

## **CODE OF CONDUCT FOR ARCHIVES SERVICES**

### **UNDER ARTICLE 40 OF THE REGULATION (EU) 2016/679 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 27 APRIL 2016 ON THE PROTECTION OF NATURAL PERSONS WITH REGARD TO THE PROCESSING OF PERSONAL DATA AND ON THE FREE MOVEMENT OF SUCH DATA.**

#### Structure

1 / Preamble .....	2
2 / Purpose and scope.....	6
3/ General principles .....	7
3.1 Definitions.....	7
3.2 Responsibilities and commitments .....	9
4 / Rules for archives services activities .....	11
4.1 Appraisal and acquisition of archives .....	11
4.2 Storage and preservation of archives .....	12
4.3 Access to archives .....	12
4.4 Processing by automated means .....	14
4.5 Data subject rights.....	14
5 / Rules for archives' users .....	15
6 / implementation .....	16
6.1 Adoption.....	16
6.2 Breaches.....	16

**1 / PREAMBLE**

The Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 (hereafter called “the Regulation”) aims to the protection of natural persons with regard to the processing of personal data and on the free movement of such data. Under its terms :

*“1. Processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes, shall be subject to appropriate safeguards, in accordance with this Regulation, for the rights and freedoms of the data subject. Those safeguards shall ensure that technical and organisational measures are in place in particular in order to ensure respect for the principle of data minimisation. Those measures may include pseudonymisation provided that those purposes can be fulfilled in that manner. Where those purposes can be fulfilled by further processing which does not permit or no longer permits the identification of data subjects, those purposes shall be fulfilled in that manner.*

*2. Where personal data are processed for scientific or historical research purposes or statistical purposes, Union or Member State law may provide for derogations from the rights referred to in Articles 15, 16, 18 and 21 subject to the conditions and safeguards referred to in paragraph 1 of this Article in so far as such rights are likely to render impossible or seriously impair the achievement of the specific purposes, and such derogations are necessary for the fulfilment of those purposes.*

*3. Where personal data are processed for archiving purposes in the public interest, Union or Member State law may provide for derogations from the rights referred to in Articles 15, 16, 18, 19, 20 and 21 subject to the conditions and safeguards referred to in paragraph 1 of this Article in so far as such rights are likely to render impossible or seriously impair the achievement of the specific purposes, and such derogations are necessary for the fulfilment of those purposes.*

*4. Where processing referred to in paragraphs 2 and 3 serves at the same time another purpose, the derogations shall apply only to processing for the purposes referred to in those paragraphs<sup>1</sup>.”*

Whereas :

*“Public authorities or public or private bodies that hold records of public interest should be services which, pursuant to Union or Member State law, have a legal obligation to acquire, preserve, appraise, arrange, describe,*

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Article 89 : Safeguards and derogations relating to processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes.

*communicate, promote, disseminate and provide access to records of enduring value for general public interest<sup>2</sup>.*“

and

*“Where personal data are processed for archiving purposes, this Regulation should also apply to that processing, bearing in mind that this Regulation should not apply to deceased persons<sup>3</sup>.”*

and

*The right to erasure does not apply “for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1)” in so far as this right is likely to render impossible or seriously impair the achievement of the objectives of that processing<sup>4</sup>”.*

Having regard :

- The *Charter of Fundamental Rights of the European Union (2000/C 364/01)* adopted on December 18<sup>th</sup>, 2000, considers to be fundamental rights on the one hand the Protection of personal data (Article 8) and on the other hand Freedom of expression and information (which includes freedom to receive and impart information) (Article 11), and Freedom of the arts and sciences, including freedom of research (Article 13) ;
- *the Council of Europe Recommendation No. R (2000) 13 of the Committee of Ministers to Member States on a European policy on access to archives* states that ‘Access to public archives is a right.’ (Article 5) and that ‘Access to archives is part of the function of public archive services.’ (Article 6) ;
- The *Recommendation Rec(2002)2 on access to official documents* adopted by the Committee of Ministers of the Council of Europe on 21 February 2002 enhances the necessity of providing access to unimpaired official documents and archives (article 3) : “Member States should guarantee the right of everyone to have access, on request, to official documents held by public authorities.” ;
- The *Universal Declaration on Archives<sup>5</sup>* enhanced by the UNESCO in 2011 says :

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Recital 158.

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Recital 158.

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Article 17.

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*“Archives record decisions, actions and memories. Archives are a unique and irreplaceable heritage passed from one generation to another. Archives are managed from creation to preserve their value and meaning. They are authoritative sources of information underpinning accountable and transparent administrative actions. They play an essential role in the development of societies by safeguarding and contributing to individual and community memory. Open access to archives enriches our knowledge of human society, promotes democracy, protects citizens' rights and enhances the quality of life.”*

- The *Code of ethics for archivists* adopted by the International Council of Archives on September 6<sup>th</sup>, 1996, states at Article 1<sup>st</sup> that :

*“Archivists should protect the integrity of archival material and thus guarantee that it continues to be reliable evidence of the past. The primary duty of archivists is to maintain the integrity of the records in their care and custody. In the accomplishment of this duty they must have regard to the legitimate, but sometimes conflicting, rights and interests of employers, owners, data subjects and users, past, present and future. The objectivity and impartiality of archivists is the measure of their professionalism. They should resist pressure from any source to manipulate evidence so as to conceal or distort facts<sup>6</sup>.” ;*

- The International Council on Archives’ *Principles of Access to Archives*<sup>7</sup> adopted in 2012 set out the benefits of access while also recognising that there may need to be some limitations :

*“Archives are preserved for use by present and future generations. An access service links archives to the public ; it provides information for users about the institution and its holdings ; it influences whether the public will trust the custodians of archives and the services they provide. Archivists support a culture of openness, but accept restrictions as required by laws and other authorities, ethics or donor requirements. (...) Access to the archives of government is essential for an informed society. Democracy, accountability, good governance and civic engagement require a legal guarantee that individuals will have access to the archives of public bodies established by national, self-governing territories and local governments, intergovernmental institutions, and any organization and any legal or natural person performing*

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The Universal Declaration on Archives, prepared by the International Council on Archives, was adopted by UNESCO on 26 October 2011 – see <http://unesdoc.unesco.org/images/0021/002134/213423e.pdf>.

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The code of ethics was Adopted by the General Assembly in its XIIIth session in Beijing (China) on September 6th, 1996 -- see [http://www.ica.org/sites/default/files/ICA\\_1996-09-06\\_code%20of%20ethics\\_EN.pdf](http://www.ica.org/sites/default/files/ICA_1996-09-06_code%20of%20ethics_EN.pdf)

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The Principles were adopted by the International Council on Archives on 10 September 2012 – see <http://www.ica.org/en/principles-access-archives>

*public functions and operating with public funds. All archives of public bodies are open to the public unless they fall under an exception grounded in law.”*

This present Code of conduct, based on article 40 of the Regulation, aims at balancing on the one hand the need to ensure that the interests of data subjects are protected in the course of archives services’ work, and on the other hand the needs to protect freedom of information and research, and to allow archives to play their role of preserving unique and irreplaceable heritage and protecting citizens’ rights, particularly in view of the need of preserving the evidential value of archives for individuals in relation to decisions and actions that affected them and their ancestors.

Processing of personal data for archiving purposes by an archives service in connection with the acquisition and management of archives and the provision of access to them is a compatible further purpose of processing in terms of Article 89 (1) of the Regulation 2016/679 and an objective of public interest in terms of Article 6 (1) (e) of the Regulation<sup>8</sup>, where such processing is in accordance with this Code.

The code sets out the actions archives services are required to take in connection with the processing of personal data for archiving purposes, specifically to enable their use for research and evidence finding, now or in the future.

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Article 89 (3).

## 2 / PURPOSE AND SCOPE

2.1.1 This code of conduct applies to public and private archives services that have adopted the code in accordance with arrangements made under Article 40 of the Regulation and described at section 5.

2.1.2 It should be noted that public archives services are likely to come under the scope of article 89 (3), and private archives services, under the scope of article 89 (2).

2.1.3 This code applies solely to processing of personal data for archiving purposes. It should be clear that processing of personal data for archive services' own initial purposes (such as staff records, or users' directory) is subject to general regime stated in the Regulation.

### 3/ GENERAL PRINCIPLES

#### 3.1 Definitions

This section explains how certain terms have been used in this code of conduct. As a general rule, terms such as data subject have the meaning given to them by Article 4 of the Regulation, but some other terms are used in a particular way in this code and hence require definition.

**Acquisition** – the receipt of archives from an external person or organisation or from another part of the same organisation. The term represents a transfer of responsibility for archives and is not intended to imply that they automatically become the property of the archives service.

**Archival information management system** – software that supports or carries out the management of archives.

**Archives** – Materials created or received by a person, family, or organization, public or private, in the conduct of their affairs and preserved because of the enduring value contained in the information they contain or as evidence of the functions and responsibilities of their creator, especially those materials maintained using the principles of provenance, original order, and collective control; permanent records<sup>9</sup>.

**Archives service** – Services which, pursuant to Union or Member State law, have a legal obligation to acquire, preserve, appraise, arrange, describe, communicate, promote, disseminate and provide access to records of enduring value for general public interest<sup>10</sup>.

**Communication** – disclosure of archives to an identified person. This includes making archives available for consultation, providing copies or enabling copying of archives, and enabling their interrogation. Communication includes the notion of “special permission for access to archives that are not openly available”, set in Recommendation No. R (2000) 13 of the Committee of Ministers to Member States on a European policy on access to archives.

**[Data controller** – has the meaning given to it in the Regulation

**[Data processor** – has the meaning given to it in the Regulation]

**[Data subject** – has the meaning given to it in the Regulation] It is stressed that a data subject is necessarily a living person<sup>11</sup>.

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Provided for by Multilingual Archival Terminology (International council on archives).

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Provided for by Recital 158.

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Provided for by Recital 158 and 160.

**Dissemination** – disclosure of archives to unidentified person or entities, including making them available for consultation, whether online or in research rooms, and enabling interrogation of them. Dissemination takes no account of the identity of the user and in effect publishes personal data to the world at large. This happens when archives are published on websites or in some other way, such as exhibitions or print publications.

**Data** – any item of information recorded in any form or format that has been acquired by an archives service for preservation as part of its collections or, having been received by the archives services, is being assessed for this purpose. The data to which this Code refers are those that contain or consist of personal data.

**Finding aids** – metadata, catalogues, indexes and other means of locating and identifying the contents and context of archives.

**Management of archives** – the term used for the activities of the archives service in relation to the archives for which it is responsible. This may include appraisal of archives for permanent preservation, acquisition and accessioning, storage and preservation, arrangement and description, and provision of access through communication, promotion and dissemination.

**Member State law** – any official measure taken by a Member State whether by law or by regulation.

[**Personal data** – has the meaning given to it in the Regulation]

**Preservation** – measures taken by an archives service to keep the integrity, authenticity, confidentiality, readability, sustainability and availability of archives in order to enable users to interpret them correctly and to reconstruct the information contained in them in an appropriate manner.

[**Processing** - has the meaning given to it in the Regulation]

[**Pseudonymisation** – has the meaning given to in the regulation]

**Record(s)** – information created, received and maintained as evidence and as an asset by an organization or person, in pursuit of legal obligations or in the transaction of business<sup>12</sup>.

**Records management** – field of management responsible for the efficient and systematic control of the creation, receipt, maintenance, use and disposition of records, including processes for capturing and maintaining evidence of and information about business activities and transactions in the form of records<sup>13</sup>.

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Provided for by NF ISO 30300 and ISO 15489.

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Idem.



**Regulation** – the Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)

[Re-use – has the meaning given to it in the Directive 2013/37/UE on re-use of public sector information.]

**Research** – investigation into persons, facts and circumstances, including the gathering, analysis and interpretation of archives and the development of conclusions based on those archives and, if applicable, other sources. It includes not only research organisations but also research conducted privately by any individual as well as genealogical research.

[**Special categories of data** – has the meaning given to it in the Regulation]

**User** – any person not identical with the data subject who requests or gains access to archives held in an archives service for archiving purposes, or who uses other services offered by the archives service, such as provision of advice and guidance in the use of the archives, with the exception of the staff working at the archives services in the course of their duties.

### ***3.2 Responsibilities and commitments***

#### **Responsibilities**

3.2.1 Archives services acquire and manage archives from many different organisations and individuals. The nature of this acquisition (transfer by public records bodies, legal deposit, purchase, private donation...) should determine whether the archives service has sole responsibility for compliance with the Regulation as data controller or shares the responsibility with the depositor or donor. The responsibilities of all parties in relation to data protection should in any case be clearly laid out and should be part of the archives' description.

3.2.2 Archives services set up a framework of rules which defines the conditions for the communication and the dissemination or re-use of personal data, in accordance with Union or Member State law. When users acquire personal data in archives communicated or disseminated by an archives service, they become responsible of that personal data<sup>14</sup>. Archives services alert users to the fact that they may acquire obligations under the Regulation in the course of their research and provide or refer them to appropriate guidance. The archives services cannot be held responsible for the use made of legally communicated or disseminated archives.

#### **Commitments**

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Article 89 (2).

3.2.4 Archives services respect the rights, fundamental freedoms and dignity of data subjects in their processing of personal data regarding living individuals.

3.2.5. Archives services ensure that their organisational structure is adequate for the processing of personal data. The processes and the allocation of staff and other resources are structured in such a way that the requirements of the Regulation can be met.

3.2.6 In particular, the data protection officer to be engaged by the archives service has knowledge of the Code and takes it into account when performing his/hers tasks as mentioned in art. 39 of the GDPR.

3.2.7 Archives services ensure that their policies and procedures are compatible with the Regulation and this code and require their staff to act in accordance with them. Archives services also ensure that suitable schemes are in place to ensure adequate training in data protection and further training in the long term. Archives services should work in close partnership with the data protection officer.

3.2.8 The archives service should implement appropriate technical and organisational measures for ensuring that, by default, only personal data which are necessary for archiving purposes are processed. That obligation applies in particular to the amount of personal data collected (principle of data minimisation) and their accessibility.

3.2.9 Archives services safeguard the integrity and authenticity of archives containing personal data and ensure that this is not impaired by any actions taken by or on behalf of the archives service. They abstain from any activity that involves tampering with, dissembling or misrepresenting facts or information in the archives.

3.2.10 Archives services put in place measures to ensure that any person undertaking activities on behalf of the archives service in connection with archives containing personal data does so with the fairness, accuracy, impartiality, honesty and diligence required by professional practice and his/her position.

3.2.11 Archives services must keep the archives unaltered for the long term. Data protection measures must be limited for the time they are needed to protect the living data subject<sup>15</sup> but must be reversible when this protection is no longer needed. Archives services ensure that adequate safeguards exist to protect personal data against unauthorised access.

When personal data are processed by automated means archives services implement appropriate technical and organisational measures to protect the rights of the data subject as well as the authenticity and the integrity of the data. In particular, if pseudonymisation of the personal data should be required, this must be entirely reversible processes, in accordance with the archives' aims of preserving reliable sources.

3.2.12 Archives services ensure that the communication and the dissemination of archives and their description by the archives service itself (finding aids, online-catalogues, digitised

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Recital 158.

collections etc.) are in conformity with the Regulation and, where relevant, to the Member State law.

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## 4 / RULES FOR ARCHIVES SERVICES ACTIVITIES

### 4.1 *Appraisal and acquisition of archives*

#### Appraisal

4.1.1 When appraising the value for preservation of archives containing personal data, archives services must consider whether preservation of these archives is in the public interest. This requires archives services to take account of their legal obligations, their mandate and their policies concerning acquisitions. Such assessment takes into account international norms such as NF ISO 30300 and NF ISO 30301 on information and documentation ; NF ISO 15489 on records management ; ISO 26122 on information and documentation (work process analysis for records).

4.1.2 Archives services should appraise whether pseudonymisation or some other means of disconnecting personal data from the identity of data subjects, would compromise the authenticity of the archives or otherwise lead to the loss of their value for historical research and evidential value. It should also be appraised whether such pseudonymisation would create a risk for possible other rights such as intellectual property rights for example.

4.1.3 Appraisal of the persistent value of archives, and the decisions made as a consequence must be documented so that archives services can explain why archives are being preserved permanently.

#### Acquisition

4.1.4 Archives services should develop and apply a policy on the types of archives they will acquire by defining collection guidelines, selection and appraisal criteria. The criteria may be content-based, formal or qualitative in nature. The application of such a policy to particular archives will support the position that their acquisition and preservation is in the public interest.

4.1.5 Archives services should follow accepted professional practice in their documentation of acquisitions, in particular in view of international professional norms of description of archives or archive producers such as those published by the International Council of Archives<sup>16</sup>.

4.1.6 Archives services are not expected to inform data subjects that archives containing their personal data have been acquired and are being processed. However they should make it clear in general publicity and guidance material that the archives they hold may contain

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ISAD-G, issued in 1994, or ISAAR-CPF, issued in 1996, for example.

personal data and that such data is being processed in accordance with the Regulation and the present Code of conduct.

## **4.2 Storage and preservation of archives**

4.2.1 Archives services must store archives containing personal data securely so as to protect them from unauthorised access, alteration, loss, damage or destruction.

4.2.2 The level of security must be appropriate and proportionate to the nature of the personal data and the harm that could result from a security breach. It must reflect accepted professional standards, such as those precised in ISO 14641-1, keep pace with ongoing technical developments, and take account of accepted risk management techniques.

4.2.3 In the event of a serious breach arising from storage and preservation of archives, archives services must consider whether the breach is likely to cause significant damage to the interests of living data subjects. If so, notification of the breach should be considered, under the terms of article 34 (3) c) of the Regulation, and given to the supervisory authority.

## **4.3 Access to archives**

4.3.1 The general approach to access adopted by archives services is set out in the International Council on Archives' Principles of Access to Archives<sup>17</sup>. This sets out the benefits of access while also recognising that there may need to be some limitations. This approach determines the description of archives and the provision of access to them through communication and dissemination.

4.3.2 It should be clear that this Code does not oppose any Member State law on access to archives or official documents<sup>18</sup>. Equally, this Code should not be held in opposition with Directive 2013/37/EU on reuse of public information sector.

### **Description of archives**

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see <http://www.ica.org/13619/toolkits-guides-manuals-and-guidelines/draft-principles-of-access-to-archives.html>

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As the Regulation itself recalls, in article 86, that “*Personal data in official documents held by a public authority or a public body or a private body for the performance of a task carried out in the public interest may be disclosed by the authority or body in accordance with Union or Member State law to which the public authority or body is subject in order to reconcile public access to official documents with the right to the protection of personal data pursuant to this Regulation.*”

4.3.3 Archives services must provide finding aids that enable users to understand the nature and contents of archives held by the archives service and that help users locate personal data of interest to them.

4.3.4 The descriptions of archives within these finding aids must respect the rights of data subjects in relation to the information they contain. Descriptions that identify data subjects must not reveal information that is confidential, protected by law or requires protection from disclosure for some other reason. Descriptions should be made in accordance with international professional norms and standards<sup>19</sup>. When description levels are defined and shall include personal data, the archives service should clearly document the reason for this decision. The fact that archives hold personal data should not be an obstacle to them being described in finding aids. If descriptions that identify data subjects reveal information that is confidential, protected by law or requires protection from disclosure for some other reason, they must not be communicated as long as these restrictions apply<sup>20</sup>.

#### Communication of archives

4.3.5 While archives services exist to preserve and provide access to archives, they must not disclose archives containing personal data unless they can reconcile the requirements of research, with the rights and fundamental freedoms of data subjects.

4.3.6 Archives services must check whether newly acquired archives contain, or are likely to contain, any of the special categories of personal data so that appropriate arrangements can be made for their management. Where practicable, they must document the circumstances in which the personal data was originally obtained and used.

4.3.7 As a general rule archives services may disclose archives to users only if the following conditions are met :

- Union or Member State law provides legal ground for the disclosure of archives ; or
- Where no such law exists, it is appraised that access would be fair to the data subject. In determining this the nature of the information and its age must be considered as well as the reasonable expectations of data subjects and the likely impact of disclosure on their private and family life, their standing in the community and their reputation ; or
- There is no impediment in law such as a court order or a statutory prohibition of disclosure or a legally binding duty of confidence ; or
- There is a wider public interest in communicating the information than in protecting the privacy of the data subject ; or
- The disclosure would not excessively affect the data subject's privacy.

4.3.8 Archives services are not expected to investigate whether data subjects are still alive and hence protected by the Regulation. However, the possibility of the data subject being still

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Such as ISAD-G or ISAAR-CPF.

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Article 8 of the CoE recommendation on access to archives.

alive should be taken into account when appraising the impact of disclosure of archives, unless such disclosure is provided for by Union or Member State law.

4.3.9 When general access cannot be provided to archives, it may be possible to provide an individual user with access to the archives subject to specific safeguards to protect the interests of data subjects. These safeguards might include requiring users to sign an undertaking to respect the rights of data subjects, to anonymise data before the dissemination or to refrain from copying the archives as a condition of obtaining access.

4.3.10 Decisions to allow or refuse access must be explained and documented so that the archives service is able to demonstrate how it has acted in accordance with the Regulation and this code.

4.3.11 Archives services must make users aware that they may acquire responsibility for compliance with the Regulation in relation to archives communicated or disseminated to them and must provide or refer users to appropriate guidance.

#### **Dissemination of archives and of finding aids**

4.3.12 It is not possible to protect archives that are disseminated from misuse or use that is unfair to data subjects. For this reason, archives services must not disseminate archives unless they have assessed them and decided that they can be disseminated without detriment to the interests of data subjects.

When a decision of dissemination is considered, archives services should assess the risk for protection of the data subject's rights, in accordance with Member State law, all the more for sensitive data. Archives services should fully document any decision of dissemination.

#### ***4.4 Processing by automated means***

4.4.1 All archival processes from acquisition to dissemination may be supported by automated means. Archive services implement adequate safeguards, security measures, mechanisms and a dedicated access rights management to ensure that only authorised staff and users can access personal data. In order to meet the requirements of the Regulation archives services will implement data protection guidelines for their archival information management systems.

#### ***4.5 Data subject rights***

4.5.1 The Regulation provides for a derogation for article 17 (right to erasure) for processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes.

4.5.2 Apart from article 17, article 89 states the possibility to derogate to other rights provided for by the Regulation, when necessary for the fulfilment of the purposes set at this article. Member State should therefore provide derogations for articles 15, 16, 18 and 21 for scientific or historical research purposes or statistical purposes under terms of article 89 (2)

and derogations for articles 15, 16, 18, 19, 20 and 21 for archiving purposes, under terms of article 89 (3). These derogations should be stated in Member State law.

4.5.3 Archives services must have procedures in place for handling requests from data subjects relating to the exercise of these rights and must ensure that all relevant staff are trained to recognise them and handle them in accordance with the procedures.

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**5 / RULES FOR ARCHIVES' USERS**

5.1. In accessing archives and exercising freedom of expression as well as in performing studies or research activities, users shall take such measures as are appropriate pursuant to laws and regulations in order to ensure respect for data subjects' rights and fundamental freedoms whenever they process personal data.

5.2. Pursuant to the provisions laid down in paragraph 5.1 above, users shall use archives under their own responsibility in compliance both with the purposes sought and with the principles laid down in the Regulation, stipulating that the data must be adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed.

5.3. Users shall take into account the relevance of the data at the time of their disclosure with particular regard to the individual personal data included in archives rather than to the archives as a whole. Users may disclose personal data if the latter are relevant and necessary for the research and do not affect the individuals' dignity and privacy.

5.4. Where a special permission for consultation of the archives<sup>21</sup> is requested by a user before expiry of the relevant term, the user shall justify the congruence between the archives and his research. If this permission is granted, the user shall undertake to respect the rights of data subjects, to anonymise data before the dissemination or to refrain from copying the archives.

5.5. The user who has been granted permission for consultation referred to in paragraph 5.4 shall not allow others to subsequently process the data. Archives shall retain their confidential nature and may not be used further by other entities without the relevant permission. In particular, re-use of public sector information rules do not apply to data consulted this way<sup>22</sup>.

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Such as stated in Article 9 of Recommendation No. R (2000) 13 of the Committee of Ministers to Member States on a European policy on access to archives.

22 In accordance with Directive 2013/37/UE on re-use of public sector information (recital 9).

**6 / IMPLEMENTATION****6.1 Adoption**

6.1.1 Member State law should provide for official adoption of this Code in view of the national organization.

6.1.2 Subscription to this Code should be mandatory for public archives services.

6.1.3 Subscription to this Code should be optional for private archives services.

6.1.4 Private archives services should be able to submit their subscription to a national referent designed by each Member State. This national referent should keep an up-to-date register of archives services having subscribed to the Code.

**6.2 Breaches**

6.2.1 Breaches of the Code by an archives services shall be reported to the national referent.