

## The latest David and Goliath story: Does the 'right to be forgotten' defy the tsunami of online information collection and distribution? By: Annelies Moens

The tsunami of personal information being collected, stored and processed online is growing and leaking in high volumes<sup>1</sup>. Collecting and storing information used to be expensive, but not anymore.

Unstructured data sets, such as location information, clickstream data, sensors, server logs, social media, RFID and other meta data, fuel data mining activities. Public and private surveillance continues to rise with law enforcement entities sifting through information held by major online warehouses<sup>2</sup> to which individuals contribute personal information.

It is in this environment that data protection laws are being enacted and amended. The Council of the European Union released on 31 May 2013 its proposed amendments to the European Commission's draft regulation on data protection<sup>3</sup>. The new 'right to be forgotten' proposed by the European Commission has been the subject of much debate and discussion. The Council of the European Union has not made significant changes to this proposed new right, but has made changes requiring the controller to act without undue delay when a data subject requests erasure. In relation to where the data is public and thus controlled by additional third parties, the controller can take into account available technology and cost of implementation in taking reasonable steps to inform third party controllers that a data subject requests erasure of their data:

Where the controller (...) has made the personal data public and is obliged pursuant to paragraph 1 to erase the data, the controller, taking account of available technology and the cost of implementation, shall take (...) reasonable steps, including technical measures, (...) to inform controllers which are processing the data, that a data subject requests them to erase any links to, or copy or replication of that personal data<sup>4</sup>.

In the Australian context, the concept of a 'right to be forgotten' is not entirely new and can be seen expressed in the Commonwealth spent convictions scheme under the Crimes Act 1914 (Cth) (and state and territory legislation) whereby after a period of years individuals do not need to disclose certain criminal convictions and unauthorised disclosure and use of this information is prohibited. Similarly, in credit reporting law contained within Part IIIA of the Privacy Act, there are requirements around erasure of defaults, bankruptcies, and new 'positive' information after a certain number of years. Australian businesses conducting business with European citizens will need to take heed of the 'right to be forgotten' as it moves closer towards implementation.

The concept of a 'right to be forgotten' on the Internet has significant social, legal and technical ramifications. There are many different perspectives that can be provided by archivists, technologists, data controllers and processors, media, lawyers and the individuals to whom the personal information relates.

The right to be forgotten may mean anything along a spectrum, including: a right to delete data held by sites and data brokers (arguably information created by the system, not the user), a right to delete information they themselves have authored and posted (possibly including the reposting of the information by another user), and/or the right to delete information drafted by another<sup>5</sup>.

Complexities quickly arise from a technological point of view, as data is duplicated and hosted around the world and combined with other data. According to the European Network and Information Security Agency, the key technical challenges are:

- (i) allowing a person to identify and locate personal data items stored about them;
- (ii) tracking all copies of an item and all copies of information derived from the data item;
- (iii) determining whether a person has the right to request removal of a data item; and
- (iv) effecting the erasure or removal of all exact or derived copies of the item in the case where an authorised person exercises the right<sup>6</sup>.

As always, the devil will be in the detail of the drafting of the 'right to be forgotten', which may be implemented in the European Union. The European Parliament's Committee on Civil Liberties, Justice and Home Affairs is considering the amendments to the proposed Data Protection Regulation and preparing a compromise text for a European Parliament vote to be negotiated with the Council of the European Union<sup>7</sup>.

It remains to be seen whether the 'right to be forgotten' is an effective and appropriate tool for individuals to control and manage the tsunami of online information collection and distribution of information about them.

Footnotes:

<sup>1</sup> Datalosdb - Largest Incidents: <http://www.datalosdb.org/> (viewed 20 June 2013)

<sup>2</sup> Edward Snowden: the whistleblower behind the NSA surveillance revelations, (viewed 10 June 2013)  
<http://www.guardian.co.uk/world/2013/jun/09/edward-snowden-nsa-whistleblower-surveillance>

<sup>3</sup><http://www.huntonprivacyblog.com/wp-content/uploads/2013/06/st10227-ad01.en13.pdf> (viewed 10 June 2013)

<sup>4</sup> Ibid p.61

<sup>5</sup> Ambrose, Meg Leta, "It's about time: Privacy, Information Life Cycles, and the Right to be Forgotten"  
16 STAN. TECH. L. REV. 369 (2013) p.386

<sup>6</sup> European Network and Information Security Agency, "The right to be forgotten – between expectations and practice" p.8 20 November 2012 <http://www.enisa.europa.eu/activities/identity-and-trust/library/deliverables/the-right-to-be-forgotten> (viewed 19 June 2013)

<sup>7</sup> <http://www.huntonprivacyblog.com/2013/06/articles/council-of-the-european-union-releases-draft-compromise-text-on-the-proposed-eu-data-protection-regulation/>  
(viewed 10 June 2013)