Right of Erasure - Right to be Forgotten

This note provides background information on the 'right of erasure' often called the 'right to be forgotten.'

Where did it come from?
In 1998, the Spanish newspaper La Vanguardia published a legal notice concerning legal action against Costeja González, at the request of authorities acting under a legal obligation to publish that information. The notice indicated that his home was being repossessed to pay off his debts.

In 2009, González contacted the newspaper, asserting that when his name was entered in Google.com, there was still a reference to the pages of the newspaper concerning the legal action. He argued that the information should be removed because the proceedings were concluded years earlier and that there was no outstanding claim against him.

The newspaper disagreed, stating that the article was factually correct and part of the public record, and that the legal action was published pursuant to an order by Spain's Ministry of Labor and Social Affairs.

In 2010, González contacted Google Spain, arguing that the online search results of his name should not make reference to the newspaper's publication of his legal proceedings. As with the newspaper, Google disagreed with González. He then complained to the Spanish Data Protection Authority and took his claim to the Courts.

In 2014 the case reached the European Court of Justice (ECJ) which held[1] that individuals have the right to ask search engines for information to be removed from search results that include their names if it is "inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes for which they [i.e. the data] were processed." In deciding what to remove, the Court said search engines must also have regard to the "public interest". The ECJ also suggested that search engines don't qualify for a "journalistic exception," even when the request is to remove journalism from the search results.

This meant that the newspaper was permitted to have the articles about González on its website, but that Google and other search engines were not legally permitted to link to those newspaper articles in search results.

How would this apply in New Zealand?
If this case applied in New Zealand, then the articles about González's debt would be permitted to appear on media news sites such as stuff.co.nz (ranked 6th top website in NZ), nzherald.co.nz (ranked 9th top website in NZ), but links to those articles would, if he made an appropriate request to Google, not be permitted on google.co.nz (ranked 2nd top website in NZ).[2]

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[1] Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González, Judgment of the Court (Grand Chamber), 13 May 2014
[2] https://www.similarweb.com/top-websites/new-zealand

What information is already removed from Google and other search engines?
Search engines aim to provide people with the information they are looking for. Their software searches websites for information to match a person's question. This is called the 'search query' and this determines the 'search results' that include a list of links to websites with relevant information.

Google Search generally reflects what's on the web, and offers free advice and resources on how to get specific content removed from the web. They also offer help on how to manage your reputation online. From their policies, also set out the different types of content Google will remove, for example:

- Information deemed illegal by a court, including defamation
- Pirated content that infringes copyright (following notification by the rights holder)
- Malware
- Personal financial information such as bank details
- Child sexual abuse imagery
- Revenge pornography
- Other things prohibited by local law - for example, harmful communications under Harmful Digital Communications Act

What laws already exist?
New Zealand law provides for the following:

- Privacy Act -
    - Deletion - agencies holding personal information have a legal duty to delete personal information when it is incorrect or no longer required - section 6 (Privacy Principles 3 and 9) Privacy Act.

    - Access - where an agency holds personal information in a way that it can readily be retrieved, individuals are entitled to have access to that personal information - section 6 (Privacy Principle 6) Privacy Act.

    - Correction - an agency must correct information when in the circumstances, and reasonable to ensure that, having regard to the purposes for which the information may lawfully be used, the information is accurate, up to date, complete, and not misleading. Section 6 (Privacy Principle 7) Privacy Act.

    - Accuracy - An agency that holds personal information shall not use that information without taking such steps (if any) as are, in the circumstances, reasonable to ensure that, having regard to the purpose for which the information is proposed to be used, the information is accurate, up to date, complete, relevant, and not misleading. Section 8 (Privacy Principle 8).

- Protection against harmful digital communications - a person has the right to complain to the Approved Agency (who has a range of functions to investigate and resolve complaints) or apply to the District Court for orders if they, or another affected individual, if the person bringing the complaint/application is not the affected

individual, will suffer harm from a breach of any one of the following Communication Principles (section 11, Harmful Digital Communications Act 2015):

Principle 1
A digital communication should not disclose sensitive personal facts about an individual.
Principle 2
A digital communication should not be threatening, intimidating, or menacing.
Principle 3
A digital communication should not be grossly offensive to a reasonable person in the position of the affected individual.
Principle 4
A digital communication should not be indecent or obscene.
Principle 5
A digital communication should not be used to harass an individual.
Principle 6
A digital communication should not make a false allegation.
Principle 7
A digital communication should not contain a matter that is published in breach of confidence.
Principle 8
A digital communication should not incite or encourage anyone to send a message to an individual for the purpose of causing harm to the individual.
Principle 9
A digital communication should not incite or encourage an individual to commit suicide.
Principle 10
A digital communication should not denigrate an individual by reason of his or her colour, race, ethnic or national origins, religion, gender, sexual orientation, or disability.

- Defamation - protects a person's reputation from unjustifiable attack.
    - The Defamation Act 1992 governs the long standing right to sue for a defamatory statement. There are four defences including a complete defence if the statement is true. Truth is not a defence under the right to be forgotten.
    - Part 3 of the Defamation Act 1992 provides a range of remedies if a person has been defamed, including retraction, correction, right of reply, and pecuniary damages.

Issues to consider
Enacting a 'right to erasure' would be a significant change to New Zealand's law. Along with the people who are the subject of the information, this change would affect all people seeking information and whether they are allowed to see accurate information - and would also affect agencies, including schools, local councils, etc., who may also be required to censor embarrassing information.

There are a range of issues to be considered:

Is it practical for New Zealand?
Although the information would not be linked to search results, it would still appear on Stuff, NZHerald and other media websites. Both these websites are in NZ's top ten websites, so people would still be able to read the embarrassing information. The alternative is to remove the journalistic exception and apply the Privacy Act to media.

It may be for reasons like these that the UK House of Lords Home Affairs EU Sub-Committee warned of the danger of trying to "enforce the impossible", saying the European judgement had resulted in material being blocked on the basis of "vague, ambiguous and unhelpful" criteria.[3]

Should embarrassing information be censored?
It is a serious matter to say that someone does not have a right to know about something that was factually true and took place in public. In Europe requests for removal include:

- former politicians wanting blog posts removed that criticize their policies in office
- violent criminals asking for articles about their crimes to be deleted
- bad reviews for professionals like architects and doctors

A 'right to erasure' raises fundamental issues of human rights, in particular freedom of expression and whether people have a right to know the truth. Section 14 of NZ's Bill of Rights Act provides that:

> *Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.*

Defamation law also provides a long-standing defence to harming someone's reputation, if the information is true[4]. A right of erasure would displace this defence.

Restricting freedom of expression and displacing the law of defamation is a serious question that requires deep legal scrutiny from various organisations, along with specific consultation with members of the public who will be affected.

Who decides what information to censor?
Google and other search engines are required to decide in the first instance if it is in the public interest to censor the search results or provide information. This means that private corporations are asked to judge and determine the balance between two competing goals: privacy versus the public's right to know and find information online. While in Europe these decisions can be appealed to courts or DPAs, in practice only a tiny fraction of them are. Search engineers are the final arbiters of nearly all removal decisions there.

This decision making process may have an inherent unfairness because it is difficult for search engines to hear from the people who transmitted the original information. Webmasters - the people that control the website with the information in question - are in a

[3] https://publications.parliament.uk/pa/ld201415/ldselect/ldeucom/40/4002.htm, 23 July 2014.
[4] Section 8, Defamation Act 1992.

better position to decide if the information should remain as they know the context, can refute claims and have a greater range of options to address any concerns (e.g. masking individual names; opting out of web crawling).

European Caselaw Since Costeja Decision
The Costeja decision requires private companies to decide if legal and truthful information should be removed from search results unless it is outweighed by the 'public interest'. This vague and difficult balancing test has been under continual review. In general, courts in Europe have sought to restrict the right to be forgotten and broaden what is in the public interest. Here are four examples of many cases:

- *February 2015 / The Court of Amsterdam, The Netherlands*
  An M&A partner with accountants firm KPMG sought to have a series of press articles about a financial dispute with a building contractor delisted.The court found that the "right of removal" is an exception to Google's right to freedom of information and it is subject to strict conditions.

- *January 2015 / Toulouse Court, France*
  The claimant sought the removal of search results mentioning the claimant's past conviction for harassment against former employees. The Court denied the request, finding that the individual's dispute of the truth of facts reported is not enough to establish that they are false and there is no absolute right to have personal data de-indexed on the internet.

- *May 2017 / Court of Appeal, Sweden*
  The Court confirmed the first instance decision and noted it is of "decisive importance" whether the information concerns the person's private or professional life. On this, the court noted that the 2011 and 2012 articles were clearly connected to persons role as a representative of construction companies. The articles were also held to be not very old. That the person had been involved in construction projects in the Autumn of 2016 was held to be important in the context of whether the information was still relevant to the public: the articles are still therefore relevant, despite being 6 years old. As a result of these factors, the person was held to have a role in public life that meant access to information about his construction activities outweighed the balance with his private life.

- *Malcolm Edwards v The Telegraph and other publishers / June 2015 / Nottingham County Court / United Kingdom*
  In a claim brought by an individual convicted in 2007 for fraud and who received a sentence of 10 years in all and was banned from running a company until 2017, the Nottingham County Court stated that "the scale of the offending, reflected as it is in the sentence that he was ordered to be served, indicates that these were serious matters and matters of great public interest". On the basis of that, the judge noted "I personally cannot imagine that any court would seriously entertain such an application while any part of the sentence was still existent, I would anticipate that that view would continue to be taken by a judge for a considerable period thereafter". Denying permission to serve out of the jurisdiction on Google Inc. the judge said "de-indexation would deprive the public of access to accurate reports and information to which they are entitled".

Please note, European Privacy law restricts the information permitted to be reported about these cases if it would identify the individual.

Is a right to erasure necessary for NZ to maintain EU Data adequacy?
It is unlikely that a right to be forgotten/right to erasure is a necessary precondition for NZ to maintain its adequacy status with the EU.

Japan and the EU agreed this month to recognise each other's data protection systems as equivalent. The EU did not require Japan to enact a right to be forgotten. Japan supports the APAC Cross Border Privacy Rules (CBPR) which offers a more flexible approach to the EUs GDPR regime.

Further Reading

1. Striking the Balance: Privacy and Freedom of Expression in a Digital Age, Canadian Journalism Foundation, 2018.

   Abstract
   Privacy – and how digital information is handled – is a hot topic these days. It is incumbent upon Canadian lawmakers to protect individual privacy without going too far in terms of freedom of expression and negatively impacting journalism. Draft regulations released by the Office of the Privacy Commissioner in January have sparked heated discussion on both sides of the issue. Some argue tighter regulations are the only way to mitigate the impact of an open web on personal reputation. Others fear tighter privacy laws can work in reverse and put democracy at greater risk by handing over quasi-judicial authority to giant information corporations. The Right To Be Forgotten (RTBF) movement is only one part of tighter privacy protections, but one with potentially threatening implications upon journalism. Does RTBF protect reputations or simply hide embarrassing truths about individuals? Will RTBF restrictions lead us down a slippery slope towards other rules at odds with journalism, a free press and other freedoms in society we cherish? Are more stringent laws even practical to uphold and enforce? These and other questions must be asked and debated in a digital world where keystrokes can potentially harm reputations, even if they're uncovering truths.

2. Debate: Should The U.S. Adopt The 'Right To Be Forgotten' Online?, Intelligence Squared, National Public Radio, March 2015.

   Extract from Summary
   Proponents say the "right to be forgotten" strikes a fair balance between personal privacy and free speech and gives individuals the ability to control their own lives in a world where more and more personal data is collected, bought and sold by third parties.

   Critics argue that this right amounts to censorship that cannot be justified in free and democratic societies. The removal of such material in search results, they argue, allows for the suppression of information that the public has a right to know.

   At the latest event from Intelligence Squared U.S., two teams tackled these questions while debating the motion, "The U.S. Should Adopt The 'Right To Be Forgotten'

Online."

Before the debate at the Kaufman Music Center in New York, 36 percent of the audience agreed with the motion, "The U.S. Should Adopt The 'Right To Be Forgotten' Online," while 26 percent were opposed and 38 percent were undecided. After the debate, 35 percent voted in favor and 56 percent voted against, making the team arguing against the motion the winner of the debate.

3. Europe's "Right to Be Forgotten" in Latin America, Daphne Keller, Towards an Internet Free of Censorship, Perspectives in Latin America, p 151.

4. Data Protection and the Right to Be Forgotten, Summary by Joris van Hoboken, Law, Borders, and Speech: Proceedings and Materials, Stanford Centre of Internet and Society, Stanford Law School, p15.

5. Inter American Press Association IAPA cautions about applying "Right to be Forgotten" rule at global level, 15 Nov 2017