

Changing Finnish Archival Legislation: Substantial Changes in the Shadow of EU Regulations

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ABSTRACT

The article discusses development of Finnish Archival Acts (1939, 1981, and 1994) and the forthcoming legislation that is currently being drafted. The acts have traditionally defined the position of the National Archives in the society and given it the power decide about permanent retention and to instruct and guide public records creators. The new legislation will weaken the status of the National Archives essentially. It will also bring terminological confusion and break current appraisal practices. The paper is based on literary sources.

Key words: Archival acts, appraisal, records management

Cambiare la legislazione archivistica finlandese: modifiche sostanziali alla luce dei regolamenti UE

SINTESI

L'articolo parla dello sviluppo della Legge archivistica finlandese (1939, 1981 e 1994) e della futura legislazione attualmente in fase di redazione. Le leggi hanno tradizionalmente definito la posizione degli archivi nazionali nella società e dato il potere decisionale sulla conservazione permanente ed istruito e guidato il pubblico registro dei creatori. La nuova legislazione indebolirà essenzialmente lo status degli archivi nazionali. E porterà inoltre anche confusione terminologica e un elemento di rottura nelle attuali pratiche di scarto. L'articolo si basa su fonti letterarie.

Parole chiave: leggi archivistiche, scarto, gestione documentale

Spreminjanje finske arhivske zakonodaje: bistvene spremembe v senci predpisov EU

IZVLEČEK

Članek obravnava razvoj finskih arhivskih aktov (1939, 1981 in 1994) ter prihajajočo zakonodajo, ki se trenutno pripravlja. Akti so tradicionalno opredelili položaj nacionalnega arhiva v družbi ter mu predali moč odločanja o trajnem zadržanju, poučevanja in usmerjanja ustvarjalcev javnega arhivskega gradiva. Nova zakonodaja bo oslabil status Državnega arhiva. Prav tako bo prinesla terminološko zmedo in zlomila sedanje prakse vrednotenja. Članek temelji na literarnih virih.

Ključne besede: arhivski akti, vrednotenje, upravljanje z dokumenti

Muuttuva suomalainen arkistolainsäädäntö: muutoksia EU-lainsäädännön varjossa

YHTEENVETO

Artikkeli käsittelee suomalaisten arkistolakien (1939, 1981 ja 1994) kehitystä sekä valmisteilla olevaa tiedonhallinnan lainsäädäntöä. Arkistolait ovat perinteisesti määrittäneet Kansallisarkiston asemaa yhteiskunnassa ja antaneet sille valtuuksia päättää asiakirjojen säilyttämisestä sekä ohjeistaa julkishallinnon arkistonmuodostajia. Tulossa oleva laki heikentää Kansallisarkiston asemaa olennaisesti. Se myös sotkee terminologiaa ja rikkoo olemassaolevia arvonmäärittäyskäytäntöjä. Kirjoitus perustuu kirjallisuuteen aiheesta.

Avainsanat: arkistolait, arvonmäärittäminen, asiakirjahallinto

During its history Finland has had three Archival Acts. The acts have defined the position of the National Archives of Finland (NAF) in the society. A new Archival Act has meant evolution of-if not revolution in-the relationship between the NAF and Finnish public administration. Now a new Archival Act is under preparation. Its content is not yet known-there are no public drafts-but preliminary work for the act suggests that there will be substantial changes that affect profoundly archival work. Some of the changes are due to the implementation of the General Data Protection Regulation (GDPR) of the European Union. This article discusses development of archival acts in Finland and the future legislation.

1 A brief history of the Finnish archival laws

Finland gained its independence in 1917. In the beginning of the 1920's there was no Archival Act, only some stipulations about archives and records that were scattered in the legislation.¹ Work for creating a more comprehensive archival legislation began in 1926 and the first Archival Act (18/1939) was promulgated more than ten years later in 1939. The main purpose of the Act was to guarantee preservation of archival documents by setting requirements to archival storage facilities and preventing their imprudent destruction in the hands of the administration. The Act gave the NAF the right to give instructions about public sector recordkeeping and to define technical requirements for archival stacks of state and municipal records creators (Orrman, 2004). It also stated that records of public agencies could not be destroyed without the consent of the NAF. Committee for Archival Affairs (*Arkistovaltuuskunta*) had suggested in 1934 that the term "archives" would be reserved for the National Archives and the network of provincial archives only. Consequently, only civil servants in these institutions should be called archivists, suggested the Committee.² However, this proposition was not included in the law. Despite its good intentions, the Archival Act of the 1939 had only a limited affect. Following years of war and construction draw the attention to more burning issues and the NAF was generally reluctant to fully use the powers given to it in the legislation.

Finland had to wait about 50 years for its next Archival Act. During this time situation changed considerably. The 1939 Archival Act had been quite short and rough in its content and it said little about management of records in public administration. The purpose of the 1939 Act was to make agencies responsible for proper storage of records and to ensure that no information necessary for future research would be destroyed. However, after the Second World War the administration expanded considerably, which led to a flood of records. For this one had not been prepared for in 1939.

The Archival Act of 1981 (184/1981) and its implementation Act (1012/1982) answered to these challenges. Their main purpose was to make appraisal more efficient. A model for the reform came from Sweden (Orrman, 2010b). Without mentioning the term "records management" (*asiakirjahallinto*), the acts brought records management into the scope of the Archival Act by requiring that every public agency creates a handbook (*arkistosääntö*) describing registration, appraisal, and storage of its records as well as the responsibilities in recordkeeping. Although the requirements were loosened later, one part of the handbook has survived to this day. The public agencies are required by law to have a Records Management Plan (*arkistonmuodostussuunnitelma*, or AMS, in short)³. The AMS contains a retention schedule that guides the registration of documents and records, their filing, appraisal, disposal and preservation of records and archives. (Orrman, 2010b; Valtonen, 2007.) Agencies sent their AMS for the NAF for approval. The NAF uses the AMS to accept and select records for permanent retention.

In the 1981 Archival Act one did not prepare for digitalization. Thus, in the next Archival Act (831/1994) the concept of "record" was expanded to digital information. Another change was that the role of the NAF in the guidance and control of records management was reduced and the independence of the agencies increased. This was the general trend in public administration of that time and followed Swedish model, like so often in Finnish history. Since 1994 the authority of the NAF has been formally limited to records that have permanent value and that will be transferred to its custody later. The goal of

1. If not otherwise noted, this chapter is based on Orrman (2015).

2. The emphasis on organizational difference between "archives" and "registries" may have its origin in German archival thinking in which *Registratur* and *Archiv* are clearly separated. (Orrman, 2015).

3. The term *arkistonmuodostussuunnitelma* did not appear in the Acts, only in the instructions that were given by the National Archives (Orrman, 2015, p. 77).

the appraisal has been to preserve permanently about 15-20 % of all the public-sector information.⁴ Thus, most of the information is outside the scope of the NAF. However, because many information systems contain at least some information that is deemed permanently valuable, the NAF has been the developer of the public-sector records management, the source for national records management standards, and for long the institution giving highest education in the field⁵, its role in records management is much larger than one might from the letter of the law alone presume.

2 Theory behind the practice

The reforms of the 1980's still form the basis for public-sector recordkeeping activities. The reforms in the 1980's were founded on the awareness that arranging and describing an archival fonds is a different kind of activity from the planning of records management to meet the current needs (Orrman, 2010b.) Eljas Orrman (2010b) states that ideas of Pentti Renvall, "the most notable archival theoretician in Finland, and in Nordic countries in general", can be seen behind the reforms. Renvall argued in the 1940's that daily management of should be based on the functions of the organization-that the function is the actual record creator, not the organization-and that planning of records processes and records' registration should be distinct from the management of archival records. (About Renvall, see Orrman, 2002, and 2010a.)

Jari Lybeck (2006, p. 22) notes that Finnish conception of record's lifespan has similarities to records continuum approach, even though the concept of "continuum" has not been used. The similarity is likely to be superficial. Finnish reforms predate Frank Upward's writings about records continuum in 1990's. Jaana Kilkki (2004) argues that Finnish practices are in harmony with the archival thinking of David Bearman: there is no clear distinction between archives and records management (and separation of archivists and records managers); archives intervene at an early stage of record life span using tools of records management; archival appraisal is based on functions; and sometimes records are left at the records creator's custody, like postcustodialism entails. However, Kilkki also notes that the Finnish practice does not explicitly have any theoretical basis. Thus, coinciding with Bearman's ideas seems also accidental. Like Upward's, also Bearman's writings appear in the 1990's largely after the Finnish reforms of the 1980's.

The idea of AMS has characterized Finnish public-sector records management in the last decades. Professional interest has focused largely on its content, creation, and use in organizations. During the years the idea about the classification scheme in the AMS has changed (today the approach is functional, see Henttonen 2018). Another change has been that today the AMS is often embedded in electronic information systems and it is no more a bunt of paper, Excel-sheet or Word-document.

3 Problems of the legislation and the need for renewal

Currently the Finnish archival legislation needs renewing for many reasons. One is the ambiguous mandate of the NAS. Over the years there have always been disputes about the powers given to the NAF in archival acts. Already the Act of 1939 caused some discussion. The NAF gave to Finnish municipalities instructions about filing of records, but the municipalities argued that that the 1939 Archival Act did not give the right to do that. A similar discussion took place in 2008 between the Ministry of Finance and the NAF when the ministry stated that the NAF had no authority over all governmental information systems. (Orrman, 2010b.)

Today, regulatory environment is ambiguous in many ways. Firstly, The Supreme Administrative Court has recently (2017) ruled that the Archival Act gives the NAS right to decide whether a registry containing personal data (a personal register) is to be preserved permanently in archives (Voutilainen, 2018a). So, from this perspective, the NAF can have its say in the matter. At the same time, however, besides the Archival Act, there are other acts regulating use and creation of personal registers. Most of

4. Finnish appraisal has generally been based on record's place in functional classification and record type which together define the retention time. In 2012 the NAF stated that records in an electronic records management systems could be retained permanently based on the functional class only. (Leppänen, 2016).

5. The University of Tampere has given education in the field archives and records management as the first Finnish university since the year 1997 (Huotari & Valtonen, 2003). Today the higher education is in the hands of the universities. The higher exam of the NAF was discontinued in 2014.

these acts do not consider the need for permanent preservation, and even when they recognize possible archival needs, it is a “dead letter”: in practice, the NAF is not heard when decisions about their retention are made. Sometimes there is also confusion about the norm hierarchy. In some cases, the status of the Archival Act in norm hierarchy has been misunderstood and the act has not been followed when another act has seemed to supersede it. (Orrman, 2010b.) A further cause of annoyance is that agencies occasionally destroy information that they consider sensitive against the will of the NAF. (Orrman, 2011, 2012.) Thus, the status of the NAF in the eyes of the law needs clarification.

Secondly, the Archival Act seems to conflict with the Finnish Constitution. The current 1994 Archival Act was stipulated before the renewal of the Finnish constitution (2000). The Constitutional Committee of the Finnish Parliament has the highest authority in the interpretation of constitutional law. According to the Committee retention time of a personal register should be defined in the law. This would mean that the decisions of the NAF based on the Archival Act are illegal, in fact. The current laws regulating use and creation of personal registers do not usually state what is the register’s retention time. (Voutilainen, 2018a.) Appraisal and retention need a legal basis.

Thirdly, regulation about management of public-sector information is scattered in numerous acts. There are about 700-800 acts about personal registers and further 200 acts more about technical access to information (Voutilainen, 2018b).

Fourth comes the new EU legislation. Like it has been noted, the Finnish conception has been that all the information that is received or created in the functions of an organization is part of its “archives” regardless the age and value of the information. However, the EU’s General Data Protection Regulation (GDPR) makes a sharp distinction between information that is preserved permanently for research in archives (“archived”) and information that is used for the original purposes. Both purposes have to be defined in the law. (Voutilainen, 2018a.)

4 Concerns about the new legislation

For above mentioned reasons, work for renewing the legislation has been going on for some time now. A research report about the current needs for the development of legislation was published in 2016 (see Voutilainen, Oikarinen, & Vartiainen, 2016). The workgroup for drafting guidelines for the new legislation published its report last year (Valtiovarainministeriö, 2017). The new act will be comprehensive and replace previous acts about information management, including the current Archival Act.

The content of the new act is not yet known—there are no public drafts available. Thus, comments here are based on the workgroup guidelines. Generally, the guidelines have caused concern among records and archives professionals.⁶ The legislative reform concerns public-sector information management as a whole and it can be looked from different angles. Here I focus on issues that are directly related to records and archives management and discuss them from this perspective assuming that they all will be actualized in the forthcoming legislation. This, of course, may not be the case.

4.1 Terminology

One of the most profound changes is taking place in the terminology. The first 1939 Archival Act did not define what is an “archives”. Reading closely the text of the act and the report of the Committee for Archival Affairs suggests that an “archives” was understood mostly as an organizational unit, and sometimes as a concept referring to archival fonds. (Orrman, 2015.) It is not entirely clear to me, whether organizational fonds in the 1939 Finnish archival thinking was a collection of only those records that were deemed permanently valuable or a totality of all the records regardless of their age and value. Orrman (2015) does not take a stand in this. However, my impression is that it was the latter: all the organizational records. In the Acts of 1981 and 1994 this is explicit: all the documents received or created in the organizational activities are a part of its archives (Orrman, 2015). This is how the term is generally used in Nordic and Roman countries (Orrman, 1987).

6. This can be seen from the comments given to the guidelines. I have personally been one of the most visible critics of the suggested legislation and written about it several times in my blog “Asiakirjahallinnan reunamerkintöjä” [Side remarks to record keeping]. This chapter contains a summary of my critique. For summary in Finnish, see (Henttonen, 2017).

Now, according to the translation of the GDPR in Finnish, “archiving” and “archives” refers only to information that is preserved in an institution like the National Archives. Thus, public agencies shall not have “archives” in the future. (Valtiovarainministeriö, 2017, pp. 140-145.) This is a break from how the term has been used so far. I think that the translation is erroneous and done probably from English without knowledge of the Finnish professional terminology and past legal usage. This will cause confusion among records professionals and those near the field. The profession may have to learn “double-talk” to retain also the old meaning of the concept. Otherwise current records and archives management literature together with all the educational material becomes instantly old-fashioned and difficult to understand.

4.2 Appraisal

Like it has been noted, the current appraisal practice is based on the agency created AMS that is sent for the NAF for approval. The NAF uses the AMS to accept and select records for permanent retention. This is going to change profoundly (Valtiovarainministeriö, 2017, pp. 140-145):

1. Permanent retention must have grounds in the legislation. Therefore, the criteria for permanent retention will be written in a law. Records creators-the workgroup uses the term “information management units”-will make decisions about permanent retention. When a criterion is filled, the records creator suggests the NAF that it should “archive” the records.
2. The role of the NAF is limited to checking whether the information is already archived. It has no authority over agencies. Instead of one controlling authority, responsibility for records management would be divided among ministries and other organizations (Ministry of Education and Culture, Ministry of Finance, National Archives, Board for Public Information (JUHTA), and State Council).
3. The AMS will disappear as a distinct records management planning tool. It will be replaced by a new plan that will integrate different descriptions and plans guiding organizational information management.

It is easy to spot several weaknesses here. Firstly, one may doubt motivation of records creators to make responsible decisions about preservation of information for cultural historical purposes. This is outside their sphere of interest. Preservation and transfer to archives usually entails some costs which can be easily avoided by defining the information as having ephemeral value. Thus, this practice poses a threat to preservation of cultural heritage.

Secondly, records management is clearly not recognized as a function of public-sector organizations. This makes the threat to cultural heritage even more real. The only hint of records professionals in organizations in the workgroup report is a reference to a person who must be made responsible for “archiving” in the organizations (this itself shows very narrow understanding of the duties in records and archives management). This would apparently be a low-level task without a strong mandate.

Thirdly, the NAF has in this model no authority to get information about organizational records (unless the organization suggests “archiving”) and it cannot give instructions to public agencies. Thus, the current support for organizational records management disappears.

Fourthly, decisions about appraisal are made in organizations independently using the criteria written in law. Appraisal is one of the most complex issues in records and archives management. It is not realistic to assume that the organizations could work without an instructing entity that also coordinates the decisions about appraisal.

Fifthly, the model destroys the current practice in which AMS lies in the core. I find it significant that the AMS does not serve records management only. It is also a bridge to the archival side: since 1983 public agencies have sent their AMS to the NAS for approval and the NAS has used the AMS to select records for permanent retention. Thus, interests of archives and records management coincide in the AMS: both have had the need to make it efficient as possible. If AMS is abolished, it will separate records and archives management from each other and destroy the exceptionally tight integration of the both which has been typical for Finnish recordkeeping.

The idea of combining the AMS with other plans of information management into one information management plan sounds appealing. The change would be welcome, if it were to increase co-operation between different parties of information management. However, considering the low status of records professionals in organizations, the change might as well marginalize records management entirely, especially when it has no explicit legal mandate and there is no outside authority to back it up. There is no knowledge on how this new information plan would be created, by whom, and what would its content. It is also not clear whether different views-like functional classification and enterprise information architecture-are reconcilable. Thus, the idea should be carefully tested before implementation.

5 Discussion and conclusions

In summary, the suggested changes to legislation threaten to revolutionize the Finnish public-sector recordkeeping. Core concepts change their meaning; public agencies have new responsibilities in appraisal; records management has no more instructing authority; current literature, instructions, and guidelines are not applicable; former practices are abolished without introducing new ones to their replacement. The changes put cultural-heritage in danger and cause confusion.

The need for legislative reform is self-evident, but the suggested changes go beyond what is required to fix problems of the current legislation. There is no apparent reason for weakening the position of the National Archives or changing Finnish appraisal the way that is suggested. The workgroup for drafting guidelines for the new legislation had little expertise in recordkeeping. However, it is required to develop records and archives management practices further.

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GDPR. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation). (2016, April 5). *Official Journal of the European Union*, 119(1).

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SUMMARY

Finland has had three Archival Acts (1939, 1981, and 1994). Now a reform is planned in which the Archival act and other acts governing public-sector information management are being replaced by a new law that replaces all previous acts. The content of the new law is not yet known. Therefore, the paper is based on the draft guidelines for the new law. The position of the National Archives has traditionally been very strong. The current practices in appraisal are based on the 1981 Archival Act. The suggested new legislation is very problematic. It will destroy current practices and take away the authority that the National Archives has had in defining permanently valuable information and supporting records management. The GDPR causes confusion by changing the traditional meanings of “archives” and “archiving” in the professional and legal terminology.

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