



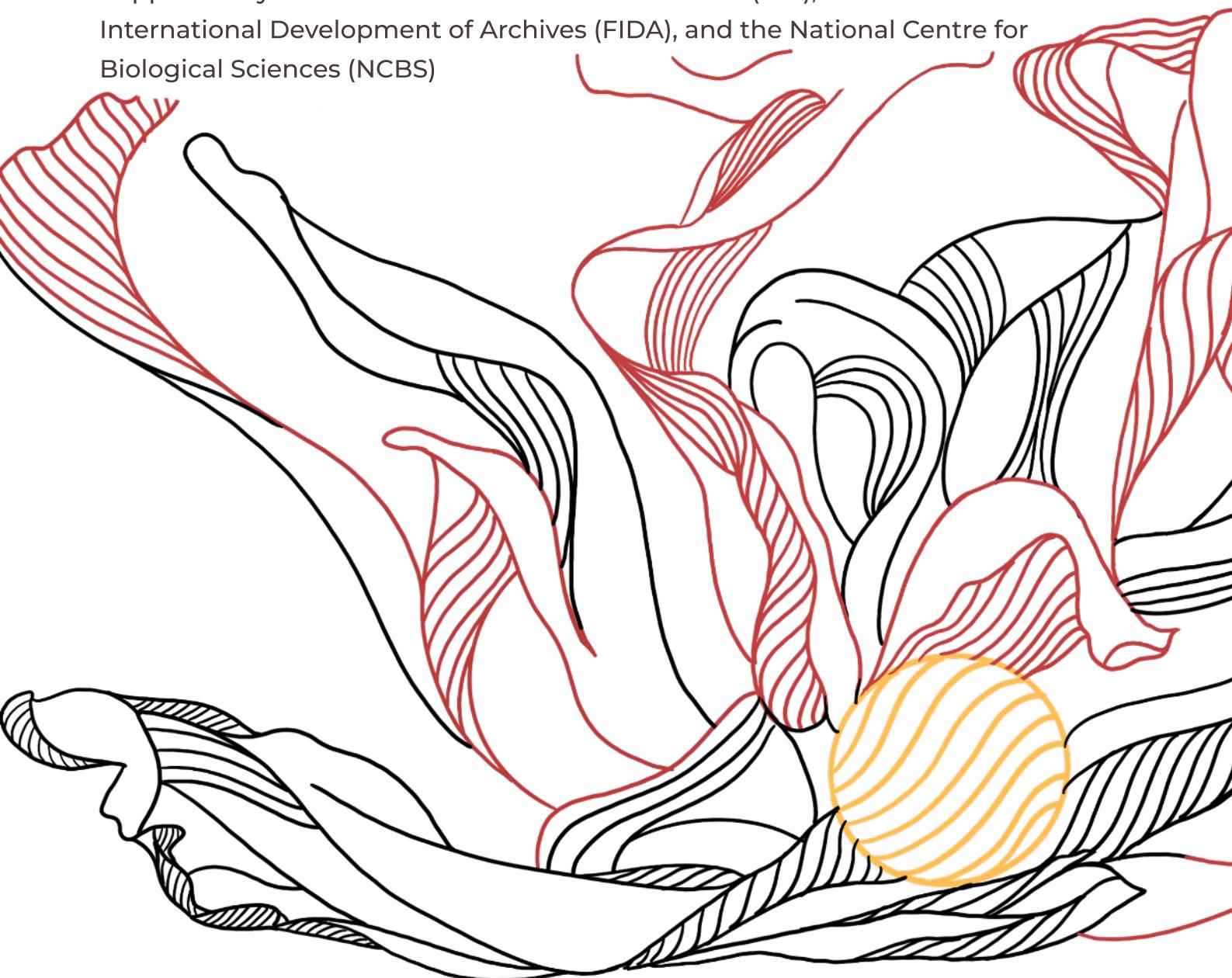
# Archives, Ethics and the Law in India

A GUIDEBOOK FOR ARCHIVISTS IN INDIA



Published by Archives at NCBS in collaboration with the Milli Archives Collective

Supported by the International Council on Archives (ICA), Fund for the International Development of Archives (FIDA), and the National Centre for Biological Sciences (NCBS)



# Archives, Ethics and the Law in India: A Guidebook for Archivists in India

Written and facilitated by Farah Yameen and Divij Joshi

Editors: Anjali R, Deepika S and Venkat Srinivasan

Design: Anoopa John and Gerleo Nimalan

Web design and development: Ojas Kadu

Cover Art: Megha Ramachandra

Publisher: Archives at NCBS

Collaborator: Milli Archives Collective

Publication year: 2022

Revision History: Version 1, published for public comment, Jan 19 2023

Additional collaborators: Archive of IIT Madras, Indian Statistical Institute Archives, QAMRA Archival Project at NLSIU

This document uses two fonts – Anybody and Montserrat from Google Fonts.

Anybody is a 90s inspired display typeface by Tyler Finck. Montserrat is a versatile sans serif by Julieta Ulanovsky, Sol Matas, Juan Pablo del Peral and Jacques Le Bailly.

Made possible with support from the International Council on Archives (ICA) Fund for the International Development of Archives (FIDA) and the National Centre for Biological Sciences (NCBS), Bangalore, India.

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This guidebook is a product of collaborative work, and is intended to be work in progress toward revisions of the guidebook in the future. We welcome feedback and discussion on the guidebook. Please address all your communications to [archives@ncbs.res.in](mailto:archives@ncbs.res.in) or drop your comments on the online form at <https://archives.ncbs.res.in/ethics-law>



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# About this Guidebook

This guidebook has been supported by the Fund for the International Development of Archives granted by the International Council on the Archives (ICA) in 2022 to the Archives at National Centre for Biological Sciences (NCBS), and by the TNQ Technologies grant that supports the operations of the Archives at NCBS. The resources of the ICA, its Universal Declaration on Archives, its 1996 Code of Ethics have underpinned the principles of this guidebook, especially its code of ethics. As part of this project, the Archives at NCBS undertook two distinct tasks. The first was the development of guides on the legal frameworks that apply to archives in India. The second was the development of an ethical code that works together with the legal framework to help archivists make decisions in archival work that are both legal and ethical.

The guidebook is the culmination of several months of seminars, workshops, roundtables and expert consultation. Between March 28-31, 2022, NCBS hosted an online seminar covering issues related to ethics, copyright, ownership and access, rights to information and privacy, among others. The seminar used a range of formats to represent different approaches to ethics and law in archives while also inviting more detailed discussions. The 4-day seminar included:

1. Speakers from 8 different archival organisations in India presenting ethical and legal encounters specific to their archival environment
2. Talks from archival researchers on being in the archive
3. Presentations from information policy law experts in India and abroad on existing and impending legal frameworks that affect Indian archives
4. Panel discussions on archival ethics, access, privacy, data protection and subject rights
5. Open discussions on case specific ethical and legal questions in archives, which were collated in a document with answers where seminar participants drew on their own experience to advise on best practices.

The seminar had 101 registrations (cumulative, across the four days, with about 50 – 60 percent actual presence) with participation from both individuals in leadership positions in private and public archives besides early career professionals and archival researchers. The discussion document from the seminar became the principal point of reference for a second consultative seminar in June.

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1. Milli Archives Collective. (n.d.). *Milli Session 2022*. Retrieved from <https://www.milli.link/iaw2022>

A professional ethics working group met between June 8 – 10, 2022 during International Archives Week as part of Milli Sessions 2022 (of which the Archives at NCBS is an incubator) to deliberate upon ethical questions in archives in India. The committee reviewed ethical standards documents from ICA and its various regional offices, Australia, Canada, New Zealand, South Africa, UK and USA. It also deliberated upon principles of ethically archiving indigenous knowledge by reviewing current global practices as articulated in the Tandanya Declaration, the FAIR principles of data governance together with the CARE principles for indigenous data governance, and the First Nations Principles of OCAP (ownership, control and access and possession). We thank our speakers – Anubha Sinha, Deepa Bhatnagar, Elizabeth Lomas, Faisal Rahman, Jaya Ravindran, Lalitha Poluru, Madhura Waikar, Padmini Ray Murray, Prashant Reddy, Ranjani Prasad, Roland Wittje, Sanjay Garg, Shaina Anand, Sarath Pillai, Siddharth Narrain and Vrunda Pathare – for sharing their insight into law and ethics from their archival contexts.

The 12-member Milli working group, which comprised of archival practitioners and researchers from all over the country, met over three days at NCBS, Bengaluru (and online), and discussed ethical principles associated with different stages of the archival workflow: Creation/Documentation, Appraisal, Acquisition, Accessioning, Description/Information, Custody/Preservation, Access/Outreach. A **Code of Ethics** that was unanimously agreed upon was drafted during the three days with accompanying commentary from the members of the working group. This working group met again later to develop areas that needed detailed attention such as digital ethics and has continued to develop the commentary for final publication in the guidebook.

This guidebook was also made possible by the advice and collaboration of archivists who guided and participated in its development, and reviewed the drafts. Their contribution has enabled the creation of a document that considers archival laws and ethics from a range of diverse perspectives. Thanks are owed to Arvind Narrain (QAMRA Archival Project at NLSIU), Bharat Iyer (French Institute Pondicherry), Biswadeep Chakraborty (India Foundation for the Arts), Deepika S (Archives at NCBS), Faisal Rehman (Keystone Foundation), Kishor Satpathy (ISI Archives), PP Sneha (Centre for Internet and Society), Padmini Ray Murray (Design Beku), Ponnarasu Subramanian (IIT Madras), Priyanka Seshadri, Ranjani Prasad (Keystone Foundation), Rochelle Pinto, Roland Wittje (IIT Madras), Sanjna GY (Archives at NCBS), Sharmila Sontakke (Sparrow Archives), Siddharth Narrain (QAMRA Archival Project at NLSIU), Smitha K Prasad (Georgetown University School of Law), Sumanto Mondal, T Jayashree (QAMRA Archival Project at NLSIU), T Prashant Reddy (Thakur Foundation) and Vrunda Pathare (Godrej Archives).

We are very grateful to Arun Thiruvengadam and Mariella Soprano for endorsing this project when we sent our first proposal to the ICA for review, and to Arul George Scaria, Jaya Ravindran, Shubha Chauduri, Smitha Krishna Prasad and Srijoni Sen for reviewing the final draft of this guidebook. We also express our gratitude to our

partners at the Archive of IIT Madras, Indian Statistical Institute Archives, and QAMRA Archival Project at NLSIU.

### **A note about the institutions and people behind the guidebook:**

The Archives at NCBS is a public collecting centre for the history of science in contemporary India. Besides its role as a collecting centre, the Archives at NCBS also aims to push the frontiers of research in archival sciences in India, forging intersections with scholarship in law and ethics, and work with a diverse community of practitioners.

Milli is a collective of individuals and communities interested in the nurturing of archives, especially in South Asia.<sup>2</sup> Milli was partly incubated at the Archives at NCBS. The collective was instrumental facilitating discussions and feedback on all aspects of the guidebook.

Farah Yameen acted as a consulting expert to lead the development of the ethical code. Yameen has been working with archives in India for 7 years and was reading for an M.A. in Archives and Records Management at University College London at the time that she was working on this guidebook. The project also supported Yameen's dissertation on archival ethics in India by facilitating access to networks of archivists for data collection. The findings of her published research have been incorporated into the development of the guidebook.

Divij Joshi acted as the legal consultant responsible for drafting the legal analysis of archival law in India for the guidebook for archivists. Divij is an India-qualified lawyer pursuing his PhD in law and information systems at UCL. He also helped with the conceptualisation of the workshop and led some of the workshop sessions.

### **Public comment and feedback:**

This guidebook is a first small step in what shall hopefully be a series of conversations to develop a meaningful understanding among archivists, archives and their users on the intersection between archives, ethics, and law in India. We welcome feedback, which shall feed into future revisions of this text. Please contact us at [archives@ncbs.res.in](mailto:archives@ncbs.res.in) or drop your comments on the online form at <https://archives.ncbs.res.in/ethics-law>.

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2. Milli Archives Collective. (n.d.). Retrieved from <https://milli.link>

# Introduction

## Archives, Ethics and the Law in India: A Guidebook for Archivists in India

Archives and archival practice occupy a peculiar place among law, regulation and policy in India. Archives of all kinds have existed in India for decades. Besides the National Archives and various state archives administered by governments, there are organisational archives of corporations, scientific labs, newspapers or even individuals and families. But they have received scant attention from lawmakers, policymakers or the legal academy, as an institution that deserves specific legislative or policy consideration. Despite their significance as institutions of historical and political importance, archives and archival practice in India remain unacknowledged and understudied as an object of legal enquiry, as well as a subject of public policy. Yet, despite this conspicuous absence of 'The Archive' as a distinct subject of regulation, archival practice intersects with the law and regulation of property, media and information in distinct ways.

Archival practices of accessioning, curating, acquiring, preserving, referencing and providing access to archival records raise a whole host of legal issues. What are the requirements for conducting a proper acquisition of records as a gift or a purchase? What kinds of activities in relation to such records are archives permitted to do by virtue of their distinct function as preserving records of enduring value? Do archives, as institutions with a particular structure and function of preserving records of persevering value, have distinct rights and duties under Indian law? More broadly, how do legal rules around property ownership, copyright, media regulation, privacy, and public access to knowledge shape archival practice and the particular institutional and organisational forms that archives take in India?

The consideration of the development, role and legal status of archives has, however, remained limited to archives as government institutions, specifically to the National Archives of India, and in some cases, to state archives, established as institutions for the preservation of the 'public record'. The activities of archives in preserving and providing access to records of enduring value – carried out today by a plethora of non-government actors and institutions, including corporations, universities, private societies or communities – has received almost no attention as a matter of legal policy, or from the legal academy.

This lack of legal comprehension among archivists has serious implications for their practice – for understanding what their potential responsibilities and liabilities might be when providing access to records for researchers, for example, or in using the various rights that might be available to archives for fulfilling their functions of providing access to archival records. More importantly, legal uncertainty and ambiguity prevents archives from fulfilling mandates to ensure more open and equitable access to archives, in a manner that respects legal rights as well as ethical principles and commitments to making the archives more accessible.

This guidebook is an effort to bridge this gap in comprehending how law and ethics intersects with archival practice. Based on interviews and workshops with archivists, as well as original research on the intersection of archival practice and legal regulation, it aims to provide a concise reference for archivists to understand and navigate the legal implications of various kinds of archival functions – from accessioning to disposal – in providing access and references services, or in preserving archival records.

Please note that this guidebook does not constitute legal advice, and in many cases, archives may require the assistance of legal professionals. However, it is an attempt to consolidate information about the kinds of legal considerations that might apply to archival practice. It is intended to act as a point of reference not only for archivists, but for other stakeholders having an interest in how archives might be managed or regulated under the law, including donors, researchers, and policymakers. In particular, its intention is to allow archives to understand and navigate legal hurdles that prevent them from providing equitable access to their records and collections.

### **How to read this guidebook:**

In addition to the previous section on the making of this guidebook and this introduction, this guidebook is divided into eight chapters, and an appendix each for glossary terms, and resources for further reading. The chapters open with a brief sentence outlining broad topics that the chapter covers. They also often have a section titled ‘scenario’ that outlines a potential situation faced by an archive. This section either gives a short response to a query that an archive might have, or the rest of the contents of the chapter will help readers flesh out the scenario better. If a page has a reference, readers can find a quick pointer in the footnotes with further links. Full citations for any references within these footnotes are also listed in the Appendix: Further Reading and Resources, which is arranged thematically. Within each theme, references are listed in alphabetical order. Individual citations in the appendix follow APA Style 6th edition, except for citations about legislation, which follow APA Style 7th edition.

Chapter 1 covers the law relating to accessioning and acquisition of records, including the forms that acquisitions of both tangible and intangible properties commonly take, and the considerations that archives should pay heed to in accessioning and acquiring records.

**Chapter 2** covers copyright and related considerations in reproducing or publishing records, including the limitations and exceptions in copyright law and defamation law that archives should be aware of.

**Chapter 3** covers data protection and privacy law concerns in archival practice, such as making personal data available in referencing, or making available records that contain personally identifiable information to the public.

**Chapter 4** covers the law of ‘public records’, including the central Public Records Act, as well as the Right to Information Act, and the considerations that archives should be aware of, including when they might fall under the scope of such legislations.

**Chapter 5** deals with specific legal considerations that arise in the creation of ‘digital archives’, as archives look to use digital technologies and the Internet to broaden access to archives or preserve archival records through digitisation.

**Chapter 6** deals with ethical considerations in archival practice, including consideration for privacy, accessibility and sharing of archival materials. It lays out a code that was developed by the working group on ethics. It covers all aspects of the archival workflow and also addresses the ethics of the archive as a workplace and the responsibilities of the archivist to the profession and society.

**Chapter 7** expands on the code of ethics with commentary to underpin the positions in the code of ethics. It is followed by a series of questions and potential ethical positions that would apply to specific scenarios based on global literature on ethics along with a common understanding of ethics as they have developed in India over the last several years.

**Chapter 8** follows with frequently asked questions raised during workshops with archivists in India. It addresses common questions on ethics and ethical positions to consider when making decisions on them.

## Chapter 1

# Acquisitions and Appraisals

This chapter covers acquisitions, donations, deeds of gift, sale deeds, loans, copyright licenses and copyright assignments.

### Scenario

**An archive of an institution is in possession of the papers of a former employee of the institution, which includes work manuals, classroom teaching material and correspondence. The archive is faced with several questions: Who has ownership over the papers? Which records are legally permissible to include in the archive? How can ownership be transferred from one party to the other?**

The circumstances and laws around the acquisition and disposal of archival records are a helpful starting point to understand legal considerations of archival practice. Private archives receive a large number of documents through internal and external acquisitions, including as institutional repositories, or through gifts or donations from people or institutions.

The acts of acquisition and appraisal raise many legal considerations. For example, are archival records the property of the archival institution that hosts the records, or property of the individuals or institutions that held the records prior to their acquisition? How does the ownership of records change hands, and what are the implications of using different methods to transfer ownership in archival records? This chapter will briefly examine the legal implications of acquisition and disposal of archival records.

## APPRAISALS

The process of acquisition of archival records begins with the appraisal of records suitable for archiving. For public institutions like the National Archives of India or other institutions covered under the Public Records Act, there are specific legal considerations to follow for appraisal and accessioning as laid down in various laws and governmental circulars and manuals.

For the most part, there are no legal mandates for preservation for the records of private institutions. As such, appraisal and accessioning of records should ideally be

determined through an established process and policy of appraisal and documentation of its institutional records, including the creation of records retention schedules.<sup>3</sup> One area where such appraisals may raise legal issues is in the determination of institutional records, as distinguished from the personal papers of employees. In general, for all records and material created in the course of employment, title and ownership rests with the employer.<sup>4</sup>

According to the Copyright Act, copyright of all records and material authored by employees as part of their duties and obligations as an employee would vest in the employer. A key question in appraising the papers of an employee would therefore be to determine whether the record in question can be construed as a part of their contractual duties, or within the scope of their employment. If the record in question does not pertain to their duties as an employee, the record and the copyright therein may fall outside of the scope of institutional records, and the title and copyright over such records would have to be cleared separately by the institution. For example, if a person employed as a scientist happens to create a painting or artwork unrelated to the terms of their employment, the institution or employee cannot claim ownership over such work.

Determining whether a particular work has been produced in the 'scope of employment' depends on the nature and degree of control exerted by an employer over the creation of that particular work, which has to be determined on a case-by-case basis. For example, if a lecturer is directed by their employer (say, an academic institution) to prepare a presentation on a particular subject, in a particular place and in a particular manner (or 'what, how when and where'), it may be construed to be a relationship of employment, where the ownership of the presentation could vest in the institution. Determining whether particular copyrighted material was produced 'in the course of employment' is a contextual exercise. However, the law generally favours the authors of the work over the employer, unless the contract or context indicates to the contrary.

In the absence of a relationship of employment, for example, in the case of works created by independent contractors, the copyright will vest with the creator or author of the work, in the absence of a written agreement to the contrary, made between the creator of the work and the person or institution for which they are working.

Archivists conducting the appraisal of institutional documents where there may be some ambiguity over claims of ownership should consult the terms of the contract according to which the work was created, and should encourage institutions to

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3. That said, particular kinds of documents or institutions might have different legal requirements to preserve records, such as corporate records mandated by the Companies Act, or financial records requisitioned for audit purposes.

4. As per Section 17(c) of the Copyright Act 1957, "[I]n the case of a work made in the course of the author's employment under a contract of service or apprenticeship, (...) the employer shall, in the absence of any agreement to the contrary, be the first owner of the copyright therein..." Retrieved from <https://copyright.gov.in/documents/copyrightrules1957.pdf>

make the ownership of works created by employees or contractors clear in the terms of contract.

*Going back to the example this chapter begins with, the archive of a scientific institution, in possession of an employee's papers, must first examine the nature of the records and distinguish between personal papers and institutional papers. In doing so, it should document the process by which this distinction was made, ideally with reference to contractual terms, the records retention schedule and the appraisal policy of the archive.*

## ACQUISITION

### Scenario

The archive of an institution receives a 'donation' of records from the legal heirs of a former scientist who was an employee. The records contain manuscripts, photographs, film and other material owned by the scientist. The archive would like to add these records to its collection, and obtain title and ownership over the records to provide access to researchers. How might the archive go about obtaining title to the records, and what are the legal mechanisms for acquisition that they should be aware of?

Once records have been appraised and determined to be suitable for accessioning, the archive must determine whether and how it should obtain the custody, title and rights over the record.

### Types of Acquisitions

Archives acquire records through a variety of practices, means and legal instruments. Briefly, these might include:

#### Internal Acquisitions:

Internal acquisitions involve the transfer of custody of records from within the institution that created them, to the archive of that institute itself. While this usually does not involve the transfer of ownership, it may involve a change in custody of the documents, and it may imply a change in the status of the record from current to non-current records. However, these changes in custody generally do not have any significant legal repercussions. For example, a corporate institution might transfer records from an employee or a department's office to its institutional archive, as a matter determined by its record retention schedule and archiving policy. This acquisition would generally be governed by institutional policies and schedules relating to record retention.

## **External Acquisitions:**

Records may also be acquired from outside of the institution in which they were created. These generally involve both a change in the ownership as well as in the custody of the record. The change in ownership may be temporary (as in the case of a loan) or permanent (as in the case of a gift or a purchase). In some cases, the records may merely be deposited, without any transfer of ownership. For example, an archive might receive a donation of records relevant to its repository, or might seek to purchase additional records to supplement its collection. Such acquisitions often involve not only institutional policies relating to record retention, but must also meet specific legal requirements.

The acquisition of records by an archive that does not already have title or rights over the records involves the legal transfer of title and other rights to the archive. Title can only be transferred by persons having ownership, or the rights to transfer ownership, over a record.

### **Transfer of Title:**

The transfer of title or ownership of a record to an archive may involve the transfer of only the tangible or physical property rights associated with a particular record, or may also involve the transfer of intangible rights, including intellectual property rights like copyright, associated with that record. The legal circumstances and processes surrounding the transfer determine the scope and extent of rights that are transferred to an archive.

### **Transfer of Intellectual Property:**

As indicated above, transfer of title or the physical ownership of a record does not always entail the transfer of all the copyrights that may be associated with that record. Apart from the transfer of title and rights over the tangible, physical record, archivists must keep in mind the requirements for the transfer of the intangible rights associated with a particular record, including the copyright that may vest in a particular record.

## **Copyrighted Works**

### **Use of Copyrighted Works and their Transfer**

If an archive wishes to make use of any copyrighted work, such rights must be cleared through the processes of acquisition described below, unless they are covered by current exempt use preservation copies of the work (review Chapter 2 for notes on access and use of an archival object already in the custody of an archive). However, if the archive does not intend to use the work for display or for making copies, and only provides the original copies to researchers (or falls under the exemptions for copyright detailed in Chapter 2), it may not require the acquisition of copyright in the records.<sup>5</sup>

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5. The third section within this discussion on Copyright Works (titled “Obtaining Permissions to Use Copyright”) details the cases in which copyright clearance may be required by archives.

Indian copyright law does allow the purchaser of a physical record to further transfer that particular copy without the permission of the copyright owner (for example, through resale or loaning that copy).<sup>6</sup> But this right is limited to the use of the same copy of a record that is owned by the archive.

Apart from the right to freely transfer the specific record (the copyrighted ‘work’) that has been purchased, a number of other rights may need to be cleared for acquisition of a work, which collectively make up the copyright in that work. For example, in the case of a private institutional archive, an archive may have validly purchased or acquired a record that is copyrighted (for example, a manuscript), and has the implied right to transfer or loan that particular physical copy of the record as per the terms of the acquisition. However, the archive would not be able to freely copy, distribute or display the acquired record without clearing copyrights associated with the record, including the right to copy the manuscript, to publish it or make it publicly available, or to adapt it into some other form. If the archive wishes to reprint the manuscript, digitise it, copy it into another format (for example, a microfilm or an audio record), it must separately acquire copyright over that work.

When an archive seeks to make use of a work – for copying for preservation, for making it available for display, or for digitising – it will generally have to acquire both physical title as well as copyright. The subsequent section describes how copyright may be acquired by the archive.

### Scenario

An archive seeks to acquire records of a writer in order to provide access to these records to researchers, as well as to copy these records for preservation, digitisation and for wider access to the records. If it only seeks to hold and provide the original physical record for research and inspection, it may do so only with title to the physical record. For the use of any copies of a record, including digitisation of the record, or for publishing or displaying the records to a larger audience, the archive will need to take into consideration the copyright in the work, and either acquire copyright or avail of relevant exemptions.

### Identifying the Rights Owner

At the outset, when seeking to acquire copyright, the archive must be able to identify who is the valid owner of copyrights and from whom such rights should be cleared. The owner of copyright depends on a number of considerations, including

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6. Indian copyright law does allow the purchaser of a physical record to further transfer that particular copy without the permission of the copyright owner (for example, through resale or loaning that copy). But this right is limited to the use of the same copy of a record that is owned by the archive.

the medium of the record, as well as the context in which it has been made.

As a general rule, copyright rests with the person or persons who created the work (the first author(s)). In the case that the original rights owner is deceased, in the normal course, the copyright will transfer to their legal heirs or legal representatives as specified in their will. However, ownership of copyright in a work depends on the context in which it is created, as well as the subsequent transactions relating to ownership of copyright.

Section 17 of the Copyright Act provides for some of these exemptions, including that:

1. For works created under contract for a magazine or periodical, the proprietor of the magazine will be the first owner.
2. For Government Works (works published by or under the direction and control of the Government, legislature, or court), or works made or first published under the direction and control of a public undertaking (an undertaking owned and controlled by the Government or a Government Company or a statutory body), the respective Government or Public Undertaking will be the owner of the work.
3. Additionally, as detailed earlier, in the case of a work made in the course of the author's employment, the copyright would vest in the employer.

### Scenario

An archive receives a request for donation by the family of a deceased playwright, for manuscripts and personal papers of the playwright. If the playwright was the original owner of these records, and subject to any contrary terms in the will of the playwright, the playwright's heirs would be the legal owners of the records and would be in a position to legally donate them to the archive.

In some forms of work, the attribution of ownership to individuals is not always possible. For example, certain cultural traditions attribute authorship of works to collective authors or to communities. In such cases, copyright law in India does not provide any clear indication of how legal rights should apply, and archivists should examine the procedures for ethical review of such works through guidance provided in Chapter 6.

For instance, an organisation working with indigenous communities may wish to record and preserve certain cultural traditions and heritage, through material records and oral histories. Some of the material records, such as cultural artefacts or certain manuscripts, may not be attributable to individuals, and copyright law would not be an applicable framework to determine ownership or access. The archive should consult ethical guidelines for the use of such material.

## **Obtaining Permissions to Use Copyright**

Under the Copyright Act, 1957, permission to use or exploit copyright in a work can be obtained in two ways:

### **A) Licensing of a copyrighted work**

A license is a contract enabling a licensor (the owner of a copyright) to give the licensee (in this case, the archival institution) the limited rights to use a record without transferring the ownership of the copyright itself.

Licenses may be exclusive or non-exclusive to the licensor: the owner may choose to license the copyright in the record to multiple parties (multiple archives and individual users, for instance). And licenses may be for any period or jurisdictional scope, which is determined by the terms of the license. Additionally, licenses must follow the conditions laid out under Section 19 of the Copyright Act, as described below.

### **B) Assignment of copyright**

A second manner of acquisition of copyright in any record is through acquisition – which entails a change in the ownership of the copyright. Akin to a ‘sale’, as distinguished from a license, the assignee of a copyright has the right to further license that work or to further assign the copyright in a record, or to sue for infringement in case of its unauthorised use. The owner of copyrights in a work may assign either all of the copyrights associated with the work or part of it, and the assignment may be for any period of jurisdictional scope, as determined by the terms of the contract.

An assignment of copyright is a particular form of contract that must adhere to the conditions under Sections 18 and 19 of the Copyright Act. According to Section 19, an assignment (as well as a license under Section 30) would only be valid if:

- (a) it is in writing and signed by the assignor or licensor.
- (b) the written contract stipulates the rights to be assigned or licensed, along with the duration and territorial extent; and,
- (c) the assignee must utilise the rights granted to them within one year of the assignment, unless explicitly stipulated otherwise.

## **Forms of Acquisition**

Once an archive has determined that it needs to acquire title to particular records, as well as copyright in order to use the records, it has to think about how to execute it. Such acquisitions generally need to be done through specific legal or contractual forms for transfer of title and ownership, which are described in this section.

*Some sample clauses for instruments of acquisition such as gift/donor agreement and loan agreement are provided in the Appendix: Further Reading and Resources.*

## **Gift or Donation Agreement**

The most common form of external acquisitions for records is through donations or ‘gifts’ from the owners of particular records. The legal form of a donation agreement is known as a ‘gift’ under Indian law.<sup>7</sup>

The essential element of a valid gift is an offer of moveable property (which can be any kind of record or other material or immaterial rights) by a donor, voluntarily and without consideration, which is accepted by the donee, and the property is delivered from the donor to the donee. The transfer should be indicated in a clear and unambiguous fashion and is completed upon the delivery of the property, or upon the registration of a gift deed. Delivery, here, takes place when the records are put in the possession and control of the archive. The transfer of property through a gift may be conditional, that is, the donor may indicate certain conditions or restrictions on the use of the record which need to be complied with by the donee.<sup>8</sup> However, a gift once made, is irrevocable.

In general, a gift may be made in any form, including orally, but it is advised that archival institutions securing a donation have a written instrument of gift, which specifies the following:

1. **The donor and the donee:** The transfer can only be made by the person with valid title to the record, and the archive should ensure that the name of the donor is the person (or entity) which has ownership of the records being transferred. The legal entity responsible for the archive (whether an individual or an incorporated entity) should be named as the donee.
2. **The date of the transfer and the details of the property conveyed:** The property conveyed should be detailed in its archival description as specifically as possible, and such description should ideally be annexed to the deed of gift or the donor agreement. As specified above, the transfer of movable property (the physical record) does not automatically convey all the copyrights which may be associated with it. If the archive wishes to acquire the copyright over the record (for purposes documented in Chapter 2), it must ensure that the copyright is assigned or licensed as indicated above. In the event that the donor is the owner of the copyright in the record, the same may be transferred along with the written deed of gift, provided the conditions of valid assignment are fulfilled.<sup>9</sup>

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7. The terms of a deed of gift are governed by Section 122 of the Transfer of Property Act, 1882, which states: “*Gift is the transfer of certain existing moveable or immoveable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee.*” Retrieved from [https://www.indiacode.nic.in/handle/123456789/2338?sam\\_handle=123456789/1362](https://www.indiacode.nic.in/handle/123456789/2338?sam_handle=123456789/1362)

8. *S Sarojini Amma v. Velayudhan Pillai Sreekumar* [2018] SCC OnLine SC 2200. Retrieved December 20, 2022, from <https://indiankanoon.org/doc/173119126>

9. There is some ambiguity on whether copyright can be assigned without consideration, as a gift, as a contract without consideration is void, except when it is a gift of movable property. To resolve such ambiguity, it is recommended that the terms of copyright assignment specifically note that the assignment is ‘for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged’. In general, a promise to preserve and utilise the work as an archival record may be

3. Any restrictions or conditions on the use of the records that the donor wishes to place on the archive should be clearly documented in the deed of conveyance. In particular, the deed should note the temporal and jurisdictional restrictions on the use of the record, as well as to whom these restrictions may apply. Similarly, the authorisations of the archive in handling the records should be clearly mentioned. For example, restrictions on display or communication of the record should not prevent the routine preservation activity by the archive and its staff. Similarly, the right of the archive to return any material not adjudged of archival value should be mentioned in the deed.

## Deposit Agreements/Loans

Another common means of acquisition of records is through the use of deposit agreements or ‘loans’. Deposit agreements may either signal intent to transfer title of certain records at some later date to the archive, or might simply be the temporary change of custody over records without transferring the ownership.

A deposit agreement should unambiguously indicate the parties to the agreement, including the responsibilities of both parties, the archival description of the records to be transferred, the period of the transfer, and the conditions attached to the deposit. If the transfer is for an indefinite period, the conditions on which the records will be transferred back to the custody of the depositor (or a third party) should be clearly mentioned.<sup>10</sup>

## Acquisition of ‘Orphan Works’

Often, archives may wish to acquire or make available certain records, but the original author or rightsholder of these records cannot be identified. They might be deceased or ownership of the record cannot be identified. For that reason, there is an obstacle in obtaining the necessary rights to exploit the work as an archival record. These works are known as ‘orphan works’, and the Copyright Act makes specific stipulations to deal with such situations.

1. Generally, resorting to licensing orphan works through the Copyright Act presumes that the archive has already conducted a ‘diligent search’ to find the owner of the work, including contacting possible heirs of a deceased author, researching the provenance of the work, etc.
2. Section 31A of the Copyright Act allows the Government of India to issue compulsory licenses for published or unpublished works in cases where the author is dead or unknown or cannot be traced, or the owner of the copyright in such work cannot be found. In order to obtain the clearance to publish such a work, the following procedure must be followed by the archive hoping to acquire such rights:

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construed as sufficient consideration.

10. For more specific guidance on terms of the deposit agreement, please refer to National Archives, Government of UK, *Loan (Deposit) Agreements for Privately Owned Archives*. Retrieved from <https://www.nationalarchives.gov.uk/documents/archives/loanagreement.pdf>

- a. They must apply to the Commercial Court, which are special courts established for commercial and copyright matters at the District level, for a license to publish the work or communicate the work to the public, in the form mentioned in Chapter V Rule 11, of the Copyright Rules, 2013 of the Copyright Rules.
- b. Prior to making such an application, they must publish an advertisement of the proposal in one issue of a daily newspaper in the English language having circulation in the major part of the country. A copy of this advertisement must be enclosed with the application.

After receiving the application, the Commercial Court will take a decision and direct the Registrar of Copyrights to grant the licence to the applicant according to the directions of the Commercial Court, which may include the deposit of royalty with the Commercial Court.

The procedure and forms for the application to license orphan works are mentioned in Chapter V of the Copyright Rules, 2013.<sup>11</sup>

### Scenario

**The archive of a scientific institution would like to acquire the personal papers of an administrator formerly employed by the institution. Once it has determined which papers are not owned by the institution, it must obtain the ownership rights in the personal papers. First, it must identify the rights owner, which in most cases would be the administrator who wrote the papers, or their legal heirs (if the administrator is deceased). Next, it must identify whether copyright subsists in the work, and determine whether the archive must also acquire copyright in the papers.**

**If the archive wishes to acquire the material (physical) record as well as the copyright in the record, it will have to acquire them through a contract that specifies that the copyright is either being licensed or being assigned from the rights owner, to the archive, and which follows the stipulations of the Copyright Act described above.**

**If the papers of the administrator include records not authored or owned by the administrator, but which are of archival value and the archive would like to acquire copyright in such records, it should conduct an additional search to find the owner of these records. If**

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11. Copyright Rules 2013. Retrieved from [https://copyright.gov.in/Documents/Copyright\\_Rules\\_2013\\_and\\_Forms.pdf](https://copyright.gov.in/Documents/Copyright_Rules_2013_and_Forms.pdf)

**the owner cannot be found after a diligent search, the archive may treat these records as ‘orphan works’, and seek to acquire the works through the process described above.**

## Chapter 2

# Access and Use of Archival Records: Copyright

This chapter covers the application of the Copyright Act to archives, fair dealing and exemptions, the public domain, reproductions, defamation, liability, preservation, digitisation and public displays.

### Scenario

An archive has a number of records of historical importance – published and unpublished manuscripts, artefacts, letters and photographs among them. The archive intends to collect and organise these records, provide access to researchers to study and copy them, make digital and physical preservation copies of the records, and occasionally display them to a wider audience.

When the archive provides access to records or reference services, or makes use of records for the purpose of preservation, digitisation or display, there are various legal considerations it must keep in mind. What is the copyright status of the records, and how does this affect their use or access? What kinds of exemptions might the archive avail itself of in order to promote wider access to important scientific history?

Collecting, maintaining, and providing access to records under the custody of an archive is one of the primary responsibilities of an archivist. Undertaking this responsibility requires archivists and archival institutions to navigate a range of legal issues pertaining to the manner in which archival records may be used. This section explores how certain laws like copyright law, defamation law or media regulations can impact the work of archives, and how these may be navigated. It will also explore the implications of law in the access and use of records by archives.

## COPYRIGHT IN ARCHIVAL RECORDS

Perhaps the foremost legal consideration in archival access and use is the issue of intellectual property rights within archival records under the custody of the archive. This applies particularly to copyright, which is a set of rights that restricts the use, particularly the copying, of various kinds of media, including many of the records

and material that archives might deal with, including in the form of documents, copyright terms and fair use shape ideas of the role and function of archives in society more broadly.

Archives may need to exploit various copyrights in the course of their work.

One common activity in which archives use copyright is in making copies of records in order to facilitate access to records by researchers, or facilitating the making of copies by researchers. Further, the preservation of particular records may require an archive to make a copy (either physical or a digital copy) of the record, including by transmitting it into a different medium, particularly through digitisation. Similarly, replacing a damaged manuscript could also require copying. Often, incidental activities of archives might also implicate copyright, such as allowing particular records for public viewing and display.

In India, copyright law is largely codified and captured under the Copyright Act, 1957. This Act defines the scope of copyright, including when works are considered copyrighted, the rights conferred by copyright, as well as important exceptions to these rights. The Copyright Act must be read in conjunction with judicial pronouncements which clarify or declare the meaning of these provisions.

## What is the Scope of Copyright Law?

According to Section 13 of the Copyright Act, the following works are capable of being copyrighted:

- (a) *original* literary, dramatic, musical and artistic works;
- (b) cinematograph films;
- (c) and sound recordings.

Each of these works should be interpreted as per the explicit definitions provided under the Copyright Act, as well as by their plain meaning. For example, 'literary works' include all manner of manuscripts or letters (plain definition) as well as computer programmes and databases (as per the definition under Section 2). Similarly, 'artistic works' include paintings, sculptures, drawings or photographs, or any other work of 'artistic craftsmanship' (Section 2(c)).

The '*originality*' of a work has to be determined on a case-to-case basis. In order to claim originality, the work must display a 'minimum degree of creativity', and the work must not merely be rote or mechanical. For example, the mere compilation of records or documents or the mere selection and arrangement of text from other sources has not been considered copyrightable.

It is important to keep in mind that copyright protects the unique, fixed expression of a particular idea. The law does not allow for copyright in an idea per se. Copyright law makes a distinction between 'ideas' and expressions of an idea, and protects

only particular material expressions of an idea. For this reason, copyright law does not protect facts or 'data'. This includes scientific principles or mathematical formulae, for instance, which cannot be expressed in any other material form.<sup>12</sup> However, compilations of data or facts arranged in particular works may be deemed to be 'original' enough to warrant copyright protection, in particular circumstances. In practice, it should be assumed that any original creations that display some amount of skill, labour and creativity from the author are subject to copyright.

### **Special Categories of Work (Broadcast and Performance)**

In addition to the copyrights under Section 14, the Copyright Act also creates certain special rights for particular categories of works. Section 37 of the Copyright Act creates a special category for 'broadcast reproduction rights', which lasts for 25 years from the date of the broadcast, and protects against unlicensed re-broadcasting.

Similarly, Section 38 of the Copyright Act protects the 'performer's right'. Performance here refers to "any visual or acoustic presentation made live by one or more performers."<sup>13</sup> The performer's right protects the right of a performer to license any sound or visual recording of their performance, or to broadcast or communicate such performance to the public.

The Copyright Act also provides exemptions to broadcast reproduction rights and performer rights, as applicable under Section 52, as well as for the purposes of private use, teaching, review or research.<sup>14</sup>

#### **Scenario**

An institution working with indigenous communities intends to produce and archive oral histories. A number of considerations relating to ownership and copyright should be kept in mind. Copyright in the spoken words of the participant or interviewee would normally vest with the participant as an original literary work, once it has been 'fixed' in some material form like a transcription or a tape. Similarly, the authorship of the interviewer's words will vest with the interviewer themselves (and ownership may vest with the interviewer or their employer, according to the context).

In the case where an oral history interview has an audio recording, there will also be a separate copyright in the sound recording of the

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12. *Chancellor Masters and Scholars of the University of Oxford v. Narendra Publishing House and Ors* [2011] 47 PTC 244 (Del.) (DB). Retrieved December 20, 2022, from <https://indiankanoon.org/doc/138192511>

13. Section 2(q), Copyright Act 1957

14. Section 39, Copyright Act 1957

**particular spoken words of the participant. The ownership of copyright in the sound recording will vest with the producer or the person who makes the sound recording – normally the interviewer themselves (or their employer).**

**In considering issues of ownership, access and use of copyrighted material in the recorded oral histories, the archive must clarify in the consent release form how these various copyrights are to be utilised, and whether they are being licensed or assigned to the archive or the interviewer. Keeping in mind the ethical considerations outlined in Chapter 6, the archive may wish to allow the participant to keep ownership of the copyright, but still allow its broader dissemination and use in non-commercial contexts, for example, through the use of a Creative Commons license.**

### **Term of Copyright (Temporal Scope) and the Public Domain**

Copyright subsists in works from the moment of their creation – regardless of whether the works are registered and without the requirement of any particular procedure for claiming ownership. However, copyright provides ownership rights that are limited in time. The temporal scope of different kinds of copyrighted works are provided in the Copyright Act, 1957.

For literary, dramatic and musical works, copyright subsists for *60 years from the death of the author of the work*. Where there are multiple authors, sixty years is calculated from the death of the last surviving author.<sup>15</sup>

Where the author of a particular literary, dramatic or musical work has died prior to the work being ‘published’, such works are termed as posthumous works, and the term of the copyright for these begins from the first day of the year after the work is first published, and extends to 60 years from that date. Similarly, if a work is published anonymously or pseudonymously (where the author’s identity is not disclosed), the copyright term will be for sixty years from the first day of the year after the work is published. (For example, if a photograph is anonymously published in a magazine on January 10, 2020, the copyright term for that photograph will be 60 years from January 1, 2021).

For cinematograph films and sound recordings, as well as where the owner of the copyright is the government or public undertaking, the term of copyright is sixty years from the end of the year in which the work is published.

All works beyond the temporal scope of the Copyright Act are considered to be in the ‘public domain’ and are free to use for the purposes of copyright. Therefore, if the author of a literary work died in 1957, the term of copyright would be  $1957 + 60$

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15. Section 22, Copyright Act 1957

years, and therefore would have expired in 2017.

(Note that prior to the enactment of the Copyright Act, 1957, the Copyright Act, 1914 was in force, which applied the UK Copyright Act of 1911, subject to some modifications. According to that law, the term of copyright protection was 50 years from the death of the author.)<sup>16</sup>

Finally, the Indian Copyright Act applies not only to works produced in India, but to works that were first made or published outside India, provided that these works were made in countries that are signatories to the The Berne Convention for the Protection of Literary and Artistic Works.<sup>17</sup>

## **Published and Unpublished Works**

Many archives might deal with works that have been published – for example, film or audio-visual archives, or those which work with records of particular governmental institutions. Usually, however, archives have to work with unpublished material, which has not previously been made public. For archivists, it is important to understand the distinction between published and unpublished works when assessing whether something may be ‘freely’ published as belonging in the public domain, or when reasonable steps should be taken to secure permissions to exploit copyrights. It is therefore essential to understand how these different forms are to be treated for the purpose of copyright.

The concept of publication under copyright law refers to a specific factual scenario that triggers various legal consequences. For example, copyright is normally granted for 60 years from the ‘publication’ of a work. Section 12 of the Copyright Act defines the act of publication as ‘making a work available to the public’, either by ‘issuing copies’ or by ‘communicating the work to the public’. Issuing copies implies distribution of the material, while communication to the public implies displaying the material in a manner where it is accessible to the public. Such distribution must be intended to be for a general or targeted ‘public’, and the private circulation of a particular archival record would not generally constitute publication.<sup>18</sup> In making this distinction, archivists should consider both whether the record was intended to be a ‘public’ document, for example, if it was put up for sale to the general public, as well as whether copies were supplied, or whether it was only intended to be for private use.

*As per the terms of the Copyright Act, unpublished works are also subject to*

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16. For the purpose of translations, an exception to this term was carved out, where the right to control translation of the work would only last for 10 years, unless the author has authorised an official translation within that period. Indian Copyright Act 1914. Retrieved from <https://www.wipo.int/edocs/lexdocs/laws/en/in/in121en.pdf>

17. Section 40, Copyright Act 1957; International Copyright Order 1999. Retrieved from <https://copyright.gov.in/documents/international%20copyright%20order.htm>

18. However, there is no clarity on the precise scope of the ‘public’ and determining the status or the date of publication of a work is a legal and factual determination on a case-to-case basis.

copyright.<sup>19</sup> However, the Copyright Act does not explicitly mention the term for which copyright in unpublished works subsists. The recognition of copyright in unpublished works, coupled with the silence on the term of copyright for unpublished works creates the anomalous situation that copyright in unpublished works may subsist for eternity, and that they may never enter the public domain. While there is no clear answer to this anomaly, there are important exemptions to copyright law for previously unpublished material used by public-facing archives, which allows archives to publish them or to provide some kinds of access to these records.<sup>20</sup>

## When is Copyright Infringed?

What kinds of rights does copyright bestow on the owner? Section 14 of the Copyright Act determines which rights are associated with copyright in different kinds of works. For example, the right of reproduction is the most elemental right conferred by copyright. Making a copy (including a digital copy) of a copyrighted work is prohibited unless permitted by the owner or by exceptions to the Act. This right of reproduction includes the right to ‘format shift’ or digitise records, which has implications for archival practice.

Similarly, literary, dramatic and musical works cannot be ‘communicated to the public’, namely, published or displayed publicly, without copyright clearance. In addition to these, Section 57 of the Copyright Act also recognises certain ‘special rights’, known as moral rights. These rights include the right of the author of a work to claim authorship of a work, as well as to prevent destruction of their creation that may be prejudicial to their honour or reputation. These rights apply even when the copyright itself has been assigned or its term has ended.

## Exceptions to Copyright Infringement

### Scenario

An archive wishes to copy its records for a number of reasons. It must digitise an old manuscript to ensure its contents can still be made accessible. It wishes to make multiple copies of a workbook in order to lend these to external researchers at a different institution. Or it wishes to digitise some copies and make them available to the wider public through its website. However, it is unable to obtain clearance to use copyright for these actions, either due to the prohibitive costs, or due to the difficulties in locating and getting permission for the use of copyrighted works. In these cases, the

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19. *George Jacob and Others v. Nandakumar Moodadi and Another* [2014] CriLJ 3421. Retrieved December 20, 2022, from <https://indiankanoon.org/doc/52827534>

20. See the discussion on Section 52(1)(p) of the Copyright Act in the section below: Exceptions to Copyright Infringement - Reproduction of Previously Unpublished Work.

**archive may avail of specific exemptions under the law, where it does not need the permission of the rights owners for making copies or using the copyrighted work under particular conditions.**

Copyright can be a substantial and structural hurdle to promoting the use and access to archival records, particularly given the lack of clarity about copyright ownership in archival records and systematic difficulties in obtaining clearances to copyright (through licensing, acquisition, or otherwise).

The Copyright Act recognises that copyrights can often limit important public values and public functions performed by archives and archivists, and therefore provides for important exceptions to the use of copyrighted works without obtaining clearances of permissions from the owner of such works (or through other means of acquisition as detailed in Chapter 1).

Section 52 of the Copyright Act provides for crucial exceptions from copyright, for activities that would otherwise constitute copyright infringement. These exemptions are considered as ‘user rights’ that are important aspects of the public policy sought to be furthered by the Copyright Act.<sup>21</sup>

Some of these exceptions are particularly important for archival institutions:

### **Fair Dealing**

Section 52(1)(a) provides that the ‘fair dealing’ with any work for the purpose of private use, including research, or for criticism or review, or to report a current event, is not considered copyright infringement.

This is one of the broader exemptions or rights available to users, which archives should facilitate. Users of archives may rely upon this to make copies of works for private study, including for their own research, as long as it is not publicly disseminated. They may also copy works where they are incorporated in subsequent works where there is a criticism or review of the work, or to report on any current event. Each of these uses is subject to the condition that the copying or the use of the work is ‘fair dealing’.

What constitutes ‘fair dealing’ is highly contextual and fact-specific. As interpreted by courts, a fair dealing analysis takes into account (i) the quantum and value of matter taken in relation to the criticism, (ii) the purpose for which it was taken and, (iii) the likelihood of competition between the two works.<sup>22</sup>

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21. This is important because, while there is no precise determination on the question, it can be argued that these exemptions may not be capable of being waived by contract, due to their importance as user rights. Therefore, regardless of contractual stipulations to the contrary, for example, license terms absolutely restricting copying including for the ‘fair dealing’ of any work, such exemptions may be relied upon to justify such copying.

22. In *Civic Chandran v Ammini Amma* [1996], the judgment states “One of the surest and safest test to determine whether or not there has been violation of copyright is to see if the reader, spectator or the viewer after having read or seen both the work is clearly of the opinion and gets an unmistakable

Archives may rely on this exception to provide copies and access to records for researchers, where they have a good faith belief that the copying is for such reasonable purposes including private research or criticism. To the extent possible, archives should obtain indemnities and undertakings from users or researchers regarding the nature of their use of archival records, including for further copying and/or display.

## Digitisation by Non-commercial Public Library

Section 52(1)(n) permits the digitisation of a work by a ‘non-commercial public library’, provided the library is already in the possession of a non-digital copy of the work. This exception is particularly important for digital preservation of non-digitally born works, although it does not explicitly permit the further copying or distribution of such a work once it is digitally reproduced.

The Copyright Act does not define what constitutes a ‘non-commercial’ library. It defines a non-profit library as a library or educational institute that receives grants from the government or is exempt from the payment of Income Tax. The dictionary meaning of ‘library’ overlaps to an extent with the function of many archives, as institutions for preservation and access to published or unpublished material. *If the archive falls within these categories, it may assume itself to be a ‘non-commercial public library’ and can avail of this exemption.* While there is no clear definition of a ‘non-commercial’ library, archives that perform the function of allowing their collections to be accessed by the general public, and do so without a commercial motive, will fit within this definition. The guidebook on copyright law published by the National Digital Library of India interprets a ‘non-commercial public library’ to mean an institution “*(a) that is either maintained/established/aided by the Government or notified by the Government as a public library or whose primary activities are the collection and preservation of books, periodicals and other documents and the provision of library services and (b) which makes its collection accessible to the public.*”<sup>23</sup> An archive which operates with a non-commercial incentive within a for-profit institution may also be considered a non-commercial library if it provides access to the public without a commercial incentive.

Taking the example in the scenario above, if the archive is not a commercial, profit-making venture, and it is allowing access to the general public (under specified conditions), it may make as many copies of a work as required for the explicit purpose of preserving this work, for example, by digitising microfilm or a manuscript that is deteriorating, without acquiring copyright. However, this does not allow it to distribute the digitised work to any members of the public.

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impression that the subsequent work appears to be a copy of the original....there can be no copyright in an idea, subject matter, themes, plots or historical or legendary facts and violation of the copyright in such cases is confined to the form, manner and arrangement and expression of the idea by the author of the copyrighted work.” Retrieved from <https://www.casemine.com/judgement/in/56e66b08607dba6b534374a3>

23. National Digital Library of India. (2021). *NDLI presents: Copyright guide for Indian libraries.* Retrieved from <https://ndl.iitkgp.ac.in/document/cXFBM1dKUElqSUsaMIVuOEo2azdGVU5oNGVYUDZEdWh1WTIWTENFOUhOWTO>

## Copies of Books Not Available for Sale in India

Section 52(1)(o) allows for the making of not more than three copies of a ‘book’ by a person in charge of a non-commercial public library, for the use of the library, if the book is not available for sale in India. ‘Books’ are widely defined to include maps or pamphlets. An archive which falls within the definition of a ‘non-commercial public library’ may avail of this exemption to make copies for its own use, for example, for reference and preservation purposes. These copies may be physical or digitised. If digitised, the archive would have to document and apply access controls to ensure that only three copies of the work are made and distributed, and if it is a library, that this distribution is for a limited period. Various archives make use of access-controlled distribution of copyrighted work. For example, the Internet Archive has a system of access control to certain parts of its collection that are copyright protected, in order to make use of exemptions available to it under copyright law.<sup>24</sup>

## Reproduction of Previously Unpublished Work

Section 52(1)(p) of the Copyright Act allows the reproduction of previously unpublished literary, dramatic or musical works, for the purposes of either research, or for private study, or for publishing the unpublished work, provided that the unpublished work is kept in an institution to which the public has access, such as a library or a museum. This exemption may be availed for orphan works at any time. However, if the author of the unpublished work is already known, then the exemption only applies from sixty years from the death of the last surviving author of the work.

Provided archives fall within this exemption, the archive has the right under this exemption to not only reproduce the work for its users, for the purpose of research or private study, but to actively ‘publish’ the work and provide copies of the work to the public or otherwise communicate the work to the public. This is particularly important for orphan works, whose authors cannot be identified, but it also unambiguously allows the publication of some works that may be unpublished and whose copyright status may be uncertain, even when the author is known (see above for the ambiguity in the copyright in unpublished material).

On a plain reading of this exemption, it appears to be more limited than the conditions to secure a compulsory license for orphan works that may be obtained under Section 31A (see the discussion of Section 31A in Chapter 1 – Acquisition of Orphan Works). While a license under Section 31A can be availed if the author’s identity is unknown or if they cannot be located or are dead, this exemption only applies if the author’s identity is not known.

To avail of this exemption, the archive must be part of an institution to which ‘the public has access’. As such, private archives that place substantial restrictions for

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24. Internet Archive. *Borrowing from the lending library*. Retrieved from <https://help.archive.org/help/borrowing-from-the-lending-library>; note that there is disagreement about the scope of the exemptions claimed by the internet archive, and the position is under litigation as of the time of writing.

the general public to access their records may not avail of this exemption. This underlines the importance of private archives that seek to enable wider public access to mention the conditions for access unambiguously in their access policies, and indicate that they provide access to the general public.

As noted above, archives must assess the copyright status of a work prior to making a determination on using this exemption.

### **Scenario**

**An institutional archive has access to an undated and unpublished manuscript whose author is not known despite a diligent search. It also has access to an unpublished manuscript co-authored by two former members of the institution. It may utilise the exemption in this section at any time to reproduce or publish the former manuscript of unknown origin. It may utilise this exemption to reproduce or publish the co-authored manuscript only sixty years after the death of the last surviving author. The archive's access policy should indicate that it is an archive that provides access to the public, and that it is providing access for the purpose of 'research, or private study, or with a view to publication'.**

### **Copies of Broadcasts of 'Exceptional Documentary Character'**

Section 52(1)(z) allows perhaps the most unambiguous exemption specific to the archival function to preserve works of historical value. It permits broadcasting organisations (undefined under the Act but used to refer to institutions that engage in radio or television broadcasting, which may include online broadcasts) to copy and retain the copy of a work that is broadcast, on the grounds that it has 'exceptional documentary character'. Therefore, the archives of a broadcasting organisation, such as a TV news channel or an FM radio channel, may copy and preserve some of the work they broadcast that has been appraised to be of archival value. This also underlines the importance of documenting a clear appraisal policy and process for such archives.

### **Reproduction for Facilitating Access**

Section 52(1)(zb) allows the reproduction or communication of a work in an accessible format, where such copying or communication is intended to facilitate the access of such work by persons with disabilities.

This exemption can be relied upon by archives that are considering reproducing particular records in order to make them more accessible, through, for example, the conversion of manuscripts from text to speech, or the digital reproduction of particular works that may not otherwise be accessible to persons with disabilities. The exemption also requires that the archive should take 'reasonable steps to

prevent the entry of such format-shifted works into ‘ordinary channels of business’, namely, it must include some form of access controls as reasonably available to the archive, to ensure that it is only used by persons with disabilities. This may, for example, require self-certification by users of works that are format-shifted digitally.

Multiple exemptions may be availed of in the course of an archive’s functioning. For example, the archive may want to avail of Section 52(1)(n) – see the section above on digitisation by a non-commercial public library – while undertaking preservation of manuscripts or allowing digitisation for the purpose of preservation. The archive may wish to format-shift a particular record for making it more accessible to users with disabilities, for example, by converting from text to speech.

The table below summarises some of these key exemptions for archivists.

Section	Type of use	Works	Purpose	Institution	Condition
<b>52(1)(a)</b>	Any	Literary, Dramatic or Musical	Private use, research, criticism or review or reportage	Any	Fair Dealing
<b>52(1)(n)</b>	Digitisation	Any	Preservation	Non-commercial public library	Must possess a non-digital copy
<b>52(1)(o)</b>	Reproduction	Books	For the use of the institution	Non-commercial public library	Not more than three copies
<b>52(1)(p)</b>	Reproduction or Publication	Previously unpublished Literary, Dramatic or Musical	For publication or private use including research	Library, or Museum or other institution to which the public has access	
<b>52(1)(z)</b>	Reproduction	Broadcast work	Archival purpose	Broadcasting organisation	The work must have ‘exceptional documentary character’
<b>52(1)(zb)</b>	Reproduction or Communication	Any	Providing access to persons with disabilities	Any	

# COPYRIGHT LICENSING AND IMPROVING ACCESS TO ARCHIVES

As discussed above, copyright is an important consideration for archives seeking to use or make available access to records of various kinds. For many archives, making their collections accessible and available broadly is an important goal. However, the default status of copyright law can often hinder these goals.

Archives should actively consider the applicability of the exemptions and rights to copyright granted to them under the Copyright Act, above, in case they do not have copyright or are unable to clear copyright. If archives seek to avail of specific exemptions, this should be clearly documented in internal documents or policies, with specific justifications as to how particular archival functions are related to the exemptions.

If archives acquire ownership of copyright in any work, for example, through gift agreements, they may consider actively adopting policies for enabling more equitable and open access to their records, for example, by allowing digitised records to be used under a Creative Commons license. Creative Commons (CC) are a set of licenses that can be applied to specific works by owners of the copyright in those works. These licenses allow copyright owners to enable wider access to copyrighted works, applying specific restrictions, without necessarily losing ownership of the works themselves. For example, a “CC by NC” license allows copyright owners to license their work freely for non-commercial reasons, provided the work is attributed to the original authors or owners.<sup>25</sup> This guidebook, for instance, is available with a “CC BY-NC-SA 4.0” license, which allows free non-commercial use of this work, provided it is attributed to authors and shared alike. Archives may also consider encouraging donors who wish to hold on to ownership of copyright in certain works, to license their works under a Creative Commons license. However, such considerations of openness should also be balanced against other considerations of privacy, ethics and equity, as outlined in Chapter 4 and Chapter 6.

## LIABILITY OF ARCHIVES

### Primary Liability for Unauthorised Use of a Copyrighted Work

The above section considered the responsibilities of archives in making reproductions or publishing any material which may be copyrighted. In the case of an infringement of a copyrighted work, the Copyright Act allows owners to pursue specific remedies against the infringer. The most common remedy is an injunction, namely, an order that the infringing party stop the infringing use of the work.

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25. Creative Commons. (n.d.) *About the licenses*. Retrieved from <https://creativecommons.org/licenses/by-nc/4.0>

In some instances, the owner may claim damages for the infringing use of the work, the extent of which will be determined, among other things, based on the potential losses incurred to the owner due to the infringing action. This is the primary liability of an archive in the event of an infringement of copyright by the archive itself.<sup>26</sup>

## **Secondary or Contributory Liability for Unauthorised Use of a Copyrighted Work**

Liability for infringement may also arise as ‘secondary’ or ‘contributory’ liability. Such liability arises when the archive knowingly and intentionally facilitates the infringement of copyright by a third-party. Contributory liability may arise in a situation where an archive has knowledge that a third party to whom it is providing, or for whom it is facilitating access to a copyrighted record, is infringing that work. In such a case, if the archive is ‘materially’ contributing to the infringement, it may be found liable to contributory infringement. A ‘material contribution’ would be a factual determination to determine whether the infringement would have taken place *but for* the actions of the party.

The Copyright Act itself only mentions one condition for secondary liability, that is, when a person permits the communication of a work by another person to the public for profit at a place, and such communication is an infringement of copyright. In such cases, copyright is considered to be infringed by the person, unless the person was not aware or had no reason to believe that copyright was being infringed. This situation might arise, for example, if an archive permits a for-profit exhibition of copyrighted works to occur on its premises.

While such instances are rare, archives should include appropriate indemnities when providing access to records for researchers to insure themselves against potential claims due to the actions of a third-party. Indemnification is a contractual agreement that specifies that the liability for any potential future infringement will be borne by the indemnifying party (the user who might further copy the work), and that if any liability arises to the archive due to the user’s actions (for example, by copying the work or communicating it publicly), then the archive can claim any damages from the user. Such indemnities may be included, for example, in the Material Use forms provided to researchers by archives. An example of such a form is provided in the Appendix – Further Reading and Resources.

It should be noted, however, that indemnity clauses may not always offer protection to archives, for example, where the researcher indemnifying the archive themselves is indigent or unable to pay adequate damages. Further, in cases where the archive has contributed to the infringement, for example, by not following its legal responsibilities relating to publication of copyrighted content, it will not be able to rely on indemnity clauses.

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26. According to Section 51 of the Copyright Act, copyright in a work is deemed to be infringed “[W]hen any person, without a licence granted by the owner of the copyright or the Registrar of Copyrights under this Act or in contravention of the conditions of a licence so granted or of any condition imposed by a competent authority under this Act [...] does anything, the exclusive right to do which is by this Act conferred upon the owner of the copyright...”

## Defences Against Liability

Besides the exemptions from the use of copyright listed above, the Copyright Act also protects innocent third party users of copyright from certain kinds of civil actions, in case of innocent infringements.

First, the Copyright Act in Section 55 states that if the defendant in a civil action for infringement proves that they were not aware and had no reasonable ground for believing that copyright subsisted in the work, then the only remedy available to the owner would be an injunction, as well as any profits made from the sale of infringing works.

Second, the law of contract generally extends certain protections to 'good faith' purchasers of property, such that if a purchaser of a work had no notice or reason to believe that the seller did not have the title in the property, their interest in the work acquired or licensed is protected. While the position of law in India specific to contracts for copyright is unclear, archives who did not have notice of any illegality in the purchase of copyrighted material may be able to argue this 'good faith' protection against any subsequent civil suit against them.

## Liability for Defamation and Related Media Restrictions

### Scenario

**An archive obtains a record of a letter published by a leading academic, which is deeply critical of a large corporation. The archive wishes to provide access to the letter to the general public, but is afraid that the letter might be considered 'defamatory' towards the corporation. What is the archives' legal responsibility for publishing such a letter, and how might it go about it?**

The law of defamation protects the reputation of a person from being damaged through statements made to the public, which may be written or spoken, or documented in other forms. Primary liability for defamation is of the person who has made the defamatory statement.

However, archives may also face secondary liability when they publish or republish particular records that contain defamatory material. At the outset, defamation requires the publication of any statements that damage the reputation of a person in the eyes of the public. Therefore, merely holding a record that contains a defamatory statement for preservation, without making it accessible to the public, may not constitute defamation under law.

Liability for defamation requires that the publisher of the material, having taken reasonable care at the time of publication, was not aware or had no reason to believe that the material was defamatory. In general, the 'innocent dissemination' of any material that might be defamatory is considered to be a defence against civil

and criminal action for defamation by the publisher or distributor of defamatory material. The conditions of ‘reasonability’ will depend from case to case – courts have held, for example, that mere distributors of a magazine that contains defamatory material, who had no knowledge of the material, cannot be held liable for the same.<sup>27</sup>

The archive in the scenario mentioned above may freely use the record for private research, or make copies for reproduction or similar uses that do not amount to publication to the general public. However, if the archive has reason to believe that the letter is defamatory (and causes reputational injury to a person or legal entity), and seeks to make the record available to the general public, it should be aware of its potential liability as a publisher of defamatory content.

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25. *SM Govindasami v. KP Arumugam*, Madras High Court [2021]. Retrieved from <https://indiankanoon.org/docfragment/55159569>

## Chapter 3

# Access and Use of Archival Records: Privacy and Data Protection Law

This chapter covers data privacy, personal data protection, and informed consent.

### Scenario

An archive with both institutional and collected records from the public has a collection that includes photographs and personal correspondence from individual donations, the institutional records of former employees including health records, and other records that contain information specific to these individuals. The archive includes several 'oral history' collections in the form of audio files and transcriptions where interviewees have revealed intimate personal information and experiences. The archive has been conscious of privacy concerns in its functioning, but to what extent is this functioning a matter of legal regulation? What are the legal requirements for archives which deal with information of a personal nature? How can archives navigate these requirements to ensure that they deal with records in a way that respects privacy, while providing access?

Archives regularly deal with records and other material that contain information that pertains to, and identifies, individuals and their attributes or behaviours. For example, some archives might work with institutional employee records, which includes job performance reviews or health information. The individuals to whom such information pertains (or their relations) may have an interest in such records, particularly regarding maintaining confidentiality in such records and controlling its access.

Privacy concerns are integral to the functioning of archives. Such considerations may be reflected within the terms of particular donations or loans that restrict access or dissemination of a record, or may involve broader legal considerations that are not specified within the terms of an acquisition document. This chapter assesses the considerations regarding the law of privacy and the protection of personal data that arise outside of specific contractual restrictions placed within

acquisition documents. With digitisation and the increasing ease with which personal information can change hands and be communicated, there is an urgent need for archivists in India to familiarise themselves with legal considerations involved with privacy within the collections, records and other material which they deal with.

Unlike in copyright, when most acts are triggered by the copying of archival records themselves, data protection law is concerned with the collection or use of personal data in any manner, whether made public or not. This has implications not only for the archives in their ability to make copies available for researchers, but also for the provision of referencing services, for example, where the metadata being made available to the public itself might constitute personal information.

## PRIVACY AND DATA PROTECTION LAW IN INDIA

In India, legal concerns around privacy can broadly be categorised as those involving specific statutory mandates for data protection, and those which arise out of non-statutory mandates, such as the common law or constitutional law.

### Statutory Mandates

Various statutory mandates in India require different forms of compliances from institutions or individuals dealing with information that poses concerns of privacy. Some of these are sector-specific. For example, the sharing of medical or health-related information is regulated by a number of statutes including the Mental Health Act<sup>28</sup>, or the Insurance Regulatory and Development Authority of India (IRDAI) Health Service Regulations.<sup>29</sup> In addition, the National Medical Commission's Code of Medical Ethics Regulations (2002), advises medical professionals to retain medical records of patients for three years from the date of commencement of the treatment.<sup>30</sup> But it is outside the scope of this guidebook to detail these codes and statutes. At the time of publishing this guidebook, there is no clear and definite guideline in Indian law on confidentiality and long-term retention period for personal health records from an archival point of view. In general, archivists should consider whether disclosure or use of some of their records or collections may be restricted by such laws, particularly when considering information that is generally considered sensitive – such as information relating to official health records or financial information.<sup>31</sup>

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28. Section 23, Mental Healthcare Act 2017. Retrieved from <https://www.indiacode.nic.in/handle/123456789/2249>

29. Insurance Regulatory and Development Authority (IRDA). (2019). IRDA health service regulations. *Insurance Regulatory and Development Authority*. Retrieved from <https://www.irdai.gov.in/ADMINCMS/cms/Uploadedfiles/Regulations/Consolidated/IRDAI%20TPA%20consolidated%20Reg%20may%202020.pdf>

30. National Medical Commission. (2002). *Code of Medical Ethics Regulation*. Retrieved from <https://www.nmc.org.in/rules-regulations/code-of-medical-ethics-regulations-2002>

31. Centre for Internet and Society. *Draft - Health Privacy*. Retrieved from <https://cis-india.org/internet-governance/health-privacy.pdf>; Centre for Internet and Society. State of Data Regulation in India: A (contd.)

Apart from sector-specific considerations of privacy, there is a broader mandate for the protection of digitised personal data within the Information Technology (IT) Act. Section 43A of the IT Act states that

*"Where a body corporate, possessing, dealing or handling any sensitive personal data or information in a computer resource which it owns, controls or operates, is negligent in implementing and maintaining reasonable security practices and procedures and thereby causes wrongful loss or wrongful gain to any person, such body corporate shall be liable to pay damages by way of compensation to the person so affected."*

Section 43A is quite limited in its scope. First, it only applies to 'body corporates' and includes all companies or even groups of individuals engaged in a 'commercial or professional' activity. As such, non-profit archives, which are not incorporated as a company, may not be affected by this law (although in certain states, registered societies are also considered 'body corporates'). Second, it only applies to 'sensitive personal information' held in a 'computer resource' (digital information). Third, the body corporate must have been negligent in implementing 'reasonable security practices'. Fourth, such negligence must lead to a wrongful loss or wrongful gain to the affected individual.

The terms 'sensitive personal information' and 'reasonable security practices' are further defined in the Information Technology (Reasonable Security Practices And Procedures And Sensitive Personal Data Or Information) Rules, 2011.<sup>32</sup> We'll refer to them here as the "SPDI Rules".

The SPDI Rules require covered entities to follow particular procedures and rules for the collection or dissemination of 'sensitive personal information', which includes financial or medical information provided to the entity. These procedures include the requirement to have a privacy policy, the requirement to obtain the consent of individuals to whom the information pertains prior to collection and disclosure, and to have a clear purpose for the collection of information.

Archives should consult and comply with the procedures indicated in the SPDI Rules in case they are part of an incorporated entity, or a part of any entity conducting for-profit or commercial activities, and are in the process of acquiring digital records or digitising existing collections.

Given the limited scope of the SPDI Rules, there is not much uncertainty or liability associated with archival activity and existing statutory regulation of data protection in India, if the activities of the archive do not involve digitisation and making

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Compendium. Centre for Internet and Society. Retrieved from <https://cis.pubpub.org/data-regulation-india-compendium>

32. India Code. (n.d.). *The Information Technology Rules 2011*. Retrieved from [https://www.indiacode.nic.in/handle/123456789/1362/simple-search?query=The%20Information%20Technology%20\(Reasonable%20Security%20Practices%20and%20Procedure%20and%20Sensitive%20Personal%20Data%20or%20Information\)%20Rules,%202011.&searchradio=rules](https://www.indiacode.nic.in/handle/123456789/1362/simple-search?query=The%20Information%20Technology%20(Reasonable%20Security%20Practices%20and%20Procedure%20and%20Sensitive%20Personal%20Data%20or%20Information)%20Rules,%202011.&searchradio=rules)

collections publicly available online. However, the Government of India is in the process of considering a comprehensive new legislation, with a substantially revised scope. Various iterations of a proposed regulation have been tabled by ministries. The latest Bill to be released by the Ministry of IT is the Digital Personal Data Protection Bill, 2022 (“DPDP Bill”). The DPDP Bill specifically covers the processing of personal information for online activities and digitised information. The definition of personal information in this Bill includes any information by which a person may be identified.

The DPDP Bill is of concern primarily to archives that work with born-digital material or are digitising their records in which personal information is being ‘processed’, which includes any automated collection, storage, structuring or retrieval of personal information. For any archive that collects or processes such material in an automated manner, the DPDP Bill introduces obligations to provide notice and obtain consent from people whose information is being processed. It further grants subjects the right to access, correct or delete their information. The DPDP Bill also includes a provision whereby the government may exempt its application for ‘archiving purposes’ although the scope of this is not clear, and will likely develop as the Bill and the rules made thereunder are enacted.<sup>33</sup>

A full discussion of the DPDP Bill is not appropriate at this time, but archivists should be aware of the pending legislation and consult this guide or other legal guidance should the law on personal data protection be enacted. At the time of publishing this guidebook, the Ministry of Electronics and Information Technology of the Government of India has made the text of the DPDP Bill and other documents accessible through its website<sup>34</sup> and invited public feedback online till Jan 2, 2023.<sup>35</sup>

## Scenario

**The corporate archive of a large for-profit corporation collects and preserves documents relating to the history of the corporation, including files of previous employees, records pertaining to their personal lives, such as healthcare and employment assessment forms. To comply with the law, the corporate archive should consider the application of Section 43A of the Information Technology Act, 2000, to its record collection functions, and should consider whether it might require obtaining consent from the individuals whose**

33. Digital Personal Data Protection Bill 2022. Retrieved from <https://www.meity.gov.in/writereaddata/files/The%20Digital%20Personal%20Data%20Protection%20Bill%2C%202022.pdf>

34. Ministry of Electronics and Information Technology. (2022). *Data Protection Framework*. Retrieved from <https://www.meity.gov.in/data-protection-framework>

35. Innovate India. (2022). *Inviting Feedback on Draft Digital Personal Data Protection Bill*. Retrieved from <https://innovateindia.mygov.in/digital-data-protection>

**personal information might be included in the records that it collects and makes public.**

### **Non-Statutory Mandates and the Right to Privacy**

The Constitution of India recognises Right to Privacy as a part of the fundamental rights accorded to every individual in India, which was affirmed in 2017 by the 9-judge bench decision of the Supreme Court of India in *Justice KS Puttaswamy v Union of India*.<sup>36</sup> The scope of this right extends to protecting the informational self-determination of individuals – namely, giving individuals control over information that pertains to them, and in which there exists a privacy interest. This constitutional right generally applies against the state – that is, governments and their agencies and instrumentalities. The Right to Privacy is not absolute, and is balanced against competing interests that the state might have in collecting or disseminating about individuals, such as collecting demographic or health information for public health purposes or for the better delivery of state services.

Archives that do not operate as part of government institutions or agencies are unlikely to face claims that they have infringed the fundamental right to privacy of individuals. However, the recognition of privacy as a fundamental right underscores the importance that archives stay sensitive to their roles as custodians of collections of historical importance, which must be balanced against the privacy interests of individuals identified within their collections. There is no formulaic mechanism for identifying compliance with the Right to Privacy, and in practice, the remedy for non-compliance might only be restricted to an injunction. However, ‘public’ archives, which are government instrumentalities, should carefully consider how principles of the right to privacy, such as consent, data protection or security, might apply across the archival process.

### **Scenario**

**The archives of a government institution systematically collects and preserves records relating to individuals (for example, former employees) that might contain personal information. As a part of a government institution, the archive has a responsibility to ensure the constitutional Right to Privacy of the individuals that are identified in the records. This might require, for example, that the archive obtains explicit prior informed consent of the identified individuals, and that it puts in place measures to ensure the protection of data from unauthorised third parties. Additionally, the**

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36. *Justice KS Puttaswamy (Retd.) and Anr. v. Union Of India And Ors* [2017] 10 SCC 1. Retrieved from <https://indiankanoon.org/doc/91938676>

**archive should have a strong public interest justification for the collecting and processing of personal information, which should be documented with reference to the kinds of information it is processing.**

### **Breach of Privacy and Breach of Confidence**

Another domain of law where privacy interests are recognised is the non-statutory domain of ‘common law’, which protects certain interests of individuals against harm or loss caused in the civil domain. A common law right to privacy has also been recognised by courts in India, which protects individuals from breaches of their privacy, through, for example, the publication of their personal information in public.<sup>37</sup> Although the scope of this right has not been explicated in detail, courts do consider the balance of the public interest in the disclosure of personal information with the infraction to privacy interests.<sup>38</sup>

An additional aspect of privacy arises in the context when information is disclosed ‘in confidence’. The tort of breach of confidence recognises that particular relationships carry duties of confidence, particularly attached to information that may be shared within such relationships (as for example, between doctors and patients, or lawyers and clients).

If the breach of privacy or breach of confidence causes harm to the person to whom an obligation of privacy or confidentiality is owed, it may result in liability for the breach, resulting in an injunction to stop the use of confidential information as well as monetary damages to be paid to the affected individual or entity. In the case that the archive is receiving records that contain confidential information about a third party who is not a party to the transaction, a court would consider whether the archive had or should have had knowledge of the fact that information contained confidential information. If the circumstances do not indicate that the archive knowingly breached a duty of confidentiality owed in information to a third party, the aggrieved party would most likely still be able to obtain an injunction against the further use of that information by the archive. There are various defences to an action for the breach of a duty of confidence, including that there is a justified overriding public interest in the archive disclosing the confidential information.<sup>39</sup>

The non-statutory rights to privacy described above are considered to be rights that attach only to specific persons during their lifetime, and are not considered to apply

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37. *R Rajagopal v State of Tamil Nadu* [1994] 6 SCC 632. Retrieved from <https://indiankanoon.org/doc/501107>

38. Kharbanda, V. (2017). Relationship between privacy and confidentiality. Centre for Internet and Society. Retrieved from <https://cis-india.org/internet-governance/blog/relationship-between-privacy-and-confidentiality>

39. Lomas, E. (2019). Navigating confidentiality, legal privilege and GDPR to maintain legal records for future generations: The case for archiving. In Cowling, C, (Ed.) Legal Records at Risk: A Strategy for Safeguarding our Legal Heritage. (pp. 150-155)

posthumously, as per the interpretation provided by various courts in India.<sup>40</sup>

Archives should protect themselves from liability for such harm by having clear disclosure and access policies, and also by including specific indemnities and warranties in their access policies against wrongful disclosure by third-parties to whom they may provide access, as also indicated in the chapter on access and use of copyrighted material. In addition, there should be a clear process for individuals who are aggrieved by any material in the archives that potentially infringes on their legal rights to privacy to be taken down through a ‘notice and takedown’ process.

### Scenario

An archive obtains a number of records pertaining to the health and finances of specific persons, which are also of historical interest. The archive should try to obtain consent (through release forms, for example) of the identified individuals if they are alive, or, in any event, it should implement data protection controls, ensure that aggrieved individuals are able to identify and remove unauthorised uses of personal information, and have these processes documented in the form of a privacy policy. The same mandates extend to other records that might disclose the personal or intimate information about particular individuals, such as oral history, sound recordings and transcripts.

### The Right to be Forgotten

A developing legal principle that archives should be cognizant of is the so-called ‘right to be forgotten’ or right of erasure. The modern application of this principle developed in the European Union as a right of an individual to be de-indexed from online cataloguing (such as search engines), where the catalogue refers to information that is no longer relevant. Such ‘de-indexing’ rights do not explicitly call for information to no longer be disclosed, but merely for placing impediments on how such information is catalogued (usually in online and publicly available catalogues). The Right to be Forgotten may also, in some circumstances, extend to the right to erasure of information held about an individual by a particular entity, such as all the personal information about an individual held by an archive. In India, the Right to Be Forgotten has been developed in the context of publicly searchable databases of judicial orders and judgements.<sup>41</sup>

40. Justice KS Puttaswamy (Retd.) and Anr. v. Union Of India And Ors [2017]; Managing Director, Makkal Tholai Thodarpu Kuzhumam Limited Vs. Mrs. V. Muthulakshmi [2007] 6 MLJ 1152. Retrieved from <https://indiankanoon.org/doc/47400>

41. Sinha, A. (2017). Right to be forgotten: A tale of two judgements. *Centre for Internet and Society*. Retrieved from <https://cis-india.org/internet-governance/blog/right-to-be-forgotten-a-tale-of-two-judgments>; Sridhar, S. (2021). ‘Walking the tightrope of the right to be forgotten’. *SpicyIP*. Retrieved from <https://spicyip.com/2021/05/walking-the-tightrope-of-the-right-to-be-forgotten-analyzing-the-delhi-hcs-recent-order.html>

The Right to Be Forgotten, while only a nascent and emerging principle, is an important consideration. Its development could affect the cataloguing and indexing of archival works, and archivists should be aware of further developments in this area.

As described above, archival practice can intersect with data protection and privacy law in different ways. Commonly, archives may ‘process’ personal data when appraising or acquiring personal information, when engaging in preservation activities, or when describing the information or creating ‘metadata’. As a matter of practice, wherever practicable, archives should attempt to gain explicit, written consent from living persons whose personal information is being archived, describing the uses to which such information may be put. Moreover, as a general principle, archives should demonstrate that personal information that they acquire, or allow for access, is only that which demonstrates archival value and is necessary to fulfil the archival function. This is best done through incorporating an ‘impact assessment’ into archives acquisition, access and use policies.<sup>42</sup> As mentioned, data protection law in India is at a nascent stage, and specific regulatory compliances may still be forthcoming. It is important that archives be prepared for compliances with privacy mandates through demonstrable, written, instruments and policies. More substantive advice on measures archives can take to comply with data protection best practices has been made available by the National Archives of the UK. Although these are made specifically with reference to UK data protection law, they provide important insight into the kinds of mechanisms (like impact assessments) that archives may employ as best practices for data security and privacy.<sup>43</sup>

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42. ‘Data Protection Impact Assessments’ (“DPIA”) are common mechanisms for institutions to assess and appraise potential regulatory compliance and data protection requirements, for example, under the European Union’s General Data Protection Regulation. Some guidance on DPIA is available at <https://gdpr.eu/data-protection-impact-assessment-template/>

43. National Archives. (2018). *Guide to Archiving Personal Data*. Retrieved from <https://www.nationalarchives.gov.uk/documents/information-management/guide-to-archiving-personal-data.pdf>

## Chapter 4

# Public Records Law and Archives

This chapter covers public archives including the National Archives of India, State Archives, and the Right to Information Act and the Public Records Act. It also covers access to public records, and government records.

### Scenario

**An archive at a government institute holds records in its capacity as a government-run or government-aided institution, without a separate legal status. Although the archive's repository includes largely 'private' records, it also holds records considered to be created by the government, or those that are considered 'public' records. Moreover, as a government-affiliated institution, many of its functions are regulated by the conditions for record-keeping of public (i.e. government) archives. This raises a host of questions for archives. To what extent are the functions of archives that hold private as well as public records regulated by laws that apply to government records? Do archives need to comply with mandates for records management and information access established for public records?**

The laws pertaining to documents of the state, for obvious reasons, have always been of particular importance to archives and archival practice. And it is important to briefly outline the coverage and scope of laws that apply to the archival activities of the state, and where they might intersect with the functioning of ostensibly 'private' archives.

## THE PUBLIC RECORDS ACT AND ARCHIVAL LEGISLATION

The Public Records Act, 1993, regulates the domain of 'public' archives, namely, the 'administration, management, preservation, selection, disposal and retirement' of public records. At the outset, it is necessary to understand the scope of such regulation.

The Public Records Act applies to the 'public records' of any 'records creating agency'. The term 'public record' is wide and includes almost any material form of a

record, including any document, manuscript or file, as well as any digital record, microfilm, etc., of any records creating agency. Importantly, the scope of the law is limited in its application to ‘records creating agencies’. According to Section 2(f) of this Act, these agencies include only:

- (i) any ministry, department or office of the Central Government or Union Territory Administration;
- (ii) the offices of any statutory body or corporation wholly or substantially controlled or financed by the Central Government or Union Territory administration, or commission or any committee constituted by that Government or administration.

The Public Records Act therefore clearly limits itself to government entities that are ministries, departments or offices of the Central Government, or corporate bodies or other bodies established by statute, provided that such bodies are also substantially controlled or financed by the Central Government.

The question of if a statutory body or corporation is ‘substantially controlled or financed’ by the Government is a question of fact and depends on the nature of the corporation, whether it was established by a specific law, and the manner in which the government exercises control over it. A body may be considered ‘substantially controlled’ by the Government if the government exercises control over its management and functioning (apart from mere regulation or supervision of its activities). Similarly, for a body to be ‘substantially financed’ by the Government, such financing must be intrinsic to its functioning. According to the Supreme Court of India, ‘merely providing subsidiaries, grants, exemptions, privileges etc., as such, cannot be said to be providing funding to a substantial extent’, and the funding should be of a nature where the body would not be able to operate without such support.<sup>44</sup>

*The Public Records Act allows records creating agencies to submit records of a permanent nature (after 25 years from creation of the record) for appraisal to the National Archives, for preservation. All unclassified public records that have been transferred to the National Archives and are more than 30 years old, may be made available for access to ‘bona fide research scholars’, subject to restrictions prescribed by the government, which may be made through rules made under the Act. Further, any records creating agency is empowered under Section 11(2) of the Public Records act to grant any person access to any public record in its custody in such manner and subject to such conditions as may be prescribed.*

The Public Records Act also allows the National Archives or the Archives of Union Territories to accept private records of ‘historical or national importance’ by way of gift or purchase, which may be a consideration for private archives looking to dispose of an archival collection by donating or selling these to the National Archives or the archives of Union Territories. Further conditions regulating the

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44. *Thalappalam Ser. Coop. Bank Ltd. v. State of Kerala* [2013] 16 SCC 82. Retrieved from <https://indiankanoon.org/doc/37517217>

functioning of records creating agencies and National Archives are present in the Public Records Rules, 1997.<sup>45</sup> Rules include, for example, a prohibition on the destruction of any public record without being recorded and reviewed as per the records retention schedule of the records creating agency.

Apart from the Public Records Act, which applies to entities at the level of the central government, some state governments like Karnataka and Maharashtra also have enacted legislation applicable to public archives at the local or regional level. These legislations largely emulate the Public Records Act, but apply to entities controlled or financed by the state government. It is important to note that not all state governments have such legislation.

If an archive falls under the definition of a ‘records creating agency’, it must comply with various provisions of the Public Records Act, which includes nominating a ‘records officer’, complying with the directions of the Central Government and the Director General of Archives (Union) and other rules and regulations for archives made under the Public Records Act (a fuller discussion of which is outside the scope of this guide). To understand whether an archive falls under this definition, please follow the checklist in the section below.

## THE RIGHT TO INFORMATION ACT, 2005

The Right to Information (RTI) Act, 2005, requires ‘public authorities’ to disclose all ‘information’ under their control. The ambit of information under the RTI Act is very broad and includes all materials of all forms, including digital records, which is ‘held by’ or ‘under the control of’, a public authority, including information relating to private bodies that can be accessed by a public authority. The scope of the RTI Act is broad enough to cover the collections of archives whether or not they relate directly to the current functioning of the institution which they may be a part of.

The RTI Act is applicable to ‘public authorities’, which is similar to the scope of the Public Records Act, but slightly broader, and includes any authority constituted by the Government, as well as non-government organisations substantially financed by the Government.

Public authorities that fall under the scope of the law have to comply with regulations on the manner and form in which their records (current or archived) are maintained, as well as in the manner in which they are to provide information both proactively and upon receipt of a Right to Information Request under the Act (subject to exemptions under Section 8 of the RTI Act, which includes information kept under a fiduciary relationship information that contains personal information and causes unwarranted intrusion into privacy of an individual, etc.). Section 4 of the RTI Act lists the obligations of public authorities in maintaining and proactively disclosing certain kinds of information available with them.

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45. Public Record Rules 1997. Retrieved from <http://nationalarchives.nic.in/content/public-record-rules-1997-0>

Archives may be impacted by the RTI Act in two ways.

First, they may fall under the definition of ‘public authority’, and be required to comply with the provisions for making its archival collections available through records requests under the RTI Act.

Determining whether a particular archive falls within the ambit of the RTI Act is a contextual and factual determination on a case by case basis. Courts have held that aided private colleges,<sup>46</sup> any body established by a statute or government notification, or joint ventures between governments and private corporations,<sup>47</sup> fall within the ambit of being ‘substantially controlled or financed’ by the government. The Indian Institutes of Technology, for example, are established by government statute through the Institutes of Technology Act, 1961, and would fall under the ambit of ‘public authorities’.<sup>48</sup>

The scope of ‘public authority’ under the RTI Act is much wider than the scope of ‘records creating agencies’ under the Public Records Act. To assess whether an archive is a public authority, the following questions are important:<sup>49</sup>

- Is the archive part of a government ministry, department or office, or an institution established by statute?
- Is the archive or the institution under which the archive operates substantially controlled by the Government? (For example, does the Government have the power to manage its affairs, for example, through control of the board of directors?)
- Is the archive a non-government organisation which relies entirely or substantially upon government funding for its sustainability?

If the answers to any of the above are in the affirmative, the archive may fall under the definition of a ‘public authority’.

Second, certain archives may also hold ‘information’ or records temporarily deposited by public authorities as part of their archival collections. Such records would continue to be ‘under the control’ of the public authority, and upon receipt of an inspection request, the public authority may be required to provide access to such records or copies of such records.

For instance, the archives of an institution that is substantially supported and financed by the Central Government or any state government or instrumentality will be considered to be a ‘public authority’ for the purpose of the RTI Act, 2005

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46. *MP Varghese vs The Mahatma Gandhi University* [2007] 3 KLT 486. Retrieved from <https://indiankanoon.org/doc/1189278>

47. *Tamil Nadu Road Development Co. Ltd v. Tamil Nadu Information Commission and Anr.* [2008] 8 MLJ 17. Retrieved from <https://indiankanoon.org/doc/454066>

48. For a more detailed overview of what constitutes a ‘public authority’ under the RTI Act, see [http://accountabilityindia.in/sites/default/files/rti\\_brief\\_no.\\_5\\_-who\\_is\\_a\\_public\\_authority\\_0.pdf](http://accountabilityindia.in/sites/default/files/rti_brief_no._5_-who_is_a_public_authority_0.pdf)

49. To understand if an archive falls within the scope of the Public Records Act or certain state public records legislations, refer only to the first question.

(an archive that keeps the records of a government institution). It must comply with the conditions for access of records under the RTI Act, including responding to RTI queries and proactively disclosing certain records, subject to the restrictions under the Act. The nature of the institution – for example, whether it was established by statute of the Central Government or any state government – will determine whether it also must comply with the requirements of the Public Records Act, 1993.

## Chapter 5

# Legal considerations for the 'Digital Archive'

This chapter covers digital records, mass digitisation, digital preservation, and format shifting.

### Scenario

An archive wishes to expand its collection in a number of ways. For one, it wishes to digitise and make available on the Internet certain records that it already holds, including photographs, manuscripts and diagrams, among other collections. In doing so, the archive must grapple with different paradigms of the legal regimes already encountered in this guidebook. For example, the risk of unwarranted disclosure of personal information is much greater if the information is placed on the Internet. Dealing with digital records also creates new legal contingencies under copyright law, given the ease with which digital records can be copied, and the centrality of 'copying' digital information to any act of archiving such records.

Archives are increasingly relying upon digital technologies and the internet to carry out the functions of preservation and access to their records and collections. Two particular activities of archives are especially relevant to digital technologies. One, archives might wish to digitise their 'analog' collections to facilitate preservation or promote access to particular records (the becoming-digital archive). And secondly, archives or specific archival collections might be composed of digital material from their inception (the born-digital archive). In either case, the function of digital copying and sharing transforms many of the legal rules and principles discussed in the prior chapters, and it is essential to keep in mind the interaction between digital technologies and the law relating to archival practice.

## COPYRIGHT AND DIGITAL REPRODUCTION

Reproduction is an elemental part of digital technologies. Every act of receiving and communicating information on a digital device or network involves the temporary or permanent creation of copies. These transient reproductions are, in general, considered 'reproductions' of works under copyright law. Moreover, the availability of records or copyrighted works as digital artefacts makes them substantially easier to reproduce than 'analog' records. This, inevitably, has substantially affected

copyright law.

Existing laws and legal exemptions for preservation and other archival work were created with physical records in mind. However, digital records can pose substantially different concerns for preservation. In many cases, the fact that the law does not consider digital records creates some impractical situations. For example, as detailed in Chapter 2, while the law allows the creation of ‘three copies’ of a book for the purpose of preservation, limiting digital preservation to only three copies may not be sufficient for many purposes, taking into consideration the number of times digital information must be copied in the process of digitisation and preservation. The ‘three copy rule’ in digital contexts is therefore anomalous. Similarly, the archival preservation of large volumes of born-digital content (such as archives of social media or of websites), are substantially more challenging in an environment where copyright work requires individual clearance for separate ‘works’ created online. As such, it is necessary to revisit the copyright law applicable to archives in light of new digital technologies.<sup>50</sup>

In general, archives may digitise and use any records over which they have copyright ownership. In other cases, such as licenses or other scenarios in which there are restrictions over access and use, the archives should carefully consider the terms of the use of the record and whether digitisation and making the work available to the public is permitted by these terms.

### **Exemptions in the Copyright Act for Digital Reproduction**

Section 52(1)(b) and 52(1)(c) of the Copyright Act exempt the ‘transient and incidental’ reproduction of a digital work in certain scenarios. Section 52(1)(b) is applicable to the ‘technical process of transmitting a work’, and, for example, might apply to incidental copies that are created when a work is incidentally reproduced (for example, when opening a file).

Section 52(1)(c) exempts reproduction for the purpose of providing ‘links, access or integration’ to a work, when there is no reasonable ground to believe that the work being copied is infringing copyright. This exemption usually applies to services that allow for user-generated content on their platforms.

In either case, the reproduction should not create permanent copies and the creation of a copy should be incidental to the activity being performed.

## **DIGITAL RIGHTS MANAGEMENT (DRM) OR TECHNOLOGICAL PROTECTION MEASURES (TPM)**

Another important consideration for archives in the context of digital records, is the

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50. Besek, J.M. et al. (2008). International Study on the Impact of Copyright Law on Digital Preservation. Retrieved from [https://www.digitalpreservation.gov/documents/digital\\_preservation\\_final\\_report2008.pdf](https://www.digitalpreservation.gov/documents/digital_preservation_final_report2008.pdf); Deazley R., and Stobo, V. (2013). Archives and Copyright: Risk and Reform. CREATE UK. Retrieved from <https://www.create.ac.uk/publications/archives-and-copyright-risk-and-reform>

routine use of Digital Rights Management mechanisms to prevent the copying of certain kinds of digital records. Digital Rights Management (DRM) or Technological Protection Measures (TPM) are software that are part of digital records. They prevent the ‘unauthorised’ reproductions of such records. Section 65B of the Copyright Act makes it a criminal offence to circumvent such TPMs with the intention of infringing copyright. Archives that deal with such records (such as geographically-locked audio-visual content or digital documents in formats that cannot be copied), and seek to use circumvention measures to enable the preservation or archival use of such records, may be affected by this restriction. Archives could argue that the copying was in good faith, without intention to infringe copyright and was directly related to a particular exemption that allows reproduction of the record, which should be clearly documented in its preservation or access policies. However, the lack of specific exemptions for such preservation and access by archives leaves some ambiguity as to the scope of this restriction.

## ONLINE PRIVACY AND DATA PROTECTION

The easy sharing and retrievability of personal information in digital archives also challenges established concepts of data protection and privacy in archives. Prior to the digitisation of records, there were practical limits to the kinds of information that could be collected and shared about individuals. Digital data collection and sharing radically transforms the ability of data to be collected from various sources and shared in different contexts. Most contemporary data protection law and regulation is made keeping in mind digital information, and the challenge it poses to concepts of confidentiality and privacy in records.

The lack of clarity within data protection laws can substantially impact the function of archives. For example, the requirement under the DPDP Bill, 2022, to obtain consent prior to the use of personal information does not specify its applicability to individuals who cannot be located, and is also not clear about the use of personal information after the death of an individual. Although the DPDP Bill allows a regulator to exempt certain provisions of regulatory compliance for ‘archival purposes’, the scope of this provision is unclear, and there is no clarity on how archives might avail of this conditional exemption if the law were to come into force. As such, it is important for archives and other memory institutions to seek greater clarity and assurance, including working with regulators on mechanisms to balance archival practice and the ends of data protection law.

In general, digital reproduction and sharing creates important opportunities for broadening public access to archival records, but also creates new contingencies and ambiguities in relation to the law. In general, archives should have in place mechanisms to respond to the greater risks posed to privacy and copyright in the course of digitisation. This can include implementing clear mechanisms for affected persons to send notice to the archive that some digital material infringes on their rights. These mechanisms should allow for the archive to identify and restrict access to such material where appropriate.

## Chapter 6

# Ethics in Archives

*This chapter covers ethics in archives and lays out a code of ethics.*

The ethics of archival acquisition, preservation and access work in tandem with legal provisions as outlined in the previous chapters. Ethics intend to understand how actions in archives can affect and be affected by individual and organizational action and entrenched social practices. For instance, an archive may have full legal control on an object. But a researcher's use of the object could inflict harm on the creator of the object, even if the use cannot be legally restricted.

A code of ethics is a guiding principle for a profession to abide by in the conduct of its work. It seeks to establish standards to which the profession holds itself in fulfilling its role in society. For the archiving profession this is the role of preserving tangible and intangible culture for posterity. Archivists receive, appraise, select, describe, organise, conserve and make available records of historical value. Archives underpin the writing of history and are important to humanity as a whole in understanding their place in the world. They serve the purpose of documenting the memory of humankind. Archives take many different forms and shapes and this fosters a diversity of narratives in how we tell our stories.

The Code of Ethics is committed to upholding this diversity. It follows the assertion of the archivist, Terry Cook: We Are What We Keep.<sup>51</sup> It recognises that the ways in which we create, contest and assert facts about our history, society and culture are deeply embedded in what we choose to keep and, equally, what we do not keep. Archives, as Verne Harris famously argued, are but a distorted sliver of a sliver of reality.<sup>52</sup> Our effort as archivists is to preserve as many of these slivers as will assist us in telling our histories in a multitude of voices and cadences. To achieve this, ethical codes for the archival profession must include all aspects of the archival process – acquisitions (and in some cases creation), custody, description, organisation, preservation, access, and outreach.

This Code of Ethics was produced by the Working Group on Ethics that comprised 12 archivists from across the country. This Working Group met as part of Milli Sessions 2022, organized by the Milli Archives Collective,<sup>53</sup> a network of individuals and

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51. Cook, T. ( 2011). 'We Are What We Keep; We Keep What We Are': Archival Appraisal Past, Present and Future. *Journal of the Society of Archivists* 32(2):173–89. doi: [10.1080/00379816.2011.619688](https://doi.org/10.1080/00379816.2011.619688)

52. Harris, V. ( 2002). The Archival Sliver: Power, Memory, and Archives in South Africa. *Archival Science* 2(1):63–86. doi: [10.1007/BF02435631](https://doi.org/10.1007/BF02435631)

53. Milli Archives Collective. (n.d.). Retrieved from <https://milli.link>

communities interested in the nurturing of archives, especially in South Asia. These are archivists from government archives, corporate archives, community archives, art archives, archives of universities, oral histories, and music, digital humanists, and historians and archivists who have worked at archives in different capacities. This section of the guidebook is voiced in the first person plural to reflect upon the collective effort of having arrived at this code. *Each statement in this code reflects a consensus in the working group on what constitutes ethical practice in the archives. The first person plural voice also indicates an aspirational ethic that we are committed to pursuing and supporting.*

The Code of Ethics aims to be as flexible as the archives we work in. They are a point of departure from which archives are encouraged to take their own paths relevant to their specific contexts. It has evolved over years of debates about archival ethics within communities that work with archives in India. It has emerged from a consultative process with participating archivists from various institutions and individual archivists across India. The code is accompanied by commentary that emerged during these discussions to help those who refer to it unpack the thinking that informed them. It recognises that archives are very diverse, and often faced with very specific ethical questions that cannot be addressed by a blanket statement or code. The code seeks to outline a framework for the practice of care and integrity that we aspire to bring to the archives and help archivists apply it to their collections and practices.

This code follows the traditional archival workflow. We recognize that in some archives these may run simultaneously and that there are other parts of the workflow such as co-creation, digitisation or born-digital access that it does not currently address adequately. This code also draws on governing principles outlined in the ICA's Universal Declaration on Archives (2011),<sup>54</sup> Code of Ethics (1996),<sup>55</sup> and Principles of Access to Archives (2012).<sup>56</sup> We are putting together this code as a rough guideline for archives in India to work toward, but not as a prescription or pledge. We envision that the code will develop with feedback from the archival community to be more inclusive of these practices.

## ARCHIVAL ETHICS: A CODE

### 1. Accountability

- a. We will develop acquisition policies that provide selection criteria for accepting collections and records in archives, and implications of access.

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54. International Council on Archives, and UNESCO. (2011). Universal Declaration on Archives. Retrieved from <https://www.ica.org/en/universal-declaration-on-archives-uda>

55. International Council on Archives. (1996). ICA Code of Ethics | International Council on Archives. Retrieved from <https://www.ica.org/en/ica-code-ethics>

56. International Council on Archives. (1996). ICA Code of Ethics | International Council on Archives. Retrieved from <https://www.ica.org/en/ica-code-ethics>

- b. We aim to ensure transparency about the archives' ability and resources to preserve a collection.
- c. We undertake to document all actions in the archive on archival materials, recording any change in the content or structure of the archive and its rationale.
- d. We undertake to preserve material against wanton destruction and document the rationale of deaccessioning or disposal.

## 2. Donor and Community Relations

- a. We undertake to recognise, respect and uphold the rights of record creators in preserving the contexts of collections.
- b. We aim to unambiguously articulate relationships with donors about custody and intellectual ownership of deposits.
- c. We advocate for communities to have rights over their collections, especially when such rights are not upheld by structures of social exclusion.
- d. We aim to ensure that donors have clarity about the implications of archiving their collections.
- e. When archiving in collaboration with vulnerable communities we aim to create and select material with a sensitive understanding of the communities' interests, decisions and knowledge sharing traditions.

## 3. Preservation and Care

- a. We seek to preserve collections in the contexts and forms in which they were created, with an aim to retain information about materiality, function, order, and provenance.
- b. As archivists we undertake to demonstrate care in our preservation practice.
- c. We undertake to preserve material to its fullest capacity, including preservation of digital material against obsolescence.
- d. We recognise that the integrity of the archive should not suffer in the process of description, organization, preservation, digitization, transfer, and access.
- e. We recognise that the materiality and intrinsic properties of archival material in our care are as important as their content and that preservation includes both these aspects.
- f. We shall endeavor to provide digital access to physical objects where physical access poses a severe risk to its preservation.

## 4. Access to Archives

- a. We assert that the right to information in public archives should be underpinned by a system that allows transparent retrieval of information.
- b. We strive to develop a fair approach to access through clear policies that explain the ways in which a collection can be accessed.
- c. We recognize that radical openness in archives can be harmful for certain vulnerable communities and account for this in access policies.

- d. Encourage a more inclusive and welcoming attitude to an interested and diverse public, ensuring accessibility to people with disabilities, the aged, the neurodivergent, and those who require additional support.

## 5. Inclusive Descriptions and Metadata

- a. We encourage the democratization of the process of creating metadata for a collection to ensure it serves the public and communities, and enriches understanding of the archival object.
- b. Seek to develop metadata and archival descriptions to support increased discovery, access and interoperability between archives.

## 6. The Archive as a Space for All

- a. We seek to make information about the archive available and intelligible to those from different linguistic backgrounds.
- b. We look to expand equitable access by reaching out to peoples and communities who are stakeholders and subjects of our archives.
- c. We commit to making the archive a safe space for donors, staff and users.
- d. We advocate using multi-modal techniques, transmedia strategies and other solutions to making the archive accessible, to address the limitations of archives as being a space for only those with a degree of text literacy.

## 7. Preservation and Care

- a. We strive to be accountable and exhibit professional conduct in making decisions on description, organization, appraisal, preservation, digitization, transfer, access, and disposal.
- b. We recognise that archives and archivists are bound by legal requirements set out by national and international laws.
- c. We undertake to preserve the trust that donors, stakeholders, and the research community bestow upon archives.
- d. We seek to foster archives and collections that enable us to correct and counter singular narratives of a place or people's history.
- e. We commit to self-improvement through systematic training in skills and best practices in the profession available locally and globally.
- f. We commit to collaborate and support other archives and archivists and those engaged in the work of nurturing archives in building, cultivating and sustaining their archives.

## 8. The Archive as a Space for All

- a. We commit to equitable representation – and setting up structures to support the same – in employment in the archives.
- b. We strive toward paying employees equitably and fairly, and making the workplace more accessible to those who are not from a background of privilege.

- c. We aim to be open and transparent about the remuneration and benefits being offered to a candidate for potential employment.
- d. We encourage archives to support archivists to grow professionally through capacity building that benefits archives everywhere.

## Chapter 7

# Guiding Principles of the Code of Ethics

These ethical statements emerged from a discursive understanding of the needs of archiving in India (see the 'About' section). While the statements are pithy, they are underpinned by many nuanced positions that cannot be contained within them. They reveal the positions and commitments that inform the statement of ethics. They also reinforce that ethics must respond to the context of the archives, the condition of their production, and their impact on their users, stakeholders and history. These positions are indicative of the intent to foster social justice, equitable representation, and a diversity of narratives. While each archive and archivist will implement ethical practice differently, the goal is to build archives that serve to promote these ideals. Some of these positions are expanded on here.

### **Accountability**

Archives and archivists are accountable to a range of stakeholders both internally and externally. Archivists are ethically accountable to their publics, subjects, communities, and history. They should therefore seek to be accountable to them by being transparent about processes of acquisition, access, and capacity to care for collections. Accountability also includes maintaining clear records of actions in the archives explaining why collections have been included, excluded, barred from access, or disposed of. Archives hold collections in trust for their institutions, subjects and users. Accountability must include demonstrating responsible stewardship for the needs of all its stakeholders.

Archives are also accountable to their donors, especially when these donors are marginalised, to preserve and protect their collections in their interests. Clear donor relationships that are sensitive to historical power imbalances, ethical understandings of intellectual property, subject rights and public interest are important to upholding the interest of the donors and the archives. Archives must also communicate clearly to the donors the implication of depositing collections with the archives.

### **Demonstrating Care For Material**

The preservation of collections for long-term use is a primary archival principle. We acknowledge that preservation can be an expensive challenge, especially for small archives. Archivists should aim to extend the best available care that does justice to the archival objects in their collections. Preservation must be a well formulated strategy and a long-term preventative measure. The ability to demonstrate care is essential when archives propose to hold the collections in their care, especially

archives that hold collections of marginalised and vulnerable communities.

Digital preservation has an integral role in modern archival collections. While seeking to preserve digital objects against obsolescence, archivists should also take note of the dangerous propensity to destroy original archival objects once they are digitised for preservation. Today, in most situations, digitisation is a tool and not a substitute for preservation of physical collections. Archives are more than their contents, and preserving the materiality of the archive is a critical component of preservation. Where a collection must necessarily be disposed of after digitisation, the decision must be taken carefully and in consultation with subjects, users, and communities that are likely to be affected by the destruction.

### **Archiving with Vulnerable Communities**

Many archives in India have emerged as the consequence of archival documentation with vulnerable communities (see, for instance, the work of the Keystone Foundation in the Nilgiris in south India). Often these archives are research documentations of projects in the community. It is important for archives to recognise cultural and intellectual rights of the communities over research in which they are participants or subjects.

If community archives are built in partnership with the community, policies for acquisition, access and preservation should be created with community consent. Many peoples have their own practices and traditions of archiving and knowledge sharing. Community archiving practices would benefit from an undertaking to understand these practices to develop sensitive archiving frameworks. When dealing with communities, processes of consent and access should be available in a language and medium that is accessible for informed decision-making.

It is also important to acknowledge that ‘community partnerships’ do not imply consensus, and the consent of some members does not amount to representation. When archives are in possession of material that pertains to community members who may want to withdraw the material, these archives must review these requests with sensitivity. While it is important to respect privacy and cultural rights, archives may also encounter lobbying for deliberate elisions and omissions of violence and discrimination. Safeguarding against these is vital to the health of archival collections and of history.

### **Describing Archives**

Archival descriptions are powerful ways of inscribing history. They determine how history and people are represented and written. Archivists should look to undo the damages of descriptions that perpetuate discrimination, social trauma and exclusion, especially in the ways in which caste is described and represented in collections. Archival descriptions should include voices of the people that are affected by them through collaborative metadata practices bound by an ethics of care. This includes expanding an understanding of metadata and description to reflect the ways in which archival subjects would choose to describe themselves.

Descriptions also have the capacity of being triggering and traumatic, especially when the archival material pertains to subjects such as war, riots, genocide and lynchings. Archivists should seek to build environments of support where warnings about the nature of the content and its possible impact are communicated to both other archivists and archive users.

## **Supporting Archivists**

Archivists should be committed to building support systems for their professional growth. This includes encouraging and facilitating archive-specific training and skills in addition to broader capacity building and sensitivity training. This support should be built both formally and informally through archive visits, shared resources, and a mutual exchange of expertise and knowledge. Archivists should aim to build an environment where they are able to consistently progress in their careers, and archives benefit from a growing professional community with a range of expertise.

## **Inclusion**

Public archives should aim to find diverse users, and acknowledge that there are many publics. Archives are agents of nurturing multiple narratives and perspectives. There is a need for more wide-ranging policies with regards to bringing the archives to the people. The aim is to maximise access as far as possible without causing harm to archive stakeholders who are marginalised or vulnerable, and to urge attitudes and practices that are sensitive to the needs of different demographics and abilities. Being open includes working towards archives that build infrastructures and sensitivity for access for those with different abilities, the aged and the neurodivergent. The goal is to counter assumptions of ableness or neurotypicality reflected in the ways in which archives are organised and made available. Committing to creating a safe space for all users of the archive involves recognising the need for differential access in some instances such as for the historically oppressed and stigmatised communities, especially Dalits, Bahujans, Adivasis, minorities and those discriminated against on account of their sexual orientation or abilities. These spaces need to be created in consultation with such communities.

## **Disposal**

Archives may sometimes need to dispose of archival objects. Archivists must undertake disposal only after careful consideration and after determining that this disposal shall not be detrimental to public interest in the present or the future such as the destruction of deeds that establish indigenous land rights. All disposal and changes to the archive must be documented, and the condition for the change or disposal must be made explicit. While archivists may be inclined to preserve all material in view of the legitimate argument that all things are valuable to someone, it is not always in the interest of space, environmental sustainability or the archive's own mission.

Archivists should seek to preserve against malicious disposal, or the loss of history at risk. An archive must carefully consider the damage to the subjects and users of their collections before disposing of any material. One aim is to resist pressures to write convenient histories through archival interventions. Disposal decisions are very specific to each archive, and one must consider public interest as a guiding principle when making these decisions.

### **Access and Outreach**

Archivists should advocate for access to archives in physical spaces and virtual, through proactive outreach and through dismantling of exclusionary structures and practices that limit access. There needs to be an intent of access in all archives whether public, publicly funded, or private. Access should be combined with outreach to let subjects of archives know that archives are in possession of records that concern them as a people, region or community. This communication is especially important as one understands that information in archives can be vital to disenfranchised peoples claiming their rights.

Archivists should try and disavow the practice of judging the worth of a request to access by the affiliation or recommendations of the requester. The right to information and the process of accessing records in public archives have been at odds ever since the Right to Information Act (2005) was enforced. The ‘bona fide’ researcher vetted for research worthiness by the state has no place in public archives when seeking access to records mandated open by the Act. Archivists should refuse to judge a research query or a researcher by the credentials of the institutions that back them, or bar people from archives based on a practice that dates to a colonial past.

As long as the points of entry into archives are dominated by the English language, archives cannot hope to be accessible to people with different linguistic backgrounds in the country. Archivists should seek to explore ways in which translations, multimedia interpretations, or visual aids can enable and transform access to archives. They should strive to make catalogues available to the widest possible public through a range of entry points as far as institutional capacity allows. Where material is at risk from physical access they should strive to provide access through digital surrogates.

### **The Archivist as a Professional**

The archivist as a professional is responsible to their employing organisation and the society that they serve. The interest of the society and the organisation can be in conflict. Archivists should act in the interest of public and social justice, as long as that act does not jeopardise personal security. The goal is to build a community that can collectively support archivists in upholding ethics when the interest of an organisation is in conflict with public interest.

Archivists should be conscious of their own role and power over their archives, and endeavour to build practices for the archive to be a valuable service to their

organisations and communities. They should also seek to build attitudes and practices that encourage the use of archives by the widest possible public.

### **The Archive as a Workplace**

For archivists to successfully push for ethical archival practice, archives themselves need to evolve into spaces that foster and encourage these standards. This includes advocacy with the employing organisation, funders and board. The ability of archivists to implement best practices is also affected by job security, a conducive workplace, and supportive environment. Archivists should advocate strongly for fair pay, equitable and fair recruitment and support for the personal and professional development of all employees in the archives.

# Some Frequently Asked Questions from Archivists

*This chapter covers ethics of access, privacy, consent, triggering information, embargoes, historical value and public interest*

This section emerged from workshops conducted in 2022 where archivists were invited to share their learnings from their archives. The workshops included open sessions where archivists raised questions on law and ethics from their specific archival environment. These included questions on copyright, access and ownership which have been covered in the section on archival law. The questions on ethics have been addressed below. These are broad approaches that will vary according to the regulatory frameworks and the nature of the material that the archive works with. The answers are intended to prompt archivists to think in different directions in weighing decisions that they make about their archives.

## OUR ARCHIVE HAS COME IN POSSESSION OF A NEW COLLECTION. SHOULD WE MAKE IT AVAILABLE FOR RESEARCH?

**Here are some follow up questions and comments, when thinking about this. Does your archive hold copyright to this collection?**

If you do hold copyright, you are legally allowed to make the collection available for research and for copying. But consider the questions below.

Consult Chapter 2 of this guidebook for advice on fair dealing and review Chapter 5 for exemptions for digital reproduction. You can still make the material available for research at the archive without making copies or allowing copies by others.

You should ascertain the donor's right to transfer physical and intellectual custody to the archive before you acquire the collection.

## Does the archive contain sensitive information about living or dead persons or minors?

As of the time of publishing this guidebook (December 2022), India does not have a comprehensive personal data protection legislation. However, data protection is regulated under a patchwork of sectoral regulations, some of which apply to archives, for example, concerning medical records. The Right to Privacy is also a

fundamental right under the Indian constitution (see Chapter 3). That said, processing of personal information by archives for public interest is one of the recognised exemptions to data protection in many countries and personal data protection cannot be cited to cover up information that is crucial to civic health.

The [IFLA and ICA Statement on Privacy Legislation and Archiving](#)<sup>57</sup> reflects on data protection regulations internationally and their impact on archives. In the absence of clear data protection legislation and legal guidance, archivists should consider the disclosure of personal information contextually and on a case-by-case basis. As an archivist, your responsibility is to minimise avoidable harm, and not withhold information. For archives that deal with sensitive data, a case-by-case review might be a more ethical position where feasible.

It is also useful to look at indigenous data sovereignty frameworks such as those from [State of Open Data](#)<sup>58</sup> and the [CARE Principles of Indigenous Data Governance](#)<sup>59</sup> as a reference when dealing with archives of communities at risk. This recognises that copyrights may often be obtained without informed consent or that marginalised communities have traditionally had little say in how their data is archived or used. While the archive may legally make these documents available for copying and circulation, it is not ethically tenable to do so. In such cases, access protocols such as those developed by [Local Contexts](#)<sup>60</sup> can be adapted in consultation with communities to apply to the collections.

If you have reviewed sensitivity and have the resources to do so, you could make your archive open access. Archives are encouraged to extend maximum support to users in finding the information they are looking for and making information available for re-use for non-commercial use where legislation permits. For more, have a look at the [ICA statement on Access to Archives](#).

If you have reviewed sensitivity and have the resources to do so, you could make your archive open access. Archives are encouraged to extend maximum support to users in finding the information they are looking for and making information available for re-use for non-commercial use where legislation permits. For more, have a look at the [ICA statement on Access to Archives](#).

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57. International Federation of Library Associations and Institutions and International Council on Archives. (2020). IFLA-ICA statement on privacy legislation and archiving. *International Federation of Library Associations and Institutions*. Retrieved from <https://www.ifla.org/publications/ifla-ica-statement-on-privacy-legislation-and-archiving>

58. State of Open Data Report. (n.d.). *Indigenous Data Sovereignty*. Retrieved from <https://www.stateofopendata.od4d.net/chapters/issues/indigenous-data.html>

59. Carroll, SR et al. (2020). The CARE Principles for Indigenous Data Governance. *Data Science Journal* 43-19

60. Traditional Knowledge Labels. (n.d.). *Local Contexts*. Retrieved from <https://localcontexts.org/labels/traditional-knowledge-labels>

## **Does the material contain triggering information such as gender or caste-based violence and discrimination?**

Triggering information in archives can be harmful to subjects of the archives, to users, and to archivists themselves. Documents containing descriptions of sexual violence, for instance, can be triggering to persons or familiars of persons to whom the document refers, but also to other survivors of sexual violence or even communities that have historically been subjected to such violence. This does not imply that archives should be cordoned off for containing such material. Instead, it is advisable to include trigger warnings as resources permit. Scholarship on trauma informed approaches<sup>61,62</sup> cites safety, trust, transparency, and choice as underlying principles in making such material accessible. In archives, these principles extend to the archive facilities, the manner in which archives are cataloged and described, the public communication of the archives, and the process of making archives available.<sup>63</sup> How these principles may be implemented can be highly specific for archives, but conversations on mental health, training on dealing with traumatic material and support for employees working with difficult material can empower the archives to practice care.

## **Have there been any embargo requests?**

Requests to embargo can be complicated. In certain conditions such as sensitive data about communities or individuals at risk or confidential information, temporary embargoes may be considered. It is advisable that the archive makes this decision on its own terms with clearly stipulated timelines for opening the collection. Occasionally embargoes may be considered for personal archives in consultation with donors (such as release after X years after donor's death). When working with vulnerable communities, embargoes must be determined by the data sharing practices of the community.

## **THE EMPLOYEE FILES IN MY ORGANISATION CONTAIN MEDICAL RECORDS AND IDENTIFIABLE DETAILS. HOW SHOULD WE TREAT THESE IN THE ARCHIVES?**

Under regular circumstances, only persons with authorization within the archive to access these records should be able to process these files. All personal data owned by organisations should have clear authorizations for access.

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61. Sloan, K, Vanderfluit, J., and Douglas, J. (2019). Not 'just my problem to handle': Emerging themes on secondary trauma and archivists. *Journal of Contemporary Archival Studies* 6(1)

62. Laurent, N., Wright, K. (2021). 'Safety, Collaboration, and Empowerment. *Archivaria* 38.

63. AusArchivists - TV. (2020). A Trauma-Informed Approach to Managing Archives [Video]. Youtube. Retrieved from <https://www.youtube.com/watch?v=JGmDxyCXdaw>

The privacy of medical records is mandated by The Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002, besides other regulatory mechanisms (see Chapter 3). Ethically, the medical records of an individual are private. However, medical records may be sought for legal proceedings, or enough time may have passed such that the content of the medical records is valuable only as historical interest and does not affect living persons adversely. Under international data protection regimes, data privacy is protected only while an individual is alive. Ethically, arguments have been made for effect on families of deceased individuals. And an attempt to enable post-mortem privacy through a designated person is part of India's draft Digital Data Protection Bill, 2022. It is for the archive to make a considered decision on the effect of making the data available and balancing access with privacy.

The same applies to other personal data. Personal data may be sought for legal reasons, or for reasons of public interest that trumps the person's right to privacy. In cases where archival access exposes caste bias, gender discrimination or legally actionable acts, the archive must make personal data, which it would otherwise withhold, available.

Situations in which the archive may consider making private data accessible include:

- a. Legal proceedings
- b. Legitimate request from family
- c. Legitimate public interest
- d. If the data subject gives informed consent for such data being made available
- e. If the archive has determined after a thorough review that the release of data does not adversely affect the persons to whom the data pertains
- f. If the information is of historical value and does not affect living persons

It is important to remember that these considerations presume the absence of a data protection regulation. Some of these considerations, although ethical, are not legally mandated under international data protection regulations.

## **WE ARE RUNNING OUT OF SPACE IN OUR ARCHIVE. SHOULD WE DIGITISE OUR COLLECTIONS AND DEACCESSION FILES THAT HAVE BEEN DIGITISED?**

**Are the collections you are proposing to destroy of historical value or archival value?**

Collections of historical and archival value are important not only for the content of the collections that can be read or viewed. History also manifests itself in material contexts and in the form of the material. Archival collections can reveal as much through the medium and material in which their contents are held as by their actual texts and marginalia. This holds true for both paper archives and collections

held on digital media that are now obsolete.

The decision to digitize a collection of historical value is dependent on various factors such as whether digitization will prevent physical degradation through handling, or improve access to the collection, or enhance use. The Northeast Documentation Conservation Centre (NEDCC) has a handy guide on selection categories for digital preservation for physical archives to assist archives that are considering going digital.<sup>64</sup>

There are international guidelines on reappraising and deaccessioning material. If the archive is satisfied that the material does not serve the mission of the archive and cannot be of value to another archive or collection elsewhere that is willing to take it in, deaccessioning is a legitimate decision. The archive must keep a record of the material that is deaccessioned, with clear reasoning. The guidelines<sup>65</sup> from the Society of American Archivists on deaccessioning are a useful reference.

The decision to digitize before deaccessioning depends on the resources available with the archive. If the material is not of historical value, the environmental cost of digital preservation must also be considered.

### **Have you considered and compared the cost of long-term digital preservation versus options such as offsite storage?**

If the archive decides upon storing collections digitally, has enough resources, and has carefully considered the environmental impact of digital storage, the National Digital Stewardship Alliance document on levels of digital stewardship<sup>66</sup> can assist in ensuring that it meets the minimum requirements of robust digital preservation.

The Digital Preservation Coalition's guide on digital storage<sup>67</sup> and the approach to it includes resources such as standards for digital storage and commonly used systems for digital preservation. It includes a section on approaches that can be used to determine budgets for setting up a digital preservation system with regularised maintenance.

## **I WORK WITH ORAL HISTORIES. MY PARTICIPANTS OFTEN COME FROM CONTEXTS WHERE SIGNING A CONSENT FORM IS AN INTIMIDATING PROSPECT.**

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64. Northeast Document Conservation Center. (n.d.). *Preservation and Selection for Digitization*. Retrieved from <https://www.nedcc.org/free-resources/preservation-leaflets/6.-reformatting/6.6-preservation-and-selection-for-digitization>

65. Society of American Archivists. (2017). *Guidelines for Reappraisal and Deaccessioning*. Retrieved from [https://www2.archivists.org/sites/all/files/GuidelinesForReappraisalDeaccessioning\\_2017.pdf](https://www2.archivists.org/sites/all/files/GuidelinesForReappraisalDeaccessioning_2017.pdf)

66. National Digital Stewardship Alliance (NDSA). (n.d.). *Levels of Digital Preservation*. Retrieved from <https://ndsa.org/publications/levels-of-digital-preservation>

67. Digital Preservation Coalition. (n.d.). *Storage*. Retrieved from <https://www.dpconline.org/handbook/organisational-activities/storage>

## HOW DO I ENSURE THE CONSENT IS PROPERLY 'INFORMED'?

As an organisation or individual, you might be collectively or personally at a position of significantly more privilege than your interlocutors (this could be the privilege of caste, class, race, education, finances, social status, gender and sexual orientation, ability, health, or neurotypicality).

In asymmetrical power relationships where the asymmetry works at different intersectional levels, informed consent is a constant process of building trust that extends beyond signatures on form or verbal information before the commencement of the research. Informed consent is built over various stages of the research process with a constant reiteration of the right of the participant to withdraw. While documentation of the consent may in fact be a form, the process of consent must involve both formal and informal conversations and engagement with participants with unambiguous space for declining, refusing and withdrawing from participation at any stage of the research process. Participants must also have recourse to internal and external redressal mechanisms with clear channels of communication with the archive. The AIATSIS Code of Ethics for Aboriginal and Torres Strait Islander Research<sup>68</sup> guidelines on responsibilities can be adapted to many different contexts to inform ethical documentation and collection. The Archives at NCBS has a Consent and Agreement Form for oral history interviews that is developed by looking at best practices at various institutions. For further details and templates, refer to the Appendix: Further Reading and Resources.

In symmetrical researcher-researched or archivist-archived relationships, informed consent should clearly explain all purposes and uses of the research as set out by guidelines on oral history and qualitative research. International guidelines are helpful in drawing up consent forms and procedures, but it is important to recognize that the regional, legal, political, and socio-cultural contexts in India about information sharing can be very different. Organisations like Archives and Research for Ethnomusicology (ARCE), Centre for Public History (CPH), Partition Museum, and the Oral History Association of India (OHAI) are organisations that have a robust experience of working with oral histories and can share experience of ethics on the field. International guidelines from Oral History Australia<sup>69</sup>, National Oral History Association of New Zealand<sup>70</sup>, Oral History Association USA<sup>71</sup> and the Oral History Society, UK<sup>72</sup> are useful to reference when collaborating in a global

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68. Russell, R., and Winkworth, K.(2009). Significance 2.0: A Guide to Assessing the Significance of Collections. *Council of Australia*. Retrieved from [https://www.arts.gov.au/sites/default/files/significance-2.0.pdf?acsf\\_files\\_redirect](https://www.arts.gov.au/sites/default/files/significance-2.0.pdf?acsf_files_redirect)

69. Oral History Australia. (n.d.). *Guide – Ethical Practice*. Retreived from <https://oralhistoryaustralia.org.au/guide-ethical-practice>

70. National Oral History Association of New Zealand (NOHANZ). (n.d.).*Ethics & Practice*. Retrieved from <https://www.oralhistory.org.nz/index.php/ethics-and-practice>

research environment. The Oral History Society also has advice on dealing with media requests<sup>73</sup> to oral history recordings.

**Have you defined guidelines for ethical processes for documenting, accessioning, and processing oral history including participant rights to recording?**

Ensure that guidelines are updated and all members on the team are aware of the guidelines. Review guidelines before commencing on a project to make them relevant to the research context. Ethical guidelines are important for both internal and external accountability. Having guidelines enables archives to set expectations for non-negotiable standards on ethics.

**Have you made the terms of future use and access of their information clear in a deposit agreement?**

If you have a deposit agreement signed after informed consent for the interview, it is imperative to stick to the requirements of the agreement. In some cases, depositors may return to review these agreements. While it is up to an archive's discretion to entertain these, an archive should consider the same questions of power asymmetries about revisiting agreements as about gaining informed consent in the first place.

Consent for collection and use of oral history is distinct from consent for deposit and storage in perpetuity. Research participants might want temporary embargoes on access to their information. Some organisations have contracts with their participants where the copyright is held by the interviewees. Others have deposit agreements that donate the intellectual and custodial rights of the interview to the archives. Decisions on what works best for both the research participants and archives must be agreed upon before the research commences. While it is important to recognise the rights of participants to their own stories, it can sometimes be difficult to follow up with participants who have moved, passed on, or otherwise forgotten about the interview. The labour of the archivist in maintaining constant communication with participants, especially in the case of large archives, must be carefully considered.

## WITH RESPECT TO ARCHIVES THAT ARE BORN DIGITAL, HOW DOES ONE ENSURE INCLUSIVITY

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71. Oral History Association. (n.d.). *OHA Statement on Ethics*. Retrieved from <https://oralhistory.org/oha-statement-on-ethics>

72. Oral History Society UK. (n.d.). *Legal and Ethical Advice*. Retrieved from <https://www.ohs.org.uk/legal-and-ethical-advice>

73. Oral History Society, UK. (2006). *OHS Media Guidelines (Britain)*. Retrieved from [https://www.ohs.org.uk/wp-content/uploads/2020/09/Media\\_Guidelines\\_1006.pdf](https://www.ohs.org.uk/wp-content/uploads/2020/09/Media_Guidelines_1006.pdf)

## WHEN WORKING IN AREAS OF LOW DIGITAL LITERACY AND RESOURCES?

### **Does the archiving process include documentation by or in collaboration with persons with limited access to technology?**

If the purpose of the collection is active documentation in collaboration with communities with limited resources, or archiving material that has already been recorded, it is understandable that the archives might not be able to acquire data in preferred formats and resolutions. However, it is advisable to run capacity building workshops when a collaboration commences and provide resources where possible to standardise documentation (even if it is not to prescribed standards).

Documentation and storage are only one part of the digital archiving process. A significant part is preservation for long-term use both by the creators of the collections and by intended users. The decision to use certain formats is less a concern of 'quality' as a concern of 'longevity'. The archive might sometimes choose to migrate to a certain format in the interest of long-term preservation while working inclusively with the resources and available technology.

The Digital Preservation Coalition has a useful compilation of archival formats and standards<sup>74</sup> for long-term preservation. The cost of digital archiving to prescribed standards can be prohibitive in the long term. Inconsistency in format and quality should not necessarily prevent you from undertaking archiving. However, it is useful to review established standards as a touchstone to ensure your data is supported against obsolescence in the long run. The Activist Archiving<sup>75</sup> page on the Commons Library has resources for activists who are often documenting and archiving in environments over which there is little control. They can be useful for other archivists as well when archiving in challenging environments.

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74. Digital Preservation Coalition. (n.d.). *Technical Solutions and Tools*. Retrieved from <https://www.dpconline.org/handbook/technical-solutions-and-tools/file-formats-and-standards>

75. Dun, A. (2005). *Activist Archiving*. Retrieved from <https://commonslibrary.org/activist-archiving-start-here>

# Glossary and Notes

## Glossary

Definitions for the following terms used often in this guidebook are taken from the following sources: the SAA Dictionary of Archives Terminology referred to below as the SAA Glossary,<sup>76</sup> the Norfolk Record Office,<sup>77</sup> and the Plain English Campaign.<sup>78</sup> If a definition has no citation, it means it has been framed by the writers of this guidebook.

## Acquisition

- Materials physically and officially transferred to a repository as a unit at a single time.
  - The process of seeking and receiving materials from any source by transfer, donation, or purchase.
- (SAA Glossary)

## Accession

- Materials physically and legally transferred to a repository as a unit at a single time; an acquisition.
- To take legal and physical custody of a group of records or other materials and to formally document their receipt.
- To document the transfer of records or materials in a register, database, or other log of the repository's holdings.

(SAA Glossary)

## Access

- The ability to locate relevant information through the use of catalogs, indexes, finding aids, or other tools.

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76. Society of American Archivists. (n.d.). *SAA Dictionary*. Retrieved from <https://dictionary.archivists.org/index.html>

77. Norfolk Records Office. (n.d.). *Cataloguing—Archives*. Retrieved from <https://www.archives.norfolk.gov.uk/community-archives/cataloguing>

78. Plain English Campaign. (n.d.). A to Z of legal phrases. Retrieved from <http://www.plainenglish.co.uk/a-to-z-of-legal-phrases.html>

- The permission to locate and retrieve information for use (consultation or reference) within legally established restrictions of privacy, confidentiality, and security clearance.

(SAA Glossary)

## Appraisal

- The process of identifying materials offered to an archives that have sufficient value to be accessioned.
- The process of determining the length of time records should be retained, based on legal requirements and on their current and potential usefulness.
- The process of determining the market value of an item; monetary appraisal.

(SAA Glossary)

## Catalogue

A list of material within a collection that describes the collection of the items held within it and shows how the items are related to each other. A catalogue is a map of the archive that helps a researcher move from a general overview of the collection to a specific item within it.

(Norfolk Record Office)

## Custody (Physical)

Possession, care, and control, especially for security and preservation. Physical custody may be, but is not always, coupled with legal custody.

(SAA Glossary)

## Custody (Legal)

The ownership and the responsibility for creating policy governing access to materials, regardless of their physical location.

(SAA Glossary)

## Deaccession

The process by which an archives, museum, or library permanently removes accessioned materials from its holdings.

(SAA Glossary)

## Digital obsolescence

The risk of data loss because of inability to access digital assets, due to the hardware or software required for information retrieval being repeatedly replaced by newer devices and systems, resulting in increasingly incompatible formats.

(SAA Glossary)

## Donor

An individual or organization who gives property or money to another without

reciprocal compensation.

(SAA Glossary)

## Fair dealing

The users' rights to use a work without permission or payment under copyright law.

## Fair use

Exemptions within copyright law that allow limited use of a work for specific purposes set out in the law.

## Function

In the record-keeping context in organisations, a function is a distinct category of activity that an organisation undertakes in its business.

## Integrity

The quality of being whole and unaltered through loss, tampering, or corruption. This is distinct from archival integrity which is the idea that all records emerging from a single function or activity must be preserved undivided and unaltered to preserve information of its context as evidence.

(SAA Glossary)

## Interoperability

The ability of different systems to use and exchange information through a shared format. Interoperability implies that the information does not need to be transformed during exchange; the different systems can use the data in its native format.

(SAA Glossary)

## Metadata

Information about data that promotes discovery, structures data objects, and supports the administration and preservation of records. Metadata may be embedded or external. It may be applied at a variety of levels of granularity and during different periods in the life cycle of data. It is typically demarcated and standardized, and it often provides context.

(SAA Glossary)

## Open Access

- The principle that access to archival resources should not be restricted unnecessarily.
- A model of access to created works and data that seeks to eliminate barriers for readers such as subscription fees and physical media, and barriers to reuse such as copyright restrictions and licensing fees.

(SAA Glossary)

## **Original Order**

The organization and sequence of records established by the creator of the records.  
(SAA Glossary)

## **Record Creator**

- The organisation or organisation function within which a record is created.
- People or groups from whom a record emerges.
- Person(s) who author a record (independent of an employment context)

## **Title**

The right to own something.

(Plain English Campaign)

## **NOTES**

### **Public Interest:** The term public interest occurs frequently in this document.

Public interest is not a legally defined concept, and in practice, what counts as 'public interest' can be highly contested. An action may be deemed to be in public interest when the social good emanating from it is significantly higher than individual gain. Archivists often need to make decisions on balancing actions which may have some repercussions for certain individuals or groups against a larger 'public interest'. For example, making available certain personal information that infringes an individual's privacy may be counter-weighed against the importance of that information being available to the public. Public interest is an important test for making case-by-case decisions on processing sensitive data in archives and opening it for access. Public interest is also a legally accepted position for processing sensitive or personal data in countries in which data protection regimes are in force. It is important to recognise at this stage that at various times in history, public interest has been used to oppress minorities and the marginalised. Public interest must serve to further the cause of transparent governance, social justice and equitable representation.

**Historical Value:** Historical value is defined variously as the intrinsic worth of a record as evidence, documentation, or witness. A record is said to have value when it captures information of enduring relevance to a people, organisation, or humanity. What is relevant, however, can vary enormously from perspective to perspective. Many organisations believe ephemera to be records of no enduring value. Others dedicate entire collections to ephemera for what they reflect of the people and the times that produced them. What is of 'intrinsic' value to one person, organisation or people may be worthless to another. Nothing, in effect, is in fact intrinsic and the determination of intrinsic value is a highly subjective assessment.

Historical value is often assessed and defined by those with financial, political, and cultural capital. It also reflects the priorities of recordkeepers at a particular time in history. A global movement on Displaced Archives petitioning for the return of

archives seized from ex-colonies of imperialist powers or lost during war highlight this conundrum. As empires receded, any documents were destroyed after being deemed irrelevant, and sometimes deliberately to keep them from causing embarrassment to colonizing governments or officials in the new colonies. Countries like Kenya, Cyprus, Uganda, Algeria consider many critical records of their history lost to this action. Although the displacement or loss of these archives may appear to be considered acts of historical malice, much of the destruction in fact happened as a routine bureaucratic procedure. It is therefore advisable to build strong preventative measures against wanton destruction and define and appraise collections for long term preservation with intention. Many international bodies have guidelines on selection of materials for long term preservation. Some of these are linked in the Further Reading section.

# Further Reading and Resources

## How this section is organized

The items in this section are divided thematically. The themes and items within them are arranged in alphabetical order. Individual citations follow APA Style 6th edition, except for citations about legislation, which follow APA Style 7th edition. Footnotes within chapters replicate the citation in this section, without the access dates.

## LEGAL FRAMEWORKS

### Copyright and Legislation and Precedents

*Chancellor Masters and Scholars of the University of Oxford v. Narendra Publishing House and Ors* [2011] 47 PTC 244 (Del.) (DB). Retrieved December 20, 2022, from <https://indiankanoon.org/doc/138192511>

Copyright Act 1957. Retrieved December 20, 2022, from <https://copyright.gov.in/documents/copyrightrules1957.pdf>

Copyright Rules 2013. Retrieved December 20, 2022, from [https://copyright.gov.in/Documents/Copyright\\_Rules\\_2013\\_and\\_Forms.pdf](https://copyright.gov.in/Documents/Copyright_Rules_2013_and_Forms.pdf)

*Delhi High Court in Warner Bros. Entertainment Inc. v. VG Santosh* [2009]. Retrieved December 20, 2022, from <https://indiankanoon.org/doc/67850614>

*George Jacob and Others v. Nandakumar Moodadi and Another* [2014] CriLJ 3421. Retrieved December 20, 2022, from <https://indiankanoon.org/doc/52827534>

Government of India. (n.d.). *The Public Records Act, 1993 / National Archives of India / Govt. Of India*. National Archives of India. Retrieved May 24, 2022, from <http://nationalarchives.nic.in/content/public-records-act-1993-0>

Government of India. (n.d.). *Right to Information*. Right to Information: A Citizen Gateway. Retrieved August 24, 2022, from <https://rti.gov.in>

Indian Copyright Act 1914. Retrieved December 20, 2022, from <https://www.wipo.int/edocs/lexdocs/laws/en/in/in121en.pdf>

## **Copyright and Libraries**

Internet Archive. Borrowing from the lending library. *Internet Archive*. Retrieved December 20, 2022, from <https://help.archive.org/help/borrowing-from-the-lending-library>

National Digital Library of India. (2021). NDLI presents: Copyright guide for Indian libraries. *National Digital Library of India*. Retrieved December 20, 2022, from <https://ndl.iitkgp.ac.in/document/cXFBM1dKUElqSUdaMIVuOEo2azdGVU5oNGVYUDZEdWh1WTIWTFENFOUhOWTO>

## **Digital Rights Management**

Besek, J.M. et al. (2008). International Study on the Impact of Copyright Law on Digital Preservation. Retrieved from [https://www.digitalpreservation.gov/documents/digital\\_preservation\\_final\\_report2008.pdf](https://www.digitalpreservation.gov/documents/digital_preservation_final_report2008.pdf)

Deazley R., and Stobo, V. (2013). Archives and Copyright: Risk and Reform. *CREATE UK*. Retrieved from <https://www.create.ac.uk/publications/archives-and-copyright-risk-and-reform>

## **Fair Dealing**

Copyright policy for Indiancine.ma. Retrieved December 20, 2022, from <https://indiancine.ma/copyrights>

*Civic Chandran v Ammini Amma* [1996] 16 PTC 670. Retrieved December 24, 2022, from <https://www.casemine.com/judgement/in/56e66b08607dba6b534374a3>

## **Privacy and Data Protection**

Centre for Internet and Society. Draft – Health Privacy. *Centre for Internet and Society*. Retrieved December 20, 2022, from <https://cis-india.org/internet-governance/health-privacy.pdf>

Centre for Internet and Society. State of Data Regulation in India: A Compendium. *Centre for Internet and Society*. Retrieved December 20, 2022, from <https://cis.pubpub.org/data-regulation-india-compendium>

European Archives Group. (2018). Guidance on data protection for archive services. Retrieved December 20, 2022, from [https://commission.europa.eu/about-european-commission/service-standards-and-principles/transparency/access-documents/information-and-document-management/archival-policy/european-archives-group/guidance-data-protection-archive-services\\_en](https://commission.europa.eu/about-european-commission/service-standards-and-principles/transparency/access-documents/information-and-document-management/archival-policy/european-archives-group/guidance-data-protection-archive-services_en)

Insurance Regulatory and Development Authority (IRDA). (2019). IRDA health service regulations. *Insurance Regulatory and Development Authority*. Retrieved December 20, 2022, from <https://www.irdai.gov.in/ADMINCMS/cms/Uploadedfiles/Regulations/Consolidated/IRDAI%20TPA%20consolidated%20Reg%20may%202020.pdf>

International Federation of Library Associations and Institutions and International Council on Archives. (2020). IFLA-ICA statement on privacy legislation and archiving. *International Federation of Library Associations and Institutions*. Retrieved December 20, 2022, from <https://www.ifla.org/publications/ifla-ica-statement-on-privacy-legislation-and-archiving>

Innovate India. (2022). *Inviting Feedback on Draft Digital Personal Data Protection Bill*. Retrieved on December 23, 2022 from <https://innovateindia.mygov.in/digital-data-protection>

*Justice KS Puttaswamy (Retd.) and Anr. v. Union Of India And Ors* [2017] 10 SCC 1. Retrieved December 20, 2022, from <https://indiankanoon.org/doc/91938676>

Kharbanda, V. (2017). Relationship between privacy and confidentiality. *Centre for Internet and Society*. Retrieved December 20, 2022, from <https://cis-india.org/internet-governance/blog/relationship-between-privacy-and-confidentiality>

Lomas, E. (2019). Navigating confidentiality, legal privilege and GDPR to maintain legal records for future generations: The case for archiving. In Cowling, C, (Ed.) Legal Records at Risk: A Strategy for Safeguarding our Legal Heritage. (pp. 150-155)

*Managing Director, Makkal Tholai Thodarpu Kuzhumam Limited Vs. Mrs. V. Muthulakshmi* [2007] 6 MLJ 1152. Retrieved December 23, 2022 from <https://indiankanoon.org/doc/47400>

Ministry of Electronics and Information Technology. (2022). *Data Protection Framework*. Retrieved on December 23, 2022 from <https://www.meity.gov.in/data-protection-framework>

National Archives. (2018). Guide to archiving personal data. *National Archives*. Retrieved December 20, 2022, from <https://www.nationalarchives.gov.uk/documents/information-management/guide-to-archiving-personal-data.pdf>

*R Rajagopal v. State of Tamil Nadu* [1994] 6 SCC 632. Retrieved December 20, 2022, from <https://indiankanoon.org/doc/501107>

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## Privacy Legislation

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