

## Privacy and Genealogy: What Are the Rules?

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One of the most challenging public policy issues of our time is the balancing act between access to public records and personal privacy. We usually focus on whether the privacy of our trees and any information contained therein, are what genealogists need to concern themselves with—but the larger picture also needs to get the attention of genealogists. If we are not able to access links on search engines, nor access the historical record, where does our genealogy leave us? With a paucity of historical documents and sites and the lack of depth for knowledge and understanding why certain occurrences happened and about the people who did them. Is this as important as whether someone wants to be removed from one's tree, whether to place the tree on the Internet, collaborative genealogy, etc.? If we continue to have governments and courts limit our access to records, Internet sources, and historical documents we won't have to worry if we should share, post, collaborate with, remove a person or a reference from our trees as there won't be information to include on our trees and they will be stagnant at the point when we could do all those genealogically important functions. There are two issues to consider: privacy for the living and privacy for the dead.

**Privacy for the Dead:** Legally, the dead have no privacy rights. However, governments embargo death records for any number of years: 0, 25, 50, 100 or more. Who are they protecting? Do they not understand that access to the death record may save lives by being able to trace back genetically-inherited diseases, such as BRACA II which not only has markers for breast cancer but also prostate cancer and pancreatic cancer? Ashkenazi Jews have a higher propensity for carrying the BRACA II gene than non-Jews, although those that come down with the diseases with the gene are a very small percentage compared to those without the gene.

The recent adoption by the European Union (EU) of an updated General Data Protection Regulation (GDPR)<sup>1</sup> expressly states the “right to be erased” or “right to be forgotten” does not apply to the dead, and requires individual states (countries) to provide personal data for archival purposes for the Holocaust, war crimes, etc.

The concept of the “right to be forgotten” in the European Union began with a court case in 2014 when the Court of Justice of the European Union declared residents of the EU had the “right to be forgotten” when they decided that a Spaniard who had once been declared bankrupt was entitled to have links to reports of his financial difficulties hidden from anyone who searched his name on Google. This declaration applies to all search engines, not just Google, which has the largest market share in Europe. While the entire concept is an anathema for those living in the United States where we rejoice with our Constitutional rights of Freedom of Speech and Freedom of the Press, in the European Union, the individual's privacy prevails. Those with roots in any of the 28 EU countries should be concerned with this practice of “erasing history”. The “right to be forgotten:” has spread to countries outside of the EU including: Argentina, Brazil, Hong Kong, Japan, Mexico, Russia and more. In the United States there is a bill introduced in

the New York State Assembly, if enacted would be the first legalization of the right to be forgotten in the United States. There is strong opposition as it would violate the first amendment Constitutional rights of Freedom of the Press and Freedom of Speech. In California, a case addressed the requirement to remove a posting by the “publisher” or “administrator” in this case Yelp, is why it may appear to be a “right to be forgotten”. In July 2018 the US Supreme Court found in a 4-3 decision that Yelp cannot be ordered to remove “derogatory” posts due to Section 230 of the Federal Communications Decency Act (CDA).<sup>2</sup> In July 2017, the Canadian Supreme Court determined they had extraterritorial authority to make Google remove posts worldwide. However, when Google took the decision to a federal court in the US the court found for Google stating it would violate the US Constitutional right of free speech. There is one pending court case, at the time this handout is being written, which will determine if extraterritoriality will be applied: Court of Justice of the European Union.

**Privacy for the Living:** As mentioned above, the EU’s “right to be forgotten/erased” applies to the living not the deceased. Genealogists need to be able to locate stories about people, places and events that are important to our family history research and having links “delinked” from search engines impedes our research. We can all agree that some of our information should not be shared or posted, such as Social Security Numbers, and information about young children. However, there is a dispute about how much information about the living should be and can be shared: now or after a period of time. Some government agencies have placed embargo periods on birth, marriage and death records—far into the future—25-75-125 years—while other jurisdictions have placed no limitations—and there is **no** documented difference in the rate of identity theft in those states that have open information vs. those with embargo dates. We want access to vital records for our family history and the importance of tracing medically inherited diseases back—both direct-line and collateral ancestors—to help current and future generations take appropriate life-saving steps. Genealogists do not cause identity theft. As we have all read or experienced, identity theft is caused by computer breaches at educational, financial, government medical and commercial entities. Gemalto’s recent report on global data breaches—4.5 billion records compromised, with identity theft as the largest category of data breach did not mention family history or genealogy anywhere in its report.<sup>3</sup> Therefore, the debate of who and/or what should be included in a family tree, and permission to do so, is left to personal decisions.

**Online Privacy:** Companies such as Ancestry, MyHeritage and Geni have developed privacy standards, not as a result of legal requirements, but as a marketing strategy. There is no law in the United States or Europe that requires any portion of a family tree to be private, or that prohibits anyone from placing a fully public family tree, including living people and minors, on the Internet. Not only are there no laws restricting online family trees, but the online companies are protected from any possible liability as a result of Internet safe harbor rules, which prohibit lawsuits against providers of online forums for users who post their own data. The limited number of European cases on the right of erasure so far concern deletion of links to embarrassing criminal and debt-related items from search engines, somewhat in line with the early common law cases concerning public disclosure of private facts. To our knowledge there has not been any case brought in the United States or Europe concerning an online family tree, nor could there be under the existing legal regime.

### **Changes in Social Issues Affect Genealogical Privacy**

Recent actions in states reflecting changes in social issues will affect how we enter our genealogy and its privacy. The New Jersey State Registrar refused to place a woman’s name on a child’s birth certificate as her mother as the child was born to a surrogate and the ovum

had an anonymous donor.<sup>4</sup> In Georgia suit has been filed against state employees who refuse to issue a birth certificate because the baby's surname does not match either parent.<sup>5</sup> Transgenders are now being given the right to change the gender they were born with on their birth certificates and California is considering legislation with non-binary as one of the gender options on birth certificates.

## Recent Legislation

On May 25, 2018 the European Union' General Data Privacy Regulation became effective. While intended only for the 28-member EU countries it has impacted privacy worldwide and affected social media such as Facebook, Twitter and Google websites as to what they may and may not do.

In June 2018 California enacted the strongest privacy legislation in the Country- AB 375, it becomes effective January 1, 2020. Some clean-up legislation was enacted on late September, AB 1121 and it is possible further amendatory legislation will be enacted before the effective date.<sup>6</sup>

In the meantime the US Congress is also looking at privacy legislation.

## Summary

- Deceased individuals do not have a right to privacy, so publication of genealogical data about deceased individuals is unrestricted.
- There is generally no legal limitation on the publication of genealogical data about living individuals, since that data is neither private nor objectionable to a reasonable person.
- Living individuals may have a right against public disclosure of private facts that would be offensive or objectionable to a reasonable person of ordinary sensibilities.
- Online genealogy sites may restrict publication of genealogical data about living individuals, but solely as a result of marketing decisions and not because of any legal requirements or risks of liability or litigation.
- Subject to the rule against public disclosure of objectionable private facts, genealogists are generally free to publish online family trees, and do not need to accede to privacy requests from individuals named on those trees.

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<sup>1</sup> <http://data.consilium.europa.eu/doc/document/ST-5419-2016-INIT/en/pdf>

<sup>2</sup> <http://www.courts.ca.gov/opinions/documents/S235968.PDF>

<sup>3</sup> <https://www.gemalto.com/press/Pages/Data-Breaches-Compromised-4-5-Billion-Records-in-First-Half-of-2018.aspx>

<sup>4</sup> <http://www.legalgenealogist.com/2014/02/14/a-multiplicity-of-parents/>

<sup>5</sup> <http://www.wjcl.com/article/the-aclu-files-suit-against-ga-officials-who-refuse-to-issue-birth-certificate-based-on-name/9174713>

<sup>6</sup> [http://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml?bill\\_id=201720180AB375](http://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml?bill_id=201720180AB375)  
[http://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml?bill\\_id=201720180SB1121](http://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml?bill_id=201720180SB1121)