

## The Thirty Year Rule

### Lord Lester of Herne Hill QC

28th February 2008

This note responds to Lord Dacre's invitation to participate in the consultation on the 30-year rule. In my view, the 30-year rule should be reduced to a normal period of 10-15 years, with appropriate and necessary exceptions, proportionate and in the public interest.

#### **Background**

The Public Records Act, 1958 ended the haphazard legal position regarding duties of custody and retention of public records.<sup>1</sup> It established the closure period of 50 years, which was then reduced to the current period of 30 years.<sup>2</sup> This began the change from the tradition of anonymity, which culminated in the present Administration's promise of open and transparent government.

The Freedom of Information Act 2000 (FOI Act)<sup>3</sup> abolished the general application of the 30-year rule, allowing access to a wide range of information held by public authorities in the UK, with the exception of sensitive material defined as "historical records."<sup>4</sup>

As a result, the public no longer have to wait 30 years for the information contained in most public documents to become available. However, there are still many sensitive records that will not become available until 30 (or 60 or 100) years after their creation, on the expiry of the exemption preventing their disclosure. The difference now is that each request for potentially exempted information will have to be considered on its merits. With the passage of time, the public interest balance may shift toward disclosure even before the exemption expires.<sup>5</sup>

The release of documents not only improved the public's access to information but also contributed to better governance and public accountability. A greater premium was placed on good record management practices and improved departmental record-keeping by requiring that information requested can be easily identified and supplied: not being able to find information does not excuse Government from its FOIA obligations.

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<sup>1</sup> See in general L.J. Butler and Anthony Gorst, *Public Records, in, MODERN BRITISH HISTORY*, (eds. L.J. Butler and Anthony Gorst.), 33 (1997).

<sup>2</sup> A new Public Records Bill was introduced into the House of Lords in April 1967, and received the Royal Assent in July. It took effect on 1 January 1968.

<sup>3</sup> On 1 January, over 50,000 files that were less than 30 years old were released. Records over thirty years old – historical records – which were not suitable for release were retained under an exemption in the FOI Act. Not all of the FOI Act exemptions apply to historical records. Records that are older than 30 years are, however, also subject to the access provisions of the FOI Act. This means that the continuing validity of the exemptions must be re-evaluated every time a request is made.

<sup>4</sup> Section 62 of the FOI Act provides that historical records are records created at least 30 years before the beginning of that year, whether or not they have been transferred to the Public Record Office.

<sup>5</sup> Dijen Basu, *Just How Free*, 155 NLJ 52, 2005.

A reduction of the 30 year period was contemplated by The National Archive in its National Archives Appraisal Policy 2001<sup>6</sup> where it raised the need to “identify digital records for permanent preservation at or near creation [which] creates the possibility of early migration of such records to the archive.”<sup>7</sup>

### **Why thirty years?**

One of the explanations for the thirty year period is that this would be enough time for a public official to have a career without being embarrassed by the disclosure of compromising material. It was also thought appropriate to protect the children or relatives of criminals or executed prisoners from potential public humiliation if the material was released.

These are legitimate concerns but they are exceptions and not the rule. It is entirely possible to have a shorter release period for public records in general with exemptions for exceptional circumstances.

It is not sensible to create a rule to regulate situations which are exceptional. This is especially true in light of the Government’s emphasis on openness and transparency. The preferable approach is to have a shorter period of embargo with specific exemptions where it is appropriate and necessary in the public interest that the information remains undisclosed.

### **Recommendation**

I recommend that there should be a general period of non-disclosure of either 10 or 15 years. This covers two or three terms of a Government and would be sufficient time to allow information relating to live policy to remain undisclosed, until the policy is implemented. There could be specific exceptions where it is in the public interest or to protect the wellbeing of individuals. In such cases the information would not go to the National Archives automatically but would remain embargoed for a longer period of time.

Official information is a tool of good governance and enables the public to hold the Government of the day to account. Public documents are also indispensable to the maintenance and creation of historical records and enables Governments to learn from past – and recent – mistakes. In the recent debate in the House of Lords on Government Archives, Lord Bew (5 February 2008: 1016) explained the attempts in Northern Ireland to “maximise the release of material while using the device of redaction to preserve the health and safety of living persons” and Lord McNally (1019) confirmed that the debate about the 30-year rule “is another aspect of open government” and that “[a] number of embargoes on the workings of government, the security forces and royalty belong to a different age. Publication can create the danger of embarrassment [but] the Freedom of Information Act is becoming a reality of open government, and we will have to come to terms with accepting the consequences of our actions when in government.”

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<sup>6</sup> The National Archives Appraisal Policy, 2001: [http://www.nationalarchives.gov.uk/documents/appraisal\\_policy.pdf](http://www.nationalarchives.gov.uk/documents/appraisal_policy.pdf).

<sup>7</sup> Page 8.

## Other jurisdictions

It is interesting to note the variety of time periods applicable to the disclosure of public documents in other common law jurisdictions.

India, like the UK, has a period of thirty years.<sup>8</sup> In New Zealand all public documents must be transferred to Archives New Zealand after a period of 25 years.<sup>9</sup> The South African disclosure period is 20 years and exceptions apply whereby documents may be referred to archive earlier than 20 years or be held back from the public archive for a period beyond 20 years.<sup>10</sup>

It is also interesting to note the time limits that apply to information exempt from FOI requests, specifically Cabinet and Cabinet committee minutes, which apply in other countries. In Ireland, exemptions do not apply in respect of records which relate to a decision of the Government that was made more than ten years before the receipt of the request for access.<sup>11</sup> Similar provisions appear in Canadian federal Access to Information Act and in a number of the Canadian provincial and Australian State and Territory FOI Acts. The time limits range from 20 years at a federal level in Canada, Prince Edward Island and the Northern Territory, to 15 years in Ontario, British Columbia and Alberta, and ten years in Nova Scotia, Tasmania, Western Australia, New South Wales, and Victoria.

The effect of this exception is that Cabinet records are subject to disclosure when the decision to which they relate is more than ten years old at the time the application for access is made.

If shorter time periods apply to the exemption of this highly sensitive material, it is reasonable that a shorter period of 10-15 years is appropriate for the referral of official public documents to The National Archive.

## Conclusion

The 30-year rule and disclosure period developed in an *ad hoc* and unprincipled way. It arose in a context of secrecy and closed government. In the new age of information, openness and transparency, the referral of documents to The National Archive should occur 10-15 years after the creation of the material. This is principled and reflects the better approach to collating and storing information. Where sensitive information exists or other compelling reasons apply, this period could be extended.

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<sup>8</sup> Section 12(1) of the Public Records Act, 1993. [http://nationalarchives.nic.in/public\\_record93.html](http://nationalarchives.nic.in/public_record93.html).

<sup>9</sup> Section 21 of the Public Records Act 2005:

<http://gpacts.knowledge-basket.co.nz/gpacts/public/text/2005/se/040se21.html>.

<sup>10</sup> Section 11(2)(b)(ii) of the National Archives of South Africa Act, 1996. Public records are referred to the public archives when they have been in existence for 20 years. Exceptions apply whereby documents may be referred earlier than 20 years or be held back from the public archive for a period beyond 20 years. <http://www.dac.gov.za/acts/a43-96.pdf>.

<sup>11</sup> Maeve McDonagh, *Freedom of Information Law*, Second Edition, Thomson Round Hall, 2006, at 187.