribed in accordance with subsection (11), which are more than 30 years old and are specified in the certificate, that to make them available for inspection by the public—

- (a) would be contrary to the public interest, or
- (b) would or might constitute a breach of statutory duty, or a breach of good faith on the ground that they contain information supplied in confidence, or
- (c) would or might cause distress or danger to living persons on the ground that they contain information about individuals, or would or might be likely to lead to an action for damages for defamation.

Under S 8 (6) Departmental records retained under subsection (5) shall be reviewed by an officer of the Department of State concerned authorised for that purpose at least once in every subsequent period of five years with a view to their possible transfer to the National Archives under subsection (1).

There is no independent system for appealing against a decision not to make records over the age of thirty years, or in some instances twenty years, available for inspection in the National Archives. This contrasts with the approach in the FOI Act, where an internal appeals system is in place, as well as an independent external appeals mechanism.



HISTORIC AND ARCHAEOLOGICAL HERITAGE BILL 2023

Historic and Archaeological Heritage Bill 2023 (The Bill) is at the time of writing at the Dáil Third Stage. The bill will enable the State to accede to the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects - which are very broadly defined under the Convention to include artworks, archives, rare books, ethnological items and more.

Claims under the Convention will be brought in the Circuit Court which will be conferred with the necessary jurisdiction.

The State will also be enabled to ratify the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property which states at Schedule 6 that:-

Considering that, as cultural institutions, museums, libraries and archives should ensure that their collections are built up in accordance with universally recognized moral principles,

The Bill gives clarification of the legal protection afforded to archives of holders of licensable activities – for instance where archaeological consultancy companies fall into trading difficulties.

An exemption to s 99 which precludes the disposal of an archaeological object which is owned by the State is included at s 99 (6) of The Bill:-

Subsections (1) and (2) shall not apply to the disposal, or proposed disposal, of an archaeological object pursuant to—

- (a) section 7 or 9 of the National Archives Act 1986, or
- (b) section 18 of the Act of 1997.

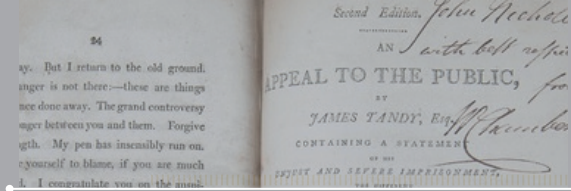
S.I. NO. 376/2021 - EUROPEAN UNION (OPEN DATA AND RE-USE OF PUBLIC SECTOR INFORMATION) REGULATIONS 2021

S.I. No. 376/2021 - European Union (Open Data and Re-use of Public Sector Information) Regulations 2021 (the Regulations) gives effect to Directive (EU) 2019/1024 of The European Parliament and of The Council of 20 June 2019 on open data and the re-use of public sector information.

At s 2 (1) of the Regulations a document is defined as:-

all or part of any form of document, record or data, whether in physical, electronic or other form, and includes—

- (a) any memorandum, book, plan, map, drawing, diagram, pictorial or graphic work,
- (b) any photograph, and
- (c) any sound, visual or audio-visual recording;



Re-use is defined at s 2 (1) of the Regulations as:-

- (a) in relation to a document held by a public sector body, the use of the document by an individual or legal entity for commercial or non-commercial purposes other than the initial purpose within the public task for which the document was produced, but does not include the exchange of that document between public sector bodies solely for the purpose of performing their public tasks, or
- (b) in relation to a document held by a public undertaking, the use of the document by an individual or legal entity for commercial or non-commercial purposes other than the initial purpose of providing services in the general interest for which the document was produced, but does not include the exchange of that document between public undertakings and public sector bodies solely for the purpose of the performance of the public tasks of the public sector bodies;

The requirement to make documents available for re-use is set out at s 5 of the Regulations:-

- (1) Subject to paragraph (2), a document to which these Regulations apply shall be made available for re-use in accordance with the conditions provided for in Regulations 7 to 13.
- (2) In respect of a document—
 - (a) in which a library, museum or archive holds intellectual property rights, or
 - (b) held by a public undertaking,

paragraph (1) shall apply where the re-use of such a document is allowed.

S 6 (5) (c) of the Regulations exempts libraries, museums and archives from the requirement, if refusing a request for re-use where the refusal is based on the intellectual property rights of a third party, for the public sector body concerned to include in the communication of the refusal to the requester a reference to the third party, where known, or alternatively to the licensor from which the public sector body has obtained the relevant material.

S 8 (3) (b) of the Regulations allows libraries, museums and archives to charge for the re-use of documents, if, as described at s 8 (3) (6):-

- (a) the total income of the library, museum or archive concerned from supplying and allowing the re-use of documents over the appropriate accounting period shall not exceed the sum of—
 - (i) the cost of collection, production, reproduction, dissemination, data storage, preservation and rights clearance,
 - (ii) a reasonable return on investment, and
 - (iii) where applicable, the cost of anonymisation of personal data and measures taken to protect commercially confidential information,

and

- (b) the charges shall be calculated in accordance with the accounting principles applicable to the library, museum or archive concerned.



S 14 (3) (b) exempts high-value datasets held by libraries, museums and archives from the requirement to be made available free of charge.

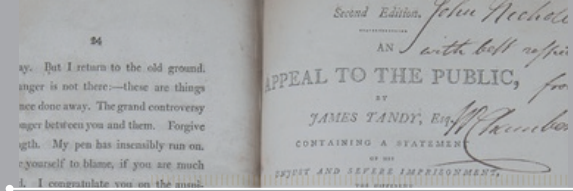
“High-value datasets” are defined within the Regulations as documents the re-use of which is associated with important benefits for society, the environment and the economy, in particular because of their suitability for the creation of value-added services, applications and new, high-quality and decent jobs, and the number of potential beneficiaries of the value-added services and applications based on those datasets

THE SAFE DEPOSITS AND RELATED DEPOSITS BILL, 2022

The Safe Deposits and Related Deposits Bill, 2022 allows for the examination of unclaimed property in safe deposit boxes and related deposits by the Director of the National Museum of Ireland (**NMI**). S15 empowers the Director of the NMI to:-

within 30 days or such longer period as may be prescribed either generally or in respect of any particular class or classes of unclaimed property, make a determination as to whether the unclaimed property concerned is of historical, archaeological or artistic importance.

- (2) For the purposes of subsection (1), the Director may—
 - (a) consult with—
 - (i) any person employed or engaged in an institution referred to in Schedule 2 to the Act of 1997,
 - (ii) the Director of the National Archives or a person authorised by the said Director to act for the purposes of this section, and
 - (iii) such other person as may be prescribed, and
 - (b) authorise any person to perform the functions of the Director under this Act.



// RATIONALE FOR REPORT

The NA has commissioned this report to situate the Act in the context of archival legislation in a number of comparator jurisdictions to examine current international practice.

The Act was commenced on 1 June 1988¹² at a time when departmental records were mainly paper.

Departmental records created up to 1993 and, in some cases, up to 2003 are now scheduled for transfer to the NA under the Thirty Year Rule, or Twenty Year Rule respectively. By virtue of their age many of these records are digital.

One of the functions of the Director of the National Archives, as defined in s 4 (1) (e) of The Act is “*the giving of advice to a member of the Government and to any public service organisation on the management, preservation and reproduction of records under their control*”.

The NA does not at present have statutory authority to set standards or requirements for the management of either paper or digital records.

The only reference to digital records in The Act is at s 2 (2) which defines Departmental records as including “*other machine readable records*”.

This has resulted in difficulties in managing the records of state, including those records generated by Third Party Organisations carrying out functions of the state utilising state funding on a contract basis.

Many jurisdictions have reviewed or are in the process of reviewing their archival legislation to address the universally acknowledged challenge presented by the need to manage Government records in a context where they are increasingly in electronic form.

This report examines whether the Act, while generally fit for purpose, requires updating to adapt to changes in how records are created and stored.



The NA does not at present have statutory authority to set standards or requirements for the management of either paper or digital records ... this has resulted in difficulties in managing the records of state.

¹² With the exception of s 5 - appointment of The Director of the NA, which commenced 24 April 1989.



// METHODOLOGY

The National Archives (NA) commissioned Martin Bradley BL, Director, Archives Ireland, to undertake this report to situate the National Archives Act, 1986 (The Act) in the context of archival legislation in a number of international comparator jurisdictions.

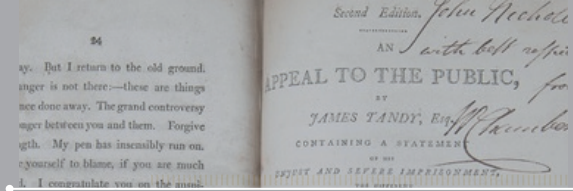
This report was prepared by a combination of desk-based legal research, questionnaires and in-person and virtual meetings.

The jurisdictions that were selected for review were the Czech Republic, Denmark, Estonia, Hungary, Scotland, Spain and New Zealand. Jurisdictions were selected by the NA on the basis of population size, recent amendment of archival legislation to facilitate digital preservation or being identified as a model of international best practice.

A questionnaire was circulated and follow-up meetings scheduled to examine the following issues in the comparator locations:-

- The positioning and statutory remit of the National Archives within central government;
- The role of the National Archives in the entire lifecycle management of records from creation to disposition/permanent retention across the civil and public service;
- The role of the National Archives in setting standards for the creation and maintenance of digital records throughout their lifecycle, including the use of preferred file formats, retention schedules, specifications and standards for digital infrastructure and the oversight and control of national digital repositories;
- The role of the National Archives in setting standards for the creation and maintenance of paper records throughout their lifecycle, including retention schedules and storage;
- The role and resourcing of dedicated staff within transferring bodies in overseeing obligations under national archives legislation on the management, transfer and disposal of public records;
- Implications for relevant bodies for non-compliance with national archives legislation, including unauthorised disposal and failure to transfer;
- The interaction of national archives legislation with other statutory recordkeeping obligations, including data protection, freedom of information and open data, including an analysis of closure periods and access rights;
- Obligations under national archives legislation for 'places of deposit';
- Obligations on third party organisations under national archives legislation, including those within the education, health and charitable spheres.





// SURVEY RESPONSES

NATIONAL ARCHIVES OF THE CZECH REPUBLIC (NACR)

KEY LEGISLATION¹³

- Act No. 499/2004 Coll., on Archiving and Records Management and on Amendments to Certain Acts
- Regulation No. 645/2004 Coll., Implementing Certain Provisions of the Act on Archiving and Records Management and on Amendments to Certain Acts
- Regulation No. 259/2012 Coll., on Details of the Performance of the Records Management



Národní archiv

STATUTORY BASIS

The National Archives of the Czech Republic (**NACR**) is an “*independent organisational unit of state*” since 2005 and forms an archival network with the independent state regional archives. It is financially supported from the budget of the Ministry of the Interior.

STATUTORY POWERS

All central government bodies are subject to the records management guidance of the NACR, but their influence is stronger for digital records as there is a statutory mandate for NACR’s intervention. The archive legislation “*entrusts the National Archives with direct and unmediated methodological activities in the field of electronic records and digital archiving*”.¹⁴ The NACR also informally contributes to drafting regulations for digital records outside of the Ministry’s sphere.

ROLE IN RECORDS LIFE-CYCLE

The NACR is seeking to strengthen its role in relation to “Archiving by design” for digital records – that is to increase “*the opportunity to comment on information systems at the design and implementation of the systems and not only at the end of the record’s Life-cycle*”.

¹³ <https://www.nacr.cz/en/about-us/legislation>

¹⁴ “Electronic records” referred to in quotation in survey responses refer to any born-digital record, that is a record created digitally – referred to elsewhere in this document as “digital records”. “Digital Archiving” referred to in quotation in survey responses refers to the long term storage and maintenance of digital records.



ROLE IN SETTING STANDARDS FOR DIGITAL RECORDS

Records management at state and local government level is expected to be conducted digitally and any exemptions are to cease in 2027. The NACR has a direct legal mandate concerning the management of digital records. The NACR establishes the regulations for digital file format. The NACR “issues an assessment on the accreditation of digital archives, the accreditation is carried out and the decision is issued by the Ministry of the Interior” and “provides digital archive services based on the OAIS¹⁵ compliant digital archives accessible through the National Archives Portal”.

ROLE IN ASSISTING WITH TRANSFERS

Transferring organisations have dedicated staff and, depending on the size of the organisation, teams of staff who specialise in managing records, both paper and digital, throughout the Life-cycle of the record. The role of these staff within each organisation is to “manage records, including electronic records, as they are created, recorded, processed, sent, stored and transferred for archiving or destruction”.

ENFORCEMENT POWERS

Failure to preserve a record, failure to submit a record to the archives for appraisal, failure to perform records management maintained in ERMS are offences punishable by a fine of up to approximately €8,300 (in certain circumstances the fine may be increased by half). Recently the NACR imposed a fine on the Office of the President of the Republic.

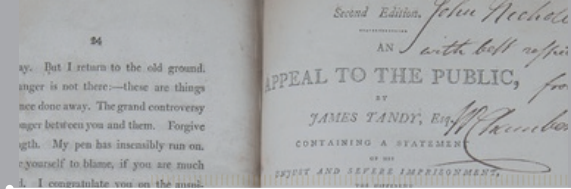
OBLIGATIONS ON PLACES OF DEPOSIT

The NACR was unclear of the meaning of “places of Deposit”. Permanent places of archival storage in the Czech Republic are subject to accreditation by the Ministry of the Interior but the NACR’s opinion is necessary for digital archives. The NACR notes, “if the deposit is for electronic archives, the opinion of the National Archives is required. If the storage of records is long term but not permanent (e.g. in the framework of ERMS), the rules set out in the Archives and Records Management Act and the National Standard for Electronic Records Management Systems for Record Offices apply. The National Archives therefore issues an opinion on digital archives and participates in the definition and formulation of parameters for digital archives. In the case of a repository of analogue or electronic records (which are not archives) and which is the responsibility of the National Archives, the National Archives has control and supervisory powers over this entity and environment”.



THE NATIONAL ARCHIVES,
CZECH REPUBLIC

¹⁵ OAIS, known as ISO 14721:2003, is a widely used preservation standard. The OAIS standard, published in 2005, is considered the optimum standard to create and maintain a digital repository over a long period of time.



INTERACTION WITH OTHER LEGISLATION

The NACR notes that archival legislation “is quite complex and therefore constitutes special and complex legislation in contrast to the FOI regulations. Archival records in archives are not consulted according to the Freedom of Information Act, but according to the Archives Act. Similarly, the archival legislation takes a comprehensive approach to the protection of personal data, providing for exemptions for the archival sector from the GDPR for Articles 15, 16, 18-21 of the GDPR and, conversely, making use of the possibility to provide for exemptions from the protection of personal and sensitive personal data for the purpose of coping with the totalitarian past (recital 73 or 158). The National Archives has its own dedicated data protection officer, in addition, the National Archives in cooperation with the Regional Archives in Prague has prepared a methodology for the protection of personal data in archives and a DPIA for archives according to Article 35 of the GDPR”.

APPLICATION OF NATIONAL ARCHIVES LEGISLATION TO THIRD PARTIES

Education and health care (e.g. state hospitals) organisations “are partly among the obliged subjects”. Non-profit organisations such as churches and political parties must preserve records and allow collection “but without a time limit and without the obligation to perform the records management”.



DANISH NATIONAL ARCHIVES (DNA)



KEY LEGISLATION

- Danish Archives Act, 2007¹⁶
- Amendment, Act No. 1170, 2008
- Amendment, Act No. 652, 2015
- Amendment, Section 3 of Act No. 742, 2015
- Amendment, Act No. 644, 2016



Rigsarkivet

STATUTORY BASIS

The Danish National Archives (**DNA**) was reorganised in 2014 and is the collective name for a system of archives under the Ministry of Culture with centres at Aabenraa, Aarhus, Copenhagen, Odense, and Viborg. The DNA is funded by the state.

STATUTORY POWERS

The DNA sets rules based on the National Archives Act concerning preservation and dissemination of public records. State Institutions and Regions and Municipalities are obligated to transfer digital records according to the standard, set down by the Danish National Archives.

ROLE IN RECORDS LIFE-CYCLE

The archival legislation provides for a role for the DNA in the record Life-cycle as all state authorities must inform the DNA of all new IT systems and digital records management systems are audited every two years.

ROLE IN SETTING STANDARDS FOR DIGITAL RECORDS

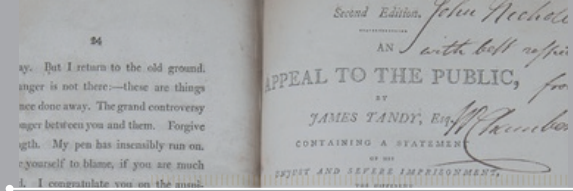
Digital records are transferred to the DNA when they are between 5 and 10 years old.¹⁷ There are no national digital repositories in Denmark other than the DNA and the municipal archives. State authorities are obliged to notify the Danish National Archives of all new IT systems including records management systems. If digital material is to be transferred to the DNA, it is assessed to ensure it meets the requirements for the purpose of preservation and reuse.

ROLE IN ASSISTING WITH TRANSFERS

There are no dedicated teams working in external transferring bodies to oversee obligations under Danish National Archives legislation. Regions and Municipalities must transfer digital data according to the standards decided by the DNA. The individual Archive decides how paper records may transfer.

¹⁶ <https://www.retsinformation.dk/eli/lta/2016/1201>

¹⁷ Apart from law enforcement, paper records are no longer created by public authorities



ENFORCEMENT POWERS

The National Archives Act does not address non-compliance regarding transfer or improper management of government records; however, it specifies penalties if confidential information is made public (s 51).

OBLIGATIONS ON PLACES OF DEPOSIT

Not applicable as this concept does not appear in the National Archives Act.

INTERACTION WITH OTHER LEGISLATION

Under the National Archives Act there is no public access to records containing data before a period of 75 years expires. The National Archives Act indicates that The Danish Data Protection Agency must be consulted before the DNA can give access to public digital archives which include sensitive personal data. The DNA is also subject to GDPR.

APPLICATION OF NATIONAL ARCHIVES LEGISLATION TO THIRD PARTIES

All public activity including education and health services are covered by the National Archives Act as are all organisations which are partly public funded.



THE DANISH NATIONAL ARCHIVES



NATIONAL ARCHIVES OF ESTONIA (NAE)



KEY LEGISLATION

- Archives Act, 1998
- Archives Act, 2011
- Archival Rules, 2011



REPUBLIC OF ESTONIA
NATIONAL ARCHIVES

STATUTORY BASIS

The National Archives of Estonia (**NAE**) is the “centre of archival administration” of Estonia and has departments in Rakvere, Tallinn, Tartu, and Valga. Founded in 1999, the NAE is a government authority within the Ministry of Education and Research and directly funded by that Ministry.

STATUTORY POWERS

While the Government of the Republic establishes records management regulations, the NAE advises, supports, and exercises administrative supervision over records management and can issue mandatory compliance orders to ensure that the Archives Act is adhered to. Specifically, under the following subsections of s 6 of the Archives Act:-

- (2) *The Government of the Republic may establish, by a regulation, the principles for the records management of agencies and persons performing public duties.*
- (3) *The National Archives advises and supports agencies and persons performing public duties upon management of records and archival records.*
- (4) *The National Archives may provide guidelines for the management of records and archival records to agencies and persons performing public duties in order to comply with this Act and legislation established on the basis thereof.*

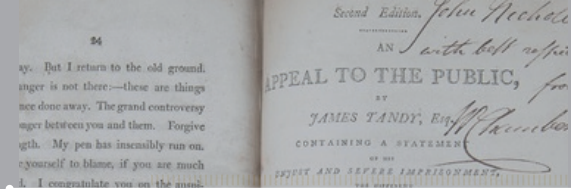
The NAE has the power to identify “agencies and persons performing public duties whose activities may result in archival records, based on the importance of the agency or person to society and the content of the public duties” - there does not appear to be a formal schedule detailing which departments and institutions are subject to the Archives Act¹⁸.

ROLE IN RECORDS LIFE-CYCLE

The Estonian Archives role in records life-cycle is defined solely at s 6 of the Archives Act (above).

There is no distinction in the Archives Act between the treatment of paper and digital records.

¹⁸ Archives Act 2011, s 7.



ROLE IN SETTING STANDARDS FOR DIGITAL RECORDS

One of the key objectives of the 2011 Archives Act was to “*establish optimal legal conditions for the final transition to digital record and archival management*”.¹⁹ The NAE understands their role as setting standards for the creation and maintenance of digital records throughout their Life-cycle – that is, advises, supports, and exercises administrative supervision over digital records management. The NAE understands one of their key functions as developing their digital archives. To facilitate this, the NAE created a software, universal archiving module (UAM), for preparing and transferring digital records which they have extracted from ERMS – there is also a list of specified file formats²⁰. The NAE has issued formal guidelines on digital records (“Archives management requirements for digital records”). The repositories of both central and local government sectors are covered by the Archives Act and Archives regulations, but the repositories of museums and National Broadcasting have their own laws (regulations). The NAE works with stakeholders such as the Ministry of Economic Affairs and Communication and e-Estonia concerning digital records in the environs of civil and public service.

ROLE IN ASSISTING WITH TRANSFERS

The rules for transfer are established in the Archival Rules 2011 with the support of the NAE. According to the Archival Rules, the responsibility is on the party transferring records to “*arrange and describe them according to the requirements set forth in these rules, accounting for the guidelines of the public archives*” with guidance from the NAE²¹.

ENFORCEMENT POWERS

The NAE can issue mandatory compliance orders. Under the existing legislation there are also fines in place for “rendering records and archival records unusable” (100 fine units / €1,500) and “unlawful destruction” (150 fine units / €1,600).

OBLIGATIONS ON PLACES OF DEPOSIT

There are no “places of deposit” as described by Estonian legislation.

INTERACTION WITH OTHER LEGISLATION

The Archives Act states, “*access to archival records preserved in the National Archives is unrestricted, unless restrictions established by Regulation (EU) 2016/679 of the European Parliament and of the Council 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) (OJ L 119, 4.5.2016, p. 1–88), the Public Information Act, the Personal Data Protection Act, the State Secrets and Classified Information of Foreign States Act or another Act extend thereto.*”²² Imaging is also subject to copyright law.

¹⁹ <https://www.ra.ee/en/national-archives/history/>

²⁰ <https://www.ra.ee/en/information-management/universal-archiving-module/>

²¹ Archives Act 2011, s 16

²² Archives Act s 10.



NATIONAL ARCHIVES OF HUNGARY (HNA)



KEY LEGISLATION

- Archives Act (1995. LXVI., Amendment 1997. CXL., Enacting Clauses 19 and 20/1198. [V.13.] MKM)
- Data Protection Act (1992. LXIII.)
- Privacy Act (1995. LXV.)



STATUTORY BASIS

The National Archives is a public collection funded from the budget chapter of the Ministry of Culture and Innovation.

STATUTORY POWERS

The National Archives cannot draft legislation but can propose and advise. All regional government bodies, all business companies that are majority-owned by the state or a local government are automatically subject to the archival legislation.

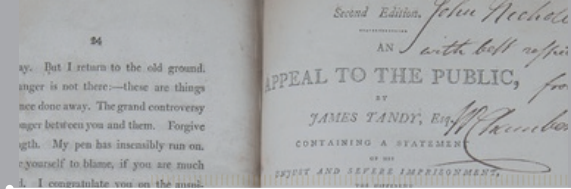
Govt.d. 335/2005 describes “the mandatory records management responsibilities of all public records creators (drafting of internal records management regulations including a classification scheme and retention/disposal schedule, archival authorization of records disposal, on-site inspection rights of public archives, records transfer responsibilities etc.).” This is reviewed every 4 years with the formation of a new government.

ROLE IN RECORDS LIFE-CYCLE

A key function of the NAH is to regulate the Life-cycle of all public records: this is achieved through records management policies “defining the Life-cycle of records, as well as by helping records creators in preparing their internal regulations”. Compliance is achieved through site inspections and audits. This is the case for both paper and digital records.

ROLE IN SETTING STANDARDS FOR DIGITAL RECORDS

Digital records are processed in accordance with the statutory legislation, using certified records management software (EDRMS) which is subject to a “declaration of conformity” issued by the NAH. The NAH examines compliance with the regulations by approving the records creator’s records management policy, as well as during on-site records management inspections. The national digital repository is outsourced to a state-owned company; the contents of the repository are fully under the custody of the NAH. The NAH works in close partnership with key stakeholders such as the Ministry of Interior and the Prime Minister’s Office “overseeing digital transformation in the civil and public service”.



ROLE IN ASSISTING WITH TRANSFERS

All transferring bodies have dedicated staff. According to Govt.d. 335/2005, “the head of the body performing a public task is responsible for the availability of trained personnel necessary for proper records management, including cooperation with the Archives”.

ENFORCEMENT POWERS

The NAH has the power to inspect bodies subject to the national archives legislation. If non-compliance is observed, the NAH issues a deadline to correct the deficit – should the deadline not be adhered to, the NAH will “will initiate an official procedure for the protection of public records which, in serious cases, may include imposing a fine”.

OBLIGATIONS ON PLACES OF DEPOSIT

Material can be retained by an organisation, but this must be sanctioned by the minister responsible for culture - this “place of deposit” must ensure that conditions for public access are met and receives guidance from the NAH. The NAH can inspect the organisation for compliance (issuing deadline for corrective measures/initiate formal proceedings for sanctions) but cannot revoke the place of deposit status.

INTERACTION WITH OTHER LEGISLATION

According to the NAH, “Based on Section 12 (1) of the Archives Act, the National Archives takes over records of permanent value 15 years after their creation, in which research is permitted after 30 years from the date of creation. Research in records containing personal data is governed by the legislation on the protection of personal data (GDPR) and Act CXII of 2011 on the right to informational self-determination and freedom of information, the acknowledgement of which the researcher declares in writing to the Archives. The default closure/protection period is 30 years (if the date of death of the person concerned is known), 60 years (if neither the birth nor the death is known), 90 years (if the date of birth is known) as specified in Section 24 (1) of the Archives Act. In the electronic catalogue of the Archives (scopeArchiv), protection periods and access rights are always set at the time of the records accession. Scientific researchers may acquire permission to access records containing personal data within the closure period.”



THE NATIONAL ARCHIVES
OF HUNGARY

APPLICATION OF NATIONAL ARCHIVES LEGISLATION TO THIRD PARTIES

The civil sector has no statutory responsibilities under the Act as only public bodies (health, education) – institutions funded by the state – are covered.



NATIONAL RECORDS OF SCOTLAND (NRS)



KEY LEGISLATION

- Public Records (Scotland) Act 2011



STATUTORY BASIS

The National Records of Scotland (**NRS**) was established in 2011 on the merging of General Register Office for Scotland and the National Archives of Scotland. The NRS is a Non-Ministerial Department within the portfolio of the Cabinet Secretary for Economy, Fair Work and Culture, funded directly from the budget of the Scottish Government.

STATUTORY POWERS

NRS works with Scottish Government legislative teams on a variety of legislative drafting, including primary and secondary legislation and standing orders. Though all central government departments are automatically subject to archival legislation, they are also named in Schedule to the Public Records (Scotland) Act 2011; the act is under continuous review and new public bodies are added either through founding legislation or through secondary legislation.

ROLE IN RECORDS LIFE-CYCLE

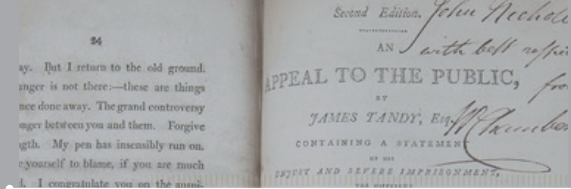
Each authority has an agreed Records management Plan with the NRS's Keeper.

ROLE IN ASSISTING WITH TRANSFERS

While there are not necessarily dedicated teams working on transfer, the bodies named in the act have a Senior Executive (e.g., CEO / SIRO) who acts as Key Contact with the Keeper. The Key Contact has “*overall responsibility for the records of the authority – and therefore the RMP [Records management Plan]*”. If the Senior Executive is not an information specialist or archivist, the individual is provided with training opportunities. The NRS has found the implementation of a non-statutory Progress Update Review programme (“*an annual health check*”), whereby authorities can “*check-in*” with the NRS an effective means of positive collaboration between the authorities and the NRS.

ROLE IN SETTING STANDARDS FOR DIGITAL RECORDS

“*The NRS has collected born-digital records since 1998*”. Though it is the national digital repository for public record, not all public authorities deposit their records with the NRS such as NHS Scotland and Scottish Local authorities (neither paper nor digital records). The NRS are working with their IT to develop a “*sandbox approach*” for exploring tools and processes to manage more modern and complex file formats.



ENFORCEMENT POWERS

In cases of non-compliance with legislation, the Keeper can revisit the body's RMP. Failure to comply can result in an 'action notice' and the authority's failure published via journals and online. The impact of "naming and shaming" on Chief Executives of local authorities who fail to meet statutory obligations under Public Records (Scotland) Act 2011 is extremely effective in promoting compliance.

OBLIGATIONS ON PLACES OF DEPOSIT

Scotland operates a "Charge and Superintendence" (C&S) scheme which has the same function as "Place of Deposit" and is currently under review. If an authority fails to meet or maintain the standard required under Proper Arrangements for Archiving Public Records the Keeper can revoke C&S Agreements.

INTERACTION WITH OTHER LEGISLATION

The primary archival legislation, PRSA, is independent of other information legislation such as data protection, freedom of information and open data. The NRS has dedicated Data Protection and FOI Officers who sit within business areas of the organisation such as Information Governance and Security Branch.

APPLICATION OF NATIONAL ARCHIVES LEGISLATION TO THIRD PARTIES

Third parties are not required to comply with the PRSA. However, contractors conducting work on behalf of the authority are subject to the act²³. The NRS, notes that it "falls to public authorities contracting out one or more of their functions, for example childcare in the case of local authorities, to ensure and satisfy the Keeper under their RMPs that they can be confident the third parties contracted to deliver the public functions(s) can manage the public records being created appropriately and in line with the arrangements agreed by the Keeper under the commissioning authority's RMP". The NRA guides and supports the relevant bodies and will engage with the bodies through stakeholder forums.



THE NATIONAL RECORDS OF SCOTLAND

Element 15 of the Public Records (Scotland) Act 2011 Model Records Management Plan (Revised 2019) states that "an authority's plan must include reference to what public records are being created and held by a third party carrying out a function of the authority and how these are being managed to the satisfaction of the authority". This provision has retrospective effect.

The Scottish Child Abuse Inquiry published a practice guideline on records²⁴ which lists records that may be of interest to the Inquiry that may be held by third parties, it does not however give advice to bodies on meeting record keeping requirements.

²³ PRSA, Section 3.

²⁴ <https://www.childabuseinquiry.scot/media/2985/practice-guideline-on-records-of-interest-to-the-inquiry-current.pdf>



SUB-DIRECTORATE GENERAL OF THE SPANISH STATE ARCHIVES (SSA)



KEY LEGISLATION

- Law 16/1985
- Law 3/2018
- Law 20/2022
- Royal Decree 1708/2011
- Spanish Constitution



STATUTORY BASIS

The Spanish State Archives (**SSA**), known officially as the Sub-Directorate General of the Spanish State Archives, is a system of archives under the Directorate General of Cultural Heritage and Fine Arts of the Ministry of Culture and Sport. The SSA coordinates the Spanish Archives System comprising The National Historical Archive, the General Archive of the Administration, the Archive of the Royal Chancellery of Valladolid, the General Archive of the Indies, the Crown of Aragon Archive, the General Archive of Simancas, the Historical Memory Documentary Centre, the Historical Archive of the Nobility, the Archive Information and Documentation Centre and the Document Reproduction Service. The archives are under both state ownership and that of the autonomous communities which means that the individual archives are subject to both state legislation and that of the community in which it is based. The SSA is funded through the exchequer.

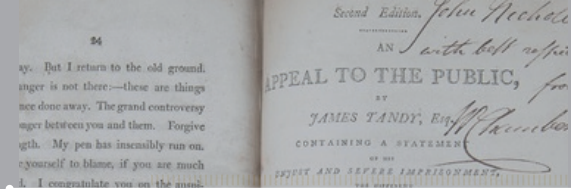
STATUTORY POWERS

The SSA cannot create legislation but can formulate regulations and technical standards. The General State Administration Archives Commission, attached to the Ministry of the Presidency - but which is overseen by the SSA - has the capacity to “draw up instructions, recommendations, manuals and criteria to *guarantee compliance* [emphasis added] with the regulations on archives and to promote the coordinated management of the archives”. The SSA also regulates the Archive System of the General State Administration and its Public Bodies and all public bodies are subject to it. All ministerial departments form part of the Spanish National Government Archive System and must transfer their documentary collections to the archives managed by the Ministry of Culture and Sport in their distinct stages: intermediate (General Administration Archive) and historical (National Historical Archive). State archives and the autonomous communities which have their own archives laws which can be revised with each new government.

ROLE IN RECORDS LIFE-CYCLE

Higher Commission for the Classification of Administrative Documents²⁵, attached to the SSA, oversees

25 <https://www.boe.es/buscar/doc.php?id=BOE-A-2007-19248>



the record Life-cycle including prior to the transfer to an archival setting. Records are subject to a Digital Records Management Policy which is described as *“a technical document with guidelines, metadata schema, standards, etc. for the management of electronic documents and files produced by this Department, in order to guarantee their preservation for future generations and facilitate access to public information”*.

ROLE IN SETTING STANDARDS FOR DIGITAL RECORDS

As digital documents are the default, or as described in the survey response the *“usual actions of the Administrations”*, records are subject to an *“Electronic Records Management Policy”* which *“assigns responsibilities for the coordination, implementation, monitoring and management of the document handling programme throughout its Life-cycle”*. However, some ministries and autonomous communities also have their own records management policies. Each public administration is supposed to maintain a single digital archive of documents corresponding to completed procedures, as well as the obligation for these files to be kept in a format that guarantees the authenticity, integrity and conservation of the document.

The National Interoperability Scheme establishes a series of Technical Interoperability Standards that are followed by the Public Administrations.



THE SPANISH STATE ARCHIVES, MADRID

ROLE IN ASSISTING WITH TRANSFERS

The Higher Commission for the Classification of Administrative Documents regulates the transfer of documents to the archival settings. The SSA notes that the Higher Commission is responsible for issuing opinions on the following issues:

- The time limits for the permanence of administrative documents in each of the different types of office or management, central, intermediate and historical archives.
- Transfers, once the periods of permanence have expired, between each of the different types of archives.
- The accessibility and use of the documents and documentary series.
- Proposals for the elimination of documents or documentary series and, where appropriate, the conservation of their content in a medium other than the original on which they were produced, in accordance with the requirements established by regulation.
- The correct application of the opinions issued by the Commission itself.
- Any other matter on archival matters related to the aforementioned competences.



ENFORCEMENT POWERS

The documentary heritage contained in the Spanish State Archives is regulated by the following provisions:-

- Law 16/1985, on Spanish Historical Heritage, specifically, Article 57, which establishes general rules such as documents containing personal data of a police, procedural, clinical or any other nature that may affect the security of persons.
- Royal Decree 1708/2011, which establishes the Spanish Archive System and regulating the Archive System of the General Archives System of the General State Administration and its Public Bodies and its Public Bodies and their access regime. Specifically chapter 4 which establishes the right of access to documents, request for access, authorisation of entry to the archives and consultation of original documents, restricted access, request for consultation of documents of a restricted nature for reasons of security and defence of the state, request for consultation of restricted access because they contain personal data, processing and resolution, deadline for resolution, obtaining copies and regime of objections.
- Law 3/2018 on the Protection of Personal Data and the guarantee of digital rights
- Law 20/2022 on Democratic Memory. It does not apply to historical records, but its link with Personal Data Protection and the impact on the configuration of the right of access, Law 19/2013 on transparency, access to public information and good governance.

There are no specific sanctions in Spanish legislation relating to destruction, retention, or transfer of records.

OBLIGATIONS ON PLACES OF DEPOSIT

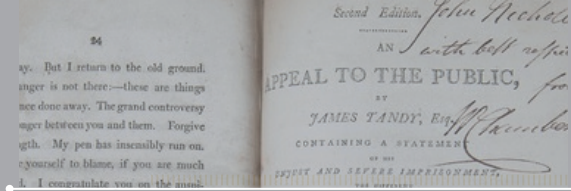
On places of deposit the SSA notes: *“these are the archives that exist in all administrative bodies and units for the custody of documents in the processing phase or subject to continuous administrative use and consultation. These documents, once their processing or their stage of use and consultation has been completed, shall be transferred to the central archive of the respective department, in accordance with the deadlines established during the appraisal process”.*

INTERACTION WITH OTHER LEGISLATION

The State Archives, as they are attached to the Ministry of Culture and Sport, have a data protection delegate from the Ministry itself, who is the head of the Sub-directorate General for Citizen Services, Documentation and Publications. There is also a data protection officer, who is the Director General of Cultural Heritage and Fine Arts.

APPLICATION OF NATIONAL ARCHIVES LEGISLATION TO THIRD PARTIES

Spanish legislation applies only to state bodies.



ARCHIVES NEW ZEALAND (ANZ)



KEY LEGISLATION

- Public Records Act 2005



STATUTORY BASIS

Archives New Zealand (ANZ) is a business unit of the Department of Internal Affairs, within a branch called Te Haumi Enterprise Partnerships. ANZ implements the Public Records Act 2005 which governs “*public sector information management*”. The Chief Archivist (leader of ANZ) exercises “*statutory independence, independent of the influence of executive government or Ministers of the Crown*” as part of several functions under the Act.

STATUTORY POWERS

The Chief Archivist exerts statutory independence over public and local authority records and all disposals of the public records. The functions of the Chief Archivist under the Act include setting and reviewing standards, advising and issuing guidelines, monitoring and reporting on the compliance of public offices with this Act, facilitating access to and promoting public records. All bodies are subject to the Act, and this is achieved through the broad definitions of “public bodies” and “local authority”. Bodies are reviewed and assessed to determine whether they meet “public office status” and therefore subject to the Act.

ROLE IN RECORDS LIFE-CYCLE

ANZ is “*the regulator of government information management for public bodies and is the sole agency with the mandate to advise and guide public offices on recordkeeping and will ensure compliance with the Public Records Act*”.

ROLE IN SETTING STANDARDS FOR DIGITAL RECORDS

The Chief Archivist has “*the sole responsibility of issuing standards for the management of digital public records*”. ANZ advises and provides guidance on digital infrastructure for public offices (including EDRMS). ANZ has no influence over the procurement of digital systems. The native file format is the preferred format for transferring digital records. The ANZ manages the one national digital repository for public records (Government Digital Archive).

ROLE IN ASSISTING WITH TRANSFERS

Some public offices have dedicated teams who are employed by the public offices directly rather than by ANZ. While the roles of these teams vary, “*ensuring compliance with the Public Records Act would be expected to be a core function of such teams*”.



ENFORCEMENT POWERS

There are penalties for contravening the Public Records Act relating to damage, disposal, and failure to comply with provisions and regulations. The penalties are monetary and can also lead to exclusion from the archive. ANZ notes that rather than penalties the “more likely” outcomes for public office for non-compliance include:

- Directions to report to the Chief Archivist on improving aspects of recordkeeping;
- Investigations into non-compliance of the relevant public office;
- Publication of details of non-compliance in dedicated reviews or as case studies in the Chief Archivist’s annual report into the state of government recordkeeping, which is tabled in the House of Representatives;
- Referral, where appropriate, to other bodies who administer legislation with information elements, such as the Office of the Ombudsman for Official Information Act compliance, or the Office of the Privacy Commissioner for privacy breaches.

ANZ has also developed an Information Management Maturity Assessment to allow public offices to “*self-assess the maturity of their current IM practices and to support the PRA audit programme*”.

OBLIGATIONS ON PLACES OF DEPOSIT

ANZ allows for public offices to retain records beyond the mandatory transfer threshold (25 years). However, regardless of the records’ age, public offices must adhere to the Chief Archivist’s information and records management standard (an implementation guide is available). There are also 12 approved repositories (“general regional heritage institutions”) holding material “*on behalf of the Chief Archivist*”. These repositories are subject to the same standards as public archives.



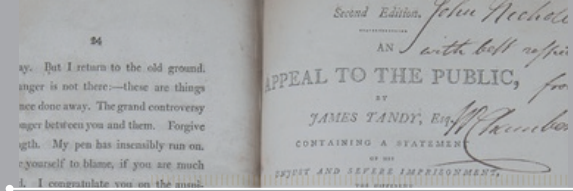
ARCHIVES NEW ZEALAND

INTERACTION WITH OTHER LEGISLATION

When a record is transferred to ANZ, access is provided through the Public Records Act rather than the Official Information Act. The Privacy Act 2020 “*specifies codes of practice and privacy principles for agencies to manage their information appropriately but decisions regarding the disposal of the information remains with the Chief Archivist.*” When departmental information is requested, ANZ conducts “freedom of information” responsibilities as per the Official Information Act 1982 by a small team from the Office of the Chief Archivist.

APPLICATION OF NATIONAL ARCHIVES LEGISLATION TO THIRD PARTIES

There is a broad definition of “public bodies” under the Act so that it “*captures a number of entities such as School Boards of Trustees*”. Non-governmental agencies that are contracted by public bodies are subject to the Act.



ANALYSIS AND RECOMMENDATIONS

THE POSITIONING AND STATUTORY REMIT OF THE NATIONAL ARCHIVES WITHIN CENTRAL GOVERNMENT.



The NA is a “business unit” of the Department of Tourism, Culture, Arts, Gaeltacht, Sport and Media, from which it receives its operational funding and administrative support in terms of HR, finance, corporate as well as the Director reporting to an Assistant Secretary in the Department.

At its establishment in 1986 the NA operated under the aegis of the Department of the Taoiseach, recognising the transversal statutory functions of the NA across government. Following the establishment in 1995 of a Minister for Culture and the subsequent enactment of the National Cultural Institutions Act, 1997, the positioning of the NA changed to one of being viewed more particularly as a Cultural Institution within this narrow frame, as opposed to an institution with responsibilities for preserving the records of State and in ongoing records management across government as originally envisaged in its foundational legislation²⁶.

In looking at other comparable institutions the following are the differing models across jurisdictions.



The National Archives of the Czech Republic has been an “*independent organisational unit of state*” since 2005 and forms an archival network with the independent state regional archives. It is financially supported from the budget of the Ministry of the Interior.



The Danish National Archives (DNA) is the collective name for a system of archives under the Ministry of Culture with centres at Aabenraa, Aarhus, Copenhagen, Odense, and Viborg. The DNA was reorganised in this format in 2014 and is funded directly by the State.



The National Archives of Estonia (NAE) is the “*centre of archival administration*” of Estonia and has departments in Rakvere, Tallinn, Tartu, and Valga. Founded in 1999, the NAE is a government authority within the Ministry of Education and Research and directly funded by that Ministry.

²⁶ The NA is not listed in the Second Schedule of the National Cultural Institutions Act, 1997, but the Director of the NA sits on the Council of National Cultural Institutions under Part 3 of the Heritage Fund Act, 2001 and as a result is commonly referred to as a “Cultural Institution”.



The Hungarian National Archives is a “*public collection*” funded from the budget chapter of the Ministry of Culture and Innovation.



The National Records of Scotland (NRS) was established in 2011 by the merger of the General Register Office for Scotland and the National Archives of Scotland. The NRS is a Non-Ministerial Department within the portfolio of the Cabinet Secretary for Economy, Fair Work and Culture, funded directly from the budget of the Scottish Government.



The Spanish State Archives (SSA), known officially as the Sub-Directorate General of the Spanish State Archives, is a system of archives under the Directorate General of Cultural Heritage and Fine Arts of the Ministry of Culture and Sport. The SSA is funded through the exchequer.



Archives New Zealand (ANZ) is a business unit of the Department of Internal Affairs. ANZ implements the Public Records Act 2005 which governs “public sector information management”²⁷. The Chief Archivist (head of ANZ) exercises “statutory independence, independent of the influence of executive government or Ministers of the Crown”.

It should be noted that of the comparator jurisdictions, only ANZ functions as a business unit, but here the Chief Archivist exercises “*statutory independence*”, powers which are not enjoyed by the Director of the NA.

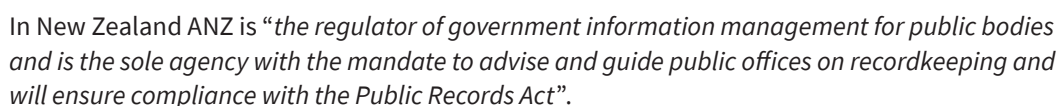
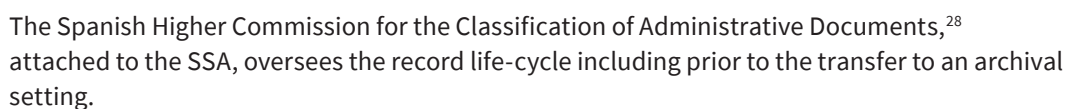
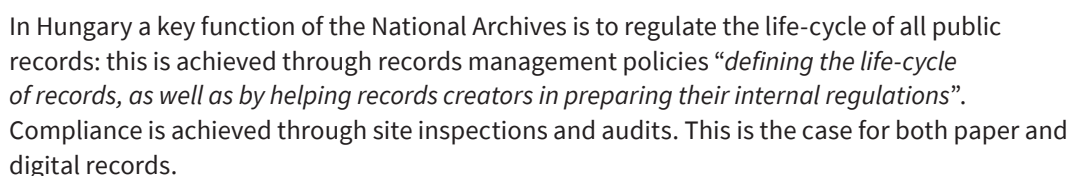
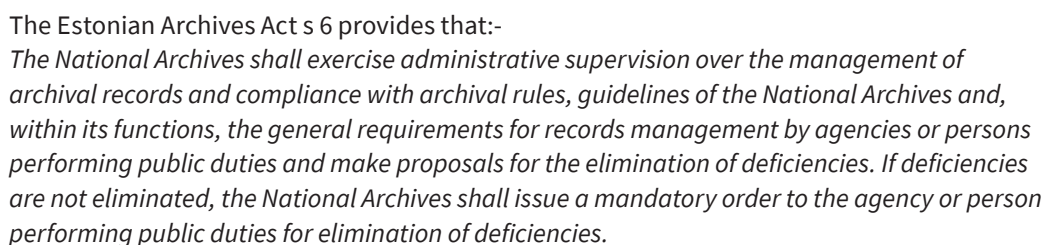
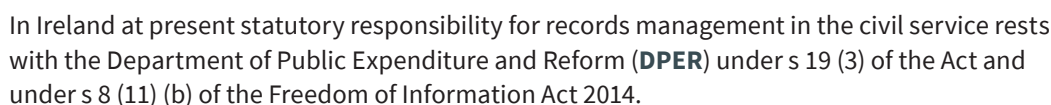
RECOMMENDATION

The NA should be positioned in a manner which reflects its role in safeguarding the records of the State on behalf of all its citizens, and the fact that its statutory function demands that it provide services, including records management services, across central government – rather than acting solely as a cultural repository for historical records.

²⁷ Before 2011, ANZ was a separate government department.

ANALYSIS & RECOMMENDATIONS

THE ROLE OF THE NATIONAL ARCHIVES IN THE ENTIRE LIFE-CYCLE MANAGEMENT OF RECORDS FROM CREATION TO DISPOSITION/PERMANENT RETENTION ACROSS THE CIVIL AND PUBLIC SERVICE



28 <https://www.boe.es/buscar/doc.php?id=BOE-A-2007-19248>



The NA is the central repository of knowledge and experience in relation to records management – comprising the largest staff of qualified and experienced archivists, conservators and records managers working in any State or Semi-State body in Ireland.

RECOMMENDATION

To bring the NA in line with comparator jurisdictions examined it should be given statutory authority for setting records management standards, systems and procedures across the civil service for both electronic and hard copy records. The NA should work with DPER in this regard given DPER's current statutory role to set regulations for records management.

This will allow the NA to be involved in the protection of public records throughout their life-cycle, ensuring complete, usable and reliable records that can support the functions and activities of the creating body and ensure future accountability.

THE ROLE OF THE NATIONAL ARCHIVES IN SETTING STANDARDS FOR THE CREATION AND MAINTENANCE OF DIGITAL RECORDS THROUGHOUT THEIR LIFE-CYCLE, INCLUDING THE USE OF PREFERRED FILE FORMATS, RETENTION SCHEDULES, SPECIFICATIONS AND STANDARDS FOR DIGITAL INFRASTRUCTURE AND THE OVERSIGHT AND CONTROL OF NATIONAL DIGITAL REPOSITORIES

At present the National Archives does not have a digital repository for the preservation or access of digital or digitised records worthy of permanent preservation. It is not currently capable of accepting transfers of any records in born digital formats. It should also be noted that there is no formal national digital repository under the Digital Ireland Framework for departmental and State records.

Departmental records created up to 1993 and, in some cases up to 2003, under the Thirty Year Rule and Twenty Year Rule respectively, are now scheduled for transfer to the National Archives, with the result that increasing numbers of digital records in a variety of formats are now falling within the statutory remit of the NA.



In Estonia one of the key objectives of the 2011 Archives Act was to “*establish optimal legal conditions for the final transition to digital record and archival management*”.²⁹ The NAE understands their role as setting standards for the creation and maintenance of digital records throughout their life-cycle.

The NAE created software – the universal archiving module (UAM), for preparing and transferring digital records which they have extracted from the ERMS used throughout the Civil Service. There is also a specified list of acceptable and preferred file formats³⁰. The NAE has issued formal guidelines on digital records (“*Archives management requirements for digital records*”). The NAE works with stakeholders such as the Ministry of Economic Affairs and Communication and e-Estonia concerning digital records in the environs of civil and public service.



Hungarian digital records are processed in accordance with statute using certified records management software (ERMS / DRMS) which is subject to a “*declaration of conformity*” issued by the NAH. The NAH examines compliance with the regulations by approving the records creator’s records management policy, as well as by undertaking on-site records management inspections. There is a Hungarian national digital repository which is outsourced to a state-owned company; the contents of the repository are fully under the custody of the NAH. The NAH works in close partnership with key stakeholders such as the Ministry of Interior and the Prime Minister’s Office “*overseeing digital transformation in the civil and public service*”.



“*In Scotland the NRS has collected born-digital records since 1998*”³¹. Although the NRS is the national digital repository for public records, not all public authorities deposit their records with the NRS. These include NHS Scotland and Scottish Local authorities who manage their records separately in both paper and digital formats, but remain subject to the terms of the Public Records (Scotland) Act, 2011. The NRS are working to develop a “sandbox approach” for exploring tools and processes to manage more modern and complex file formats.



In New Zealand the Chief Archivist has “*the sole responsibility of issuing standards for the management of digital public records*”. ANZ advises and provides guidance on digital infrastructure for public offices (including EDRMS). ANZ has no influence over the procurement of digital systems. The native file format is the preferred format for transferring digital records. The ANZ manages the one national digital repository for public records (Government Digital Archive).

²⁹ <https://www.ra.ee/en/national-archives/history/>

³⁰ <https://www.ra.ee/en/information-management/universal-archiving-module/>

³¹ “*born-digital records*” in this instance refers to a record created digitally, referred to elsewhere in this document as “digital records”



In the Czech Republic the NACR is seeking to strengthen its role in relation to “Archiving by design” for digital records – that is to increase “*the opportunity to comment on information systems at the design and implementation of the systems and not only at the end of the record’s life-cycle*”. Records management at state and local government level is moving to a digital only infrastructure for the creation and maintenance of public records, and any exemptions are to cease in 2027. The NACR has a direct legal mandate concerning the management of digital records. The NACR establishes the regulations for digital file formats. The NACR “*issues an assessment on the accreditation of digital archives, the accreditation is carried out and the decision is issued by the Ministry of the Interior*” and “*provides digital archive services based on the OAIS compliant digital archives accessible through the National Archives Portal*”.



In Denmark archival legislation provides a statutory role for the Danish National Archives in the record life-cycle. All state authorities must inform the DNA of all new IT systems to be implemented, and EDRMS are audited every two years. Danish Digital records are transferred to the DNA when they are between 5 and 10 years old³². There are no national digital repositories in Denmark other than the DNA and the municipal archives. State authorities are obliged to notify the Danish National Archives of all new IT systems including records management systems. If digital material is to be transferred to the DNA, it is assessed to ensure it meets the requirements for the purpose of preservation and reuse, including compliance with regulations on accepted file formats.

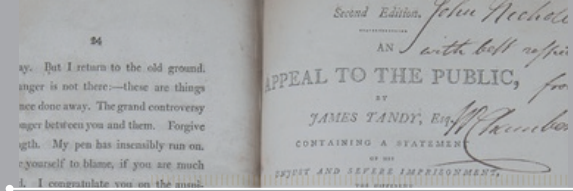


In Spain records are subject to an “*Electronic Records Management Policy*” which is described as “*a technical document with guidelines, metadata schema, standards, etc. for the management of electronic documents and files produced by this Department, in order to guarantee their preservation for future generations and facilitate access to public information*”.³³

Spanish digital documents are the “*usual actions of the Administrations*” and responsibility for “*the coordination, implementation, monitoring and management of the document handling programme throughout its life-cycle*” is assigned by the “*Electronic Records Management Policy*”. However, some Ministries and autonomous communities also have their own records management policies. Each public administration is supposed to maintain a single digital archive of documents corresponding to completed procedures, as well as the obligation for these files to be kept in a format that guarantees the authenticity, integrity and conservation of the document. The National Interoperability Scheme establishes a series of Technical Interoperability Standards that are followed by the Public Administrations.

³² Apart from law enforcement, paper records are no longer created by public authorities

³³ <https://www.culturaydeporte.gob.es/en/cultura/archivos/recursos-profesionales/documentos-electronicos.html>



In Ireland there is at present no national digital repository for digital and digitised Departmental records, nor are there any nationally implemented standards for preservation, preferred formats, naming conventions or EDRMS systems. While international standards exist, such as ISO 1461:2018 *Electronic document management — Design and operation of an information system for the preservation of electronic documents — Specifications* and ISO 14721 the *OAIS Reference Model* for the development of digital repositories, these have not been implemented in Ireland.

The NA has statutory authority under the Act to accept transfers of digital Departmental records once they have reached thirty, or in some cases, twenty years old. At present the NA has no capacity to accept transfers of digital records.

RECOMMENDATION

A national digital repository for the management, storage and preservation of digital Departmental records will need to be resourced, staffed, developed and maintained by the NA. The NA should work in partnership with DPER in relation to development of a national digital repository given DPER's current statutory role to set regulations for records management, and with the Office of the Government Chief Information Officer in its role leading the digital agenda across government, working in collaboration with government departments and agencies across the Civil and Public Service.

Work on development of a national digital repository should be multidisciplinary, with the NA assigned a statutory lead role.



THE ROLE OF THE NATIONAL ARCHIVES IN SETTING STANDARDS FOR THE CREATION AND MAINTENANCE OF PAPER RECORDS THROUGHOUT THEIR LIFE-CYCLE, INCLUDING RETENTION SCHEDULES AND STORAGE

Comparator jurisdictions often drew no distinction between processes and procedures for digital and hard copy records – in many instances having moved over to only accepting digital records as transfers of civil service records, which further demonstrates how Ireland lags behind comparable jurisdictions in this regard. In Denmark, for instance, apart from law enforcement, paper records are no longer created by public authorities.

The NA is the central repository of knowledge and experience in relation to records management – comprising the largest staff of qualified and experienced archivists including digital archivists, conservators and records managers working in any state or semi-state body in Ireland.

RECOMMENDATION

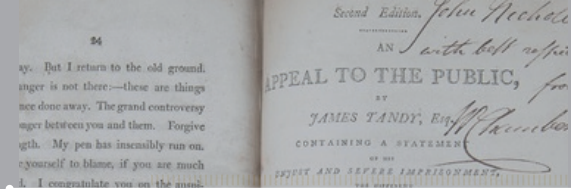
On this basis the NA should be given statutory authority for setting records management standards, systems and procedures across the civil service, including defining storage conditions, environmental controls and retention / disposition schedules to ensure that only records with long-term value are transferred to the NA at the appropriate time. The NA should work in partnership with DPER in this regard given DPER's current statutory role to set regulations for records management.

THE ROLE AND RESOURCING OF DEDICATED STAFF WITHIN TRANSFERRING BODIES IN OVERSEEING OBLIGATIONS UNDER NATIONAL ARCHIVES LEGISLATION ON THE MANAGEMENT, TRANSFER AND DISPOSAL OF PUBLIC RECORDS

Under the Act, a Certifying Officer is an appointed person of at least Principal Officer grade within a Department of State to ensure that the Act is implemented correctly in relation to the retention, disposal, and preparation of records for transfer to the NA. The Certifying Officer can sign certificates for the retention or withholding of records in their department or court office; however, applications for authorisation for disposal of records under s 7 (3) (a) of the Act must be made directly to the NA.



At present NA staff support government departments at the record transfer stage as required. Staff from the NA have recently worked on site within the Department of Foreign Affairs and the Department of Justice to assist in meeting their requirements for transfer under the Twenty



Year Rule as set out in the National Archives (Amendment) Act, 2018 with a similar process in place now relating to departmental records that will ultimately transfer to the NA as part of the new National Centre for Research and Remembrance.



In the Czech Republic transferring organisations have dedicated staff and, depending on the size of the organisation, teams of staff who specialise in managing records, both paper and digital, throughout the life-cycle of the record. The role of these staff within each organisation is to “*manage records, including electronic records, as they are created, recorded, processed, sent, stored and transferred for archiving or destruction*”.



There are no dedicated teams from the Danish National Archives working in external transferring bodies to oversee obligations under DNA legislation. Regions and Municipalities must transfer digital data according to the mandatory guidance provided by the DNA to relevant personnel in the transferring bodies. The individual Archive decides how paper records may transfer.



In Estonia the rules for transfer are established in the Archival Rules 2011 with the support of the NAE. According to the Archival Rules, the responsibility lies with the transferring body to “*arrange and describe them according to the requirements set forth in these rules, accounting for the guidelines of the public archives*” with guidance from the NAE.³⁴



Under Hungarian statute all transferring bodies have dedicated staff. According to Govt.d. 335/2005, “*the head of the body performing a public task is responsible for the availability of trained personnel necessary for proper records management, including cooperation with the Archives*”.



In Scotland, while there are not necessarily dedicated teams working on transfer, the bodies named in The Act have a Senior Executive (e.g., CEO / SIRO) who acts as Key Contact with the Keeper. The Key Contact has “*overall responsibility for the records of the authority – and therefore the RMP [Records Management Plan]*”. If the Senior Executive is not an information specialist or archivist, the individual is provided with training opportunities. The NRS has found the implementation of a non-statutory Progress Update Review programme (“*an annual health check*”), whereby authorities can “check-in” with the NRS an effective means of positive collaboration between the authorities and the NRS.

³⁴ Archive Act 2011, §16



The Spanish Higher Commission for the Classification of Administrative Documents regulates the transfer of documents to the archival settings, but only by means of issuing 'opinions'.



In New Zealand some public offices have dedicated teams who are employed by the public offices directly rather than by ANZ. While the roles of these teams vary, "*ensuring compliance with the Public Records Act would be expected to be a core function of such teams*".

Like the Scottish model whereby training opportunities are provided to Certifying Officers in instances where these persons are not qualified information specialists or archivists, the NA provides training to staff in transferring bodies.

RECOMMENDATION

Transferring bodies should, however, have dedicated fulltime staff to ensure that they are able to meet their statutory requirements under the Act, and to meet the record keeping requirements of the transferring bodies themselves.

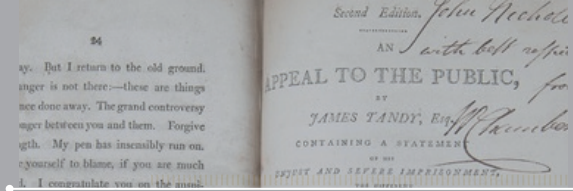
IMPLICATIONS FOR RELEVANT BODIES FOR NON-COMPLIANCE WITH NATIONAL ARCHIVES LEGISLATION, INCLUDING UNAUTHORISED DISPOSAL AND FAILURE TO TRANSFER



In Ireland S 18 of the Act provides sets out penalties for the removal, concealment or destruction of "archives" (see: *Terms and Definitions*). This applies only to records once transferred to the NA.

S 7 (1) of the Act states that:-

Subject to the provisions of sections 19 (3) and 19 (4), Departmental records shall, unless they are transferred to the National Archives in accordance with section 8 or are disposed of under subsection (5), be retained and preserved in the Department of State in which they were made or are held, and shall not in any case be disposed of except in accordance with subsection (5); provided that, where more than one copy of such a record exists, the retention and preservation of the original or, if the original is no longer available, of an accurate and complete copy thereof shall suffice.



S 8 (1) of the Act states that:-

Departmental records which are more than 30 years old and in relation to which a certificate granted under this section is not in force shall, subject to section 7, be transferred by the Department of State in which they were made (or, if they are held in another such Department, by that other Department) to the National Archives, where they shall be made available for inspection by the public.

There is no provision within the Act for penalties for non-compliance with transfer requirements under s 8 of the Act, or unauthorised disposal of Departmental records under s 7.



In the Czech Republic failure to preserve a record, failure to submit a record to the archives for appraisal, failure to perform records management maintained in ERMS are offences punishable by a fine of up to approximately €8,300 (in certain circumstances the fine may be increased by half). Recently the NACR imposed a fine on the Office of the President of the Republic.



The Danish National Archives Act does not address non-compliance regarding transfer or improper management of government records; however, it specifies penalties if confidential information is made public (s 51).



In Estonia the NAE can issue mandatory compliance orders. Under the existing legislation there are also fines in place for “rendering records and archival records unusable” (100 fine units / €1,500) and “unlawful destruction” (150 fine units / €1,600).



The Hungarian NAH has the power to inspect bodies subject to the national archives legislation. If non-compliance is observed, the NAH issues a deadline to correct the deficit – should the deadline not be adhered to, the NAH will “will initiate an official procedure for the protection of public records which, in serious cases, may include imposing a fine”.



In Scotland in cases of non-compliance with legislation, the Keeper can revisit the body's Records Management Plan. Failure to comply can result in an ‘action notice’ and the authority's failure published via journals and online. The impact of “naming and shaming” on Chief Executives of local authorities who fail to meet statutory obligations under Public Records (Scotland) Act 2011 is extremely effective in promoting compliance.



There are no specific sanctions in Spanish legislation relating to destruction, retention or transfer of records.



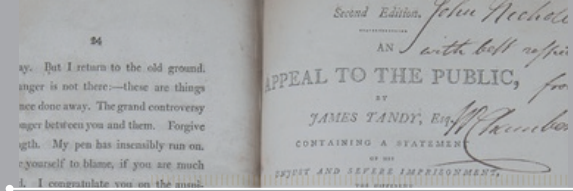
In New Zealand there are penalties for contravening the Public Records Act relating to damage, disposal, and failure to comply with provisions and regulations. The penalties are monetary and can also lead to exclusion from the archive. ANZ notes that rather than penalties the “more likely” outcomes for public office for non-compliance include: Directions to report to the Chief Archivist on improving aspects of recordkeeping; investigations into non-compliance of the relevant public office; publication of details of non-compliance in dedicated reviews or as case studies in the Chief Archivist’s annual report into the state of government recordkeeping, which is tabled in the House of Representatives; referral, where appropriate, to other bodies who administer legislation with information elements, such as the Office of the Ombudsman for Official Information Act compliance, or the Office of the Privacy Commissioner for privacy breaches.

RECOMMENDATION

Consideration could be given to adding statutory penalties for non-compliance with transfer requirements and or destruction of records to Irish national archives legislation following the Czech or Estonian models, and / or the ability to issue compliance notices following the model in Scotland.

There are currently records over one hundred years old in many transferring bodies. Many of these situations have arisen due to a lack of prioritisation of the transfer of records and the absence of enforcement and sanctions mechanism.

However, consideration will need to be given to the potential resourcing implications for the NA, as enforcement mechanisms may result in increased volumes of transfers which will require suitable infrastructure and staffing to accession and appraise.



THE INTERACTION OF NATIONAL ARCHIVES LEGISLATION WITH OTHER STATUTORY RECORDKEEPING OBLIGATIONS, INCLUDING DATA PROTECTION, FREEDOM OF INFORMATION AND OPEN DATA, INCLUDING AN ANALYSIS OF CLOSURE PERIODS AND ACCESS RIGHTS;

There is widespread knowledge among transferring bodies of requirements under GDPR, the FOI Acts, the Copyright Acts and increasingly in relation to Open Data.

This may, in part, be driven by public / data subject / rights holders' engagement and enforcement with their rights under this suite of access legislation. For instance, at the time of writing there are over one hundred separate litigants bringing actions against the HSE in relation to a data breach, currently stayed awaiting a CJEU ruling in relation to liability for “non-material damages”.

This may also be due to higher profile training or information sessions being offered in relation to this legislation, or to their association among IT Departments with risk management processes and associated resources. Records management and obligations for the preservation of records are given less emphasis in induction training offered by transferring bodies. A further misunderstanding that the Act applies only to “historical” records, rather than to Departmental records throughout their life-cycle may also be a factor.



In the Czech Republic the NACR notes that archival legislation is “*is quite complex and therefore constitutes special and complex legislation in contrast to the FOI regulations. Archival records in archives are not consulted according to the Freedom of Information Act, but according to the Archives Act. Similarly, the archival legislation takes a comprehensive approach to the protection of personal data, providing for exemptions for the archival sector from the GDPR for Articles 15, 16, 18-21 of the GDPR and, conversely, making use of the possibility to provide for exemptions from the protection of personal and sensitive personal data for the purpose of coping with the totalitarian past.*”



In Denmark under the National Archives Act there is no public access to records containing personal data without permission before a period of 75 years expires³⁵. The National Archives Act indicates that the Danish Data Protection Agency must be consulted before the DNA can give access to public digital archives which include sensitive personal data. The DNA is also subject to GDPR.

³⁵ “Over the first 20 years, no one can receive access to your data without your consent. Following that, it is the Danish National Archives that determines whether to give access to your data. If your data contains personal data, the Danish Data Protection Agency must always approve whether other researchers and users may access it. Users are only able to access your material without applying for permission after 75 years.” - <https://en.rigsarkivet.dk/transfer-and-submit/creating-research-data/personal-data-in-research-data/>



The Estonian Archives Act states, “access to archival records preserved in the National Archives is unrestricted, unless restrictions established by Regulation (EU) 2016/679 of the European Parliament and of the Council 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), the Public Information Act, the Personal Data Protection Act, the State Secrets and Classified Information of Foreign States Act or another Act extend thereto.”³⁶ Imaging is also subject to copyright law.



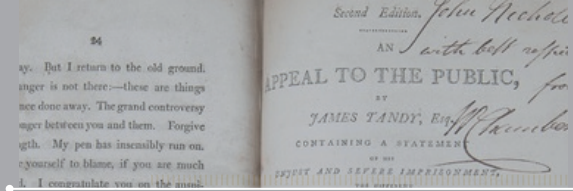
In Hungary According to the NAH, “Based on Section 12 (1) of the Archives Act, the National Archives takes over records of permanent value 15 years after their creation, in which research is permitted after 30 years from the date of creation. Research in records containing personal data is governed by the legislation on the protection of personal data (GDPR) and Act CXII of 2011 on the right to informational self-determination and freedom of information, the acknowledgement of which the researcher declares in writing to the Archives. The default closure/protection period is 30 years (if the date of death of the person concerned is known), 60 years (if neither the birth nor the death is known), 90 years (if the date of birth is known) as specified in Section 24 (1) of the Archives Act. In the electronic catalogue of the Archives (scopeArchiv), protection periods and access rights are always set at the time of the records accession. Scientific researchers may acquire permission to access records containing personal data within the closure period.”



Scottish primary archival legislation, PRSA, is independent of other information legislation such as data protection, freedom of information and open data. The NRS has dedicated Data Protection and FOI Officers who sit within business areas of the organisation such as Information Governance and Security Branch. Scotland operates a 20 year rule for the release of government records. NRS processes records involving personal data for archiving purposes in the public interest. The Keeper of the Records of Scotland is the data controller of personal data in record collections which have been purchased by or gifted to NRS. More commonly, record collections are not owned by NRS, but have instead been placed on indefinite deposit in the national archives. The Keeper acts as data processor for personal data in these record collections, while the depositor remains data controller. Additionally, where a body that deposited records is now defunct and a successor body cannot be identified the Keeper will take on the role of data controller.

NRS ensures that when personal data is processed for archiving purposes the appropriate safeguards under Article 89(1) of the GDPR and Section 19 of the Data Protection Act 2018 are met. 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. The Freedom of Information (Scotland) Act 2002 (FOISA) provides a general right to information from Scottish public authorities, including information

³⁶ Archives Act § 10.



in archival records transferred to NRS. Section 38 of FOISA regulates the relationship between FOISA and data protection law and provides for exemptions from disclosure. Section 38(1)(a) exempts the personal data of the person requesting the information from disclosure because they have a right of access instead under Article 15 of the GDPR. Section 38(1)(b) exempts the personal data of a third party to protect the individual's privacy. These exemptions have been applied to many archival records.



The Spanish State Archives, as they are attached to the Ministry of Culture and Sport, have a data protection delegate from the Ministry itself, who is the head of the Sub-directorate General for Citizen Services, Documentation and Publications. There is also a data protection officer, who is the Director General of Cultural Heritage and Fine Arts.



In New Zealand when a record is transferred to ANZ, access is provided through the Public Records Act rather than the Official Information Act. The Privacy Act 2020 “specifies codes of practice and privacy principles for agencies to manage their information appropriately but decisions regarding the disposal of the information remains with the Chief Archivist.” When departmental information is requested, ANZ conducts “freedom of information” responsibilities as per the Official Information Act 1982 by a small team from the Office of the Chief Archivist.

The Act addresses the issue of copyright at s 17 (1):-

The making or supplying of reproductions by or under the direction of the Director of archives which are in the custody of the National Archives or held elsewhere in accordance with this Act and are open to public inspection shall not infringe the copyright of such archives.

But Departmental records are Government copyright in any event, and other classes of records are subject to normal copyright restrictions – as outlined in “Legislative Framework”.

The Act does not refer to FOI, GDPR, the Data Protection Act 2018 or the Open Data Regulations.

RECOMMENDATION

The interoperation of FOI, Copyright, GDPR, DPA and Open Data legislation in relation to record keeping should be clearly defined in any new iteration of the Act to strengthen the ability of the NA to collect and manage departmental and state records, including those containing personal data. Standardised access rights and closure periods should be defined in relation to records held by the NA considering the various exemptions explored in detail in “Legislative Framework” in the body of this report.



RECOMMENDATION

The role of the Director of the NA as either data processor or data controller for collections containing personal data should be defined for Departmental records and non-Departmental records, depending on their provenance as transferred records, gifts, deposits or the records of bodies that deposited records which are now defunct and where a successor body cannot be identified.

OBLIGATIONS UNDER NATIONAL ARCHIVES LEGISLATION FOR 'PLACES OF DEPOSIT'

In Ireland S 14 of the Act allows that:-

The deposit of specified Departmental records in any place that may from time to time be approved by the Taoiseach after consultation with the Director shall constitute a transfer to the National Archives for the purposes of this Act.



In the Czech Republic permanent places of archival storage are subject to accreditation by the Ministry of the Interior but the NACR's opinion is necessary for digital archives.

The NACR notes, "if the deposit is for electronic archives, the opinion of the National Archives is required. If the storage of records is long term but not permanent (e.g. in the framework of ERMS), the rules set out in the Archives and Records Management Act and the National Standard for Electronic Records Management Systems for Record Offices apply. The National Archives therefore issues an opinion on digital archives and participates in the definition and formulation of parameters for digital archives. In the case of a repository of analogue or electronic records (which are not archives) and which is the responsibility of the National Archives, the National Archives has control and supervisory powers over this entity and environment".



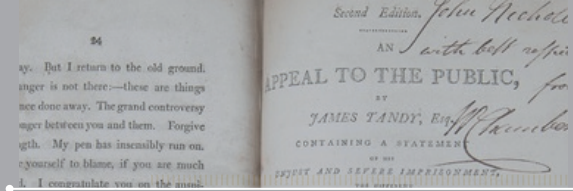
In Denmark this is not applicable as this concept does not appear in the National Archives Act.



Similarly, there are no "places of deposit" described by Estonian legislation.



In Hungary material can be retained by an organisation, but this must be sanctioned by the Minister for Culture and Innovation - this "place of deposit" must ensure that conditions for public access are met and receives guidance from the NAH. The NAH can inspect the organisation for compliance (issuing a deadline for corrective measures/initiate formal proceedings for sanctions) but cannot revoke the place of deposit status.



Scotland operates a “Charge and Superintendence” (C&S) scheme which has the same function as “Place of Deposit” and is currently under review. If an authority fails to meet or maintain the standard required under *Proper Arrangements for Archiving Public Records* the Keeper can revoke C&S Agreements.



Spanish archives legislation notes: “*these are the archives that exist in all administrative bodies and units for the custody of documents in the processing phase or subject to continuous administrative use and consultation. These documents, once their processing or their stage of use and consultation has been completed, shall be transferred to the central archive of the respective department, in accordance with the deadlines established during the appraisal process*”.



Archives New Zealand allows for public offices to retain records beyond the mandatory transfer threshold (25 years). However, regardless of the records’ age, public offices must adhere to the Chief Archivist’s information and records management standard (an implementation guide is available). There are also 12 approved repositories (“general regional heritage institutions”) holding material “*on behalf of the Chief Archivist*”. These repositories are subject to the same standards as public archives.

Interestingly New Zealand operate a similar approach to that under s 8 (2) of the Act which allows for records “*in regular use in that Department or required in connection with its administration*” to be maintained in situ in their creating Department after the mandatory transfer period has elapsed.

It would appear from an analysis of comparators there are a mixture of approaches, from the concept of places of deposit not existing in statute to the national archives having extensive powers of management, inspection and correction over any place of deposit that exists.

RECOMMENDATION

The powers of the NA to set standards for arrangement, indexing, cataloguing, storage and environmental conditions in any designated places of deposit and statutory authority of inspection and sanction of such places of deposit should be clearly defined in any new iteration of the Act, with the role of the Director in granting and maintaining approved place of deposit status clearly defined. This will improve the engagement of the NA with the protection of public records throughout their life-cycle.



OBLIGATIONS ON THIRD PARTY ORGANISATIONS UNDER NATIONAL ARCHIVES LEGISLATION, INCLUDING THOSE WITHIN THE EDUCATION, HEALTH AND CHARITABLE SPHERES.

There is no provision under the Act to define the obligations of Third Parties carrying out functions of the state utilising state funding in relation to their records.



In the Czech Republic education and health care (e.g. state hospitals) organisations “*are partly among the obliged subjects*”. Non-profit organisations such as churches and political parties must preserve records and allow collection “but without a time limit and without the obligation to perform the records management”.



Danish legislation states all public activity including education and health services are covered by the National Archives Act as are all organisations which are partly publicly funded.



In Hungary the civil sector has no statutory responsibilities under the Act as only public bodies (health, education) – institutions funded by the state – are covered.



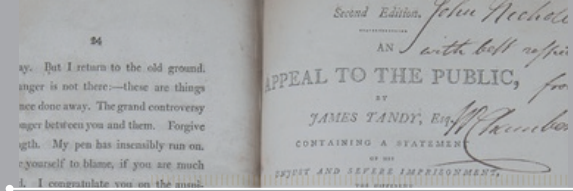
In Scotland third parties are not required to comply with the PRSA. However, contractors conducting work on behalf of the authority are subject to the Act.³⁷ The NRS, notes that it “*falls to public authorities contracting out one or more of their functions, for example childcare in the case of local authorities, to ensure and satisfy the Keeper under their RMPs that they can be confident the third parties contracted to deliver the public functions(s) can manage the public records being created appropriately and in line with the arrangements agreed by the Keeper under the commissioning authority’s RMP*”. The NRA guides and supports the relevant bodies and will engage with the bodies through stakeholder forums.

Element 15 of the Public Records (Scotland) Act 2011 Model Records Management Plan (Revised 2019) states that “*an authority’s plan must include reference to what public records are being created and held by a third party carrying out a function of the authority and how these are being managed to the satisfaction of the authority*”. This provision has retrospective effect.

The Scottish Child Abuse Inquiry published a practice guideline on records, that was introduced as a direct consequence of the experience of the Child Abuse inquiry and the lack of adequate or surviving records.³⁸ The practice guideline lists records that may be of interest to the Inquiry that may be held by third parties, it does not however give advice to bodies on meeting record keeping requirements.

³⁷ PRSA, Section 3.

³⁸ <https://www.childabuseinquiry.scot/media/2985/practice-guideline-on-records-of-interest-to-the-inquiry-current.pdf>



Spanish legislation applies only to state bodies.



In New Zealand there is a broad definition of “public bodies” under the Act so that it “captures a number of entities such as School Boards of Trustees”. Non-governmental agencies that are contracted by public bodies are subject to the Act.

RECOMMENDATION

Any new Act should define the obligations of Third Parties carrying out functions of the state utilising state funding, such as education or health services, in relation to the management, storage, preservation and provision of access to their records. This should be applied with retrospective effect.

Any such definition of obligations should also take care to define the classes of records referred to. For instance, the Birth Information and Tracing Act 2022 has considered this issue under very specific circumstances for records relating to the adoption of boarding out of children in Ireland.

Obligations should include a requirement for Third Parties to return all records generated during the lifetime of state contracts to the contracting authority or department. Consideration should also be given to the issue of orphan records, similar to the provisions of the Historic and Archaeological Heritage Bill 2023, which gives clarification of the legal protection afforded to archives of Third Parties – for instance if they encounter trading difficulties or move location.