

**Privacy as a human right in Italian data protection law and its impact on records as evidence and memory\***

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**Abstract**

In Europe data protection laws have their basis in international and European conventions which recognise privacy as a fundamental human right centred on personal dignity. While privacy has a wider meaning than data protection, as indicated in case law of the European Court of Human Rights, it is through data protection laws that EU citizens generally exercise their rights over their personal data. Two data protection rights that appear contradictory but are in fact complementary, are the "right to forget", that is the right to have personal data that has served its purpose destroyed or anonymised, and the "right to know", that is the right to access personal data

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\* This article is a revised version of an unpublished paper, Iacovino, L. "'The Right to Forget' and 'the Right to Know': the Italian Approach to Privacy as a Human Right in Data Protection Law". Presented at: New Europe, New Governance, New Worlds? International Conference, 12-14 April 2007, Melbourne: Monash University, European and EU Centre and Australasian Centre for Italian Studies.

about oneself, which may also be of interest to third parties including researchers, as well as the related right to remember for society as a whole. This article examines Italian data protection law which is expressed in the language of human rights but at the same time provides significant exemptions for accessing, using and preserving personal information, in particular through incorporating ethical codes for archivists and researchers. However, this analysis found that the Italian data protection law is often inconsistent with the ethical code, favouring the right to forget over the right to remember.

### **Introduction**

Privacy is not universally recognised as a human right and requires consistent protection on a global scale.<sup>1</sup> In Australia, the 2006 Victorian Charter of Human Rights and Responsibilities Act which came into force 1 January 2008 requires legislation to be interpreted, and public bodies to act in ways compatible with the Act. It was influenced by the United Kingdom's Human Rights Act 1998. No other Australian State apart from the Australian Capital Territory has a Charter of Human Rights. European Union (EU) member states, New Zealand and Canada have human rights regimes. The European system like the Charter is based on the International Covenant on

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<sup>1</sup> World Summit on the Information Society (WSIS), Civil Society Privacy and Security Working Group, Comments on the Report of the Working Group on Internet Governance, 15 August 2005, Geneva. The Privacy and Security Working Group is a body of civil society active in the WSIS process, with members from all over the world, in particular from Europe: <http://www.itu.int/wsis/docs2/pc3/contributions/misc/PSWG-wqiq.doc0> (accessed March 2008). There are also sector-specific international human rights instruments, for example the 2007 United Nations Declaration on the Rights of Indigenous Peoples.

Civil and Political Rights. It is through data protection laws of EU member states that individuals generally exercise their right to privacy with regard to their personal data. At the same time, the fundamental right of access to government information, established in EU conventions and regulations may create a tension with the right to privacy. This article focuses on analysing Italian data protection law within the EU context which aims to ensure that the fundamental human right of privacy is respected, as articulated in Article 8 of *The European Convention on Human Rights* 1950, while providing some exemptions for accessing, using and retaining personal information that is considered "relevant" and "necessary" for research, thus contributing to preserving collective memory.<sup>2</sup>

### **EU context of privacy and data protection**

Public access to documents as well as privacy, integrity and data protection have been recognized as fundamental rights. Citizens of the European Union, nationals of third countries residing on the territory of a Member State and, in some cases, other nationals of third countries, are entitled to enjoy both rights. An adequate protection of both rights is needed because they are recognised not only as fundamental rights, but also as being elements of the notion of good governance. High levels of transparency and data protection are an expression of good governance.<sup>3</sup>

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<sup>2</sup> Piggott, M. "Archives and Memory". In McKemmish S et al. (eds). *Archives: Recordkeeping in Society*. Wagga Wagga, NSW: Centre for Information Studies, Charles Sturt University, 2005, pp. 299-328; Millar, L. "Touchstones: Considering the Relationship between Memory and Archives". In: *Archivaria*, 2006, v. 61, pp 105-126.

<sup>3</sup> European Data Protection Supervisor. *Public Access to Documents and Data Protection*, Background Paper Series. July 2005, no.1. Brussels: European

Privacy, data protection and public access are recognised in Europe as fundamental human rights, underpinned by the conventions of the Council of Europe, EU treaties and case law from the Court of Justice of the European Communities or the European Court of Human Rights. Importantly, the two fundamental rights – access and privacy – apply at the same time.

*The European Convention on Human Rights* of 1950 established a “right to privacy” in Article 8 which stipulates that “everyone has the right to respect for his private and family life, his home and his correspondence”.<sup>4</sup> Article 7 of the *Charter of the Fundamental Rights of the Union*, December 2000, reiterates the 1950 right to privacy.<sup>5</sup> The European Court of Human Rights adopted a broad scope of the right to privacy defining “private life” within the context of private, business, public or any other environment.<sup>6</sup> Communication

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Communities, 2005, p. 4. Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 limits the right of access to the documents of the European Parliament, the Council and the Commission. See Casini, P. “European Governance, Citizens’ Rights of Access to Documents and the Role of Archives”. In: *Archives and Manuscripts*, 2003, v.31(2), pp. 23-38.

<sup>4</sup> Council of Europe. *The European Convention on Human Rights*, 4 Nov. 1950. Rome <http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf> (accessed July 2007).

<sup>5</sup> The European Parliament, the Council of the EU and the European Commission, “Charter of Fundamental Rights of the European Union, 2000/C 364/01,” in: *Official Journal of the European Communities*, 18 Dec. 2000, [http://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/text_en.pdf) (accessed July 2007).

<sup>6</sup> European Court of Human Rights. *Niemietz v. Germany*, Judgment of 16 Dec. 1992, Series A no. 251 – B, reaffirmed in *Amann v. Switzerland*, Judgment of 16 Feb. 2000, no. 27798/95, ECHR 2000 – II quoted in *European Data Protection Supervisor*, op.cit., p. 17.

technologies and increased surveillance in the 1980s prompted a call for a separate right in the protection of personal data, referenced in the Council of Europe *Convention 108* 1981 and in Article 8 of the *Charter of the Fundamental Rights of the Union* 2000 which reads as follows:

Protection of personal data:

1. Everyone has the right to the protection of personal data concerning him or her.
2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law.

Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.

3. Compliance with these rules shall be subject to control by an independent authority.<sup>7</sup>

Article 3 of *Convention 108* of the Council of Europe states that any State may give notice:

[...] that it will also apply this convention to information relating to groups of persons, associations, foundations, companies, corporations and any other bodies consisting directly or indirectly of individuals, whether or not such bodies possess legal personality.<sup>8</sup>

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<sup>7</sup> The European Parliament, the Council of the EU and the European Commission. "Charter of Fundamental Rights of the European Union". op. cit.

<sup>8</sup> Council of Europe. *Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data*. Strasbourg, 28 Jan. 1981, <http://conventions.coe.int/Treaty/en/Treaties/Html/108.htm> (accessed July 2007).

Italy has taken up this notice.

Hence, in Europe, privacy is defined as a broader concept than data protection which essentially aims to protect personal data concerning a data subject, and in some instances families and groups. At the same time data protection contributes to privacy protection, in particular when the disclosure of personal, often sensitive information may cause harm to a person or family, or his or her private life, and may affect his or her honour and reputation.

### **Evidence and memory: the right to forget and the right to know**

Although privacy and data protection are fundamental human rights, they should not be interpreted in a way that leads to a loss of evidence and memory of what has happened to individuals and communities over time, in particular violations of human rights. This view is supported by the principles expressed in the United Nations' Commission on Human Rights, the *Joinet Report* (1997), in particular the "right to know", reaffirmed in the Orentlicher study in 2005.<sup>9</sup> In the *Joinet Report* "the right to know" consists of four principles:

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<sup>9</sup> United Nations, Economic and Social Council, Commission on Human Rights. Revised Final Report Prepared by Mr. Joinet Pursuant to Sub-Commission Decision 1996/119, E/CN.4/Sub.2/1997/20/Rev.1, 2 Oct. 1997, [http://www.unhcr.ch/Huridocda/Huridoca.nsf/%20\(Symbol\)/E.CN.4.sub.2.1997.20.Rev.1.En](http://www.unhcr.ch/Huridocda/Huridoca.nsf/%20(Symbol)/E.CN.4.sub.2.1997.20.Rev.1.En) (accessed July 2007); United Nations, Economic and Social Council, Commission on Human Rights. Promotion and Protection of Human Rights: Impunity Report of the Independent Expert to update the Set of Principles to Combat Impunity, Diane Orentlicher, E/CN.4/2005/102/Add.1, 8 February 2005.

Principle 1: The inalienable right to the truth; Principle 2: The duty to remember; Principle 3: The victims' right to know and Principle 4: Guarantees to give effect to the right to know.<sup>10</sup> Most importantly, "the right to know" is also a collective right. As elaborated in the Joinet Report:

A. The right to know

17. This is not simply the right of any individual victim or closely related persons to know what happened, *a right to the truth*. The right to know is also *a collective right*, drawing upon history to prevent violations from recurring in the future. Its corollary is a "*duty to remember*", which the State must assume, in order to guard against the perversions of history that go under the names of revisionism or negationism; the knowledge of the oppression it has lived through is part of a people's national heritage and as such must be preserved. These, then, are the main objectives of the right to know as a *collective right*.<sup>11</sup>

Therefore, the right to know the truth about past events is not only a right of individuals – a right of victims and families to know the truth – but also of society as a collectivity and implies a duty to preserve memory, as well as guarantees to give effect to the right. This is expressed in Principle 2: Preserving archives relating to human rights violations, in particular by allowing anyone they implicate to add a right of reply to the file.<sup>12</sup> To take advantage of the right of reply requires the preservation of the records that document the violation.

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<sup>10</sup> Revised Final Report Prepared by Mr. Joinet, p. 11.

<sup>11</sup> Revised Final Report Prepared by Mr. Joinet, p. 4 [emphasis added].

<sup>12</sup> Revised Final Report Prepared by Mr. Joinet, p. 5.

Victims of physical abuse (eg slave labourers during war) or of surveillance (a form of psychological abuse), as well as the public have a right to know how governments or private organisations have controlled their lives through the record. In fact, it is a democratic right of everyone to know the dealings of government, not just those who have been scrutinised.<sup>13</sup> The right to know is not only an individual right; it is a collective right, as evidence of an individual's documentary traces is evidence of how entire communities have been documented. Privacy has been used to close off access to or destroy information that provides evidence of wrongdoings, which has occurred in some cases in the former communist regimes of Eastern Europe<sup>14</sup> and continues to be used to eliminate evidence of recent and past events in modern societies.<sup>15</sup> For EU member states of the former Soviet bloc the most pressing issue is to find the right balance

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<sup>13</sup> In many European countries the democratic right to government information is found in access to information or transparency laws. The Australian situation is referenced in Iacovino, L. "Recordkeeping and Juridical Governance". In McKemmish S et al. (eds), *Archives: Recordkeeping in Society*. Wagga Wagga, NSW: Centre for Information Studies, Charles Sturt University, 2005, pp. 255-276.

<sup>14</sup> Ketelaar, E. "Access: The Democratic Imperative". In: *Archives and Manuscripts*, 2006, v. 34(2) pp. 62-81.

<sup>15</sup> A judge in Spain has linked the discovery of unmarked mass graves with disappearances during the 1936-39 civil war. The "pacto de olvido" (pact of forgetting) of 1977 was designed to put a closure to the civil war and its aftermath. This pact has been challenged by the new discovery and the 2007 Law of Historical Memory which requires local administrations to assist in the search for victims of the Spanish civil war. "Judge Rules for Victims of Franco". *The Weekend Australian*, 18-19 October 2008. Records from the National Archives of Spain (Archivos de España), Spanish civil war records (special archive) and from local authorities will play a significant role in "remembering" the victims and to bringing to justice perpetrators who are still alive. [http://www.mcu.es/archivos/docs/Centro\\_Memoria\\_Historica.pdf](http://www.mcu.es/archivos/docs/Centro_Memoria_Historica.pdf). (Accessed November 2008)

between opening up vast amounts of personal data, often generated by surveillance, while enabling their citizens the right to protect their privacy and personal data.<sup>16</sup>

Data protection principles are focused on the "right to forget", that is the right of the data subject to have personal data de-identified, anonymised or destroyed once its primary purpose has been fulfilled. At the same time, data protection does include the "right to know" of the existence of personal data captured about oneself, which supports the right to the truth but minimises the collective right to know, through the right to forget. While reducing the interference of government and business on private life must be addressed, the right to anonymisation, de-identification or destruction not only diminishes the integrity of the record, it limits the reconstruction of personal and collective narratives.

### **Italy: the right to forget and the right to know**

How has Italian data protection law responded to these dual rights? In Italy, data protection law has been in existence since 1996. Like its European Union member counterparts, Italy was required to pass national data protection law to conform with Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995, *Protection of Individuals with Regard to the Processing of Personal Data and in the Free Movement of such Data*, and Directive 97/66/EC *Concerning the Processing of Personal Data and the Protection of*

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<sup>16</sup> Quintana, A. G. "Archives of the Security Services of Former Repressive Regimes". Report Prepared for UNESCO, on behalf of the International Council of Archives. Paris: UNESCO 1997.

*Privacy in the Telecommunications Sector* which took effect in 1998. Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002, *Concerning the Processing of Personal data and the Protection of Privacy in the Electronic Communications Sector* updated Directive 97/66/EC to reflect developments in the markets and technologies for electronic communications services. These Directives must be interpreted in the light of fundamental rights recognised in *The European Convention on Human Rights*, in particular the right to privacy according to settled case-law.<sup>17</sup>

Although the Italian constitution guarantees the right to freedom of speech which includes scientific research, as well as the protection of personal data, the initial data protection Decree 675/1996 did not address these two rights equally. It created individual rights over personal information at the expense of a public interest in the historical memory of society.<sup>18</sup> Decree 675/1996 Section 16 provided for the destruction of personal data once its primary purpose had ceased unless there was a continuing administrative use, with limited exemptions for historical records regulated by archival law.<sup>19</sup> Decree 241/1990 on transparency of administrative proceedings included

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<sup>17</sup> The European Court of Justice(ECJ) in the joined cases, C-465/00, C-138/01 and C-139/01, *Österreichischer Rundfunk and Others*, Judgment of the court of 20 May 2003, ECR, 2003, I-4989, paras 68 and 69 as quoted in European Data Protection Supervisor, *op.cit.*, p. 18.

<sup>18</sup> Carucci, P. "Privacy and Historical Research in Italy". In, *Archivum*, 2000, v. XLV, pp. 161-169.

<sup>19</sup> Italy, Decree 1409/1963 regulating archives, Section 21 provided for open access to documents in the state archives with a 50 year limit for policy documents, a 70 year limit for personal information or criminal cases, and Section 22 allowed access to closed records with special authorisation.

further restrictions on access to personal information.<sup>20</sup> In this scenario specific legislative action was required to ensure that data protection law included the retention of personal data that was in the public interest.

The transformation of Italian privacy law to take account of the need to preserve collective memory has been a gradual process. Amendments to the data protection Decree 675/1996 were the result of considerable effort in 1997-98 by the Central State Archives of Rome, as well as archivists and historians who began a debate on the effects of privacy law for collective memory, fearful that the right to forget, *il diritto all'oblio*, exemplified in the first privacy code would prevail.<sup>21</sup> Decree 675/1996 Section 16 was modified by Decree 135/1999.<sup>22</sup> A further data protection Decree 281/1999 reached an equilibrium between the right to forget and the right to know by supplementing Section 16 with a clause allowing the preservation of personal data for historical, scientific and statistical research, taking account of archival law on access to documents, and, in 2001

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<sup>20</sup> Italy, Decree 241/1990 on transparency of administrative processes does provide a right of access to personal data by a third party if needed to defend a right. It provides access to records of the public administration even before transfer to the state archives or to records not open under archival law. Italian archival law has included rights of access to documents not in archival custody but these rights have not generally been applied.

<sup>21</sup> Giannetto, M. "Principi Metodologici e Deontologie Professionali nel Codice Degli Archivisti e Degli Storici". In: *La Storia e la Privacy, Dal Dibattito alla Pubblicazione del Codice Deontologico*. Proceedings of a Seminar. 30 Nov. 1999, Rome: Ministry for Cultural Property and Affairs, 2001, pp. 55-90.

<sup>22</sup> Italy. Decree 135/1999 on Data Protection, Section 23 inserted a provision on the retention of personal information in the public interest for historical purposes without the need to obtain the consent of persons concerned.

incorporating a *Code of Conduct and Professional Practice Regarding the Processing of Personal Data for Historical Purposes*. The Code of Conduct drew its inspiration from the Council of Europe, *Recommendation No. R (2000)13 of the Committee of Ministers to Member States on European Policy on Access to Archives*, the Italian Constitution, EU conventions, and the International Code of Ethics for Archivists. Recommendation No. R (2000)13 established access to archives as a democratic right while taking into account the protection of the individual. As a Recommendation of the Council of Europe it was not mandatory. Italy was the first EU country to incorporate the Recommendation into a Code of Conduct within its data protection law. The Code has legal sanctions for violations, and breaches can be reported via historical societies or archival authorities to the *Garante* (Privacy Commissioner). The Code provides rules for archivists and users when undertaking historical research involving data subjects that require recognising their human rights as exemplified in the Preamble which states:

[...] This Code is also the expression of the professional associations and categories concerned, including scientific societies, with a view to reconciling the requirements of investigation into and description of historical facts with the rights and fundamental freedoms of data subjects.<sup>23</sup>

The *Code of Conduct and Professional Practice Regarding the Processing of Personal Data for Historical Purposes* adopts the

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<sup>23</sup> Code of Conduct and Professional Practice Regarding the Processing of Personal Data for Historical Purposes, 2001, Preamble, para. 5 In: *La Storia e la Privacy, Dal Dibattito alla Pubblicazione del Codice Deontologico*, op.cit., p. 132.

terminology of human rights as expressed in European conventions. Researchers take on the responsibility for “processing” in relation to the research and its communication to the public which must be pertinent and indispensable for the research.<sup>24</sup> The Code marked a high point in the success of the Italian archival and historical communities’ efforts in protecting collective memory. It has been annexed to the data protection code 196/2003.<sup>25</sup>

The Italian *Personal Data Protection Code*, Legislative Decree no. 196 of 30 June 2003 (*Codice in Materia di Protezione dei Dati Personali*),<sup>26</sup> came into force in 2004. One of its main purposes was to transpose Directive 2002/58/EC into Italian law. It is firmly embedded in *The European Convention on Human Rights*, 1950, in particular *The Charter of Fundamental Rights of the European Union*, 2000, principally Article 8 and Convention 108, as reflected in Sections 1 and 2 of the *Personal Data Protection Code*, Decree no. 196, which state:

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<sup>24</sup> Code of Conduct and Professional Practice Regarding the Processing of Personal Data for Historical Purposes, op.cit. Article 11 (Disclosure) 1 “The user’s construction shall fall under the scope of the freedom of speech and expression as set out in the Constitution, without prejudice to the data subjects’ right to privacy, personal identity and dignity.”

<sup>25</sup> Italy. Personal Data Protection Code Decree 196/2003. Codes of Conduct (Annex A). A.2 Processing of Personal Data for Historical Purposes: Code of Conduct and Professional Practice Regarding the Processing of Personal Data for Historical Purposes.

<sup>26</sup> Italy. Codice in Materia di Protezione dei Dati Personali. 30 June 2003, n. 196. In addition to the Italian version, this article has used the official English translation from the website of the Italian Garante. <http://www.garanteprivacy.it/garante/navig/jsp/index.jsp?solotesto=N> (accessed July 2007).

Section 1(Right to the Protection of Personal Data):

1. Everyone has the right to protection of the personal data concerning him or her [...].

Section 2, (Purposes)

1. This consolidated statute, hereinafter referred to as "Code", shall ensure that personal data are processed by respecting data subjects' rights, fundamental freedoms and dignity, particularly with regard to confidentiality, personal identity and the right to personal data protection.

While Article 2 of Directive 95/46/EC confines personal data to any information relating to an identified or identifiable natural person, Italian data protection law, unlike most other EU member states, from its first data protection enactment, defines "data subject," to include corporate persons by adopting the definition in Article 3 of Convention 108 of the Council of Europe.

1. For the purposes of this Code, [...] b) "Personal data" shall mean any information relating to natural or legal persons, bodies or associations that are or can be identified, even indirectly, by reference to any other information including a personal identification number; c) "identification data" shall mean personal data allowing a data subject to be directly identified; [...] i) "data subject" shall mean any natural or legal person, body or association that is the subject of the personal data; [...].<sup>27</sup>

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<sup>27</sup> Italy. Personal Data Protection Code. Decree 196/2003, Section 4, (Definitions) 1. It is important to note that in the Italian version of the decree the term "interessato" is used for data subject which signifies an interested party or parties, while the English version uses "data subject" in the singular as adopted in EU privacy directives, which does not correctly convey the meaning of the Italian term.

Decree 196/2003 is national in character and applies to all personal data "processed"<sup>28</sup> by public or private entities or persons in Italy. Any organisation that processes data on Italian territory or under Italian law must apply the Italian rules.<sup>29</sup> An important feature is the use of codes of conduct for specific sectors including video surveillance and marketing.<sup>30</sup> There are increased penalties for privacy violations, in particular in relation to the use of data without the consent of the data subject. Disputes can be settled through the courts or by lodging a complaint with the *Garante* if one has been prevented from exercising rights of access, erasure or updating.

The Italian data protection law provides high protection for health data.<sup>31</sup> There is a right to make an annotation on one's criminal record to ensure personal details are not published. Sensitive and judicial data are defined separately from other personal data, given

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<sup>28</sup> Italy. Personal Data Protection Code Decree 196/203. Section 4 (Definitions) 1. "For the purposes of this Code, a) 'processing' shall mean any operation, or set of operations, carried out with or without the help of electronic or automated means, concerning the collection, recording, organisation, keeping, interrogation, elaboration, modification, selection, retrieval, comparison, utilization, interconnection, blocking, communication, dissemination, erasure and destruction of data, whether the latter are contained or not in a data bank; [...]."

<sup>29</sup> Italy. Personal Data Protection Code Decree 196/203. Section 5 (Subject-Matter and Scope of Application).1.

<sup>30</sup> Italy. Personal Data Protection Code Decree 196/203. Section 12 Codes of Conduct and Professional Practice.

<sup>31</sup> Italy. Personal Data Protection Code Decree 196/203. Title V-Processing of personal data in the health care sector which includes a codification of the patient's rights, for example, a right to anonymous prescriptions.

added protection and require additional consent requirements.<sup>32</sup> Public administrative bodies do not require consent for processing for public purposes,<sup>33</sup> but private organisations must seek consent in writing and provide reasons for the processing of sensitive information.<sup>34</sup> There is a simplified method of informing authorities of data collection, with set forms only for health data or high risk data, but all processing must be declared on request to anyone making an enquiry. It has strengthened technological measures in relation to destruction, intrusion and improper use of personal data.<sup>35</sup>

The Decree therefore aims to avoid undesired intrusions into private life and to guarantee that the processing of personal data takes account of the legitimacy of the operations. It is not just a modification of the previous data protection law but a transformed

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<sup>32</sup> Italy. Personal Data Protection Code Decree 196/2003. Section 4. "(Definitions) d) 'sensitive data' shall mean personal data allowing the disclosure of racial or ethnic origin, religious, philosophical or other beliefs, political opinions, membership of parties, trade unions, associations or organizations of a religious, philosophical, political or trade-unionist character, as well as personal data disclosing health and sex life; e) 'judicial data' shall mean personal data disclosing the measures referred to in Section 3(1), letters a) to o) and r) to u), of Presidential Decree no. 313 of 14 November 2002 concerning the criminal record office, the register of offence-related administrative sanctions and the relevant current charges, or the status of being either defendant or the subject of investigations pursuant to Sections 60 and 61 of the Criminal Procedure Code;" Title 2 Section 22 7. "Data disclosing health and sex life shall be kept separate from any other personal data that is processed for purposes for which they are not required."

<sup>33</sup> Italy. Personal Data Protection Code Decree 196/2003. Section 18 (4).

<sup>34</sup> Italy. Personal Data Protection Code Decree 196/2003. Chapter iii-Additional rules applying to private bodies and profit-seeking public bodies. Section 23 (Consent). 4.

<sup>35</sup> Italy. Personal Data Protection Code Decree 196/2003. Title X-Electronic Communications.

law based on human rights, fundamental freedoms, rights and dignity of persons, and gives special emphasis to principles that enhance personal liberty with a right to revoke consent if there are unintended consequences as a result of disclosure of personal data.

The data protection code Decree 196/2003 is more extensive than its predecessors. It regulates personal data in public and private entities without any time limits. While a "data minimisation principle"<sup>36</sup> supports the right to forget by directing system designers to provide for anonymous data where possible, Decree 196/2003 does contain special provisions for "historical, statistical or scientific purposes" that support the right to know over time. Section 16 provides that with the cessation of processing, data can be destroyed, transferred to another body that uses it for the same purpose, or preserved for historical, scientific or statistical research.<sup>37</sup> Historical purposes are defined to mean "purposes related to studies, investigations, research

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<sup>36</sup> Italy. Personal Data Protection Code Decree 196/2003. Section 3 (Data Minimisation Principle). 1. "Information systems and software shall be configured by minimising the use of personal data and identification data, in such a way as to rule out their processing if the purposes sought in the individual cases can be achieved by using either anonymous data or suitable arrangements to allow identifying data subjects only in cases of necessity, respectively."

<sup>37</sup> Italy. Personal Data Protection Code Decree 196/2003. Section 16 (Termination of Processing Operations):1. "Should data processing be terminated, for whatever reason, the data shall be a) destroyed; b) assigned to another data controller, provided they are intended for processing under terms that are compatible with the purposes for which the data have been collected; c) kept for exclusively personal purposes, without being intended for systematic communication or dissemination; d) kept or assigned to another controller for historical, scientific or statistical purposes, in compliance with laws, regulations, Community legislation and the codes of conduct and professional practice adopted in pursuance of Section 12."

and documentation concerning characters, events and situations *of the past;*" and "statistical purposes' shall mean purposes related to statistical investigations or the production of statistical results, also by means of statistical information systems; c) 'scientific purposes' shall mean purposes related to studies and systematic investigations that are aimed at developing scientific knowledge in a given sector."<sup>38</sup>

With the transmission of documents for access via the Internet that previously would have only been available in a search room to a single researcher, it is possible to expand the purview of personal data to the world at large. On the other hand, with digital records, decisions regarding retention have to be built into systems or else there is a risk that data will not be readable by the time they are released for research. These are not unique issues to personal data in electronic form; rather they are problems in preserving electronic media in general as a result of the time lag between creation and termination of data which is not taken into account in Section 16's definition of historical purposes as referring to the past.

Traffic data that is "any data processed for the purpose of the conveyance of a communication on an electronic communications network or for the billing thereof,"<sup>39</sup> does have a retention period of six months<sup>40</sup> and has been extended to 24 months and to 48 months in cases of criminal prosecution.<sup>41</sup> Overall Decree 196/2003 requires

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<sup>38</sup> Italy. Personal Data Protection Code Decree 196/2003. Section 4 Definitions 4a), b) and c).

<sup>39</sup> Italy. Personal Data Protection Code Decree 196/2003. Section 4 Definitions 2 h).

<sup>40</sup> Italy. Personal Data Protection Code Decree 196/2003. Section 123 (Traffic Data) 2.

<sup>41</sup> Italy. Personal Data Protection Code Decree 196/2003. Section 132 (Traffic Data Retention for Other Purposes) 1.

that personal data should not be kept once the purpose for which the data have been collected and processed has ceased.<sup>42</sup>

***Processing personal data for historical, scientific or statistical purposes***

Article 6 (1)(b) of Directive 95/46/EC allows for further processing for "historical, statistical or scientific purposes", but only when appropriate safeguards are in place. Historical provisions often depend on whether privacy law overrides archival and/or freedom of information legislation, whether archival law preceded data protection as well as human rights, of which privacy is one of the most fundamental.<sup>43</sup> Decree 196/2003 deals with historical, scientific and statistical purposes in Section 98. Processing for historical purposes in respect of records kept in State archives and historical archives of public bodies shall be considered to be in the substantial public interest, thus excluding those in private organisations or those that are not as yet "historical".<sup>44</sup> Processing for historical purposes can be

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<sup>42</sup> Italy. Personal Data Protection Code Decree 196/203. Section 11 (Processing Arrangements and Data Quality) "[...] e) kept in a form which permits identification of the data subject for no longer than is necessary for the purposes for which the data were collected or subsequently processed."

<sup>43</sup> Not all EU member states have interpreted Article 6 (1)(b) of Directive 95/46/EC in the same way. See Iacovino, L. and Todd, M, "The Long-term Preservation of Identifiable Personal Data: a Comparative Archival Perspective on Privacy Regulatory Models in the European Union, Australia, Canada and the United States". In: *Archival Science*. 2007 March, v. 7(1) pp. 107-127; Iacovino, L. "Aspetti Archivistici delle Disposizioni Europee sulla Privacy: un Confronto con la Tradizione Australiana". In: *Archivi e Computer*, 2007, v.07(1). pp. 112-126.

<sup>44</sup> Italy. Personal Data Protection Code Decree 196/203. Title VII - Processing for historical, statistical or scientific purposes. Section 97 (Scope of Application) 1. This Title shall regulate processing of personal data for historical, statistical or scientific

compatible with the original purposes.<sup>45</sup> Personal data can be exchanged for research collaboration purposes with the exception of data that fall into a sensitive or a legal class of information, or where data subjects refuse access to their personal data for research purposes.<sup>46</sup> Data used for historical purposes cannot be used to harm the data subject, and must be "relevant and indispensable" for the research.<sup>47</sup> Thus even with the historical exemption the nature and use of personal data are taken into account. Codes of conduct for

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purposes. Section 98 (Purposes in the Substantial Public Interest) 1. "For the purposes of Sections 20 and 21, the purposes related to the data processing operations carried out by public bodies a) for historical purposes in respect of keeping, classifying and communicating the documents and records kept in State archives and historical archives of public bodies pursuant to legislative decree no. 490 of 29 October 1999, which adopted the consolidated statute on cultural and environmental heritage, as amended by this Code, shall be considered to be in the substantial public interest."

<sup>45</sup> Italy. Personal Data Protection Code Decree 196/203. Section 99 (Compatibility between Purposes and Duration of Processing) 1. "Processing of personal data for historical, scientific or statistical purposes shall be considered to be compatible with the different purposes for which the data had been previously collected or processed. 2. Processing of personal data for historical, scientific or statistical purposes may be carried out also upon expiry of the period that is necessary for achieving the different purposes for which the data had been previously collected or processed. 3. Where the processing of personal data is terminated, for whatever reason, such data may be kept or transferred to another data controller for historical, statistical or scientific purposes."

<sup>46</sup> Italy. Personal Data Protection Code Decree 196/203. Section 100 Data Concerning Studies and Researches.

<sup>47</sup> Italy. Personal Data Protection Code Decree 196/203. Chapter ii-Processing for historical purposes. Section 101 (Processing Arrangements) 1. "No personal data that has been collected for historical purposes may be used for taking actions or issuing provisions against the data subject in administrative matters, unless said data are also used for other purposes in compliance with Section 11. 2. Any document containing personal data that is processed for historical purposes may only be used, by having regard to its nature, if it is relevant and indispensable for said purposes. Personal data that are disseminated may only be used for achieving the aforementioned purposes."

public and private bodies that process personal data for historical purposes must include safeguards regarding highly sensitive data and in some cases the subject and interested parties should be made aware of any dissemination of their personal data. There is a reference to applying the same standard of processing for historical purposes to private archives.<sup>48</sup> While the data protection Decree 196/230 applies to all documents regardless of location, the Code of Conduct does not apply to private institutional archives, although Article 1(4) of Code of Conduct provides a voluntary option for private organisations to adhere to the Code.<sup>49</sup> Decree 196/230 defers to the

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<sup>48</sup> Italy. Personal Data Protection Code Decree 196/203. Section 102 (Code of Conduct and Professional Practice) 1. "The Garante shall encourage adoption of a code of conduct and professional practice by the private and public entities, including scientific societies and professional associations, which are involved in the processing of data for historical purposes, in pursuance of Section 12. 2. The code of conduct and professional practice referred to in paragraph 1 shall set out, in particular, a) rules based on fairness and non-discrimination in respect of users, to be abided by also in communication and dissemination of data, pursuant to the provisions of this Code that are applicable to the processing of data for journalistic purposes or else for publication of papers, essays and other intellectual works also in terms of artistic expression; b) the specific safeguards applying to collection, interrogation and dissemination of documents concerning data disclosing health, sex life or private family relations; the cases shall be also specified in which either the data subject or an interested party must be informed by the user of the planned dissemination; c) arrangements to apply the provisions on processing of data for historical purposes to private archives, as also related to harmonisation of interrogation criteria and the precautions to be taken in respect of communication and dissemination."

<sup>49</sup> Italy. Personal Data Protection Code Decree 196/203. Codes of Conduct (Annex A). A.2 – Processing of Personal Data for Historical Purposes: Code of Conduct and Professional Practice Regarding the Processing of Personal Data for Historical Purposes. Article 1(4). "Owners, holders or keepers of either private archives which have not been declared to be of substantial historical interest or individual documents with

*Cultural and Environmental Heritage Code (Codice dei Beni Culturali e Ambientali)* Decree 490/1999, which has been superseded by Decree 42/2004, in relation to regulating access to records held in state archives, historical records of public entities, and private archives.<sup>50</sup>

### ***Data subjects' rights to know and to forget***

Data subjects' rights are modified in relation to the interests of public administration for judicial, fiscal, and security purposes. The data subject's right to know and other rights are found in Section 7.<sup>51</sup>

Section 7 1. A data subject shall have the right to obtain confirmation as to whether or not personal data concerning him exist, regardless of their being already recorded, and communication of such data in intelligible form.

The right to forget is expressed in:

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historical interest may notify the competent Superintendent's Office for archives of their intention to apply this Code to the appropriate extent."

<sup>50</sup> Italy. Personal Data Protection Code Decree 196/203. Section 103 (Interrogating Documents Kept in Archives) 1. Interrogation of documents kept in State archives, historical archives of public bodies and private archives shall be regulated by legislative decree no. 490 of 29 October 1999, enacting the consolidated Act on Cultural and Environmental Heritage, as amended by this Code." In fact only private archives that are declared to be of noteworthy historical interest are covered by the Act on Cultural and Environmental Heritage; other private records held in private collections or institutes are excluded.

<sup>51</sup> Italy. Personal Data Protection Code Decree 196/203. Title II-Data subject's rights Section 7 (Right to Access Personal Data and Other Rights).

Section 7 3. A data subject shall have the right to obtain

- a) updating, rectification or, where interested therein, integration [data integrity/accuracy] of the data;
- b) erasure, anonymization or blocking of data that have been processed unlawfully, including data whose retention is unnecessary for the purposes for which they have been collected or subsequently processed; [...].

Blocking has no time limit in this section although the definition implies that it is temporary. Section 7 does not have a public interest exemption for research and could override access to personal data transferred to an archival entity. From an archival and evidential perspective data accuracy is best served by an annotation of any amendment held separately from the original record, not by erasure, anonymisation or blocking.<sup>52</sup> This is expressed in the *Code of Conduct* Article 7:

(Data Update) 1. Archivists shall facilitate the exercise of a data subject's right to have the data updated, rectified or supplemented and ensure that the data are kept in a way allowing the original source to remain separate from any subsequent accessions.

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<sup>52</sup> Italy. Personal Data Protection Code Decree 196/2003. Definitions o) "blocking" shall mean keeping personal data by temporarily suspending any other processing operation; [...]."

### ***Rights of the deceased***

The rights related to personal data concerning a deceased may be exercised by any interested party.<sup>53</sup> In many EU countries (for example Sweden and UK) privacy ceases at death and personal data can thereafter be disclosed. In Italy the right to protect deceased persons has no time limit but the *Code of Conduct and Professional Practice Regarding the Processing of Personal Data for Historical Purposes* adds a lapse of time principle in Article 7, (Data Update) 3:

In case a right is to be exercised pursuant to Section 13(3) of Act no. 675/1996 by an entity having an interest therein as regards personal data concerning either deceased persons or documents dating back to remote times, existence of the relevant interest shall be assessed by also taking account of the time already elapsed.

The *Code of Conduct and Professional Practice Regarding the Processing of Personal Data for Historical Purposes* plays an important part in the Italian data protection law in guaranteeing the fundamental human right of privacy while allowing for processing of personal data for “conservation, categorisation and communication of documents”<sup>54</sup> and “to safeguard integrity of archives and authenticity of documents, including those in electronic and multimedia form, and

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<sup>53</sup> Italy. Personal Data Protection Code Decree 196/203. Section 9 (Mechanisms to Exercise Rights) 3. “The rights as per Section 7, where related to the personal data concerning a deceased, may be exercised by any entity that is interested therein or else acts to protect a data subject or for family related reasons deserving protection.”

<sup>54</sup> Italy. Personal Data Protection Code Decree 196/203. Annex A2. Processing Personal Data for Historical Purposes: Code of Conduct and Professional Practice Regarding the Processing of Personal Data for Historical Purposes, Preamble para. 4.

to aim at their permanent conservation with particular regard to the documents endangered by cancellation, dispersion and alteration of the data.<sup>55</sup> The Code of Conduct was written before the *Personal Data Protection Code*, Decree 196/2003 and supports the notion of the right to know more firmly than the legislation and is often inconsistent with it.

### **Conclusion**

The Italian data protection law of 2003 responded to the EU Directive on electronic communications in order to provide a high level of protection for personal data in a world of increasing privacy intrusion. It ensures the right to know in specific exemptions for historical, statistical and scientific purposes deemed of public interest with significant safeguards for data subjects within the EU framework of human rights of private life. It adopt EU Convention 108's definition of the data subject to include groups and family who can also take on the interests of a deceased person, thus substantially increasing a person's privacy, as envisaged in EU human rights declarations.

While the exemption for historical processing provides an opportunity to preserve personal data for long term retention, it limits historical processing to public and private archives held by public bodies. Its definition of historical purposes as "data dealing with the past" does not take account of technological constraints that require data in its digital form to be appraised for retention before or at least at the time they are created, if they are to survive obsolescence. Data

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<sup>55</sup> Ibid. Article 4 1b).

subjects retain a right of erasure when data is collected unlawfully. While this is an important right, erasure may jeopardize the survival of evidence of abuse and the collective right to know that it took place. The retention of past cases of unlawful gathering of personal data has been important to locating individuals and organisations that have perpetrated human rights' abuses, as expressed in the joint Joinet – Orentlicher principles. As recommended by the Code of Conduct, an annotation system that documents inaccurate data with "blocking" for a set period of time would be preferable to erasure.

These issues could be rectified if the data protection Code conformed to the Code of Conduct. The right to forget and the right to know remain complementary fundamental rights necessary for good governance recognised in EU and Italian law. In Italy the data protection law does take account of the right to know in the public interest but favours the right to forget. This approach is the inevitable outcome of a networked electronic world in which the mass collection of personal data intrudes daily on private life, and consequently requires substantial protection from inappropriate use.