

# Privacy Rights and the Rights of Political Victims: Implications of the German Experience

Elena S. Danielson

## Abstract

Three forces collide when security police files surface: the right to privacy, the right to state security, and the right to access information. In the case of the East German “Stasi” files, communists tried to destroy them, West German archivists and politicians tried to restrict them for decades, and dissidents tried to open access to them. A unique solution, pushed into law in 1990–91, has now stood the test of time. Fifteen years after the fall of the Berlin wall, the formula devised by Joachim Gauck is a tested model for balancing the conflicts between transparency, privacy, and security.

When repressive regimes collapsed in Eastern Europe, Africa, and Latin America during the 1980s and 1990s, the demand to open police files filled with private information had international support from the human rights movement and carried a certain moral imperative. Coping with the demand has resulted in a number of methods for balancing the need for justice and the right to privacy. Some countries established “truth commissions,” while others attempted to establish special courts of inquiry with trusted judges.

The German experience is instructive and has implications for the use of what can be termed the “archives of repression” in a way that successfully validates the rights of victims to know their fate and at the same time makes an effort to preserve their right to privacy. The files were consciously used to create a basis of extrajudicial justice for a society in transition. While the German system was an exception in Eastern Europe, its policy of openness has proven to be an effective method of transitional justice. It almost did not happen. During a confused moment in history, a relatively small number of activists were able to formulate and implement a legal structure to meet the demands from widespread but diffuse citizens’ groups.

### The Background of the German Policy

As the Berlin Wall fell in 1989–1990, the German Democratic Republic and the Federal Republic of Germany united with great speed and utter confusion. The records of the East German State Security Service (Ministerium für Staatssicherheit, called the MfS or Stasi) were at first neglected by West German authorities preoccupied with the seemingly hopeless task of steering monumental changes that were beyond any governmental control. The Communist security apparatus continued to operate after the fall of the Wall, and party loyalists ran shredding machines around the clock in an effort to destroy incriminating evidence from forty years of intelligence gathering activity. The shreds, which were saved, actually filled 15,587 mail sacks. In the power vacuum, East German dissidents and some more politically mainstream citizens invaded the Stasi headquarters in Berlin on 15 January 1990 to halt the destruction of records by Stasi functionaries. Certainly the dissidents wanted to preserve the evidence of the fallen regime's oppression for historical reasons. On a more personal level, they also wanted to know exactly who had been reporting the adverse information about them that had affected their jobs, personal freedom, and basic aspects of their lives.<sup>1</sup> The long-term implications of these spontaneous actions only became apparent later.

A remarkable group of people had protested against the repressive German Democratic Republic without any realistic hope of success. In general, German dissidents proved far less aggressive than their counterparts in Poland and the Soviet Union. When the regime fell, ordinary German citizens seemed as surprised as the experts. Quite unexpectedly, a host of fundamental questions had to be resolved. The disposition of the Stasi files was one of many political issues under intense debate. The national archives of West Germany, known as the Bundesarchiv, advocated the consistent application of West German archival policy. This plan would have closed the Stasi archives for thirty years, except for privileged government access. Personal files would be closed for longer periods, typically thirty years after the individual's death. This thirty-year rule had been standard practice in West Germany for decades, having been codified in the nation's 1969 archival law. Chancellor Helmut Kohl also adamantly expressed his opposition to opening the files.

<sup>1</sup> Joachim Gauck, *Die Stasi-Akten: Das unheimliche Erbe der DDR* (Hamburg: Rowohlt, May 1991). Written during the controversy over the opening of the files, Gauck's firsthand account includes an impassioned plea for the rights of citizens to see their own files. At the end is a draft Stasi archives law formulated in February 1991 that eventually formed the basis of legislation passed in December 1991. Fundamental information about the structure of the Stasi and its files was promptly published by David Gill and Ulrich Schröter, *Das Ministerium für Staatssicherheit: Anatomie des Mielke-Imperium* (Berlin: Rowohlt, 1991). Later, the personnel structure was analyzed by Jens Gieseke, *Die hauptamtlichen Mitarbeiter der Staatssicherheit* (Berlin: Links, 2000). A two-part compendium of the work of the unofficial informants was edited by Helmut Müller-Enbergs, *Inoffizielle Mitarbeiter des Ministeriums für Staatssicherheit* (Berlin: Links, 1996–1998).

Much happened in 1990 during the months between the fall of Communism and unification. Despite the heroic work of the January 15 citizens' groups to save the Stasi archives, the hastily assembled Control Commission for the Dissolution of the Ministry of Security advocated complete destruction of the records, largely out of fear that they would be exploited by the West German intelligence service and its allies, including the CIA. This reasoning was based on the privacy argument, and on the fear that closing the files would not sufficiently protect the information. The concerns were not exaggerated, for in fact the CIA did surreptitiously acquire substantial sets of Stasi records in the course of those confusing days. The privacy argument also masked the fact that the Control Commission promoted the interests of the former Communist regime and was anxious to obliterate the record of its misdeeds. The democratically elected East German prime minister declared that opening the records would usher in an era of politically motivated murder and manslaughter. In effect, he invoked a security argument. His motivation may well have been mixed, as later developments implicated him in unsavory collaboration with the Stasi. In both east and west, persuasive voices advocated actually destroying the files for a third reason. They worried about the debilitating burden of coping with the recent past. In fact these three arguments at first persuaded the interim East German democracy simply to do away with the most troubling records of the Communist era. They began with the electronic security files, which were erased on the orders of the advisory Round Table in February of 1990. Already doubts existed about the wisdom of obliterating history. In something of a panic, a partially successful secret effort was made to duplicate the electronic files on diskettes prior to the official erasure. The doubts increased as disturbing news was reported in the press.

In March of 1990, rumors began circulating about Stasi collaborators. One dissident named Ralf Hirsch was accused of having Stasi connections by a political opponent. With great difficulty, Hirsch succeeded in examining his files even though no clear procedures for allowing access existed. His documents were stamped "very uncooperative," a badge of honor for him that now vindicated his career. "If I hadn't got access to the file, I would have been finished," he observed in a *New York Times* interview on 28 October 1990. "I could have gone out with a noose and hung myself." Evidence of tampering with the historical record added more pressure. Bärbel Bohley, an important dissident, reported that an anonymous caller offered to sell her the Stasi file kept on her activities. Most telling was the case of Wolfgang Schnur, the leading Christian Democratic candidate for the March 18 elections. Stasi records revealed conclusively that he had served for many years as a Stasi collaborator. Schnur's political career was damaged by accurate documentation, not by rumors or by blackmail with secret information as happened in other post-Communist regimes. The need for preserving the files became very clear.

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As a result of these developments, the debate in the first freely elected East German parliament, the Volkskammer (in power from March to October 1990) soon took a radically different turn. A consensus began to form in favor of using the files to uncover the truth about recent history. Once elected to the Volkskammer, an outspoken pastor from Rostock, Joachim Gauck, was unwavering in his advocacy of openness. To the surprise of the establishment, his views prevailed. Against all odds, it became clear within five years of opening the files to victims that Gauck's policy had substantially helped Germany come to terms with the past. In fact, despite great problems, Germany has coped more successfully than the other post-Communist governments that have continued to keep police files tightly restricted under the guise of privacy protection. In the process a new level of freedom of information was tried, tested, and proved to be an effective tool of democratization.

The results have implications for other countries with agencies that accumulate adverse information on the private lives of their citizens. The historian William G. Rosenberg makes a convincing case that the obvious ethical problems surrounding the release of archives from Communist regimes have a more universal, if less obvious, significance for state archival systems in other countries as well, including democracies. Throughout recent history, the sentiment that people have a right to know the truth about their lives seems to be gaining momentum. It appears in many settings internationally, but most prominently when basic human rights have been violated and when privacy has been invaded by surreptitious surveillance.<sup>2</sup> Simultaneous with this trend, unprecedented acts of terrorism have justified the need for increased monitoring of private communications. The two competing tendencies have yet to achieve a legal balance. The recent German experience with the Stasi Records Act is a positive story with practical implications on finding this balance. Its success can be seen in the details of the legal structure that was established to ensure implementation.

### **The Stasi Records Act**

The Stasi Records Act of 20 December 1991 was greeted initially with great skepticism. It was passed by the united German Parliament with the insistent urging of Joachim Gauck. Bypassing the West German Bundesarchiv, the legislation placed the State Security Service records of the former German Democratic Republic in the custody of the Parliament, which was charged with appointing a federal commissioner to administer this particular set of records.

<sup>2</sup> William G. Rosenberg, "Politics in the (Russian) Archives: The 'Objectivity Question,' Trust, and the Limitations of Law," *American Archivist* 64 (Spring/Summer 2001), 78–95.

Stringent German security and privacy laws would not apply. Most crucially the law provided for immediate access by victims of political persecution to their own records. As noted above, this unprecedented access reflected the consensus reached in the summer of 1990 by the Volkskammer. On 24 August 1990, the Volkskammer passed legislation to open the Stasi archives to victims. A major obstacle almost blocked this legislation: the jurisdiction of the Volkskammer was unclear, as the body was soon to be superseded by the unified German parliament.

Since so many public figures in both East and West Germany wanted to consign this legislation to the area of benign neglect and to let restrictive West German law apply instead, the initial draft of the unification treaty of 31 August 1990 simply ignored the access demanded by the dissidents. Activists responded quickly. On September 4, they occupied the Stasi archives in building seven of the huge Ministry of Security complex in Berlin and publicized the missing part of the treaty. Some held a hunger strike. There were press releases, folk concerts, and all the classic techniques of grass roots demonstrations. Banners proclaimed slogans such as "To each his file" and "Occupied – The Files Belong to Us." It took hundreds of thousands of demonstrators marching in the streets to bring down the regime in 1989. A much smaller group of activists, probably a few dozen, pressured the government to reaffirm the legislation from 24 August 1990 in a special addition to the unification treaty. The wording specifically addressed the rights of individuals to obtain access to their files. It also advocated the right to privacy for third parties. Significant attention was paid to blocking access to the information for intelligence purposes by other unspecified security services. People whose private lives had been secretly recorded by adversaries were especially sensitive to the potential abuse of the information collected by the Stasi if it fell into the hands of the West German, Soviet and American security services. Wolfram Kempe, one of the participants, explained: "On September 28, 1990, the occupation of the Stasi headquarters ended. Without it the unification treaty would be somewhat shorter . . . thousands of people would not have had the opportunity to see their own files and to find out whether their friends or relatives denounced them. And the informants would be vulnerable to blackmail with secrets of the old regime for recruitment by other secret services."<sup>3</sup>

On 3 October 1990, Joachim Gauck was designated as the federal commissioner to oversee the administration of the files. The preservation of the files thus found a strong advocate with a clear concept of how to administer them in order to balance the right to information and the right to privacy. In the confused aftermath of unification, many basic miscarriages of justice

<sup>3</sup> Wolfram Kempe, "Das vorletzte Gefecht: Besetzung und Hungerstreik in der Stasizentral im September 1990," *Horch und Guck, Historisch-literarische Zeitschrift des Bürgerkomitees* 15. Januar 9 (2000), 4.

occurred simply from a lack of coherent leadership. The Stasi files could easily have been destroyed, as some were, or completely restricted in the name of privacy during the lifetime of those affected by them. Gauck and a relatively small number of activists prevailed against the odds for two reasons: they were able to pull together a feasible plan for implementation, and they represented a groundswell of popular opinion.

Under Part One, Section One of the 20 December 1991 Stasi Records Act that regulated the purposes and scope of the legislation, both the right to know the truth about one's personal history and the right to privacy were addressed. Since these two principles are sometimes seen as contradictory, it is worth considering the exact language as translated by the Gauck Authority:

This Act regulates the custody, preparation, administration and use of the records of the Ministry for State Security of the former German Democratic Republic and its preceding and succeeding organizations (State Security Service) in order to

1. facilitate individual access to personal data which the State Security Service has stored regarding him, so that he can clarify what influence the State Security Service has had on his personal destiny;
2. protect the individual from impairment of his right to privacy being caused by use of the personal data stored by the State Security Service;
3. ensure and promote the historical, political, and juridical reappraisal of the activities of the State Security Service;
4. provide public and private bodies with access to the information required to achieve the purposes of this Act.<sup>4</sup>

Of these four provisions, the most urgent at the time that the legislation was drafted involved the immediate need for victims' rights to their personal history. The law also allowed government access to the files so that it might evaluate the suitability of job applicants and screen out former spies and informants from public jobs. A very strongly felt consensus emerged among the former dissidents that those who had benefited from a morally compromised regime should not be placed in positions of trust, and should not teach the next generation in the public schools. The right to know and the right to privacy were reconciled by eliminating the basic principle of equal access to files that contain personal data. Victims viewed their own files but could not access those of others. Copying was allowed, and much information eventually entered the public domain. Legal ordinances regulated the fees involved and varied

<sup>4</sup> The complete text of the law is available in pamphlet form from the Gauck Authority and on the Web in both German and English: <http://www.bstu.de/home.htm>. For perspectives on how the Stasi act fits into existing privacy legislation and archival law, see Dagmar Unverhau, ed., *Das Stasi-Unterlagen-Gesetz im Lichte von Datenschutz und Archivgesetzgebung. Referate der Tagung des BstU vom 26.–28. 11 1997* (Münster: LIT Verlag, 1998).

depending on the type of inquiry. Victims paid substantially less than former Stasi employees for photocopies, for example. The letters sent in response to applications for access provided very precise citations to the applicable legal paragraphs.

While protecting the privacy rights of the victims and of third parties, a very specific and well thought-out exception was made to German privacy law, or *Datenschutz*. Unlike the provisions of the American Privacy Act of 1974, the Stasi Records Act enabled victims of spying to have nearly complete access to the identity of those who informed on them. Not only was information that enabled the victims to identify code names made available to the researchers, but the staff of the archives actively assisted with the decoding of pseudonyms.

It is worth quoting the exact language of the law:

Section 13 (5)

If code names of employees of the State Security Service who gathered or evaluated personal data regarding the data subject, or names of their officers, together with particulars which make it possible to positively identify these employees, can be found in the existing prepared records which the data subject has inspected or for which he has obtained duplicates, the names of such employees shall be provided to the data subject at his request. Sentence 1 shall also apply to other persons who informed on the data subject in writing, if the contents of their reports were written in such a way as to be detrimental to the data subject. The interest of employees and informers in keeping their names secret shall not rule out disclosure of their names.

Many experts warned that the dissidents would not be able to cope with the truth about their personal history. There were some dire predictions that the fragile social fabric would be torn beyond repair. Now that most citizens have had the opportunity to find out their history, it can be safely determined that the opening of the files was beneficial to individuals and to German society. If it were not for the quick action of a small group of citizens in September 1990, it is unlikely that the good intentions of the Volkskammer would ever have been implemented.

Ten years after the passage of the Stasi Act, the files continue to be a source of controversy. In 2000, Gauck stepped down to make way for a new commissioner, a member of the Green Party named Marianne Birthler. She has also championed the opening of records of historical interest in the face of serious opposition and legal challenges from both of the main political parties. Birthler makes a distinction between the privacy rights of public figures and ordinary citizens. Like her predecessor, she interprets the law as granting ordinary citizens a higher degree of protection than celebrities and political figures who deserve

more scrutiny because of their public role. The arguments for and against this interpretation are given full play on a lively Web site.<sup>5</sup>

One aspect of the law has been vindicated during the past decade. The ability of victims to learn the identity of informants has strengthened rather than weakened the democratic process. Even opponents concede that a great service was done by revealing the truth, no matter how inconvenient. This is the conclusion of British journalist and historian Timothy Garton Ash, who published a diary-like narrative tracing the process of reading one's file and reliving events that were being observed and recorded.<sup>6</sup> It is a book that every archivist should read. Garton Ash, unlike most victims, sought out the informants and confronted them to discover their motivations. In this confrontation with a notorious system, he found his informers fundamentally ordinary, venal perhaps, or jealous, but not especially evil. The people who spied on him were polite, punctual, and orderly. They assembled information that was shared through a database with the Soviet KGB, and is no doubt available to Russian intelligence. At the end of the narrative, Garton Ash meditates on the British intelligence services MI5 and MI6 and wonders: how similar and how different are the files of repression in a totalitarian state and in a democratic country?

Garton Ash's other books have explained the dynamics of repression and resistance throughout the last twenty years of the Communist era in Eastern Europe. The regimes could not have survived as long as they did without such repressive internal spying and the files that this activity required. Garton Ash interviewed the Gauck Authority archivists about the experience of other readers. There were a few divorces when people learned that spouses had informed on their most private conversations, and sadly some suicides occurred because of the revelations. The main consequences were endless discussions (private and in the press), encounters with history, and a search for a truthful understanding of the past.

What did it take to accomplish this reconciliation with history? In the first ten years since the fall of the Wall, a staff of over two thousand Gauck employees processed approximately 1.5 million applications from citizens to see their files, sometimes called *habeas data*. Clearly some of the requests turned up no files at all, or only small fragments of information. Other requests involved the lengthy searching and the copying of hundreds of documents. Some applicants waited a year or two—sometimes four or five—but the system worked. To expedite processing, archivists identified the people with very small files and

<sup>5</sup> The Gauck-Birthler Authority Web site maintains current information on disputes over the use of the files. The effort by former chancellor Helmut Kohl to prevent the release of information about his activities acquired through Stasi surveillance has been particularly revealing. The use of the intelligence gathered on West Germans and Americans is extremely sensitive. See Web site for details: <http://www.bstu.de>.

<sup>6</sup> Timothy Garton Ash, *The File: A Personal History* (New York: Random House, 1997).

simply mailed them copies, rather than trying to provide reading room service for everyone. In most cases, that package in the mail sufficed. Other cases were more complicated and took a great deal of staff time, such as the files on foreign embassies in Berlin. Much time was devoted to helping influential dissidents, who generated stacks of files that documented intercepted mail, telephone taps, reported conversations, plans for dirty tricks, and similar examples of official malfeasance. On the whole most people felt liberated from doubts, and free to act from a more secure base of knowledge. A typical reaction was, "Now that I know my nephew did not spy on me, I can include him in my will."

In addition, the archivists conducted background checks on another 1.5 million cases for civil service applicants. The Gauck authority supported wide-ranging research that resulted in exhibitions, conferences, books, and dissertations. Archivists took on seemingly impossible tasks, such as the reassembly of shredded documents. Some 400,000 pages have been pieced back together. In all, it is an impressive record in many ways. Certainly a generous budget helped make these achievements possible, with approximately 200,000,000 DM spent annually on the project. Two other key factors included the leadership of the Gauck authority and the professionalism of the staff archivists. The motivation of the employees and the support of the government combined to create a remarkable institution in the history of archives management.

#### The Experience in Other Post-Communist Countries

Other post-Communist states grappled with the same issues.<sup>7</sup> Only Germany, however, implemented a clear process for ensuring victims' rights through opening the records to those affected. Each country took a different trajectory that reflected the unique political forces at work. Several countries tried to address the problem through the judiciary rather than through an archival authority. In the other post-Communist countries more attention was paid to vetting public officials than to providing people with information on their individual lives. "Lustration" became the term used to describe the process of examining people's pasts in order to determine their suitability for public service in a democracy. Two fundamental flaws in this approach quickly became evident. When closed files are used to determine a civil servant's reliability, the charges cannot be verified. Good careers may be ruined. Politicians with a questionable past are vulnerable to blackmail. In addition, closing the files, except for verifying holders of high public office, means that the pervasive spying and culture of denunciation at lower levels of society remains unexamined.

<sup>7</sup> Dagmar Unverhau, ed., *Lustration, Aktenöffnung, demokratischer Umbruch in Polen, Tschechien, der Slowakei und Ungarn* (Münster: Lit, 1999).

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Czechoslovakia passed a lustration law in 1991 for the purpose of using its files to perform background checks on government officials. Collaborators were disqualified from public office for a period of ten years. This use of the files actually functioned rather well, although Vaclav Havel pointed out the problem of publicly verifying allegations with closed files. Czech legislation in July 1993 formally declared the criminality of the previous Communist regime and the legality of the resistance. An office in the justice department was established and staffed with fifty employees in an attempt to come to terms with the crimes of the Communist period. Without substantial funding and adequate staffing, the system could not provide a widespread sense of reconciliation with the past. Repeated scandals rocked the government throughout the 1990s, often based on unsubstantiated charges about past collaboration. The Czechs established a limited system for citizens to see their files in April 1996, but by then much documentation had been destroyed. The legislation covered only 60,000 files. By the end of the decade, many felt that the limitations and delays simply provided a method to prevent information from surfacing until the statute of limitations had run its course. In Slovakia, the feeling is widespread that the number of competent politicians remained so small that reducing the number even further through the process of lustration would decimate the leadership of the entire country. Access to files by ordinary citizens was not even attempted.

In 1992, Boris Yeltsin tried unsuccessfully to outlaw the Russian Communist Party. He assembled documentary evidence of criminality, but the eventual trial led to inconclusive results. The Communist Party continued to function, and many past acts have not been adjudicated. The same leadership was largely retained through the transition to a post-Communist regime. There is however a process for "rehabilitation" of former political prisoners. The identity of the informers was tightly concealed, according to legislation passed in 1992. In theory victims who have been formally rehabilitated can see their own files, but those who have not been rehabilitated cannot access the information. An attempt at lustration legislation in 1993 failed. Post-Communist Russian archival law of 1993 has adopted the traditional German Bundesarchiv guidelines for closing government papers for thirty years, and personal papers for seventy-five years, or basically for the lifetime of the people involved. This law in theory places the records of the security service under the national archives of the Russian Federation. In practice, the successor organizations of the KGB and the Russian Ministry of the Interior still control their records from the Communist era and continue to restrict access. Privacy and security arguments have become stronger over time, and some files that had once been opened subsequently were reclassified.

When Communism abruptly fell in Poland in the summer of 1989, the first non-Communist prime minister Tadeusz Mazowiecki advocated making a break

with the past, without looking too closely at historical issues. The files of the Polish secret service remained in the hands of the Communist functionaries much longer than in Germany. An estimated 50 percent of the files were destroyed. In addition, forgeries were introduced into the records, corrupting the files as a reliable source. Because the Ministry of the Interior files were both fragmentary and in some cases misleading, politicians used other methods to come to terms with the past. In 1992, the minister of the interior was asked to check on the background of high officials. He issued a list of sixty-four former agents, including the name of the sitting president. The resulting "war of the files" had a destabilizing effect on the government. A long series of lustration laws were proposed and rejected. Finally, in 1997, a court was established in order to determine questions of guilt and innocence during the Communist period. Political candidates were required to admit any participation in domestic surveillance. The court would vet these statements. In theory, consequences would occur only if officials lied about the past, not if they openly acknowledged collaboration. It was difficult to find judges willing to serve on such a court. Once in operation, the lustration court seemed to unearth unverifiable documents about politicians running for office in a manner that seemed politically motivated. In 1998, Parliament established an Institute for National Memory to clarify questions concerning the recent past. This institution primarily dealt with broad problems and did not open files for large numbers of individual victims. The lives of ordinary citizens have remained clouded by uncertainty about their former friends and suspicions concerning acquaintances who had betrayed them in the past. It is unlikely that any sense of resolution will be achieved in the next generation.

In Hungary, the new custodians of the security files initially advocated openness on the German model. An examination showed evidence of widespread destruction of files, as well as poorly documented transfers of record groups.<sup>8</sup> Soon a new administrator was appointed who implemented more restrictive regulations to limit access and shield the identity of informers. According to Dr. György Markó, director of the Historical Office of the Security Service, victims of surveillance during the Communist era can request to see copies from their files, but cannot access the originals. Historians can apply for permission to conduct research. When asked whether an American historian could conduct such research, the director responded negatively. The reason provided was that the United States does not have privacy legislation comparable to Hungary. A serious German historian, the director explained, could be allowed to gain access, but not a journalist.

<sup>8</sup> Thanks to Margit Gregory for translating the Hungarian report on the security files written by László Varga. Additional information on the Hungarian situation was noted in conversations with both Varga and György Markó on 5 October 2000.

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In Romania, a committee was established in 2000 to provide access to the files along the lines advocated by Joachim Gauck. This committee was not provided with the basic staff and offices necessary to implement the parliamentary mandate. The committee members were not even told of all of the locations of the files they were to administer. The result of the struggles over secret police files in Russia and most of Eastern Europe has been a great deal of contention concerning the basic question: who did what to whom? In many cases, citizens of these countries feel that privacy law has been used to obstruct justice.

The comparison of the German experience with the unresolved quandaries of the other post-Communist countries can be seen as a strong argument for opening files to victims of political oppression. Opening the files is increasingly seen as an act of basic human rights. In Germany, the Gauck Authority used archives as a basis for what essentially constitutes a "Truth Commission." This successful model could be useful for other countries, not just in Eastern Europe, but also in Latin America and Africa. While his program originated in a chaotic grass roots movement, Gauck very carefully drafted clear and effective guidelines into the law. Legislation inspired by the human rights movement has generated a momentum that crosses borders. Standards and expectations of openness are often set by practice. For this reason, there may be implications for American practice as well. A fundamental lesson from the experience of the Gauck Authority was the need to understand the moral ambiguity of the freelance informers. The Germans developed a vocabulary to cope with the different categories of people in a repressive regime.

**Victims and Perpetrators in Transitional Justice**

"Informer," "spy," "tattle-tale," "snitch," "fink," "canary": the terms for those who supply private information concerning their acquaintances carry a heavily negative connotation with the general public even when the words derive from underworld slang. Unpopular as these informers have been throughout history, official agencies have gone to great lengths to conceal sources of intelligence. In the nongovernmental sphere, journalists feel strongly about their right to protect their sources. In the East German context, particular attention is paid to the "unofficial co-workers" of the state security apparatus. They are known by the initials "IM" or *Inoffizielle Mitarbeiter*, translated as "unofficial informers." It is felt that the official spies, while pernicious, were doing a job for a salary. The freelance, part-time informers were not paid especially well. The implication is that this group informed on friends and family out of a malicious, even criminal, motivation, or from a primitive urge to do harm. Collaborators carry a heavier moral burden in this view. In general, an estimated one hundred thousand free-lance informers were not prosecuted in the newly reunified German state. Several reasons account for this seeming apathy. First, the numbers are

too large. Second, their work was legal under the laws of a sovereign state. Interestingly, the revelation of names has not resulted in the massive retaliation that was predicted, but it has effectively limited the informants' ability to profit from the new open society. Borrowing an American concept of "sunshine laws," the truth is simply revealed and society responds. In some sense, the failure of the unified state to punish widespread abuses of trust in the former regime is compensated for by opening otherwise privileged information. It is a form of parliamentary rather than judicial justice, an important component of transitional justice in democratizing societies.

Terms identifying the person about whom confidential information is collected have not been standardized. Typical attempts include the following: "the individual to whom the record pertains," "suspect," "data subject," "victim," "the individual affected," "the person in question," and "the subject of investigation." The Stasi files refer simply to "the object." Before the passage of the Stasi Act, the victims of political informants had not traditionally been given the opportunity to learn the identity of their accusers. The reasons ranged from weighty matters of state security and freedom of the press to bureaucratic self-protection. In German, the term is often given as "those affected" (*die Betroffenen*), as in the sense of adversely affected. The official English version, published by the Gauck Authority, translated this term with the more neutral phrase "data subjects." In the literature, the most frequent term used is *Opfer* or "victim."

Case studies demonstrate a great confusion between the concepts of the victim and the perpetrator. When the privacy of a suspected perpetrator of a crime is violated, he or she becomes a victim of sorts. If pressed to name accomplices, he or she becomes an informer and another type of perpetrator. The privacy of the informant is protected to prevent retaliation and victimization. The informant may be acting out of malicious motives and may supply false information in the role of a perpetrator. The informant may be blackmailed into reporting on friends and simultaneously be victim and perpetrator. Again in the German context, special note is made of those who benefited from the whole apparatus of informing on acquaintances. Those who benefited are *die Begünstigten*, translated into English as the rather confusing "beneficiaries." Instead of distinguishing between victim and perpetrator, the Germans have made a distinction between those who were harmed from an officially sanctioned but criminal system, and those who benefited. Third parties form the other recognized category whose privacy rights are addressed. The Stasi Act makes generous provisions for the rights of the victims, but sometimes necessarily protects beneficiaries of the old system. Even perpetrators have rights, according to Gauck. The strength of the legislation lies partly in its judiciousness.

Defining the universe of information that governments need to preserve can be awkward. "Records maintained on individuals" is a term defined in the United States Privacy Act of 1974 (5 U.S.C. Section 552a) as follows:

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The term “record” means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph.

The sources of these records are left unexplained. The most important ethical issue is basically ignored. In the East German case, the text makes it explicitly clear that the records include “personal data collected by deliberate, including secret, information-gathering or spying.”

#### A Few Historical Notes

While the Stasi case may be extreme, the situation of spies compiling adverse information on suspects has a long tradition in the history of police files. Maintaining files on such suspects as murderers and thieves with intelligence gathered from informants can easily be justified for the well-being of society. Few would deny the basic justification for a state intelligence and security service. The situation becomes more convoluted when a police apparatus is used to enforce religious or political conformity and when the guardians of the rights of citizens are perceived as violating those rights themselves. Spies were certainly known in antiquity, but not until the development of consistent record keeping was it possible to track individuals' casual remarks for reliability.

In many cases, the archives of repression have survived to provide grist for serious research. The Italian historian Carlo Ginzburg made very good use of extensive records to understand the belief structure of literate peasants during the Counter-Reformation. In the sixteenth century, the Roman Inquisition enforced a code of law. Like the Spanish Inquisition, it used a vast system of records that have largely survived. The court was charged with the enforcement of religious dogma and required an elaborate system of monitoring and recording acts of heresy, and it used forced confessions and denunciations. Verbatim records were kept by a notary, including testimony produced by the defendant undergoing the then-common judicial procedure of torture. Denunciations made by neighbor against neighbor fueled the system, enforcing conformity of belief. Unlike contemporary organized crimes, which the perpetrators take care not to record, political and religious persecutions are characterized by detailed files.<sup>9</sup>

While dogmatic conformity enforced by a culture of denunciation was common in Western Europe by the sixteenth century, it was in Eastern Europe

<sup>9</sup> Carlo Ginzburg, *Il formaggio e i vermini: Il cosmo di un mugnaio del '500* (Torino: Einaudi, 1976).

with its fragmented ethnic mosaic that repression became an essential tool of statecraft. In the history of the German, Russian, and Hapsburg empires, religious uniformity was harder to enforce given the welter of languages and nationalities. Stringent methods emerged. Over the course of the nineteenth century, the issues shift almost seamlessly from religious to political dogma. Police were assigned to track subversive conversations by national separatists in the manner that the Inquisition previously rooted out religious heresy. A complex system of internal passports and residency permits was developed to control the population, and this paperwork required an extensive bureaucracy dedicated to maintaining files of private information on individual citizens.

Throughout the nineteenth century, the tsarist regime in Russia was rocked by a series of increasingly violent attacks on government officials. Terrorism created an environment of fear. The assassination of Tsar Alexander II in 1881 by politically motivated radicals made the need for the security services very plain. The Okhrana soon began to open mail, eavesdrop on meetings, and gather files on political activists. Polish nationalists were monitored by the Okhrana, and Czech nationalists received attention from the Hapsburg authorities. Secret police activity became more effective at the end the nineteenth century as typewriters and modern filing systems made it easier to monitor the activities of subversives. The files burgeoned. The Russian, German, and French police services shared information then, as they sometimes do now.

In the Russian Revolution of 1917, common people rushed to the Okhrana offices to burn files that tracked their movements and casual conversations. By 1918, the successful revolutionaries established their own political police, the Cheka, roughly modeled on the old tsarist Okhrana. The Bolsheviks were even more dedicated to maintaining files on citizens than their predecessors had been. By the 1930s, the Russian NKVD and German Gestapo competed with each other in vigilance. Germans experimented with American-designed punch cards to facilitate the record-keeping work, which became an obsession.

Once the Red Army defeated Nazi Germany and took over the eastern sector of the country, the two traditions merged in the development of the Communist German state. Feliks Dzerzynskii, founder of the Soviet Cheka, was a hero, and his portrait could be found in all of the Stasi offices until 1989. The compounding of German and Soviet file mania can be seen in the sheer mass of files maintained: about 180 kilometers of files, 360,000 photographs, 600,000 negatives, and more than 40,000 file cards. Hundreds of sacks of shredded documents that were found in offices have been labeled, and efforts are being made to piece the shreds back together in legible form. The number of official Stasi employees in 1989 has been calculated as about 91,000 official agents and another 174,000 freelance informers in a population that totaled only 16.4 million. The Russian KGB in 1990 had one employee for every 595 Soviet

citizens. The ratio of Stasi employees to citizens has been estimated at 1:180.<sup>10</sup> Files were kept on approximately four million citizens and two million foreigners. Essentially every East German family was affected. Even among Communist countries, the East Germans were credited with developing the most intensive domestic surveillance system in history. When the United States seized the Iraqi security service files, which had been secured by the embattled Kurdish political groups, various East German materials were found mixed in the documentation, probably evidence of an advisory role. Globalization has compounded the complexity of these archival issues.

#### **Globalization of Archival Issues Relating to Files of Repression**

From 1993 to 1997, a panel of experts assembled by the International Council of Archives (ICA) analyzed the issues posed by the surviving security services files of the collapsed repressive regimes in Spain, Portugal, Greece, Eastern Europe, Latin America, and Africa. Their report to UNESCO is still one of the best and most succinct outlines of the practical problems involved.<sup>11</sup> They examined the situation in twenty-five countries and were able to gather systematic data on thirteen of these. The range of responses was very broad. Some countries had no written records, but in most cases the records were created out of the necessity to control domestic unrest. In many countries, the records could not be found. Others were openly destroyed. In a few cases, the records were kept for a brief period of judicial review prior to destruction. In most cases, where the files were preserved, they have been maintained as heavily restricted records. Germany appears to have been the most open and most meticulous nation in handling the documentation, but only, as can be seen by the historical sketch, due to the insight and tenacity of a small group of activists.

ICA's UNESCO report makes recommendations for legislation to provide a more consistent legal framework for records access. The main recommendation involves the right to obtain information on the existence of "personal information in whatever form, providing always that the privacy of third parties is guaranteed." As is often the case, this recommendation is self-contradictory. The wording seems to preclude the disclosure of informants' names, along the lines of the American Privacy Act and the Russian rehabilitation rules. The recommendations obliquely make provisions for individuals to obtain special permission to see their own

<sup>10</sup> Gieseke, *Die hauptamtlichen Mitarbeiter*, 538. Jens Gieseke, *Die DDR-Staatssicherheit; Schild und Schwert der Partei* (Bonn: Bundeszentrale für politische Bildung, 2000).

<sup>11</sup> Antonio Gonzales Quintana, et al., *Archives of the Security Services of Former Repressive Regimes: Report Prepared for UNESCO on Behalf of the International Council of Archives* (Paris: UNESCO, 1997).

files, and provide an opportunity for them to answer allegations that they consider false, along the lines of American credit reports. It does not mandate the massive program initiated by Gauck in Germany. Another area where the report diverges from the Gauck model is its insistence that these records belong to the national archives of the successor state. The report does make allowances for a specialized agency to handle the records on an interim basis if necessary. It also includes a draft Code of Ethics, which describes the process of protecting third party privacy by copying, redacting, and recopying files as practiced in the U.S. Freedom of Information Act and to a lesser degree by the Gauck Authority. Implementation of this kind of legislation would be very expensive and beyond the means of most underdeveloped countries and emerging democracies.

The UNESCO report represents real progress in comparing the practices in different transitional regimes. Although the report did not aim to provide a single set of regulations that would apply in all cases, its one consistent point is the need to preserve such files after the collapse of a repressive regime, as occurred in Poland, or during the gradual transformation and democratization of the country, as happened in Spain. In most of these situations, there has been a strong desire to destroy the incriminating records of the past and to make a fresh start. It can be assumed that former operatives of the old regime will attempt to destroy evidence. In most of the cases examined, such efforts succeeded to some extent. Historical experience shows that the new, more democratic regimes often prefer not to cope with the burden of the past, and that destruction of the historical record is a strong temptation. In Greece, the police files of the previous repressive regime were used to verify restitution claims and then were destroyed to prevent their later misuse. The loss to Greek national history is immeasurable. During times of turmoil, basic guidelines such as the UNESCO proposals can be of great practical utility in tipping the balance in favor of preservation.

The UNESCO report remains tacitly skeptical of the use of the files as a form of an extra-judicial truth commission. It does not advocate allowing hundreds of thousands of victims see their files and to learn the identity of their accusers. In Europe there is a trend to harmonize privacy laws along the lines of a thirty-year closure for most state records and a seventy-five-to-eighty-year closure for records containing personal information. There is no doubt that this model has been used to obscure the criminal past of many paid and unpaid agents from earlier regimes. Very little operative difference exists between destroying files and closing them for the lifetime of those affected. The countries that invoked privacy to cover up widespread denunciations in fact lost credibility with the public and underwent more turmoil and political instability than Germany did with its policy of openness. As technology and legislation enhance the ability to gather information, citizens will increasingly wish to view such information.

PRIVACY RIGHTS AND THE RIGHTS OF POLITICAL  
VICTIMS: IMPLICATIONS OF THE GERMAN EXPERIENCE

Archives have long been used as evidence in judicial proceedings. In cases where the injustice has been systemic, jailing every perpetrator is simply not feasible. Archivists can use the records in the process of establishing the basic historical truths and accurate personal histories. Special legislation is required in these cases, along with a realistic sense of program costs and an understanding of the care required in administration. Another essential factor in the credibility of the Gauck Authority has been largely missing from the administration of the privacy acts in the United States and other countries. Gauck widely circulated the forms for requesting access to one's files, both in paper and on the Web. Posters announced the availability of the service. Lecture series, open house days, and traveling exhibits familiarized the public with the program. Average German citizens have the impression that the authorities want them to know as much as legally possible about data collected on them as individuals, as well as about the politicians for whom they vote. The concepts of lustration and habeas data are linked. The archivists consider this work essential to a democracy and convey this message consistently. Not everyone is happy with the results, but the general legitimacy of the effort has been vindicated. The countries that did not make this effort have yet to recover from the effects of the past.

**Conclusion**

The German experience makes it very clear that archives play a role in transitional or extrajudicial justice. Preserving and then opening security files of repressive regimes to the subjects builds confidence in the democratic process and creates a sense of justice even in cases beyond the reach of the courts' formal jurisdiction. The other post-Communist regimes that restricted security files by using justifications of privacy or security continue to wrestle with basic issues of legitimacy. In a global situation of shifting borders, changing notions of sovereignty, and unclear jurisdiction, past injustice can sometimes be best addressed by opening records and providing a truth commission or forum for discussion. The individual situation should be looked at carefully. Joachim Gauck was correct on both a theoretical and pragmatic level to honor the rights of victims of anonymous informants. In such cases, it is a great mistake to try to define the role of archives according to narrowly traditional rules. Procedures can be designed that reconcile privacy rights and the right to information about one's life and one's national history.<sup>12</sup>

<sup>12</sup> Jens Gieseke, with Doris Hubert, *The GDR State Security: Shield and Sword of the Party*, trans. Mary Carlene Forszt. (Berlin: Die Bundesbeauftragte für die Stasi-Unterlagen, 2002). Single copies in English are available free of charge from [www.bstu.de](http://www.bstu.de).