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New Technology and Researchers' Access to Court and Tribunal Information: the need for European analysis

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Abstract

We discuss the limitations and rights which may affect the researcher's access to and use of digital, court and administrative tribunal based information. We suggest that there is a need for a European-wide investigation of the legal framework which affects the researcher who might wish to utilise this form of information. A European-wide context is required because much of the relevant law is European rather than national, but much of the constraints are cultural. It is our thesis that research improves understanding and then improves practice as that understanding becomes part of public debate. If it is difficult to undertake research, then public debate about the court system – its effectiveness, its biases, its strengths – becomes constrained.

Access to court records is currently determined on a discretionary basis or on the basis of interpretation of rules of the court where these are challenged in legal proceedings. Anecdotal evidence would suggest that there are significant variations in the extent to which court documents such as pleadings, transcripts, affidavits etc are made generally accessible under court rules or as a result of litigation in different jurisdictions or, indeed, in different courts in the same jurisdiction. Such a lack of clarity can only encourage a chilling of what might otherwise be valuable research.

Courts are not, of course, democratic bodies. However, they are part of a democratic system and should, we suggest – both for the public benefit and for their proper operation – be accessible and criticisable by the independent researcher. The extent to which the independent researcher is enabled access is the subject of this article.

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The rights of access for researchers and the public have been examined in other common law countries but not, to date, in the UK or Europe.

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1. Introduction

Those very aspects of the digital environment which bring fear to the privacy advocate are those which bring delight to the researcher: constant collection of raw data; ever decreasing costs of storage of that data; ease of copying (and thus multiple copies to insure against accidental loss over time); tools for manipulation of the data; and a horizon where the source of data is never ending. For example, think of the social historian who might – in fifty or one hundred years – gain access to Google mail contents. And the family researcher wanting to understand the personality of their ancestors – something which only the wealthy (and the detailed records they stored in the attics of their stately homes) could manage. “They never threw anything away” could become the norm rather than the exception as we leave a trail for others to follow – perhaps both making more sense of our individual lives than we do ourselves and making sense of how larger society works.

The raw data, too, is wide ranging in form – emails, photographs, education records, utility records, newspaper articles, detailed travel information (think of London transport pre-pay cards) etc. Everything produced as part of daily life is potentially accessible to the researcher who might come from one of many possible fields: history, geography, students of dialect, medicine, etc. Raw data is, after all, the basis upon which our understanding develops, and we cannot now know what might be usefully extracted from that data in the future.

For the socio-legal researcher the possibilities are just as exciting: access to digitised recordings of advocacy, the trial bundle, judge’s notes, etc. A wealth of data might be made available which enables a better understanding of the legal process than does the *post hoc* judgment. Such access would not be just of current utility: legal historians in the distant future will have a floodlight thrown back upon our legal world.

Unfortunately, the researcher’s perspective is not the only one which has relevance. Many are the voices arguing that the collection and storage of data should be heavily controlled. For example, the UK Information Commissioner has interpreted data protection law to suggest that data controllers are required to destroy (without discussion with the data subject) records at the earliest opportunity.¹ School records, under this instruction, will be lost to future generations even if the scholar has no objection to their continued existence. The researcher may view such destruction of data as wanton, but his or her voice is out of line with the Data Protection Directive

¹ “There is a significant difference between permanently, irreversibly deleting a record and merely archiving it. If you merely archive a record or store it ‘off-line’ it must still be necessary to hold it and you must be prepared to give subject access to it and comply with the data protection principles. If it is appropriate to delete a record from your live system you should also delete it from any back-up of your information you keep.” Information Commissioners Office, *Framework code of practice for sharing personal information* (October 2007).

which requires that personal data should not be retained for any longer than is necessary.²

If there is today a technical environment which increases the opportunities of access, there is also generally a concomitant pressure to both: (a) reduce access to data; and (b) a pressure to increase access. For example, the legal constraints to reduce access include:

- Data protection;
- Privacy/confidentiality of data;
- Copyright and database rights in data; and
- Commercial confidentiality.

And those which emphasize the opening up of data include:

- The principle of open justice;
- Freedom of information legislation;
- Archives/Public records legislation;
- Re-use of public sector information.

It is this tension between the two – control and access – which creates a difficult environment in which to carry out research which uses the raw data from the new digital environment. What can the researcher rightly expect access to?

In this paper we will focus upon the data which has been collected (sometimes over many decades) by courts. This is *potentially* accessible to the citizen researcher, rather than that being automatically accessible. This – as with other data – is more and more being collected and stored as electronic data. What are the pressures which might limit access? What are the philosophies which might extend access? Such questions are of great importance to researchers both now and in the near and long-term future. Unfortunately, there are few certain answers to these questions, but the highlighting of them is surely a useful first step towards developing a measured view of how we should approach the opening up and/or the restriction upon information pertaining to the justice system.

2. Why is access problematic?

Given the obvious benefit to the researcher, why is access to information problematic? Mostly, because the new technology not only stores information but makes it much more open and malleable: the technology is seen as requiring control because it is more powerful than previous storage and accessing technologies. There is an understandable fear of the difference between print access and digital access – particularly that of ease of access and length of period of access. Even in 1972, the

² Both the Directive and the Data Protection Act (DP Act) provide for exceptions in the case of research. Accordingly, the s 33(3) of the DP Act provides that personal data which are processed only for research purposes in compliance with certain conditions may be kept indefinitely notwithstanding this requirement. Interestingly, the Directive only allows for exceptions to be made in relation to scientific and historic research but the DP Act just refers to research generally.

Younger *Report on Privacy*³ noted a concern about the usage of computers for the collection of data when there were only 4,800 computers “in use or on order”. The situation has become much worse – to the privacy advocate – since the inception of the internet and the freefall in the price of storage. Access to information is global and – with the rise of systems such as Google’s caching mechanism⁴ and the *waybackmachine*⁵ – once information has been put onto a web server, it can be very difficult to remove it from public view.

While the court systems in Europe have traditionally been under-funded and computer provision has been poor, developments in e-government have offered a means to improve the effectiveness of courts and also cut costs.⁶ Since courts are heavy users and producers of information – they receive and send monetary sums, create reports, produce judgments etc in a manner much like a power company’s billing office – they are ideal targets for computerisation. But also, since documents are also now produced electronically, it is not uncommon for UK judges in complex civil cases to request a digital copy of paperwork to allow them to work more easily with evidence and the Civil Procedure Rules have developed to enable this.⁷

In parallel to this, digital information production and collection by the courts is the public right to “open justice” – to attend court and to collect information and publish details on those cases which are open to the public.⁸

In a digital context, open justice becomes a qualitatively different entity.⁹ For example, in 1965 US President Johnson set up a Commission on Law Enforcement and the Administration of Justice to investigate causes of crime and prevention which also looked to computerisation of the courts. This was one of the first instances where privacy was raised as a potential issue. The Commission observed that the inefficiency of manual files provided a built-in protection of privacy which would no longer be available with computerisation. The systems which were developed in the US (for example, the National Crime Information Centre) were not, of course, public

³ *Report of the Committee on Privacy* (Cmnd 5012, 1972).

⁴ Even when a web page is removed from a site, it remains available through caching mechanisms both at the search engine and throughout the route that the communication packages travelled.

⁵ See www.waybackmachine.org (accessed 1 April 2009). The system acts as a repository of old and deleted web pages, so that it is possible to reconstruct a web site from as far back as the mid 1990s.

⁶ The Council of Europe recognised this and produced two recommendations in 2001.

⁷ In the UK see “Practice Direction 5b”, available at http://www.justice.gov.uk/civil/procrules_fin/contents/practice_directions/pd_part05b.htm (accessed 1 April 2009).

⁸ Some countries have routine restrictions on reporting certain courts (for example family courts, or those dealing with child offences).

⁹ See N Gomez-Velez, “Internet Access to Court Records: Balancing Public Access and Privacy” (2005) 51 *Loyola Law Review* 365; P Winn, “Technology, Values, and the Justice System: Online Court Records: Balancing Judicial Accountability and Privacy in an Age of Electronic Information” (2004) 79 *Washington Law Review* 307; C Sabin and K Black, “Managing Pandora’s Box: Recognizing and Handling the Privacy Risks Associated with Electronic Access to Court Records” (2005) 18 *Utah Bar Journal* 6.

access systems, but there were accusations that they almost became so. Marchand states:

Not only did NCIC permit access to the information by federally insured banks and private employers with state contracts but it also permitted a variety of secondary access. Data could be made available to credit agencies and private employers through a “friendly cop”. In addition, much of the information supplied to such private individuals or agencies could be wrong or outdated.¹⁰

These systems related to much pre-court activity – including police files where there was no intention to prosecute. All courts will have similar kinds of information (defendants who have been found not-guilty or where charges were dropped as the case neared) as well as the more formal and public information about successful prosecutions. It is not difficult to imagine that, with the latter type of information in digital format available via the internet (and available to the public), a few seconds would be sufficient to download the prosecution history of an entire town.

As examples of current accessibility to criminal records we can cite the freely available information from the Minnesota Department of Corrections.¹¹ Users of this State web site are enabled to locate prisoners (and view images of them) by name and to have information on their crime, date of expected release, etc available. Other US states also have information of this kind available: Illinois,¹² Ohio¹³ and North Carolina,¹⁴ are examples. LEXIS also allows for access to criminal records.¹⁵ Criminal records are thus a good example of one “problem” of publicly available information – that of the limits to rights to information.

The US PACER system (discussed below) would have been unthinkable in the 1970s when authors such as Westin¹⁶ were pointing to the dangers of a new computing technology which was then simply stand alone servers with relatively limited capacity.¹⁷ Downloading very large amounts of data, with twenty-four hour access from across the world, is now routine.

There appear to be no sites in Europe which mirror the online publishing by US state courts but there is a current view of the UK government that such access may well be beneficial.¹⁸ There is also a desire amongst many in Britain to have access to child

¹⁰ D Marchand, *The Politics of Privacy, Computers and Criminal Justice Records* (Information Resources Press, 1980), at 147.

¹¹ <http://www.doc.state.mn.us/> (accessed 1 April 2009).

¹² <http://www.idoc.state.il.us/> (accessed 1 April 2009).

¹³ <http://www.drc.state.oh.us/> (accessed 1 April 2009).

¹⁴ <http://www.doc.state.nc.us/> (accessed 1 April 2009).

¹⁵ See <http://risk.lexisnexis.com/search-and-order-court-records>.

¹⁶ A Westin and M Baker, *Databanks in a Free Society: Computers, Record Keeping and Privacy* (Times Books, 1972).

¹⁷ Twenty-five megabytes was very large at that date. In 1986, ten megabytes of mainframe storage cost around £25,000 (disk and drive).

¹⁸ “Justice Secretary Jack Straw is looking at plans to provide information of all criminal hearings on one national website which could become a vital source of information for journalists. Straw told Press

abuse registers. With the use of technology in prisons to organize prison life and in courts to better administer court processing, it is clear that the digitised information on various elements of criminal and civil records is available. The automatic presentation of such information to the public via a web site would be technically trivial, and the site could be designed to remove information as required by rehabilitation legislation (in the UK this is the Rehabilitation of Offenders Act 1974) so long as it was not copied or cached by other services.

Achieving a balance between access to information and privacy is a matter which has taken on increased significance in light of recent worldwide trend towards the introduction of laws which confer rights of access. Freedom of information (FOI) legislation is, for many jurisdictions, a relatively recent phenomenon. According to a 2006 report,¹⁹ over half of the seventy FOI laws in place at the date of its publication had been introduced in the previous decade. Given the relative novelty of such legislation, the development of strategies to achieve a balance between access and privacy has been, to a large extent, neglected and many jurisdictions are struggling with the best approach to legislating for an appropriate balance between these important rights.²⁰

The development of public criminal information systems has caused courts to investigate further the advantages and disadvantages of easy access. Minnesota's Supreme Court, while seeing potential problems in bulk data provision, reported why access to court records is of value to many:

Perhaps the least discussed, although most widely shared, benefit resulting from accessible judicial records is the use of those records as part of the critical infrastructure of our information economy. Reliable, accessible public records are the very foundation of consumer credit, consumer mobility, and a wide range of consumer benefits that we all enjoy. There is extensive economic research from the Federal Reserve Board and others that demonstrates the economic and personal value of accessible public records, but it does not require an economist to see that lenders, employers, and other service providers are far more likely to do business with someone, and to do so at lower cost, if they can rapidly and confidently access information about that individual.²¹

Gazette: 'Making sure justice is done and seen to be done is vital if people are to have confidence in the system. People have a right to know what happens when an offender is sentenced in our courts and a website with this information on would be one way of doing this.'" P Smith, Press Gazette, 3 September 2008.

¹⁹ D Banisar, *Freedom of Information Around the World* (Privacy International, 2006).

²⁰ See for example, New Zealand Law Reform Commission, *Access to Court Records*, Report No. 93, (2006); Judicial Conference of the United States, *Report of the Judicial Conference Committee on Court Administration and Case Management on privacy and public access to electronic case files*, (2002); Canadian Judicial Council, *Open Courts, Electronic Access to Court Records, and Privacy. Discussion Paper prepared on behalf of the Judges Technology Advisory Committee* (2003); Attorney General's Department of New South Wales, *Review of the Policy on Access to Court Information* (2006); County Court of Victoria, Discussion Paper: *Access to Court Records* (2005).

²¹ Minnesota Supreme Court, *Recommendations of the Minnesota Supreme Court Advisory Committee on Rules of Public Access to Records of the Judicial Branch* (2004).

Other states, too, have carried out substantial investigation of these issues. For example, Arkansas,²² New York State²³ as has the National Centre for State Courts²⁴ as well as an academic debate on the privacy issues concerning the granting of access to court records.

3. Who is ‘the Researcher’?

There is a tendency amongst academic researchers to adopt a position which assumes they have a more “genuine” or a more “public interest-oriented” *locus standi* and therefore deserve better access than others. Also, part of this academic assumption underlying this *locus standi* is that higher ethical requirements will enforce a more detached perspective. For example, that reference to individuals will be removed and that “dramatic, salacious or polemical narratives”²⁵ will not intrude.

These factors may in fact be true, but should certainly not be assumed for the purposes of this topic. There are many valid reasons why non-academic researchers may wish access to court documentation. Journalists, family members,²⁶ commercial bodies, potential litigators, variously interested individuals – all could wish access and it does not appear to us obvious why one group necessarily stands above other groups. For example, in the Northern Ireland context – where the courts have existed and adjudicated in a politicised and violent social conflict – there continue to be many individual requests for access to the court files in cases where academics have shown little interest.

Therefore, in this paper, we assume that when we wish to investigate notions of “public access” that it indeed means “public access”, rather than some scheme whereby academics are allowed privileged access. It may be that any harmonised European system would indeed deny full public access to information, but the research question should not presume that, nor should it presume – without further analysis – that institutionally co-opted academics deserve “better” access than a non co-opted public. Neither do we take a particular stance on what should or should not be allowed: our concern is with measuring and mapping the information environment rather than the particulars which are affected by that environment.

Our approach is thus not prescriptive, but concerned with making sense of a complex European court-based document access environment. It is our argument that there should be more clarity and agreement over just what research behaviour is possible and should be encouraged with respect to court-based information. There is currently

²² R Peltz, J Leonard and A Andrews, “The Arkansas Proposal on Access to Court Records: Upgrading the Common law with Electronic Freedom of Information Norms” (2006) 59 *Arkansas Law Review* 55.

²³ <http://www.courtaccess.org> (accessed 1 April 2009).

²⁴ National Centre for State Courts, *Public Access to Court Records: Implementing the CCJ/COSCA Guidelines: Final Project Report* (2005).

²⁵ The phrase was used by a reviewer of this paper.

²⁶ One of the authors received a letter from a family member – not seen for over forty years – from an open prison. The irony of knowing that they could discover information from prison records on an ancestor’s criminal activities, but not a current member, was obvious. Which of the two pieces of information is more important?

no transparency of legal position, and indeed trans-European research on civil or criminal justice would appear to be impossible given the disparate attitudes towards informational access in the various European member states. This is, we suggest, a weakness in the study of the civil and criminal justice systems for all those who wish access.

4. Is court-based information ‘public’?

The concept of *public information* presumes that the information is somehow “public” (usually related to governmental tasks) and, presumably, that this can be potentially utilised by members of the public – the body politic participating in civil society. Unfortunately, things are more complex than such a simple definition suggests. Just what is actually “public” in the sense of availability depends upon historical and cultural factors. For example, tax returns are viewed as private documents in the UK open only to the tax authorities (unless otherwise authorised – e.g. in criminal proceedings), whereas in Norway they can be accessed by any member of the public (prior to 2002 in print form, but electronically after this date). Death certificates in the UK are public, but in France are strictly confidential even from the next of kin.²⁷

Furthermore, the source of “public information” may also vary: what information is produced by a “public authority” in one country may not be so carried out in another.²⁸

Access to public information may be enabled through a formal “public register”, through statutory mechanism, or other less formal means. Note that “being accessible” does not necessarily mean that users are free to use this information in any way they wish: copyright licences in particular are not always passed along with access rights, so that the public may inspect a document but may not use it in other ways (such as republishing). Reasons for this are obvious – the collection of data by government can be expensive and there can be opposition to subsidising commercial activity from the public purse. In the US federal materials are explicitly excluded from copyright protection,²⁹ but this is rarely the case in Europe.³⁰

Another example: it is possible in most countries to attend local criminal courts or peruse local newspapers and draw up a database of prosecutions in the local area. The database could include information on drink drivers, sexual offenders, burglars and it would be possible to include a wide variety of information: all of it, clearly, of a public nature. Indeed, such activities have been common for many years where credit agencies have collected information from courts on debtors and made this available on a commercial basis. On a more mundane level, judgments from most European

²⁷ Information provided by an anonymous reviewer.

²⁸ Two standard texts on UK law are P Coppel et al, *Information Rights* (Sweet & Maxwell, 2004) and P Birkinshaw, *Government & Information: the law relating to access, disclosure and their regulation*, 3rd Edition (Tottel Publishing, 2005).

²⁹ US Code, Title 17, §105.

³⁰ See H Burkert, “The Mechanics of Public Sector Information” in G Aicholzer and H Burkert (eds) *Public Sector information in the Digital Age* (Edward Elgar, 2004). See www.hms.gov.uk for the UK situation.

courts are copyright of the relevant government or agency. In the UK, differing again, there is some dispute over whether the judge or Court Service owns the judgment, and frequently the only text version of a judgment is copyright of the privately employed court stenographer.³¹

Is, then, court based information public? Answered *in toto*, it certainly is not. There are some parts of the information produced which do become part of wider information networks (databases, newspaper reports) etc. But, for most European countries it would not be possible to describe the output from the court system as public as that, say, from the US court system.

5. Contents of Court Records

Discussion of court records in the abstract does not really demonstrate the depth of materials available and the utility to the researcher of having these available digitally. Prior to the development of the new digital Information and Communication Technologies (ICT), access to court and tribunal records was – as a result of physical constraints – hardly an issue. Any records after litigation or prosecution were usually bundled together by a junior member of court staff, stored in a basement and then, later, passed to the Public Records Office (PRO) after around ten years or so. Indexing was limited and just what was contained in each bundle could only be discovered by physical browsing. Today, as we have pointed out, court information is less paper-based and more and more is being produced in digital format.³² Such access has developed significantly in some jurisdictions. For example, the US PACER system, run by the Administrative Office of the United States Courts offers:

[A]n inexpensive, fast, and comprehensive case information service to any individual with a personal computer (PC) and Internet access. The PACER system permits you to request information about a particular individual or case. The data is displayed directly on your PC screen within a few seconds. The system is simple enough that little user training or documentation is required.³³

The information which can be accessed is wide ranging, well-indexed and includes:

- A listing of all parties and participants including judges, attorneys, and trustees;
- A compilation of case related information such as cause of action, nature of suit, and dollar demand;
- A chronology of dates of case events entered in the case record;
- A claims registry;
- A listing of new cases each day;

³¹ P Leith and C Fellows, “Problems Arising for BAILII from the History of Law Reporting”, forthcoming.

³² One reason for this is the continuing interest in e-government. See, for example, Money Claim Online, the UK Court Service digital version of the small claims court (available at <https://www.moneyclaim.gov.uk/csmco2/index.jsp> (accessed 1 April 2009)).

³³ <http://pacer.psc.uscourts.gov/pacerdesc.html>

- Appellate court opinions;
- Judgments or case status; and
- Imaged copies of documents.

This US content is mirrored in other jurisdictions, but exactly what is retained after each case is heard will depend upon a number of factors: some procedural, some statutory and some chance. For example, in the UK, it is not uncommon to note that judges have been requested to produce redacted judgments due to commercial sensitivities³⁴ and what is bundled up and arrives, eventually, at the PRO appears to be more random than planned – it may include full or partial police files, pleadings, evidence, etc, but there is no checklist against which collated files should be matched – a situation which changes with computerisation since the data collection system becomes more formalised.³⁵

While, historically, the courts have been the primary producer of legal data, administrative justice has been a growing field – offering advantages which the traditional court format cannot offer – and the recent attempts to develop harmonised systems amongst these tribunals (in the UK, in particular) mean that the information which will be produced may increase through more centralised and better resourced facilities. Already, Employment Tribunal decisions are widely accessible in the UK but the *Leggatt Report* appeared to desire more informational access through Information Technology:

Superior public confidence will surely flow naturally from the use of modern systems across the Tribunals Service. If there is greater public understanding of the Tribunals System and of its performance, if tribunals become more accessible and more efficient, and if they come to be perceived as delivering a higher quality of service, then it is likely that public confidence will increase and the entire system of tribunals will enjoy a much improved reputation within and beyond the United Kingdom.³⁶

Leggatt particularly noted the desirability of systems such as BAILII³⁷ to promulgate decisions from tribunals.

³⁴ This is relatively common in Chancery decisions. For example, Jacob LJ stated “This judgment in its full form is for the parties' eyes only. By the time of its publication portions will have been redacted by the parties so as to exclude alleged trade secrets. Since that will reduce its intelligibility to the general reader and because no question of general interest arises I see no point in setting out background explanatory matter. It is sufficient to delve straight into the points argued, pausing only to remind myself of the requisite standard for appeal on a question of fact”: *Environmental Technologies Inc (EPI) & Anor v Symphony Plastic Technologies Plc & Anor* [2006] EWCA Civ 3 (26 January 2006).

³⁵ With a computerised system, a checklist becomes central. See Crown Prosecution Service Inspectorate (CPSI), HM Inspectorate of Constabulary (HMIC), HM Magistrates' Courts Service Inspectorate (MCSI), HM Inspectorate of Prisons (HMIPrison), HM Inspectorate of Probation (HMIP) and the Social Services Inspectorate (SSI), *Casework Information Needs within the Criminal Justice System, Vol 2* (2006), available at http://www.hmica.gov.uk/files/Vol_2_complete_in_one_file.pdf (accessed 1 April 2009).

³⁶ A Leggatt, *Tribunals for Users – One System, One Service Report of the Review of Tribunals* by Sir Andrew Leggatt (Department of Constitutional Affairs, 2001), at para 10.18.

³⁷ British and Irish Legal Information Institute: www.bailii.org (accessed 1 April 2009).

The overall situation, then, is one where there are dramatic changes taking place in the information environment in the courts and tribunals, and many strands require more detailed analysis than they have had to date.

6. The Legal Context

Undertaking research which utilises court documentation is not a simple task: the legal hurdles which the researcher must meet, analyse and overcome are not insubstantial, particularly given that there are no clear guidelines upon which the researcher can rely. Unfortunately, such an analysis might tend to act as a chilling factor rather than an encouragement to pursue court documentation-based research. Why so? Simply because the legal imponderables in such research militate against developing simple research strategies – the path towards actually starting a research project becomes longer and more difficult when it involves court-based data. By teasing out these legal difficulties, we see just how difficult it is for the researcher who wishes to embark upon independent research.

6.1 Data Protection

The Data Protection Directive (DP Directive)³⁸ aims to protect personal data which is defined as “any information relating to an identified or identifiable natural person” and an identifiable person is “one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity”. The central provision of the Directive consists of a requirement that member states ensure that those who process personal data do so in a manner compatible with a set of data quality principles.³⁹ These principles cover fair and lawful processing, purpose specification, sufficiency, accuracy and time. The two most significant data quality principles are those relating to fair and lawful processing and purpose specification. The former places an obligation upon those who are processing personal data to ensure that the personal data is processed fairly and lawfully. The purpose specification principle can be referred to as the core provision of data protection law. It is aimed at ensuring that data collected for one purpose shall not be used for another, incompatible purpose.

As well as requiring compliance with the data protection principles, the DP Directive sets out criteria for the legitimate processing of personal data. Separate sets of criteria are provided for with respect to sensitive and non-sensitive data. The effect of these provisions is that processing of personal data can only take place where it comes within the scope of these criteria. In the case of data relating to offences or criminal convictions, processing of such data may only be carried out:

[U]nder the control of official authority or if suitable safeguards are provided under national law, subject to derogations which may be granted by the

³⁸ Council Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. L 281 31.

³⁹ *Ibid*, art 6.

Member State under national provisions providing suitable specific safeguards. In addition, a complete register of criminal convictions may be kept only under the control of official authority.⁴⁰

A wide definition of processing is provided for: it covers matters such as collection, recording, organisation, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination, making available, alignment or combination, blocking, erasure or destruction.

The scope of the DP Directive is limited by various exclusions. In particular, the DP Directive does not apply to activities falling outside the scope of community law. A specific exclusion is provided for in respect of processing operations concerning the activities of the State in the area of criminal law. As well as the exclusions, the DP Directive contains a set of exceptions to the operation of various aspects of the protection regime provided for, including the application of the data quality principles. Another important element of the DP Directive is to be found in article nine, which requires that member states put in place exemptions or derogations in respect of “the processing personal data carried out solely for journalistic purposes or the purpose of literary or artistic expression”. Such exemptions or derogations must only be provided for where “they are necessary to reconcile the right to privacy with the rules governing freedom of expression”.

It is clear that there are complex issues regarding what constitutes “personal data”, “sensitive personal data” and what is “public” when discussing access to court records. The extent to which court records qualify as personal data will certainly depend on the nature of the record in question. For example, the UK Court of Appeal’s decision in *Durant*⁴¹ adopted a particular approach to the scope of “personal data”. An application had been made to view files which contained the name of the applicant, but this was not considered “personal data” under the terms of the DP Directive.

For the researcher interested in court records there are a number of problems:

- The impact of the exclusion from the DP Directive of processing operations concerning the activities of the State in the area of criminal law on the question of access to court records concerning criminal matters must be considered;
- The implications for court records of the provisions regarding the processing of data relating to offences, criminal convictions and registers of criminal convictions must be assessed;
- The exceptions to the protections provided for under the DP Directive must be borne in mind. In particular, there is an exception in respect of restrictions which constitute a necessary measure to safeguard “the rights and freedoms of others”.⁴² The possible operation of this

⁴⁰ *Ibid*, art 8(5).

⁴¹ *Durant v Financial Services Authority* [2003] EWCA Civ 1746 (08 December 2003).

⁴² DP Directive, art 13 (1)(g).

exception to allow for the granting of access to court records containing personal data on the grounds that such access is necessary to safeguard the right of access to information of those seeking such access must be considered;

- To what extent is there a harmonised approach to the exemptions in article eleven relating “processing for statistical purposes or for the purposes of historical or scientific research”; and
- To what extent the media can, in seeking access to court records, avail of the exemption or derogation provided for under article nine.

All of these points are relevant across Europe. Derogations, philosophies of access and also procedural issues will all impact upon how these exceptions and exclusions are implemented in each European jurisdiction.

6.2 Privacy/Confidentiality

The role of article eight of the European Convention on Human Rights (ECHR) in influencing developments in privacy law cannot be overestimated but the differing approaches to privacy in Europe which impinge upon how court records are viewed in each country. For example, basing of privacy law upon the law of confidence as outlined by Woolf LCJ in *A v B*⁴³ has led to a situation where “privacy” is being viewed in a manner which is not entirely consistent with the ECHR’s approach,⁴⁴ but is more related to rights of publicity (as in *Douglas v Hello*⁴⁵ where images similar to those in dispute were published through agreement with a rival newspaper).

A practical example of how privacy might affect access to records is that an individual may object to his name appearing in a judgment which is simply uploaded to an information service such as BAILII. In Spain, for example, surnames are routinely removed from published criminal judgements.⁴⁶ Some individuals in the UK have requested that judgments concerning them should be removed from BAILII – at least one vexatious litigant has complained, yet his name appears on a list published online by the Court Service.⁴⁷ Most services in common law countries would not remove references to individuals but the Canadian Legal Information Institute has

⁴³ *A v B & C* [2002] EWCA Civ 337 (11th March, 2002).

⁴⁴ See H MacQueen, “Searching For Privacy In A Mixed Jurisdiction” (2006) 21 *Tulane European and Civil Law Forum* 73, where the differences between the Scots approach to privacy and breach of confidence is discussed. For a critical assessment of breach of confidence as a basis of privacy, see P Leith, “The Socio-legal Context of Privacy” (2006) 2 *International Journal of Law in Context* 105.

⁴⁵ *Douglas & Ors v Hello Ltd & Ors* [2005] EWCA Civ 595 (18 May 2005).

⁴⁶ See <http://www.poderjudicial.es> (accessed 1 April 2009). (Nb: available in Spanish only.)

⁴⁷ See http://www.hmcourts-service.gov.uk/infoabout/vexatious_litigant/index.htm (accessed 1 April 2009).

considered what might be the technical problems involved in doing this, should the courts require anonymisation of a person's name.⁴⁸

It might be thought that a researcher has no need to access such detailed information, but it is not difficult to imagine good quality research which was interested in the nature of criminal activity within communities and how individuals and families affect a larger unit – socio-geographical legal research perhaps (of the sort routinely done by policing bodies). Without access to such “personal” information from court records, it would be difficult to envisage how a research plan could be developed.

Opposition to easy access is not usually made on privacy grounds. Rather, the argument is that for integration into the community – for criminal records in particular – of the criminal:

A key element of sentencing is the rehabilitation of offenders to reduce re-offending and contribute to safer communities. Employment is an important aspect of resettlement – it can halve the risk of re-offending – yet a criminal record can be a real barrier. Effective arrangements must be in place to ensure that, where it is safe to do so, individuals can put their past behind them.⁴⁹

Yet, in many countries, with the availability of electronic versions of the local press, the weekly “court column” – with drink driving, fighting amongst neighbours etc being reported and searchable – the researcher would have access to that information from a different source, anyway. Just how this integrates with legislation dealing with spent convictions is not clear, but is obviously of import to the researcher.

6.3 Open Justice

The principle of open justice is a fundamental principle of the rule of law.⁵⁰ It has its origin in the common law and its best known expression is to be found in the statement of Hewart LCJ in *R v Sussex Justices Ex parte McCarthy*⁵¹ to the effect that: “[i]t is not merely of some importance but is of fundamental importance, that justice should not only be done, but should manifestly and undoubtedly be seen to be done.”

The principle is also recognised in international human rights treaties such as the International Covenant on Civil and Political Rights (article fourteen) and of the

⁴⁸ “In Canada, Internet publication of case law does not require a systematic anonymization of parties named in decisions. However, there are statutory requirements that identities of certain participants in the judicial system be protected. Given the supplementary costs entailed by anonymization, free access to these decisions has become somewhat scarce in Canada. In order to contribute to lowering the costs of anonymization, we are developing a software application designed to automate some of the repetitive chores associated with the anonymization of judgments. The current version of this application, called NOME, is an MS Word macro. NOME allows for automating the replacement of names mentioned in a document by their initials or by any other characters”: see <http://www.frli.org/spip.php?article110> (accessed 1 April 2009).

⁴⁹ Statement on UK Home Office Web Site, 2005.

⁵⁰ See discussion in P Leith, “The Socio-legal Context of Privacy” (2006) 2 *International Journal of Law in Context* 105.

⁵¹ [1923] All ER Rep 233.

European Convention on Human Rights (article six). The fundamental rule of open justice is that judicial proceedings must be conducted in an open court to which the public and the press have access.⁵² Tribunals, too, are similarly subject to the open justice philosophy.⁵³

The requirement that justice be dispensed in public is, however, subject to exceptions. It is in these limitations that the picture becomes less clear. For example, one aspect of open justice must be access to the records of a court which is arguably a necessary corollary of the right to have justice dispensed in public. As in the case of the principle that justice should be dispensed in public, the principle of access to court records cannot be absolute but must give way in some circumstances to other interests. Unfortunately, it is not clear how the principle would give way in practice to these other interests.

Open justice also has several possible limitations allowed by article six of the ECHR:

Judgement shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

The UK – as mentioned above – has disallowed public access to family court hearings,⁵⁴ with significant unease from single issue organisations who argue that this hides biased decisions (usually, critics argue, against fathers) from the public.⁵⁵ One individual who was involved in a family law case, Pelling, had requested that his case should be heard in public but was denied this by the judge. He unsuccessfully undertook to have the rule declared *ultra vires*⁵⁶ (and later was sentenced for contempt of court for publishing a judgment, which was given in private, in print and

⁵² This principle has been recognised across a range of jurisdictions: see J Spigelman, “The Principle of Open Justice: A Comparative Perspective” Address by the Honourable J.J. Spigelman AC, Chief Justice of New South Wales (Media Law Resource Centre Conference, London, September 2005). See P Keyzer, *The Courts and the Media* (Halstead Press, 1999) and P Keyzer, “Media Access to Transcripts and Pleadings and ‘Open Justice’: A Case Study” (2002) 2(3) *The Drawing Board: An Australian Review of Public Affairs* 209–219 for the Australian experience.

⁵³ See *Kay v Newcombe* [1997] EWCA Civ 2028 (4 July 1997) where the applicant was concerned about sexual matters being made public. Peter Gibson LJ confirming the public nature of these hearings noted: “The employee will, of course, find himself potentially the object of interest when the allegations made by the employer when her evidence is heard are reported. These cases are unfortunate ones where, unhappily, unsavoury allegations do attract the attention of the press, but that matter was taken into account by the Industrial Tribunal.”

⁵⁴ Civil Procedure Rules, Rule 39.

⁵⁵ “In just a few years Fathers 4 Justice has not only effected ‘climate change’, but it has also succeeded in discrediting the secret courts and undermining public confidence in them. The result has been to force the government to advance proposals to open up the secret family courts to greater scrutiny and propose tougher enforcement of contact orders”: <http://www.fathers-4-justice.org> (accessed 10 Nov 2008).

⁵⁶ *Pelling, R (on the application of) v Bow County Court* [2000] EWHC 636 (Admin) (19 October 2000).

on the internet).⁵⁷ At the European Court of Human Rights he argued that public access was necessary in the interest of justice and was required under arts six and ten of the ECHR.⁵⁸ The court was not persuaded, pointing to the fact that – although not public – anyone who could establish a legitimate “interest” in a case would be allowed access to relevant judgments.⁵⁹

In the UK, Wall LJ has argued for wider accessibility to family law courts, arguing that it was not the judiciary who wished the “secrecy” which has recently been perceived as problematic:

It is, in my judgment, unacceptable that conscientious judges and magistrates up and down the country, doing their best, with inadequate resources and under heavy pressure of work to make difficult decisions in the best interests of children, should be accused of administering “secret” justice. Let it always be remembered that it was Parliament, not the courts, which imposed the restrictions contained in CA 1989,⁶⁰ section 97 and AJA 1960⁶¹ section 12. The judicial task is to interpret and apply those statutes.⁶²

The accusation of “secret justice” appears to be a powerful critique and is causing a change in attitudes. For example, in Ireland, a pilot project was established in 2006 by the Courts Service for the recording and creation of reports of family law proceedings for the first time for distribution to the media and the public.⁶³

The argument for the essentiality of open access was raised around the case of Professor Roy Meadow, who was struck off by the General Medical Council for his behaviour as an expert in child abuse cases (he was later re-instated following an appeal).⁶⁴ At the time, one newspaper suggested:

The problem with child protection cases, especially those involving expert witnesses, is that unless and until they result in a criminal trial, they take place in secret behind closed doors. The media has no access and there is therefore

⁵⁷ *HM Attorney General v Pelling* [2005] EWHC 414 (Admin) (8 April 2005).

⁵⁸ *B and P v The United Kingdom* (Applications nos 36337/97 and 35974/97), 24 April 2001.

⁵⁹ “The Court notes that anyone who can establish an interest may consult or obtain a copy of the full text of the orders and/or judgments of first-instance courts in child residence cases, and that the judgments of the Court of Appeal and of first-instance courts in cases of special interest are routinely published, thereby enabling the public to study the manner in which the courts generally approach such cases and the principles applied in deciding them. It is noteworthy in this respect that the first applicant, despite his desire to share information about his son with the child’s grandparents, never made any application either for the grandparents to be present in the county court or for leave to disclose the residence judgment to them”: *ibid*, at para 47.

⁶⁰ Children Act 1989.

⁶¹ Administration of Justice Act 1960.

⁶² See http://www.judiciary.gov.uk/docs/speeches/290606_lecture.pdf (accessed 1 April 2009).

⁶³ See:

<http://www.courts.ie/courts.ie/library3.nsf/16c93c36d3635d5180256e3f003a4580/77f49293da750f82802571fe0056728a?OpenDocument> (accessed 1 April 2009).

⁶⁴ *Meadow v General Medical Council* [2006] EWHC 146 (Admin) (17 February 2006); *General Medical Council v Meadow* [2006] EWCA Civ 1390 (26 October 2006).

minimal opportunity for transparency or scrutiny. If one wants to prevent further miscarriages of justice taking place and for a system that often relies on expert witnesses to sustain, then the answer is to open up that system to scrutiny and let the open justice principle break its way into family courts.⁶⁵

The difficulty which a researcher would have carrying out research into, say, family law and its handling by courts would appear to be substantial – much of interest could be “off limits” and this must affect the research output. Such research is not impossible – so long as permissions are granted by the relevant authority – but independent research which was not approved by the courts would certainly be impossible, despite ideals of “open justice”.⁶⁶

6.4 Freedom of Information (FOI)

While the introduction of access to information laws has become widespread around the world,⁶⁷ FOI has only recently come into effect in the UK (2005) while it has been place in Ireland since 1998 and for much longer in Scandinavian countries. There are therefore developments – sometimes contradictory – between the various legislation regimes. Many FOI measures contain exceptions which impact on the accessibility of documents concerning court proceedings. For example, subject to some limited exceptions, records held by courts or tribunals are excluded from the scope of the Irish FOI Act.⁶⁸ Similarly, the UK FOI Act includes an exemption in respect of documents filed with a court for the purposes of proceedings as well as documents created by a court for the purposes of proceedings.⁶⁹ The operation of neither the Irish exclusion nor the UK exemption is subject to a public interest override.

With respect to court records in the UK, those which relate to ongoing litigation are exempt from FOI rights under section thirty-two:

- (1) Information held by a public authority is exempt information if it is held only by virtue of being contained in—
 - (a) any document filed with, or otherwise placed in the custody of, a court for the purposes of proceedings in a particular cause or matter,
 - (b) any document served upon, or by, a public authority for the purposes of proceedings in a particular cause or matter, or
 - (c) any document created by—
 - (i) a court, or

⁶⁵ Guardian, Tuesday 19 July 2005.

⁶⁶ See, for example, the UK Ministry of Justice information on research in courts at <http://www.justice.gov.uk/publications/announcement160508a.htm> (accessed 1 April 2009). The Data Access Panel of the Courts Service considers such applications.

⁶⁷ Banisar (see note 19 above); www.freedominfo.org (accessed 1 April 2009).

⁶⁸ Freedom of information Act 1997, s 46(1)(a). See M McDonagh, *Freedom of Information Law in Ireland*, 2nd edn (Round Hall Sweet & Maxwell, 2006).

⁶⁹ Freedom of Information Act 2000, s 32.

(ii) a member of the administrative staff of a court, for the purposes of proceedings in a particular cause or matter.

There remains some disagreement over what a “court record” actually is. The Court Service in England has claimed that judgments, as court records, are exempt.⁷⁰ In *Mitchell*⁷¹ the appellant wished to view a transcript of a trial which had taken place in open court, had been recorded and transcribed (but later destroyed under a document retention policy). The Information Tribunal suggested:

Transcripts of civil proceedings are, by virtue of paragraphs 6.3 and 6.4 of Practice Direction 39 to CPR Part 39, obtainable by a non-party upon payment of a prescribed fee, which is, we assume, chargeable for economic reasons, not as a curb to access. The Criminal Procedure Rules 2005 contain no provision relating to access. We are unaware of any statutory limitation or relevant practice direction and, as already indicated, cannot, in the absence of any contrary rule, envisage any plausible reason for barring anybody prepared to defray reasonable costs from reading what happened in a public trial ... Therefore, we find no indication that the courts themselves seek to restrict the dissemination of transcripts of public hearings; nor do we see why they should.⁷²

However, a more recent attempt to acquire – on CD – a recording of proceedings which had occurred in open court was decided by the Information Tribunal in favour of the Ministry of Justice who argued that a recording (or transcript) was a document created by the court and thus exempt, overturning the earlier decision in *Mitchell*:

The Civil and, as amended, the Criminal Procedure Rules provide for limited judicial control over transcripts. Rule 65.9 of the Criminal Procedure Rules imposes a duty on the transcriber to supply transcripts for the purposes of an appeal and forbids the provision of records of public interest immunity hearings without leave. Rule 5(4) of the Civil Procedure Rules permits the provision of pleadings and judgment on payment of a fee. Rule 10.15(6) of the Family Procedure Rules 1991 prohibits the dissemination of any material created for the proceedings without judicial leave. This latter rule, which was not considered by the Tribunal in *Mitchell*, lends the clearest support to the Appellant’s argument as to the policy behind section 32(1) ... We conclude, therefore, that a tape recording is a document created by a member of the administrative staff of a court and that *Mitchell* was wrongly decided.⁷³

The tentative UK conclusion is that judgments are available to the researcher through FOI access, but little else can be got without the permission of the court. Even this tentative conclusion, though, does not appear to be an absolute – a judge may prefer not to make available a decision even though it is of much public interest. In Ireland,

⁷⁰ Personal communication.

⁷¹ *Mitchell v The Information Commissioner* [2005] UKIT EA_2005_0002 (10 October 2005).

⁷² *Ibid*, at paras 39-40.

⁷³ *Ministry of Justice v Information Commissioner* [2008] UKIT EA_2007_0120 (29 July 2008), at paras 31-32.

relevant decisions include Decision No 99003,⁷⁴ which was dealt with by the High Court on appeal in Minister for Justice, Equality and Law Reform and Information Commissioner⁷⁵ and, in line with the current situation in the UK, found that court transcripts were not accessible under FOI.⁷⁶

The application of FOI law to the courts in the UK is further confused by courts not being “public bodies” in terms of the Act, while the Court Service is. The relationship between the two entities and where the line lies between what is produced and held by one or the other also lacks clarity.

6.5 Archives/Public Records Legislation

Repositories of archives and public records have the potential to contribute significantly to securing access to older court records. Access to court records under such legislation has tended in the UK and Ireland to be relatively restricted. For example, to gain access to High Court records which are seventy-five or less years from date of hearing from the National Archives of Scotland, permission must be given by the court.⁷⁷ Crown Court records are usually not available to the public for thirty years in England and Wales.⁷⁸ The same time scale applies in Ireland.⁷⁹ Court records are required to be transferred to the National Archives when they are thirty years old but it is not clear whether this actually happens in practice. Such broad and lengthy exemptions to access were developed in a more closed official culture, and – once again – the position of the researcher who wishes access to recent European court records is unclear.

The Irish Courts Officers Act 1926, for example, makes it clear that access to court records is a matter for the courts: section sixty-five of that Act states that “all proofs and all other documents and papers lodged in or handed in to any court in relation to or in the course of the hearing of any suit or matter shall be held by or at the order and disposal of the judge or the senior of the judges by or before whom such suit is heard”. Part 5 of the UK Civil Procedure Rules indicates the general rule that non-parties can access statement of case or public judgments, but permission may be given to access other documents.⁸⁰

⁷⁴ September 13, 2000.

⁷⁵ [2003] IEHC 29.

⁷⁶ *Minister for Justice, Equality and Law Reform v Information Commissioner* [2001] IEHC 35; [2002] 2 ILRM 1 (14 March 2001)

⁷⁷ See <http://www.nas.gov.uk/guides/crime.asp> (accessed 1 April 2009).

⁷⁸ See <http://www.nationalarchives.gov.uk/catalogue/RdLeaflet.asp?sLeafletID=402> (accessed 1 April 2009).

⁷⁹ Archives Act 1986.

⁸⁰ See http://www.justice.gov.uk/civil/procrules_fin/contents/parts/part05.htm (accessed 1 April 2009).

6.6 Re-Use of Public Sector Information (PSI)

The demand for access to public sector information for commercial purposes is growing rapidly. This issue constitutes an important aspect of the formulation of national and global policies on access to information. At European Community level, policy developments in this area have culminated in the adoption of a Directive on Re-Use of Public Sector Information, the aim of which is to facilitate the commercial exploitation of information held by public sector bodies.⁸¹ This measure is aimed solely at the re-use of public sector information that is already available; it does not seek to set standards in terms of the granting of access to public sector information. The Directive has been transposed into national law by regulations in both the UK⁸² and Ireland.⁸³

It is clear that such applications based upon PSI can be powerful and potentially intrusive. In the US, there are a variety of commercial systems which piggyback upon available court information. For example, systems such as *Public Record Finder* in the US link directly into court and criminal public records.⁸⁴ Lexis, too, offers this facility. The possible application of the PSI regulations to European court records is something which would certainly enable significant development of research strategies, yet clearly is contrary to much of the existing court practice and procedure.

6.7 Commercial Confidence and FOI

The new governmentality model is based on the partnership between government as director and agency as task manager. The agency may be a regulator, a semi-autonomous government spin-off, or it may be a fully commercial partner. The relationship between these agencies and governments are clearly problematical when it comes to access to information – what may be viewed as of “public interest” can quickly become “private interest”. As a private interest, the owner can protect this through trade secret law and law of confidentiality generally.⁸⁵ Since confidentiality relies upon keeping the reason why something is confidential itself secret, it is a very powerful tool indeed.

There has been much debate in the UK over the value of PFI (Public Finance Initiatives) and PPP (Public Private Partnerships) which have been the Labour government’s preferred tool to invest in the public sector. The basic idea has been that, in the past, these large spending contracts (schools, hospitals, etc) were high risk. They were usually late and over budget. By using PFI and PPP, the risk is supposed to be transferred to the private sector. Unfortunately – as a host of reports by the National Audit Office (NAO) show⁸⁶ – the process has not been as effective as the

⁸¹ Directive 2003/98/EC, [2003] OJ L345/31.

⁸² European Communities (Re-Use of Public Sector Information) Regulations 2005, SI No 279 of 2005.

⁸³ The Re-use of Public Sector Information Regulations 2005, SI No 1515 of 2005.

⁸⁴ See <http://www.publicrecordfinder.com/> (accessed 1 April 2009).

⁸⁵ Office of Government Commerce, *PFI projects: disclosure of information and consultation with staff and other interested parties* (1998).

⁸⁶ See <http://www.nao.org.uk/> (accessed 1 April 2009).

government might have wished. Not only have there been significant problems in costs and completion, but scrutiny of these contracts by the public (and in fact by the NAO) has been difficult due to the commercial confidentiality regime under which they are signed and run. Even supporters of the financing tool have suggested problems:

As a result of the commercial confidentiality inherent in the PFI process, virtually no informed public debate has taken place on the merits of that scheme. The details have seeped out and the local authority has quashed every request for information or a public debate on the ground that it would breach commercial confidentiality.⁸⁷

In contrast to rights to confidentiality, there is of course a growing expectation of FOI access. Such an approach to FOI clashes with rights to keep information in confidence. The guidelines from the UK government on how to treat this clash when dealing with PFI Projects, for example, indicate that:

[P]ublic sector clients should not misuse the term "commercial confidentiality" as an excuse to withhold information. When public sector clients wish to withhold information on individual PFI projects "for reasons of commercial confidentiality", they should only do so where disclosure would cause real harm to the legitimate commercial or legal interests of suppliers, contractors, the public sector client or any other relevant party.⁸⁸

However, the FOI Act appears to provide substantial exemptions for commercial partners in the new governmental models (for example in section forty-three). Recent decisions appear to suggest that commercial confidentiality is not being allowed to restrict access as much as critics feared. For example, Derry City Council was required to provide information on financial support toward Ryanair after investigation of the public interest in these payments.⁸⁹

Why is this of relevance in discussion of court records? Because the courts will frequently use commercial providers to undertake developments and record handling. The *Libra* project to computerise Magistrates Courts in the UK was just such an occasion, leading to a project which had substantial problems. The NAO report of 2003 noted the rise in costs, delays, renegotiations of contract, breach of contracts, etc – all of which the researcher into the court system may well have wished to investigate.⁹⁰ At the time of the NAO report, the chairman of the Public Accounts Committee said to various media sources, "[t]he *Libra* project is one of the worst IT projects I have ever seen. It may also be the shoddiest PFI project ever."

⁸⁷ D Lock, UK House of Commons debate in March 1999, reported at <http://www.parliament.the-stationery-office.co.uk/pa/cm200102/cmselect/cmpublicadm/263/1112208.htm> (accessed 1 April 2009).

⁸⁸ Local Government Information Unit, *Consultation with the workforce and public-private partnerships* (2005), Summary, at 4.

⁸⁹ *Derry City Council v Information Commissioner* [2006] UKIT EA_2006_0014 (11 November 2006).

⁹⁰ The Comptroller and Auditor General, *New IT systems for Magistrates' Courts: the Libra project*, HC 327 Session 2002-2003: 29 January (2003).

7. Conclusion: The Need for European-wide Research

We take the view that a major impediment that researchers meet in analysing tribunal and court systems is the lack of basic data and information on the processes. Usually researchers will attempt to overcome this constraint by means of interview of participants or through basic statistical analysis of what limited information is available. While good quality work comes from using these approaches, there is a sense in which the research community appear to be running out of novel techniques to produce more novel findings. We suggest that – in order to have any real long term impact upon the quality of civil, criminal and administrative justice – that it is essential to build a system which is more open and measurable. That is a system where decisions can be tested against various forms of evidence – particularly that of documentary evidence and which will thus give depth and context to the other forms of analysis.

In many socio-legal studies involving, say, the criminal justice system it is sufficient to look at the local problems with a relatively provincial focus. In civil and administrative justice matters, however, this approach is not possible. Much of the legal framework which regulates topics such as access to records is European in origin and thus a wider comparative framework of analysis is still required. European Directives and judgments radically affect the way we practice and determine procedures in the common law countries.

Typical issues which a research project might investigate in a European context might include:

- Rules of the courts of the various jurisdictions, their application and level of information access;
- FOI cases relating to requests for access to court records;
- Re-use policies and internal/external developments;
- Data protection and privacy issues generally and with particular relevance to each jurisdiction;
- Funding/control of ICT court/tribunal developments (to provide background context to the economic environment of courts and tribunals in each jurisdiction); and
- Development/philosophies of administrative justice systems vs. courts across Europe as it relates to information access.

And the views of various actors:

- The judiciary & tribunal staff: to determine judicial attitudes to disclosure of court records;
- Court staff;
- Journalists: to determine whether they are satisfied with current approaches to access to court records;
- Legal publishers: issues of product development;
- Litigants: to see what concerns they may have in relation to disclosure of court records;
- EC representatives who are involved in policy making issues - (e.g. art twenty-nine members, members of the Commission's Information Systems Directorate); and

- Many others.

The emphasis should be on the “open” element, since researchers can gain access to some documentation when given permission by the court. We suspect – though cannot currently assert – that there will be a difference in research findings which are part of approved research and those which are unsupervised by the courts.⁹¹

A range of issues need to be addressed in exploring the right of access to court records. These include matters such as:

1. What categories of court records are/should be made available? In respect of each of these categories, should exceptions be made in respect of particular types of records: e.g. records containing medical information or criminal records history?
2. To what extent does/should the approach to access vary depending on the type of proceedings? E.g. in civil, criminal or family law?
3. Do or should different rules apply in relation to the granting of access to different groups? E.g. parties to the legal proceedings, the public, the media?
4. What form of access is – or should be – granted? In particular should online access to court records ever be curtailed where access to the paper records is allowed?
5. Are or should any temporal distinction be drawn in terms of the granting of access to court records? E.g. should access be prohibited or limited until the proceedings have been concluded and, once granted, should the access right continue indefinitely?

We have outlined the various legal elements which impinge upon potential research projects which wish to undertake independent research into the court system – that is, research which is not “approved” by the courts themselves. These appear to us to be more negative than positive. The system looks to be designed more to be unhelpful than helpful to the researcher. It may be that such a bias against the independent researcher is desirable, but we are not necessarily convinced. A well-organised and trans-European project would provide a better empirical context from which to determine/argue whether access is currently too limited, well balanced or too lax.

⁹¹ We mean by this that there will probably be a “chilling” effect upon researchers who have no automatic right to information and who have to request permissions.