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Časopis arhivske teorije in prakse
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COLLISION BETWEEN LEGAL REGULATIONS ON THE PROTECTION OF PERSONAL DATA AND LEGAL REGULATIONS ON ARCHIVAL WORK

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Abstract:
The paper deals with the topic of collision between legal regulations on the protection of personal data and the legal regulations on archival work. The legal regulation applied by the Personal Data Protection Agency in Bosnia and Herzegovina often conflicts with the legislation that regulates archival work and lays down retention periods in the Records Schedule for given documentation. Due to this lack of uniformity of regulations, Archives has often been faced with requests for destroying the kind of records which have to be permanently retained. The paper also proposes possible solutions for overcoming this problem by both protecting the rights of individuals and remaining consistent to archival legislation.

Key words:
legislation, collision, personal data, retention periods, Records Schedule

Izvleček:
Kolizija med pravnimi predpisi na področju varstva osebnih podatkov in predpisov o arhivskem delu
Avtorica prispevka se ukvarja s temo kolizije med pravnimi predpisi na področju varstva osebnih podatkov in predpisi, ki urejajo arhivsko delo. Predpis, ki ga uvaja Agencija za zaščito osebnih podatkov Bosne in Hercegovine, je pri določanju rokov hrambe dokumentacije namreč velikokrat v neskladju s predpisi, ki urejajo arhivsko delo. Zaradi tega neskladja ustvarjalci arhivskega gradiva pogosto za uničenje določijo gradivo, ki bi ga bilo potrebno hraniti trajno. Prispevek podaja nekaj možnosti za rešitev te težave, ki bi hkrati ščitila pravice posameznikov in bila v skladju z arhivsko zakonodajo.

Ključne besede:
zakonodaja, kolizija, osebni podatki, roki hrambe

1. INTRODUCTION

The paper will deal with the problems that arise when applying regulations pertaining to archival work and other laws, subordinate legislation as well as individual institutions' acts. It will particularly focus on regulations related to personal data protection. In its practice, the Sarajevo Historical Archives (henceforth: the Archives) has been faced with queries that indicated the conflict between adherence to the current records retention periods on the one hand, and application of other regulations that require their destruction on the other. How to satisfy both interests, how to maintain compliance in both cases?

2. PROBLEMS FROM PRACTICE

The problems described below arose between the Ministry of Interior (henceforth: the Ministry) and the Personal Data Protection Agency in Bosnia and Herzegovina (henceforth: the Agency). The research into this topic reveals that this problem also arises between other ministries and the Agency.

The paper discusses cases forwarded to the Archives. The case involved the Ministry's current records pertaining to operational records collected for police purposes, the retention period for which should be determined by the purpose for which they are stored and after which they should be deleted. However, the Ministry often chooses to permanently retain these records, thus probably ensuring their use in cases from Recommendation no. R (87) of the Committee of Ministers to member states regulating the use of personal data in the police sector, adopted by the Committee of Ministers on September 17, 1987 at the 410th meeting of the Ministers' Deputies (henceforth: the Recommendation). The determination of retention periods should be particularly discussed in the context of various criteria pursuant to the Recommendation.

Principle 7 of the Recommendation deals with the issue of storage length and updating of data. Recommendation says that *"measures should be taken so that personal data kept for police purposes are deleted if they are no longer necessary for the purposes for which they were stored.*

For this purpose, consideration shall in particular be given to the following criteria: the need to retain data in the light of the conclusion of an inquiry into a particular case; a final judicial decision, in particular an acquittal; rehabilitation; spent convictions; amnesties; the age of the data subject, particular categories of data."

The problem became evident when the Agency, upon a party's objection, established that operational records were used as a source of providing information on a person, although they were no longer usable and no longer serve their purpose and therefore have no legal significance. The Law on the Protection of Personal Data prescribes that, within its competences, the Agency has the power to *"order <u>blocking, erasing or destroying</u> of data, temporary or permanently ban processing, issue warning or reprimand the controller."* (Law on the Protection of Personal Data, 2006) Art. 40, par. 2, point e.). In the actual case, contrary to this provision, the Agency in its decision ordered the Ministry to cumulatively take all the listed measures from the quoted point, while it can be observed that the Law provides for the possibility of destruction as an alternative, rather as a binding measure.

This gives rise to problems in practice, since these records are defined as "permanent" by the Ministry as their creator while, on the other hand, the Agency orders their destruction. Acting upon the Agency's decision, the Ministry issued a document on the destruction of part of the records concerned; however, the implementation of the

decision required the consent of the Archives. Requests by the Ministry for granting consent for the destruction of current records, which were designated as permanent and the Agency's order to destroy them, put the Archives in an impossible position in terms of finding a solution.

3. PROPOSALS OF MEASURES FOR OVERCOMING SIMILAR PROBLEMS IN PRACTICE

To overcome such problems, it is necessary to consider measures that would serve to avoid such and similar situations in the future:

- When proposing a Records Schedule for current records with retention periods (henceforth: the Schedule), ministries or any other creators of current records should realistically estimate periods of retaining current records, i.e. limit their retention until the time when they are no longer purposeful and legally usable.
- Ministries should become up-to-date in erasing individuals' personal data if the data no longer serve their purpose in accordance with the quoted Recommendation.
- Ministries should not provide data on an individual based on operational records which serve only for police processing, i.e. police purpose.
- In the actual case, in its act, i.e. in the order for correcting or suppressing the provision of personal data on an individual, the Agency should have ordered all the other measures provided for by the Law, such as erasing from records, blocking and banning data processing, rather than destruction, since these measures could achieve the desired effect, which would be in accordance with Art. 40, par 2, point e.
- Propose solutions which would allow the Archives to meet requests for erasing some documents from current records in exceptional situations.

The Archives' activity, related to its role in preserving archival records and destroying current records, is limited to the application of substantive regulations of laws and subordinate legislation.

Indeed, through substantive rules and rules that were valid at the time when these situations occurred, the protection and safekeeping of archival and current records, which involve their preservation and destruction, are duly regulated by law and subordinate legislation. Previous regulations regulating this area included the Law on Archival Activity (2000, 2005) and Decree on organizing and the manner of performing archival tasks in administrative authorities and administrative services in the Federation Bosnia and Herzegovina from 2003, while the currently valid ones include the Law on Archival Activity adapted in 2016 and the Rulebook on evaluation and selection of archival records from 2018.

All the listed regulations, primarily the Law in its Article 15, Paragraph 2, point b) prescribe *that creators and custodians of archival and current records define the current records schedule with retention periods, which has to be approved by the Archives.* Furthermore, the listed subordinate legislation comprehensively prescribes that the creator defines the records' retention periods (Current records schedule with retention periods), while the Archives grant consent upon assessing the justification of the set periods, taking into account the periods, i.e. minimum time limits, provided for by law or other acts. It was believed that each creator of archival and current records has business reasons and needs that determine the time period of their retention. Besides, every

proposer of a Records Schedule is bound to make objective estimates of the need and justification of providing a longer period of retaining the records than usual, or than those prescribed by law or other acts.

4. PROPOSALS OF SOLUTIONS THAT CAN BE INITIATED BY THE ARCHIVES

What can be done by the Archives when faced with a *fait accompli* and with applying acts which order the destruction of records whose retention period has not expired?

The following solutions are proposed to overcome the problems dealt with in the paper:

1. Initiate changes to the subordinate legislation, which will prescribe:

- - exceptional reasons for retaining current records longer than prescribed periods or the purpose of their retention;
- - possibility for granting consent to the destruction of a part of current records before the retention period expires in exceptional cases, with rigorously prescribed reasons and procedures, to avoid disruption of legal certainty and the meaning of establishing Current Records Schedule with retention periods;

2. Act in the existing legal situation in a way that legally "covers" the prescribed procedures, by allowing the current records creator, who was ordered to destroy the records even before the retention period had expired, to make a correction, i.e. shorten the records retention period in the Records Schedule. It can be achieved by means of the procedure of correcting an error in Decision, as a possibility provided for by Article 217 of the Law on Administrative Proceeding of the Federation Bosnia and Herzegovina (Official Gazette of F BiH, 2/98). In this way, the Archives would suggest that the creator and proposer of Records Schedule apply for the consent to the correction of erroneously proposed retention period in the Current Records Schedule with retention periods.

5. CONCLUSION

The experience described leads to the conclusion that the role of archivists, who have contacts with current records creators in the field, could be reinforced in terms of advisory role in defining current records retention periods, by pointing out all the implications that may result from poor estimate, due to unnecessary retention of documents that present a burden on their premises, engage employees and require proper storing conditions.

Field experience reveals that current records creators choose to retain records longer or permanently although the records cannot have any legal effect nor are they relevant over time; therefore, one cannot see a reason for their longer/permanent retention except for the "logic" guiding them, i.e. "it may come useful" (e.g. decisions on vacation approvals, paid leaves, various memos etc.). When, in practice, a Proposal of Records Schedule appears where most periods are marked as *permanent*, the question about the purpose and goal of Records Schedule arises. Records Schedule is aimed at distinguishing essential from less essential, allowing us to systematically and regularly dispose of documents that eventually become only a burden. Due to a lack of understanding of the meaning of existence and need for this normative act, authors of Records Schedules frequently resort to the designation *permanent* starting from the

assumption that it is the safest. The examples from practice described above lead to the conclusion that it is not true, and that permanent retention of records can adversely affect or, in actual cases, violate human rights.

POVZETEK

KOLIZIJA MED PRAVNIMI PREDPISI NA PODROČJU ZAŠČITE OSEBNIH PODATKOV IN PREDPISOV O ARHIVSKEM DELU

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Avtorica se ukvarja s temo kolizije med pravnimi predpisi na področju varstva osebnih podatkov in predpisi, ki urejajo arhivsko delo. Predpis, ki ga uvaja Agencija za varstvo osebnih podatkov Bosne in Hercegovine, je pri določanju rokov hrambe dokumentacije namreč velikokrat v neskladju s predpisi, ki urejajo arhivsko delo. Zaradi tega neskladja ustvarjalci arhivskega gradiva pogosto za uničenje določijo gradivo, ki bi ga bilo potrebno hraniti trajno. Prispevek podaja nekaj možnosti za rešitev te težave, ki bi hkrati ščitila pravice posameznikov in bila v skladju z arhivsko zakonodajo.

Dolžnost ustvarjalcev zapisov je med drugim tudi redno izločanje dokumentacije, ki so ji pretekli roki hrambe. Prav tako pa ima ustvarjalec tudi možnost, da dokumente za potrebe svojega delovanja obdrži dlje časa, lahko tudi trajno. Tukaj lahko pride do neskladja z zakonodajo, ki ureja varstvo osebnih podatkov. Ustvarjalci namreč v uradno sprejetem dokumentu določijo roke hrambe za gradivo, ki ga ustvarjajo, zakonodaja o varstvu osebnih podatkov pa v nekaterih primerih predvideva uničenje dokumentacije pred iztekom roka hrambe. Ustvarjalec mora za uničenje pridobiti soglasje pristojnega arhiva, ki pa je s tem postavljen v nezavidljiv položaj, ko mora pretehtati določbe obeh zakonodaj in sprejeti odločitev.

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