

## Restriction of Access to Records Is Increasing Threat to Genealogical Research

(continued from page 4)

indexes would no longer be permitted online, drastically reducing genealogical access to these documents. Recent examples of “opt in” procedures versus “opt out” (where everyone is included and the individual has to request to have information removed) come from censuses in both Australia and Canada where the opt in rate to allow the sharing of data is only about 50 percent. With a reduced number of participants, genealogists would lose access to many records, and that would dramatically impede research.

**Current Situation.** The European Court of Justice (ECJ) is the highest court in the EU in matters of European Union law. It has one judge for each EU country and eight advocate generals. Its responsibility is to interpret EU law and to ensure its equal application in all EU member countries. A recent opinion by an advocate general of the ECJ—not a decision by the full court—held that the individual does not have the right to be forgotten. In the case *Google vs. Spanish Protection Agency*, Advocate General Niilo Jääskinen declared that he considered search engine service providers, such as Google, not responsible regarding the Data Protection Directive for personal data appearing on webpages they process.<sup>5</sup> Thus, the section of the proposed regulation that pertains to historical research and documents would not necessarily be affected by the right to be forgotten since only a living person can give this permission.

Social media, on the other hand, increasingly has become part of the genealogical arsenal of resources and the potential loss of access in this arena, because of the right to be forgotten and right to erasure, will hinder research efforts. In spring 2013, French archivists initiated a petition protesting what the regulation will do to historical records access. Because the requirement is that individuals must grant permission to include their records but there is no way that someone dead can do this, archivists are concerned about the potential loss of the histories of their countries. German, Greek, Italian, Norwegian and Polish associations of archivists have initiated similar petitions.<sup>6</sup>

Many address the fact that companies that process data could not permit individuals to move their data from one company to another or to have it removed altogether without insupportable administrative and financial consequences. The International Association of Jewish Genealogical Societies (IAJGS) submitted a letter on August 29, 2013, to the Ministers of Justice of all 28 EU countries that addresses two issues it hopes will resonate with the EU Ministers.<sup>7</sup>

• The importance of being able to trace family medical problems that are passed from generation to generation is emphasized. Information in birth, marriage and death rec-

ords is critical to reconstruct families and to trace genetically inherited attributes in current family members.

• To counter the EU “right to be forgotten,” IAJGS asserted “the right to be remembered.” Many family historians still are trying to determine the fate of relatives lost in the Holocaust. Not only do Jewish genealogists help people trace those lost or murdered during the Holocaust, but also those persons trying to repatriate with members of their original family by first discovering their roots.

**Responses.** As of October 14, 2013, IAJGS received responses from the Ministers of Justice in Austria, Czech Republic, Ireland, Germany, Spain, Sweden and the United Kingdom. The Ministries of Justice from Germany, Spain and the United Kingdom expanded their responses beyond merely acknowledging receipt of the IAJGS letter. These three ministries stated their belief that historical records should not be affected by the proposed regulation as the intent is to protect the living. The response from the Right Honourable Lord McNally, Minister of State within the Ministry of Justice Responsible for Data Protection, United Kingdom, was supportive of the IAJGS concerns. He wrote, “...I agree that the rights of victims of the Holocaust to be remembered and preserved in history are extremely important, as is the need of families who were split up by the Holocaust to find each other again. It is also vital for individuals to be able to research their ancestry and their likelihood of having inherited potentially deadly genetic mutations.... However, the focus of data protection initiatives is to protect the living. Historical information about the dead is beyond the scope of the proposed regulation, and the UK government will resist any calls to extend its range in such a way....Under the current provisions, the ‘right to be forgotten’ includes exemptions for matters of public interest and statistical and historical research. Individuals would not be permitted to have their data removed from publicly available census records or birth, marriage and death registers.”

### Social Security Death Index/Death Master File

Many genealogists, both inside and outside the United States, doing U.S. research rely on the Social Security Death Index (SSDI), the commercial name of the Death Master File (DMF). The Death Master File is a computer database file made available by the United States Social Security Administration since 1980.<sup>8</sup> Because the Social Security system began in 1936, deaths prior to that year are not part of the file. The DMF is developed by the National Technical Information Service (NTIS),<sup>9</sup> a cost-recovery government agency (an agency that helps recover excessive or inappropriate payments made by the government) and that disseminates the DMF data on behalf of the Social Security Administration. NTIS states on its website that use of the SSDI actually prevents identity theft.

Starting with the 2010–11 congressional session, some members of congress decided that public access to the

SSDI, available free of charge on a variety of genealogical websites, was the cause of identity theft—specifically that of deceased individuals—when some people submitted fraudulent claims to the Internal Revenue Service (IRS) for refunds on deceased children whom they claimed were their own. A number of bills were introduced that would have curtailed public access to the SSDI/DMF. Several hearings were held, but no legislation was enacted. As a result of congressional pressure, however, most commercial genealogical websites that had included the SSDI as a free service, placed it on their subscription (pay) access website and removed the Social Security numbers from deceased individuals' records for a period of three or more years from the date of death.

The 2012–13 Congress introduced a spate of bills that vary from denying public access to the SSDI for three years from date of death, to terminating the program and allowing no access at all.<sup>10</sup> The Executive Branch in its budget proposal called for a waiting period for access to the SSDI, but as of now, no bill has been introduced on behalf of the Executive Branch. Of the currently introduced bills, the ones most likely to proceed are HR 2720 sponsored by Congressman Sam Johnson (R-TX), who chairs the House Ways and Means Committee Subcommittee on Social Security with 23 co-sponsors, and SB 676 sponsored by Senator Bill Nelson (D-FL), a member of the Senate Finance Committee, who chairs the Committee on Aging with four co-sponsors. In general, these bills would limit access by the public to the SSDI as well as require the IRS to implement procedures to insure that only the correct individuals receive tax refunds and stop refunds to perpetrators of identity theft.

**Genealogical Viewpoint.** Today, most identity thefts relating to IRS filings are those of living persons, not the deceased as attested to during the Senate Finance Committee hearing on April 16, 2013, entitled “Tax Fraud and Tax ID Theft: Moving Forward with Solutions.” Of course, closing or limiting public access to the SSDI will not prevent tax fraud against living individuals. Congress has not changed its focus on the SSDI/DMF, however, despite its recognition of the shift of victims.

Use of the SSDI actually could be an effective identity fraud deterrent. If the IRS matched the filings in its computer database against those listed on the SSDI who now are deceased, fewer inappropriate tax refunds would go to those perpetrating identity theft of the deceased. The SSDI should be retained and used effectively.

In addition, congressional hearings brought pressure upon the Internal Revenue Service to scrutinize returns more aggressively to prevent tax fraud through the use of better filters and the comparison of various available databases to recognize deceased individuals on tax returns.

While some proposals would permit certain categories of individuals to have immediate access if they are certified by the U.S. Department of Commerce, no provisions for genealogists have been included despite numerous statements

filed by the IAJGS, RPAC and other genealogical organizations. In its statements to Congress, the genealogical community suggested an option that would permit certain genealogists to have immediate access to the SSDI for specific reasons while the rest would wait two to three years for access. For technological reasons associated with filing taxes, accurate processing may take that long. The genealogists suggested that those who should have immediate and direct access are:

- Those helping the military in the repatriation of the remains of service persons lost in previous military conflicts by identifying and locating their living relatives
- Those helping county coroners by identifying the relatives of unclaimed deceased persons
- Heir genealogists who assist attorneys in finding missing heirs to settle estate cases
- Genealogists researching genetically inherited disease in families when time is of the essence in locating extended family members who may have inherited a gene and may need to be tested and treated as quickly as possible

The genealogical community recommended that genealogists with government or legal contracts doing work as forensic genealogists or heir researchers and certified or accredited genealogists be certified for immediate access. Genealogists who are already certified by the Board for Certification of Genealogists (BCG) or the International Commission for the Accreditation of Professional Genealogists (ICAP-GEN) should be immediately certified by the Department of Commerce—the government department mentioned in the proposed legislation as responsible for certification in several bills addressing access to the DMF/SSDI. Until now, the genealogical community's recommendations have elicited no response from Congress.

**U.S. Model Vital Record Act.** In 1992, a number of U.S. state vital records registrars began to operate under state legislation based on the last approved federal Model State Vital Statistics Act that includes restrictions on access to birth records for 100 years and death, marriage and divorce records for 50 years. The Model State Vital Statistics Act was developed by the Center for Disease Control and Prevention (CDC), a U.S. government agency under the Department of Health and Human Services. The 1992 Model Act, currently in effect, may be read at [www.cdc.gov/nchs/data/misc/mvsact92b.pdf](http://www.cdc.gov/nchs/data/misc/mvsact92b.pdf).<sup>11</sup>

In 2011, a revision was developed and reported by a working group consisting primarily of state and local vital statistics executives. The draft was not distributed to the genealogical community for comments. In June 2011, the National Association for Public Health Statistics and Information Systems (NAPHSIS) endorsed the 2011 Revision of the Model State Vital Statistics Act and Regulations and encouraged state vital registration executives to introduce legislation that supported the 2011 Draft Revision. The proposed Model Act extends the closure periods to 125 years after the date of a live birth, 75 years after the date of death, or 100 years after the date of marriage or divorce.

States are not required to adopt the Model Act.

In April 2012, the Department of Health and Human Services (HHS) delayed implementation of the 2011 revision, but that did not stop NAPHSIS from encouraging state vital records officers to promote legislation introduced in several states during the 2013 session.

Oklahoma was the first state to enact these provisions. Unfortunately, the action was unnoticed by the genealogical community until early 2013 when the new procedures for accessing vital records were implemented. One of the provisions allows only the subject of a death record (the deceased!) to request his or her record.<sup>12</sup>

**Genealogical Responses.** In Oregon, the genealogical community successfully blocked adoption of a proposal to extend the embargo period for vital records. Genealogists were successful also in Texas when legislation died in committee in part because vital records officers were unable to present any compelling reasons to extend the closure dates for access to vital records. In Washington State, the Model Act provisions were introduced at an administrative committee level. The issue never progressed beyond the committee because the genealogical community voiced its concerns. The genealogical community believes that as a result of its successes (aside from Oklahoma), state vital records officers may try to adopt these provisions by regulation rather than through legislation.

### **Genealogy Organizes to Respond**

Genealogists lose access to records of genealogical value when they are unaware of what is happening in local, regional, state and country legislatures/parliaments and thus take no action to preserve public access. As part of their missions, the IAJGS Public Records Access Monitoring Committee (PRAMC) and the Records Preservation and Access Committee (RPAC) analyze pending legislation and deliver regular, timely, concise communications on records access issues to genealogists.

**IAJGS Public Records Access Monitoring Committee (PRAMC).** At the annual meeting held at the IAJGS annual conference in Toronto, Canada, in 2002, the membership voted that the IAJGS should become more active in preserving records access and suggested the formation of an IAJGS committee to monitor and inform the membership about this issue. In 2003, the IAJGS Board of Directors adopted a charter for the PRAMC under which it monitors, reports and, when appropriate, submits statements to appropriate government entities on pending legislation or regulation that would affect access to records of genealogical value.<sup>13</sup>

The IAJGS website, [www.IAJGS.org](http://www.IAJGS.org), has links to all Canadian and U.S. federal and state/provincial legislative sites in order to facilitate finding elected officials, their addresses and websites for pending legislation.<sup>14</sup> Additional items of interest included on the website are the Records Access Power Point presentation made at the 2013 IAJGS International Conference on Jewish Genealogy and the accompanying conference handout. PRAMC members who

review and collectively draft statements have been commended for their excellence in conceptual writing, accuracy and thoroughness.<sup>15</sup>

**Records Preservation and Access Committee (RPAC).** In 2004, the IAJGS joined the Records Preservation and Access Committee (RPAC). In 2009, the boards of directors of both the Federation of Genealogical Societies (FGS) and the National Genealogy Society (NGS) voted to make IAJGS a voting/sponsoring member of RPAC with status equal to that of the other two umbrella genealogical organizations. Today, RPAC is a joint committee of the FGS, NGS and IAJGS as voting and sponsoring members. The Association of Professional Genealogists (APG), the Board for Certification of Genealogists (BCG), International Commission for the Accreditation of Professional Genealogists (ICAPGen) and the American Society of Genealogists (ASG) also serve as participating members. By invitation, RPAC also includes participation from a few commercial providers of genealogical information. RPAC meets monthly to inform and advise the genealogical community on ensuring proper access to vital records and on supporting strong records preservation policies and practices at the federal, state and occasionally the local level. RPAC submits statements on selected proposed U.S. federal and state legislation and regulations pertaining to access to records of genealogical interest.

### **Call to Action—What an Individual Can Do**

Currently, three potentially broad-reaching actions exist that would adversely affect genealogists' access to records; the EU's Proposed Data Protection Regulation, the (U.S.) SSDI/DMF congressional legislation limiting access, and the (US) Model State Vital Records Act which would extend embargo periods for accessing vital records. The IAJGS Public Records Access Monitoring Committee and the Records Preservation and Access Committee are critical to monitoring and responding to regulatory actions that address access to public records. To help to ensure genealogists have continued access to records, active participation from the community is essential. PRAMC and RPAC urge individual genealogists to:

- Meet with local elected representatives and their staffs. Educate them about why access to the records is important. Invite them to society meetings; members are their constituents and especially near election time elected officials want to visit groups. Send them society newsletters so they remember you.

- Follow and become involved with what is happening in local/state/region/federal legislatures or parliaments. Periodically monitor the Legislative Tool Kit on the IAJGS website.<sup>16</sup>

- Members of a Jewish Genealogical Society and subscribers to the JewishGen Discussion Group or one of the JewishGen Special Interest Groups (SIGS) may subscribe to the IAJGS Records Access Alert.<sup>17</sup>

- Contact the PRAMC, [Vicepresident@IAJGS.org](mailto:Vicepresident@IAJGS.org), to

report access issues.

### Notes

1. [www.identitytheft.info/breaches09.aspx](http://www.identitytheft.info/breaches09.aspx); [www.washingtonpost.com/politics/tricare-military-beneficiaries-being-informed-of-20stolen-personal-data/2011/11/23/gIQAQRNHtN\\_story.html](http://www.washingtonpost.com/politics/tricare-military-beneficiaries-being-informed-of-20stolen-personal-data/2011/11/23/gIQAQRNHtN_story.html); [www.hhs.gov/news/press/2013pres/07/20130711b.html](http://www.hhs.gov/news/press/2013pres/07/20130711b.html)

2. [http://en.wikipedia.org/wiki/European\\_Union](http://en.wikipedia.org/wiki/European_Union)

3. [www.europarl.europa.eu/document/activities/cont/201305/20130508ATT65776/20130508ATT65776EN.pdf](http://www.europarl.europa.eu/document/activities/cont/201305/20130508ATT65776/20130508ATT65776EN.pdf)

4. [http://en.wikipedia.org/wiki/General\\_Data\\_Protection\\_Regulation](http://en.wikipedia.org/wiki/General_Data_Protection_Regulation)

5. [http://europa.eu/rapid/press-release\\_CJE-13-77\\_en.htm](http://europa.eu/rapid/press-release_CJE-13-77_en.htm)

6. [www.ica.org/?lid=14318](http://www.ica.org/?lid=14318); <http://tinyurl.com/lsejrd6>

7. [www.dropbox.com/s/ehtslp8llv7e9bk/EU%20Data%20Protection%20Letter%20UK-1.pdf](http://www.dropbox.com/s/ehtslp8llv7e9bk/EU%20Data%20Protection%20Letter%20UK-1.pdf)

8. [http://en.wikipedia.org/wiki/Death\\_Master\\_File](http://en.wikipedia.org/wiki/Death_Master_File)

9. <http://tinyurl.com/yb6e49e>

10. HR 295; HR 466; HR 531; HR2720 and SB 676

11. [www.fgs.org/rpac/2013/03/12/rpac-alert-2011-revision-of-model-state-vital-statistics-act/](http://www.fgs.org/rpac/2013/03/12/rpac-alert-2011-revision-of-model-state-vital-statistics-act/)

12. The Oklahoma genealogical community tried to have amending legislation introduced in 2013 once the issue of “only the deceased may request their own death records” became known. The legislators who had sponsored the original bill for the Oklahoma State Department of Health understandably were embarrassed and, as it was late in the legislative session, opted not to address it this year. In the interim, the Oklahoma State Department of Health is permitting immediate family members to obtain the death records, even though it is a felony for the clerk to provide those records to family until amending legislation is enacted.

13. [www.iajgs.org/pramc/legislation.html](http://www.iajgs.org/pramc/legislation.html)

14. [www.iajgs.org/pramc/legisites.html](http://www.iajgs.org/pramc/legisites.html)

15. Jan Meisels Allen, chairperson, vice-president, IAJGS and president of JGS Conejo Valley and Ventura County; Teven Laxer, JGS Sacramento; David Ockene JGS, Inc. New York; Kenneth H. Ryesky, JGS, Inc. New York; Paul Silverstone, treasurer, IAJGS and member of Executive Council, JGS, New York; Joel L. Spector, JGS Greater Philadelphia; Catherine Youngren, president, Jewish Genealogical Institute of British Columbia; Marliss Humphrey, president IAJGS, vice-president JGS Orlando, ex officio.

16. [www.iajgs.org/index.php](http://www.iajgs.org/index.php). Go to PRAMC section in center of page and click on Legislative Tool Kit.

17. To register go to <http://lists.iajgs.org/mailman/listinfo/records-access-alerts>. Follow the instructions to enter e-mail address, full name and JGS/JHS/SIG/JewishGen affiliation.

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