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1. Introduction

A specific regulation on archives no longer exists in Spain's national legislation, although in 1901 a regulation (*reglamento*) of State Archives was approved. The management of archives has received generally scarce attention in general or specific rules. During this latest legislative period the Spanish government planned the development of a law of Transparency and Access of Citizens to Public Information, alongside with a Law of Archives, but both have been recently abandoned.

By 1980 the administrative division became an autonomic state based on regional home rule governments, called *Comunidades Autónomas* (CC.AA.). This political model implies that CC.AA. received competences in document management, culture and historical heritage area, and so they have legislated on these subjects. The Spanish system of archives (specifically the public ones) main levels are: the state Archives (managed by the General Administration of State, A.G.E.), regional autonomic archives, and municipal archives.

As it has been said, there is not a common state law on Archives. Nevertheless some state laws include archives related points and have a basic character, concerning all public administrations. The current local administrative organization implies a large number of small municipalities (in size and population) which means, on one hand, that they have neither archivist nor technical employees but, on the other hand, they benefit from a degree of autonomy that allows them to work under their own regulations.

This profusion of legislation has created certain confusion in those members of the public who want or need to use records and archival documents (from current archives till historical ones) in a faster and easier way, from any public body. Access is being increasingly seen as a right for citizenship. Historical archives are less affected by problems of access or copyright, or, at least, they do not suffer them in the same way.

So, different rights and aims have to be balanced, transparency but mandatory professional secrecy imposed on civil servants, access and privacy, dissemination and data protection, „openness“

and proportionality, in order to provide a fair access to public and official documents.

2. The Right of access

Along to the 20th century, Spanish archives were almost closed to the public. State historical archives were consulted mainly by academic researchers.

The Spanish Constitution of 1978 mentions in Article 105 as basic the right of access to records and archives, except those related to state security and defence, the investigation of crimes and the privacy of people. This article should have been developed in a specific law (*ley orgánica*), but it never was. A wide range of general and local regional laws addresses this right.

As a general principle, documents holding part of finished administrative procedures and deposited in the central archives can be freely consulted. Access can only be denied applying legal limits and the denial has to be justified. Access to an archival item involves people's right to obtain reproductions there of, once public prices are paid. This point has received different interpretations (access yes, copies not always).

In Spain access to archives is mainly regulated by two laws: Spanish Historical Heritage Law (*Ley 16/1985, del Patrimonio Histórico Español, LPHE*) and the Legal Regime of Public Administrations and Common Administrative Procedure Law (*Ley 30/1992*).

LPHE affects historical archives. It grants access to documents that are more than 50 years old, or 25 years after the death of people affected by the files.

Access is limited to „*interesados*“ (interested parties), people whose personal, policy, or procedural data were included or mentioned in documents. Third parties would need an application or express consent of the affected people, or their relatives, to consult or reproduce that documentation. Alternatively, they need to prove the value for their research (under their responsibility, removing or discriminating data if necessary).

This term applies to „documents containing personal data of police, procedural, clinical or other nature that may affect the safety of persons, their honour, the privacy of their private and family life and his own image“. Matters falling under the Official

Secrets Act were excluded from public consultation, but a request for authorization may be granted by the Head of Department in charge of custody. Besides, the law mentions that the Commission of Administrative Documents will be in charge for the appraisal, qualification, and use of state documents.

However some regional laws (CC.AA.) set up a different, longer period of time: 30 years in the Canarian's Documentary Heritage and Archives Act, or 50 years after affected people's death in Castilla y León's case – despite being revised in 2004 –, and 100 years since the date of document. A future Andalusian's Law on Documents, Archives and Documentary Heritage will reduce its actual term and fix the same period of 25 years than Law 16/1985, like the new Catalanian Law did some years ago.

Also affecting the term of access, the Civil Protection of the Right to Honour, Personal and Familiar Intimacy and the Own Image Law (*Ley Orgánica 1/1982, de Protección civil del derecho al honor, a la intimidad personal y familiar y a la propia imagen*) denies it „unless more than 80 years have passed since the death of the people affected”, in accordance with updated cultural norms.

Another slightly different example in access time: Historic Church Archive of Vizcaya (Archivo Histórico Eclesiástico de Bizcaya, AHEB-BEHA) offers sacramental registers on its website, but they do note that public access to documentation under 75 years is not allowed in parishes nor diocesan institutions nor in the archive itself.

Legally, the organic law of *Data Protection* (Ley 15/1999, LOPD) has a higher range than ordinary legislation, such as laws 15/1985 or 30/1992, and its interpretation could prevail. It gives no waiting periods; in fact access and protection to the transfer and data processing is extinguished by the death of people. It points out that compulsory permission must be given for people on the interchange of private data, what also affects to interoperability measures between public administrations. And it offers the option to correct or delete the wrong data. The Spanish Agency for Data Protection takes care on this matter.

The Data Protection Law mentions the treatment of files compiled under the outdated law of Vagrancy and Dangerousness and Social Rehabilitation („Vagos y Maleantes y de Peligrosidad y Reha-

bilitación Social”, quite a bizarre, old-fashioned name, now) containing data related to security, honour, intimacy, or personal image. This 1933 Act – popularly known as the Gandula, „lazy woman” – concerning the treatment of vagrants, beggars, nomads, pimps, and other so considered antisocial people, was amended in 1945 to punish homosexuals as well. Their consultation is forbidden without expressed consent of the affected people or 50 years after the documents date (even in this case, personal data referred to should be deleted, using the appropriate technical procedures in each case). The media echoed the example of a man who deleted his whole file of homosexuality.

The second main law related to archives that directly affects to public bodies is Legal Regime of Public Administrations and Common Administrative Procedure Law (*Ley 30/1992, de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común*). It states the right to access to records, current archives and registers. People being part of a record held by an administrative body are entitled to access to those records and documents, whatever the form of expression, graphic, sound or image or type of material containing them, provided such records were related to proceedings terminated on the date of the application.

It limits access to documents containing information concerning the privacy of individuals to themselves, except in the case of files on paper expired by lapse of time. On the contrary, access to documents containing people's names – but neither data nor information pertaining to the privacy of individuals – may be exercised by their owners as well as by third parties who can show a direct and legitimate interest. Punishment or disciplinary files are exempted.

Right of access can be denied if the public interest or the interests of others more needed of protection prevail. In such cases, the competent body shall issue a reasoned decision. The right of access implies the obtention of certified copies of documents or whose examination is authorized by the Administration, upon payment, if any, of the charges established by law.

Generally speaking, following files are excluded from access: Files related to National Defence or State Security, procedures for the investigation of

crimes, topics protected by commercial or industrial secrecy or linked to monetary administrative politics. In spite of this statement, in case the applicants are researchers showing a historical, scientific or cultural relevance, they may be authorized direct access to those records to consult. People privacy is assured.

Access to some areas is governed by specific provisions and rules: archives subject to the legislation on classified materials, documents and files containing health-sanitary data of patients, records under polls and elections regime legislation, exclusively statistical records, Civil Register and the Central Register of prisoners and fugitives („penados y rebeldes”) and those register ruled by a law, the access to documents held in public administration by General Deputies, Senators, MP (member of a Autonomic Community Parliament), or the consultation of documentary funds from Historical Archives. A list of the documents held by public authorities subject to special regime of advertising must be periodically published in order to be consulted by individuals.

Focused on administrative bodies, the right of access must be exercised without disturbing the effective work of public services. Applicants must ask for concrete items or documents, no generic queries are accepted. In these circumstances, plus the absence of archivist technical staff, the lack of time, and the accumulation of work to be done, access can be denied. A literal interpretation of law 30/1992 leaves out documentation not regulated by administrative procedures (such as correspondence, reports, minutes, databases etc). This omission would close the door to a part of the public and official documents. Furthermore, each archival centre can regulate these issues in their services' requirements – „reglamentos“, „ordenanzas“.

The number of archive users has grown and their profile has changed by social queries, civil rights, environment, and so on. The European Commission (EC) has set rules which ensure freedom of access to, and dissemination of, information on the environment held by public authorities, and to set out the basic conditions under which such information should be available. A case that is a bit shocking: Town planning regulations warrant public access to its documentation, with no restrictions but – in some cases – to private data. Theoretical-

ly, if a neighbour (interested person, authorized person or any general applicant) asks for a reproduction of a home's technical drawings, he should be always given a private copy, although their author never loses their intellectual property protection. In order to protect the privacy, internal or external plans can be distinguished, and the aim of the request can be checked (it is public communication, distribution, or transformation of these drawings, commercial purposes and so on), but it is only on the user's responsibility.

Some governmental economic compensations and legal measures in favour of people who suffered prosecution or violence during the Spanish Civil War and Franco's dictatorship stimulated the investigation in civil and military archives in order to prove deaths, the stays in prison or concentration camps, identify common burials etc. The Law of Historic Memory (2007) granted access to documentary funds held on public archives and warranted obtaining copies, and also granted access to private archives partly or fully sustained by public funds. This point has generated sometimes controversies in practice: for instance, the access to funds of the private Francisco Franco Foundation.

In this sense, some examples of proactive approach to „right to know” are set in websites: State Administration General Archive (AGA) based on Alcalá de Henares, Documentary Historic Memory Centre (former Civil War Archive) of Salamanca, Ministry of Defence Archives open tools (such as the site Civil War Victims and the Franco Reprisals), database of members of the military and law enforcement personnel in the service of the Republic, or Missing people in the Army of the Spanish Republic (1936–1939). There are other research lines as applicants looking for Spanish ancestors can check the site of Latin American Migration (Spanish movement to Cuba, Mexico and Argentina etc) or Castilla y León regional archive informing on documentary sources for research on the so-called „Stolen babies”.

One more practical measure that improved access to Archives depending from the Ministry of Culture was the end in 2007 of the researcher card („Tarjeta de investigador”). Users can identify themselves through their identity card, passport, or driving licence (in the National Archive of Catalonia), and it is not compulsory to justify requests for research

or consultation. This is a step in favour of equal access. However, a specific user card or permission can be required for accessing to archives of other semi-public (such as Spanish Military Archives, Banco de España, Real Academia de Bellas Artes de San Fernando) or private institutions.

Appraisal schedules published by ministries or regional commissions, even though they are not updated regularly, lay down a good tool to be used in favour of a clear access and consultation. To this extent the regional government of the Generalitat de Catalunya (Catalonia/Cataluña) publishes the „Catalan access and appraisal Commission's agreement“ by approving a standard form of confidentiality commitments in the case of consultation of research of public documents of restricted access.

From time to time practical troubles show up in an archivist's professional practice, such as a simple one: people live longer. Some people consider that the present lengthening of the life span can make a 50 year term too short. It seems that law protects more dead people than those alive. We face new archival borders in data dissemination through Internet (patterns of population and public exhibition limits). Lately, a stronger use of rights – adoptees seeking their birth parents, stolen babies – clashes with old practices in specific regulation. For instance, business archives: ancient private clinic archives hardly kept their records nor transfer them to the public health system.

3. Intellectual property and copyright

Spanish Intellectual Property regulations (Law 23/2006, and refunded text of the *Real Decreto legislativo* 1/1996) distinguish two kinds of rights: Moral and the economic. Firstly, Spanish law supports moral rights of original authors and recognizes the integrity of their works. Authorship is always acknowledged (in the Penal Code too). This is the reason why, if the author can not be identified, the term „unknown“ must be used. Secondly, rights of economic character distinguish between rights relating to the exploitation of the work or subject-matter (exclusive rights and rights of remuneration) and countervailing duties such as payment in compensation for a private copy.

How long do the rights on Intellectual Property stand? The general term is the length of the author's

life, and 70 years after his death to their heirs. There are shorter terms for moral rights (25 years). If authors died before 1987 this term is commonly 80 years (based on a former law of 1879). Intellectual property rights are transmitted by means of a written document. If the state, a CC.AA. or a cultural public institution does not know who or where the author or their heirs – „*titulares del derecho*“, people holding the rights – are, they are legitimized to exercise their rights *on* intellectual property. Once the intellectual property period of protection lapses, the right goes to the public dominion, which means that the work can be used freely by everybody.

Archival items such as photographs, films, video or tape recording, maps, construction plans and project drawings, brochures, correspondence, speeches, and lectures (widely expressed as literary, artistic or scientific creations etc) are subject to rights linked to intellectual property and so they have exploitation rights, i.e. reproduction, distribution, public communication, or transformation. Authors can express their opinion on the use of their works. In case of a transformation ending in a different work, the new author will have their own right, but the original author may or may not authorise it.

A particular approach is given to those so called „mere photographs“ („*meras fotografías*“). This term refers to photographs taken without an artistic aim, the simple, common ones. Mere photographs are protected by law and their authors have the exclusive right to authorize (or not) their reproduction, distribution and public communication for 25 years since the 1st January following to the date the photo was taken or printed.

Besides administrative purposes, archive policies set down conditions for the reproduction of information units for external users, taking care of highlighting legal advice in this point and in personal data protection, privacy and intimacy as well, and according the range of communication, the social aim (teaching, research, commercial), and private copying.

A private copy of any work or other subject already reported is allowed, except for computer programs and electronic databases. Guardprotected works of whatever format (paper, film, audio etc) held by any public body or by institutions of cultural or scientific nature can be reproduced for research or conservation purposes.

Archives having the right of exploitation of their Intellectual property sell their photos according to public taxes and prices. The Girona municipal archive has a Centre for Research and Promotion of the Image (C.D.R.I.) that takes care of the copyright assignment, authorization of use, special use, temporary custodies, etc. A written contract – according to circumstances – should detail every condition. Permission is given for a single use. Prices vary depending on the purpose. Price for private use or teaching can be only the physical cost of reproduction or free, for personal use.

Internet does not change the basis of intellectual property, but it can make its protection more difficult, even though metadata can help technology to shield this right. The use of archival items must extend to its use in digital project, radio, television, publications or electronic books, reuse of public information. Watermarks, legible text, or low resolutions are some of the ways of protecting intellectual property in downloaded files (photographs, digital copies) from fraudulent use.

Some archival items, such as recorded interviews, have to face several regulations: the content – full of references to third parties with nominal data – could be the subject of LOPD. Another common situation: users don't quote individually every photograph or single plan in published books or research papers. On the subject of photographs, the oldest administrative press services didn't take care of writing down the name of photographers who took every picture, sometimes bought to photographers who currently published them in the journals they worked for. The new law of Contracts of 2007 states that the property of works and their rights stays with the contracting party, unless explicitly said otherwise; before, for instance, the rights of photographs bought by a public body were owned to their physical author.

4. More on archives and electronic administration rules

A few words about archival practice. Even if international standards of description (ISAD-G, ISAAD and so on) are known and followed, they aren't mentioned in general laws. There are archives that have adopted the ISO 9000, about quality improvements. The standards ISO 15489 and 30300 could

be taken as a framework of excellence possible in organizations, strengthening the role of archivists.

There are also various description rules. There are territorial rules both in Catalonia (NODAC) and in Galicia (NOGADA). Meanwhile the nation-wide NEDA (Spanish Standards of Archival Description, *Normas españolas de descripción de archivo*) is in its final draft.

The increasing development of electronic administration moved the State to launch the law of Electronic Access of Citizens to Electronic Administration (*Ley 11/2007 de Acceso Electrónico de los Ciudadanos a los Servicios Públicos*), developed in 2009. Archival concepts have been reflected in the law. In 2010 the National Schemes of Security and Interoperability were published. New technical regulations – still not mandatory – define minimal requirements for all public bodies, such as: electronic document, scanning documents, electronic files, policy on electronic Signatures and management of Certificates, procedures for conversion between copies and electronic documents, as well as from paper or other physical media to electronic formats, data model for sharing of sites between the Entities registration or Authentic copying between electronic records.

Electronic records, documents and objects, in the form of electronic files will end – in the long term – in electronic archives, according to appraisal rules. This is why some archivists bet for their integration in teams with the computer technicians, leading since the very beginning tasks at the electronic management document system.

A final impression

Summing up, common, clear and state-wide terms of access would be desirable, instead of the range of national and regional acts, unequal criteria depending on territories or on the kind of archive.

The professional body of Archivists has the feeling of going from the opening of the Heritage Law 16/1985 to more restrictive guidelines. Most legal interpretations are focusing on privacy, and some colleagues miss a bigger effort in favour of access. They feel that in everyday practice, the full service in public archives is undermined by the increasing weight of rules of e-government and data protection. Of course archival services (such as a wide

timetable of services, well-placed buildings, researcher's rooms, the arrangement and state of the funds themselves, accurate descriptions, technological facilities if possible) would help to improve the conditions of access.

Records and archives, e-records and e-archives: changing times. Some municipal archives are deeply involved in the electronic management of electronic records and documents. A leap or – may be – a chance for archivists to lead electronic archives. A big task is waiting for all of us.

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