

# Response to the invitation for HISC to participate in the review of the '30 year Rule'

## Summary

The introduction of the FOIA makes the repeal of the 30 year rule both inevitable and welcome, providing the opportunity to make a positive contribution to academic research, accountability, engagement in the democratic process and the success of 'UK plc'. However, the removal of a 'blanket' closure period such as the pre-FOI 30 year rule is not without its own risks and complications, not least inadvertent damage to the integrity of the decision-making process through the erosion of the 'private space' required for free, frank and innovative policy formation.

## Detailed commentary

It is certainly difficult to continue to justify the rationale for a blanket 30 year closure period in an environment where individual FOI requests repeatedly and legitimately provide access to information covered under the 30 year rule but which is significantly less than 30 years old. The fact that c.80% of FOI requests are granted (the vast majority of which will be for information that is less than 30 years old) confirms that a simple 30 year rule is too blunt an instrument to be of use in an age of open and transparent government. The FOIA has effectively superseded an access regime based on simple chronology with a far more sophisticated one based on informational content, and this is to be applauded for having opened up access to a far greater volume of public information.

There are well established and understood arguments in favour of enabling freedom of information and these are enshrined within the FOIA and the Re-use of Public Sector Information Regulations. Greater access to public sector information is clearly of benefit to the research community by providing enhanced access to the data which has informed policy making in the UK and enabling reuse and reinterpretation of this data for novel purposes. It encourages participation in the democratic process by ensuring the accountability of politicians and civil servants and by enabling the many to scrutinise the few. It also delivers benefit to the UK economy as a whole by enabling the re-use of existing data for innovative and profitable purposes.

However, it is equally important to ensure that the integrity and effectiveness of the decision making process is protected. It could be argued that the 30 year rule created an invaluable 'safe space' within which public servants felt emboldened to discuss, debate and decide in a frank, free and robust environment – safe in the knowledge that what was recorded would not be generally available until a considerable cooling off period had elapsed. The 30 year rule reflected a view that what the public is interested in is *not* necessarily the same as what is in the public

interest and that it is possible to have proper, accountable decision-making which is regulated from within, rather than requiring scrutiny from without. Even more potentially significant is that freedom of information without due protection for the decision-making process risks damaging many of the ideals that it strives to preserve. When people become reluctant to record their true thoughts and to document both decisions taken and the rationale which lays behind them this decreases accountability and increases the likelihood of poor decision making.

For the sake of completeness we should consider whether it would be beneficial to replace the 30 year rule with another, lesser, chronological closure period – after all this was deemed an appropriate response in 1967 when the original 50 years period was reduced to the current 30 years. But this change was, of course, made during the pre-FOI era and it is hard to see what logic could be used to sensibly determine any other period, given as we have already seen, that it is the whole concept of taking a blanket chronological approach which has been rendered redundant by FOI. This aside it is difficult to see what criteria could be usefully used to determine a more appropriate period: 15 years? 10 years? 5 years? Each is as arbitrary as the others, especially when one considers the breadth of information it would have to be applied to.

This would appear to move the focus back to how best we can preserve the required safe area around the decision-making process whilst acknowledging that however this is done must be consistent with an FOIA-determined access regime. There are, of course, already safe-guards designed to do this built into the existing FOIA exemptions. In particular, Section 36 which prevents the disclosure of information whose release may 'prejudice the effective conduct of public affairs'. With the proposed removal of the 30 year rule it becomes vital that this clause within the Act is fit for purpose. Further guidance based on case law is starting to emerge about the appropriate use of this exemption but it is my opinion that the 30 Year Rule Review Team should commission their own research into whether this exemption (either when used alone or in conjunction with other exemptions) not only provides the level of protection required, but is *seen to provide it* by the decision-makers concerned. It is recognised that any attempts to amend the terms of the FOIA is potentially politically sensitive, especially if it appears to expose the Government to accusations of wishing to 'water down the Act', but with the removal of the 30 year rule it is vital that the FOIA is able to maintain the delicate equilibrium between laudable openness and necessary discretion.

We must also be sensitive to the wider changes that a move away from the 30 year rule will have and be prepared to resource them accordingly. Any attempts to simply remove the rule 'on the cheap' will almost certainly backfire with the potential to cause significant distress to individuals and massive damage to the Government (as witnessed by the recent losses of personal data by HMRC and others). The removal of the 30 year rule reduces the role of The National Archives (TNA) and 'front-loads' much of the decision making process to the department of origin and ultimately to individual information creators. This is the logic which sits

behind the existing 'Seamless Flow' programme

[http://www.nationalarchives.gov.uk/electronicrecords/seamless\\_flow/default.htm](http://www.nationalarchives.gov.uk/electronicrecords/seamless_flow/default.htm) being rolled out by TNA and is necessary for the process to be sufficiently scalable to deal with the quantity of information now being created across Whitehall.

Unfortunately the combination of ever-increasing data volumes plus a move to a decision-making process based on file-by-file appraisal to assess its suitability for release is a potentially dangerous one. It will be absolutely essential that a robust decision making framework and the tools required to enable it are rolled out across the civil service. Without such measures it is inevitable that inappropriate data will be inadvertently released into the public domain due to human error. It will also prove difficult, if not impossible, to ensure the required level of consistency between departments with regards to what material it is appropriate to release and what should legitimately be withheld.

Finally, the removal of the 30 year rule and the move to electronic information also introduces an additional element into the decision making process. As well as deciding what information should/shouldn't be made publicly available it will also be necessary to determine which should be made *proactively* available 'on demand' to the public via various government websites. The apparently simple answer of making all non-exempt information readily available online is fraught with its own practical complications, not least how to provide a meaningful and useful user interface to such an enormous quantity of information.

To conclude: the decision to review the 30 year rule is a necessary and welcome one and is seen as a positive further step towards open and transparent government. However, it is vital that the changes made reflect not only the needs and interests of the wider public but of the policy officers and decision makers who create and actively use the information on daily basis for the public good.

### Context✳

This paper is based on the views of Steve Bailey, Senior Advisor, JISC infoNet and Member of the Ministry of Justice's *Information Rights User Group* and is provided with regards to both of these roles.

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