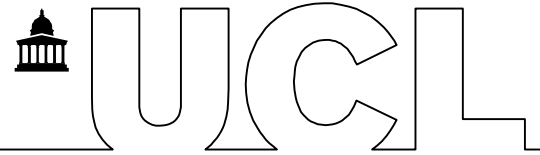


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DEPARTMENT OF POLITICAL SCIENCE, UCL

The **Constitution** Unit



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## **30 YEAR RULE REVIEW**

### **SUBMISSION FROM THE CONSTITUTION UNIT**

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## **THIRTY YEAR RULE REVIEW**

### **SUBMISSION FROM THE CONSTITUTION UNIT**

The Constitution Unit (CU) has been invited to submit its comments on the 30 year rule review. CU is part of the [UCL School of Public Policy](#), within the Department of Political Science. We are the UK's foremost independent research body on constitutional change. We specialise in constitutional reform and comparative constitutional studies. We are independent and non-partisan and the centre of a wide network of national and international experts. For the last ten years we have had a team specialising in access to information including freedom of information, data protection and records management.

Our approach to access to information is balanced and we recognise the importance of protecting information as well as disclosing it. In both cases the public interest plays a significant role in making the decision. Our overall view is that at present and despite the introduction of the Freedom of Information Act 2000 (FOIA) there remains a tendency to protect and to withhold too much official information. This is to the detriment of researchers, academics, scholars of all types, professionals and the general public. This review offers a positive opportunity to adjust that balance where historic records and information are concerned and to provide more transparent principles to cover access to historical records, bringing them into line with other modern information access provisions.

We therefore welcome the review of the 30 year rule and are grateful to be invited to contribute to its work.

We hope the comments below will be clear but if clarification or further detail is needed we will be pleased to speak to the review team.

### **REPLACING THE 30 YEAR RULE**

The Constitution Unit recognises the considerable progress towards greater openness that has been achieved by the National Archives (TNA) over the past few years and especially since 2005 when the FOIA came fully into force. We believe, though, that the opening of public records should and can in many cases be achieved earlier and more flexibly while retaining adequate protection for genuinely sensitive material.

We question whether achieving this by setting a reduced minimum period of closure is the best approach. We advocate instead moving to an approach which mirrors that established by the Freedom of Information Act 2000 (FOIA) in offering a general right of access without time constraint, limited by a system of exemptions to protect sensitive material.

We are conscious that such a change might be burdensome in administrative terms and comment below on how this burden could be made manageable. Though we also note that the FOIA allows anyone to request access to information at any time after its creation so we would not want to see administrative burden used as an excuse for resisting otherwise beneficial changes in access provisions for historic records.

The main basis for access to public records used to be the Public Records Acts of 1958 and 1967 (PRAs) but was replaced, essentially, by the FOIA. The statutory basis of the FOIA is that everyone has a right to have access to information created by public bodies subject to the Act from the date of creation. This right is then moderated by a series of exemptions in those cases where information needs protecting from disclosure. This

system has been operating now for over three years and has proved itself robust in protecting information that needs to be protected.

## **ADOPTING AN FOIA APPROACH TO ALL HISTORIC RECORDS**

Sections 62-67 of the FOIA began a process which largely subsumed the access provision for public records into the FOIA. Schedule 5.2 of the FOIA amended the previous '30 year rule' access provisions of the PRA 1958 and 1967. We propose that the 30 year rule review should complete this process. An approach modelled on the FOIA should be adopted for all public or (to use the term introduced by the FOIA) historic records, replacing the remaining vestiges of the '30 year rule'.

We propose that in principle the default should be to openness for all records from date of creation but with a clear understanding - without set time periods - as to which categories of records might be kept closed for longer and on what grounds. It seems sensible and inevitable to take this additional step and move finally away from a closure system based on time periods which must by their nature often be arbitrary to one which relates instead to the content or the sensitivity of records.

The existing exemptions in the FOIA give a clear steer as to what the categories of exemption for historic records might be. It seems straightforward and sensible to adopt these as the basis for a new system of continuing to protect records, regardless of age, where release would be undesirable.

There might then be an issue as to whether the sunset provisions of section 63 of the FOIA also need revision. We would welcome a simplification which required all records to be opened after 100 years except in the most unusual cases.

## **RECORDS EXEMPT FROM THE PROVISIONS OF THE FOIA**

Certain records, notably those of the security services, are exempt from the provisions of the FOIA so would still be exempt from any changed provisions over the 30 year rule.

## **ADMINISTRATIVE IMPACT OF THE PROPOSED CHANGES**

The Constitution Unit recognises that there will be administrative concerns about the impact of a move to automatic early opening subject to a series of exemptions. These would mainly arise from two causes.

First, records at creation and while they still have administrative usefulness are held by creating departments. Only later are they transferred to TNA. This used not to happen until the thirty year stage. We understand that, increasingly, transfer takes place at an earlier stage and that arrangements are being made for this process to be automated for electronic records. It is not feasible for transfer to TNA to take place from the point of creation. Before transfer, at whatever point this occurs, records are of course subject to the existing provisions of the FOIA.

Second, the sheer volume of records being created will cause concern because of the burden that changing to a more open system could place both on originating departments and the National Archives.

Both of these pose problems for the standardizing of early release of greater amounts of public records.

In administrative terms therefore, rather than potentially opening all records from the date of creation, a workable compromise might be to retain a presumption of closure until a 'first review' stage. This might also be related to the initial period where the records need to be retained – for statutory or management reasons - by the creating departments and bodies. At present this is generally recognised as five years. At this 'first review' stage a very high proportion of records, up to 80%, are destroyed as having no further use. So to introduce our suggested new 'presumption of openness' FOI type approach only after first review would bring substantial administrative and workload advantages while still offering acceptably early opening of the great majority records which are to be retained beyond the first review stage. FOIA requests could still of course be made for material before the first review stage, as at present. Whether five years would continue to be the right period for the first review is debatable. However we would not want to see this period extended significantly as this would erode the principle of widespread early release.

### **USING ELECTRONIC RECORD MANAGEMENT SYSTEMS TO REDUCE ADMINISTRATIVE BURDENS**

It is our view that new electronic systems for creating, storing, managing and disposing of digital records make management of record review potentially easier. Such systems will allow review and transfer to the National Archives to be more flexible and in many cases earlier. For example, routine records which are not to be retained permanently can be 'tagged' at creation and highlighted for destruction automatically at the appropriate time, removing the need for review by staff. And records which are tagged for retention might be transferred electronically in a more automated so less labour intensive way. We recognise that a huge amount of work is already being done by TNA and government departments to develop electronic management systems and procedures. We urge that, to bolster this process, the review of the 30 year rule also include recommendations on developing electronic records management systems to allow at least partial automation of the first review stage. We believe this would help meet concerns about administrative burden.

### **HANDLING REQUESTS TO OVERRIDE EXEMPTIONS AND DISCLOSE RECORDS**

The FOIA provides a means for anyone wishing to do so to challenge extended withholding of information where they believe the reasons to be insufficient. However this process needs to be as effective as possible. Current FOIA cost regulations, in particular, may well prove a barrier to some challenges involving substantial classes or categories of record.

It falls ultimately to the Information Commissioner to handle appeals where FOI requests for disclosure have failed, for whatever reason.

To help a changed system to work effectively the Information Commissioner might need some additional resource to cope with increased workload from appeals. The issue of resource for the ICO is already being explored in a different context. An additional or perhaps alternative route might be to develop a form of challenge which could – subject to the necessary agreements and to legal considerations - work alongside the existing right of appeal to the Information Commissioner. We wonder whether this might be achieved by extending the excellent work currently done by the Lord Chancellor's Advisory Council on Public Records by adding an appeal process open to the public. We recognise that there are significant workload implications here for the Council. Also that it would change the nature of the Council from a body handling representations from government departments to one also handling appeals from the public. Such a change would need to be agreed by the Information Commissioner and might need changes to statute.

We suggest it because the Advisory Council has long standing expertise in these issues. The main benefits would be increased speed in dealing with appeals and getting the view of experts in historic records when making decisions about their release.

## **OTHER RELEVANT LEGISLATION**

The comments we have made and our proposed approach to opening of public records concentrate on the FOIA. A similar approach would work with public records subject to other regulation or statute – the Environmental Information Regulations 2004 (EIR), the Re-use of Public Sector Information Regulations 2005 (PSIR). It can also be adapted to work in areas where personal privacy is a concern such as those covered by the Data Protection Act 1998 (DPA) which is already linked to the FOIA through exemption. This would enable personal information to continue to be protected in the public records system where necessary but more flexibly and subtly than by the present use of relatively arbitrary fixed closure periods.

## **TERMINOLOGY**

The FOIA, DPA, EIRs and the PSIR 2005 refer to ‘information’ while the PRAs refer to ‘records’. It would be helpful for the future if the review could rationalize this.

## **CHANGES TO STATUTE**

We offer no detailed comment on how change – if agreed – would best be implemented. It seems likely that some change of legislation, either to the FOIA or the PRAs or both, would be needed. This is a matter for lawyers. We note that, if there is to be statutory change, this might be an opportunity to review and perhaps replace other provisions of the now outdated PRAs.

## **ATTRIBUTION**

The Constitution Unit agrees that comments in this document may be attributed in any report arising from the 30 year review.

## **CONTACT POINTS AT THE CONSTITUTION UNIT**

Please contact Ben Worthy. [b.worthy@ucl.ac.uk](mailto:b.worthy@ucl.ac.uk) : tel 0207 679 4979 for any general queries about this submission.

For detailed questions about content please contact Duncan Simpson, [ds@dsimpson.eu](mailto:ds@dsimpson.eu); tel: 020 8675 6652; mob: 07753 619 347

Constitution Unit

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