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27 February 2008

*Dear Mr. Dave,*

Review of the 30 Year Rule

I welcome the opportunity to contribute to the '30 Year Rule Review' consultation, particularly as the MOJ is the lead department for information rights legislation and the Lord Chancellor has specific responsibilities for Public Records.

The MOJ and its agencies fully support the Prime Minister's statement last October that it was time to look again at whether historical records could be made available for public inspection much more swiftly than under the current arrangements. In the light of the successful implementation of the Freedom of Information Act over the last three years and its effectiveness in improving openness and accountability, it is timely to re-examine the justification for routinely withholding information on events and decisions that happened less than 30 years ago. It is particularly difficult to justify why information that would today be published routinely, in accordance with departmental publication schemes, is still being withheld unless and until it is requested under the FOI Act. Where information is not exempt and can readily be disclosed, we would be in favour of opening it to public view sooner than under the present arrangements.

Among the points that the Review team and Ministers will need to consider is the impact any reduction in the 30 year period would have on the convention that Ministers do not normally see the advice submitted to their predecessors of a different political party. It is possible that officials might be less willing to provide full

and frank advice if they recognised a risk of that advice coming to the attention of a different administration a little later in their career. The convention is already overridden to some extent by the 30 Year Rule, and we have no firm evidence that this has had any deterrent effect on the provision of advice. Nevertheless, any reduction should only be undertaken if its effect on the convention about advice has been clearly recognised and understood.

That point is of particular importance to us because of our responsibility for information rights policy across Government. Another is the consideration that any change in the 30 Year Rule would require primary legislation, to amend the definition of 'historical record' in both the FOI Act and the Public Records Act, which this Department would be responsible for taking forward.

Ministers will, of course, need to take a view in due course on the Review's final conclusions and recommendations. Although we, as a Department, would not wish to pre-empt the outcomes of the review, we believe that a reduction in the closure period to 20 years would strike the right balance between maximum closure and process efficiency. A closure period of less than 20 years could result in documents being heavily redacted before release. This could call into question the value of the release and result in the need for a further review later down the line. Whilst any time period is arbitrary, our view is based on the experience we have gained as policy lead for Freedom of Information and The National Archives. We have also considered the position in similar jurisdictions, such as the US, Canada, Australia and New Zealand where the closure periods are between 20 and 30 years.

This response addresses the practical implications of any change for the MOJ family of organisations, including the Scotland Office and the Wales Office.

#### **1. Records relevant to any 30 Year Rule change**

MOJ adherence to the Lord Chancellor's Code on Records Management and international standards means that the *majority* of records generated by the MOJ and its agencies are disposed of within 8 years and will never constitute historical records. The business and legal value of each type of record has been carefully assessed and the Department has a complete set of local policies showing how long paper and electronic files should be kept for. The disposal of these transactional records enables the Department to meet legislative requirements (e.g. by not keeping personal data longer than necessary) as well as keeping storage costs to a minimum.

A smaller sub-set of files has a longer business value (7 years+). These include criminal trial cases relating to serious offences, prisoner records, some civil cases (e.g. divorce, bankruptcies etc), financial material (e.g. contracts) and a wide range of policy files relating to the work of units within MOJ headquarters, HM Courts Service, HM Prison Service, the Tribunals Service, Scotland Office, Wales Office and other bodies. There are approximately 1,560,000 court files alone held in a long-term storage facility for between 7 years and 30 years (primarily for business purposes) and approximately 200,000 policy files relating to MOJ policy at sites in London. Prior to 30 years some categories of file can be automatically destroyed or securely transferred to The National Archives (TNA) or approved places of deposit such as local record offices. But some files require a careful file-by-file second review for both historical and business value and it is these which will be most affected by any change to the 30 Year Rule. Though a small proportion of the total number, this group of files still runs into the thousands each year and generates a significant workload for the MOJ's Records Management Service. These include:

- policy files which record key decisions and activities of government;
- significant criminal and civil court cases with high archival value;
- high profile prisoner records; and
- key data sets and registers which summarise decisions (e.g. from the courts) affecting UK citizens.

There is a particular issue in relation to Scotland as the records of the pre-devolution Scottish Office are held by the National Archives of Scotland, which operates a 30 year rule on an administrative rather than a statutory basis. While the Scotland Office retains responsibility for files that were transferred to the National Archives for Scotland prior to devolution, even if the subject matter is now devolved, any files transferred by the Scottish Executive after devolution are a matter for Scottish Ministers. Both parties consult one another about Freedom of Information requests but careful consideration would need to be given to managing the practicalities of having a different retention period in England and Wales from that in Scotland and the interrelationship with the Freedom of Information Act (which applies to all UK Government public authorities wherever they are based).

The majority (over 500,000) of the Wales Office's pre-devolution records were transferred to the Welsh Assembly Government from January 2006. The Wales Office retains lists of them.

## **2. Freedom of Information Act and 30 Year Rule**

In theory the introduction of the Freedom of Information Act in 2005 has made the 30 Year Rule less important since the public can request to see information of any age (subject to exemptions). Freedom of information is working well, with non-routine requests to central Government-monitored bodies running at around 34,000 per year, and requests to public authorities in the wider public sector at some 87,000 per year. Some 60% of requests to central Government are granted in full, and another 15% in part. Departments have also been encouraged where possible to make 'proactive releases' of records to TNA (i.e. to transfer records younger than 30 years).

However, in practice the 30 Year Rule is still very important as the whole file review process is geared around the fact that perhaps 95% of all historical information is put into the public domain at this point. While it is true that academics, journalists and individual citizens have benefited from FOI legislation, the actual quantity of information released is small compared to what is released on an annual basis to TNA. The FOI Act and Fees Regulations strike a balance, ensuring that requests are refused on cost grounds only in limited circumstances and that assistance is provided to requestors while at the same time ensuring that departments' resources are not tied up searching, retrieving and reviewing *entire collections* of files. A single focused FOI request may lead to the release of a small group of documents (or summary) whereas an annual release to TNA, which is always eagerly awaited by historians, can lead to dozens or hundreds of entire files being put into the public domain. Feed-back from academic researchers suggests that an analysis of a complete run of policy or case files relating to a particular topic is even more valuable than the summaries of documents or parts of documents which can be gleaned via FOI requests. Annual release allows historians to step back and contextualise key decisions of government over the long term.

## **3. Key benefits of any change**

The MoJ perceives a number of potential benefits from liberalisation of the Thirty Year Rule:-

- Any reduction to the 30-year closure period encourages further openness, transparency and accountability in government. Large-scale transfers of files at an earlier stage would enable a more complete picture of government to emerge.
- Opening large numbers of files after a shorter period than 30 years would remove the need for the newly accessible information they contain to be requested under FOI. Numerous potential FOI requests would be avoided, with consequent reductions in workload for departments, the MOJ Clearing House, the Information Commissioner's Office and the Information Tribunal.
- Departments are now urged to transfer electronic files much sooner to TNA after a single review in order to ensure that digital material survives. Unlike paper, electronic documents and data-sets need regular attention if they are to remain readable. The logic therefore follows that the paper material should also be transferred much sooner.
- Reducing the period might provide a further incentive for government departments to follow more closely the Lord Chancellor's Code on Records Management. Holding large quantities of files for up to 30 years can lead to complacency. A shorter period may focus the attention on the importance of regular file review (e.g. first review at 5 years and second review after a further 15 years).
- Data protection risks could be reduced; holding more data than necessary can make subject access requests more time-consuming and contravene the fifth principle of the Data Protection Act.
- Storage costs in departments could be reduced and floor space freed up for other activities. Similarly the registry data-bases which manage both paper and electronic files could be cleansed sooner. TNA's storage needs would increase but we understand that they have access to larger, more cost-effective storage facilities than departments.

#### **4. Risks and Impact of change**

We also see some risks in relaxing the 30 Year Rule:-

- Even with the current 30 Year Rule arrangements many departments, including MOJ, already have a backlog of files that are due to be reviewed. Furthermore, recent machinery of government changes have led to additional 30 year+ files being inherited from other departments. If the period was reduced to 20 years for example, then an additional 10 years worth of files would be added to this stock-pile. Without proper resource and investment the backlog would grow. The more recent a file is, the greater the likelihood of it containing personal data and material that may be subject to FOI exemptions. So the more recent the file, the longer it would take to review. Even with a stronger complement of

record review staff - with the necessary skills to do sensitivity reading – inadvertent release may sometimes occur. The negative impact of any inadvertent release can be high. Once a file has been transferred as 'open' to TNA, departments cannot simply change their minds at a later date. Only the Advisory Council on National Records and Archives, under the auspices of the Lord Chancellor, can retrospectively close files in very special circumstances (e.g. defence, national security etc).

- Even if files are transferred sooner to TNA there will still be some files that require redaction or partial closure because they contain information that is exempt from disclosure under the FOI Act. A researcher who spots this closed material listed on TNA's web-based catalogue would still need to make a FOI request in order to access it and the originating Department's records management team would need to be consulted. A reduction in the 30 Year Rule could lead to an increase in such requests. This cost would have to be offset against the savings in FOI requests referred to above. All FOI requests to central Government potentially impact on the MOJ, through the work of the Clearing House and lawyers in supporting departments through the appeal process.
- To date within the wider MOJ family, only MOJ headquarters has a specially trained file review team (which also acts on behalf of HM Courts Service). Some of our sponsored bodies and agencies would need either considerable advice and training to ensure that files are not being destroyed locally that have potential historical value or arrangements put in place so that MOJ HQ provides a shared service to review files on behalf of these bodies in order to ensure consistency (in terms of selecting files with high archival value and applying FOI exemptions uniformly).
- Some categories of file have a business life which lasts 30 years or even longer (e.g. files on persons given a life sentence and released from prison on licence and some policy files which have relevance for decades, such as Crown Dependencies and Human Rights). Retaining records for longer than 30 years is by 'application to retain'. A reduction in the 30 year transfer period would result in an increase in the number of applications to retain.
- Even if more information is physically transferred 10 years earlier to TNA, much of it could still not be accessible to the public because it contains personal data. Currently *almost every* 30 year old criminal trial file transferred to TNA has at least one redaction in order to protect the privacy of victims and defendants and avoid possible harm to living relatives. The Information Commissioner's Office

has recently taken the view that even certain data relating to dead persons (e.g. medical records on prisoners) could cause harm to living relatives.

- If local record offices as legal places of deposit are required to provide access to certain classes of files (e.g. magistrate's courts registers and Prison establishment files) much sooner, then they would need to expand storage space. Much of this information would still need to remain closed to the public because of Data Protection, statutory prohibitions on release of information in court records (e.g. in the Sexual Offences (Amendment) Act 1992) and court reporting restrictions.
- Information covered by legal professional privilege, which can currently be protected for 30 years, would also fall to be disclosed sooner if the 30 Year Rule is reduced – unless the FOI Act was amended to treat such material differently. The implications of any reduction would need to be considered carefully and the Scotland Office would wish to seek the views of the Advocate General for Scotland and the Lord Advocate.

#### **5. Options for planning and implementing any new arrangements**

If, for example, the 30 year period was reduced the following measures could be considered in order to manage the change:-

- Granting a transitional period in which to clear up the additional backlog that would occur before departments could gear up for an annual rhythm. By way of analogy there was a five year period between the passing of the Freedom of Information Bill in 2000 and the introduction of the Act in 2005 to allow departments time to prepare for implementation.
- TNA could advise departments on macro-appraisal of files where possible (rather than file-by-file review). This could mean that quite large caches of files could be destroyed without reviewing them individually because similar material is collected from another department. However, there is a negative side-effect to this macro approach in that the potentially high number of electronic records contained in the selected part of the file-plan would still need to be reviewed for sensitivity (i.e. FOI/DPA implications) and there is the risk that historically interesting information would be lost in the parts of the file-plan not selected.
- Only a very small proportion of TNA's total holdings are actually requested by researchers and there may be scope to look again at whether the types of file traditionally selected in the past are still just as relevant to historians. Though current visitors to TNA today are much more interested in family, social and cultural history than ever before, the purpose of TNA is to maintain the corporate memory of the UK Government and it is vital that a good cross-

section of records (from the main departments of state as well as agencies and NDPBs) continue to be selected.

- Even with a reduction in the closure period there will still be many records with enduring business value and it would be helpful for administrative expediency if blanket 'applications to retain' could be used for whole categories of record rather than making individual applications for each file.

#### **6. 30 Year Rule and the digital age**

Since the advent of the Freedom of Information Act departments have made considerable progress implementing electronic solutions for record keeping through Electronic Document and Record Management Systems and thinking much more about the lifecycle of digital information and records (which is generally much shorter). These systems can in theory make the selection of files for historical value much more automatic, using macro-appraisal techniques, but a side-effect of electronic systems will be a far greater volume of material that will need to be reviewed and redacted if it is to be transferred to TNA (whether it be 5 years, 10 years or 30 years). Even with the push to digital records we shall in the MOJ still need to manage the considerable legacy of paper files accrued since the mid-1970s. My colleagues in e-Delivery Group (headed by the Chief Information Officer) and in the Information Rights Division will continue to work closely with TNA and the newly formed Knowledge Council in order to meet these challenges.

I am copying this letter to Sir Gus O'Donnell and Alex Allan.

*Yours sincerely,  
Suma Chakrabarti*

**SUMA CHAKRABARTI**