

What Organizations Must Know About the ‘Right to be Forgotten’

The European Union’s (EU) “right to be forgotten” affects not only search engines but any organization that hosts EU citizens’ information or does business in the EU. Records and information management professionals who get requests to remove information must understand the factors that should guide their decisions.

Erik Werfel, J.D., IGP, CIPP-US, CISSP, CEDS



The European Union’s (EU) right to be forgotten does not apply specifically to Google alone, although reports sometimes suggest it. Rather, the decision in *Google Spain v. AEPD and Mario Costeja González* is the application of a more general right of erasure under the EU’s Data Protection Directive of 1995, and the directive applies not just to search engines but to all organizations that control and process EU consumer data. Organizations should therefore be aware of the directive’s provisions, particularly if they do business in the EU.

Under the right of access provisions of the directive’s Article 12, EU individuals have the right to request that any data controller remove personal data if the information is inaccurate, inadequate, irrelevant, or excessive. Typical applications of this provision might be a request to remove misleading information on an individual’s credit report or to remove inaccurate data from medical records. The *Google Spain* decision held that this right is not a right to the removal of records in data sets, but is a more general right to have obsolete information removed.

The Court Decision

In *Google Spain*, a Spanish citizen living in Spain asked that a notice of foreclosure be removed from the website of *La Vanguardia*, the newspaper that had originally published the public notice, and that links to the notice be removed from Google’s search engine. The European Court of Justice ruled that *La Vanguardia* need not remove the notice from its site, in part because the notice was published in fulfillment of Spanish law, and because under the principles of the Data Protection Directive, rights to freedom of expression may counterbalance the right to erasure, especially for media companies.

Google Spain declined to be considered a media company. The court found that Google was a data controller under Article 12 and that the information about the fore-

closure was no longer relevant. Google Spain was therefore required to remove all links to the notice.

The EU Court of Justice indicated that Google should consider each request on a case-by-case basis, balancing the public's interest in the information, the data controller's right to free expression, and the individual's right to privacy. It is anticipated that judgement calls will be necessary. According to Google's website on February 10, 2016, the company had approved 42.5% of the 386,038 requests to remove links it had received since it launched its official request process on May 29, 2014.

An EU *directive* describes an aim for the EU that must be implemented in law by member states. With 28 member states implementing distinct laws, there is bound to be inconsistency. An EU *regulation* is enforceable as law in

the EU, the Spanish subsidiary was selling advertising in Spain, and since advertising was Google's major source of revenue, Google could be considered to be doing business in Spain.

Google has applied the *Google Spain* ruling by providing a form that allows users to request that links be removed. Once the request is approved, Google removes links from all of its European sites (*google.es* or *google.uk*, for example) but not from the U.S. *google.com* site, which is accessible in Europe. The French data protection agency has objected, claiming it makes the information too easily accessible in Europe, and has requested that the links be removed from *google.com* as well.

It might be possible for an organization to use a technological solution to remove the links for end users based

...the current Data Protection Directive provides that data controllers must make every effort to inform third parties with whom they share data if any data must be removed because it is inaccurate or irrelevant.

all member states, ensuring consistency. So, in part to ensure consistency and in part to account for changes in information technology since 1995, the EU recently reached agreement in principle on a new General Data Protection Regulation (GDPR). The GDPR was expected to receive formal adoption from the European Parliament and Council in early 2016, with an effective date sometime in 2018.

Criteria for Erasure

Notably, with regard to the right to erasure, the current Data Protection Directive provides that data controllers must make every effort to inform third parties with whom they share data if any data must be removed because it is inaccurate or irrelevant, while the upcoming GDPR makes data controllers responsible for ensuring that third parties actually remove the information. Organizations that receive take-down requests should consider the following factors in determining whether to comply with each request.

Location

Before removing data, the organization should determine whether the server is physically located in the EU, whether the data processing happens in Europe, or whether the organization does business in the EU. If the answer to all of these is *no*, the directive's provisions do not apply. The court in *Google Spain* held that while the data processing done by Google took place wholly outside

on the location of the source Internet protocol address (which could possibly be spoofed) or a more creative solution similar to Google's. But a sure way for an organization to comply with a legitimate request is to remove the information globally.

Data Controller

As provided by the Data Protection Directive, a *data controller* "determines the purposes and means of the personal data processing." Data an organization is hosting for someone else might not be data it controls.

Identification

The right to erasure is a personal right, so persons making a request must be able to demonstrate that they are the persons whose rights are implicated or that they have the approval of the person whose rights are implicated. Google requires some form of photo ID before it will approve requests for removal, and it is reasonable for other organizations to require some sort of documentation of identity before approving or considering a request.

Balance of Rights

The Data Protection Directive indicates that the individual's right to privacy must be weighed against the publisher's right to free expression and the community's right to know. As generally applied, media companies have not been expected to comply with requests to remove

Criteria for Determining the Need to Comply with a 'Right to Be Forgotten' Request

"Yes" answers to these questions indicate the likelihood that the requested information should be removed:

- Is the server housing your data located in the EU, is the data processed in the EU, or does your company do business in the EU?
 - Is your organization the data controller?
 - Is your organization something other than a media company?
 - Has the requester provided documentation proving that he or she is the person whose rights are implicated OR that he or she has the approval of the person whose rights are implicated?
 - Is the data inaccurate, inadequate, irrelevant, or excessive?
-

information, and provisions in the proposed GDPR would make media companies explicitly exempt once that regulation is adopted.

So, it may be safe to assume that newspapers and media companies do not need to consider take-down requests. Google Spain opted not to be treated as a media company, so no ruling on that point was required in the *Google Spain* decision, leaving open the possibility that "media company" may be broadly defined. As an example of the varied ways European media companies are applying the directive, some European newspapers host pages displaying the stories for which Google has removed links from its search results in response to right to be forgotten requests.

Relevance of Information

Determine whether the information is inaccurate, inadequate, irrelevant, or excessive. In the *Google Spain* decision, the information that was the subject of the case was accurate, in that the foreclosure had taken place. However, Costeja was no longer insolvent, and he argued successfully that the notices did not reflect his current condition and were therefore irrelevant because the information was obsolete.

Truth alone would not be a reason to deny a request to remove information, and indeed it is because accurate information may be removed that this provision is known as the *right to be forgotten*, rather than *the right to correction*.

Penalties for Non-Compliance

Under the Data Protection Directive, the implementing law sets fines for noncompliance, so the cost of noncom-

pliance is not consistent across the EU. Under the new GDPR, a fine may be levied up to €20 million (\$2.4 million U.S.) or up to 4% of the annual worldwide turnover of the preceding financial year in case of an enterprise, whichever is greater.

The costs can be substantial, so this should be factored into an organization's decision about whether to comply with a takedown request. On the other hand, there is generally an appeals process with the member state's data protection authority, and an initial ruling is more likely to order the removal of information than a fine.

Invoking the Right to Protect Reputation

Organizations should bear in mind that while the EU's right to be forgotten is an individual right, it may be that invoking the right to be forgotten to enhance the reputation of a key individual would benefit the organization as a whole. Records and information management professionals should be able to recommend and assist with requesting the removal of information from third-party sites, if that is appropriate.

An appropriate request for removal will meet these criteria: the site should be hosted in the EU or the host company should be doing business in the EU; users should be in the EU; the host in most instances should not be a media company; and the information should be inaccurate, inadequate, irrelevant, or excessive.

Prospects for a Similar U.S. Right

Privacy advocates, including, for example, the often-cited Eric Posner of the University of Chicago Law School, have argued there should be a similar right to be forgotten in the United States. However, while the EU's right to be forgotten requires that the individual's right to privacy be balanced against rights of free expression, it seems likely the U.S. First Amendment would not allow the prohibition of publication of information that has not already been found defamatory by a court.

Many states already allow a tort claim for public disclosure of private facts, and perhaps that might be a model for applying the right in the United States, requiring adjudication for removal. But courts typically rule narrowly on claims for public disclosure of private facts, in recognition of First Amendment interests, which suggests they would be reluctant to extend rights under such a claim any further. A U.S. right to be forgotten would need to be very different in form from the EU's, and might nevertheless be constitutionally suspect, so it seems unlikely such a right would be adopted in the near future. **END**

Erik Werfel, J.D., IGP, CIPP-US, CISSP, CEDS, *can be contacted at erik.werfel@gmail.com. See his bio on page 47.*