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REVIEW OF THE 30 YEAR RULE

You wrote to Gus O'Donnell on 28 December inviting him to provide a written submission to your Review Team. The attached submission sets out some of the issues that form relevant background to your Review. For the avoidance of doubt, I should note that it is submitted on behalf of the Cabinet Office at official level, without seeking to incorporate views of Ministers at this stage.

Our submission deals in particular with the role of Ministers and officials, the convention of the collective responsibility of the Cabinet, and the position of the non-political and permanent Civil Service. It does not seek to be a comprehensive account of all the issues that will be relevant to your review, including the benefits that flow from greater openness and improved accountability.

The 30 Year Rule Review Team also wrote to the Royal Household, copying the letter to the Cabinet Secretary. This response covers considerations that the Cabinet Office believes are relevant to Royal information.

This response also reflects the views of the intelligence agencies.

The attached note also provides answers to the specific questions posed in your letter and outlines some of the key types of records held by the Cabinet Office.

ALEX ALLAN

CABINET OFFICE CONTRIBUTION TO THE 30 YEAR RULE REVIEW

This note covers:

1. Balancing confidentiality and openness
 - Collective responsibility and the role of Ministers
 - The role of the civil service
 - Royal Information
 - Intelligence
2. What types of records does the Cabinet Office hold?
3. Specific questions posed by the Review Team
4. Implementation of change in the Cabinet Office

1. Balancing confidentiality and openness

The United Kingdom system of Government, like many others, is based on an interval elapsing between a decision being taken, and the documents relating to that decision being released to the public. This is primarily because of the principle of the collective responsibility of the Cabinet, but other factors are also important. These considerations form the crux of the balance between increased openness and the maintenance of confidentiality. They do not point to one particular period of time before opening being right, but to a judgement being needed between the potential impact of early release, and the public interest in openness.

In February 1966, the then Cabinet Secretary, Sir Burke Trend consulted with the then Prime Minister, Harold Wilson, about a change to the 50 Year Rule as established by the Public Records Act 1958. As with the change to 50 years a decade previously, one of the key considerations in 1966 was to ensure that both Ministers and senior officials were not 'subjected to the possible embarrassment of having their deliberations published while they are still active in public affairs'. It was acknowledged at the time that any period is to an extent an arbitrary figure, because the conventions that apply around collective responsibility and the Civil Service will not all of a sudden break, but will gradually erode. The key consideration then, as now, is therefore the balance between openness and potential damage to these conventions.

The Freedom of Information Act 2000 (FOI Act) has made these considerations more apparent. Some information will be released well before the 30 year point following an FOI application, whereas similar information may only enter the public domain when it is transferred to The National Archives.

In addition, the movement towards more public engagement in the development of policy and delivery is likely to increase the demand for openness wherever possible. For some time, successive Governments have been committed to publishing as much information as possible about the factual background and analyses underpinning Government policies and decisions.

The Government has made clear its commitment to greater openness in the way Government business is conducted, and to the benefits that can flow from improved accountability. This submission is focussed on some particular issues which need to be considered in the Review, and does not attempt to set out a comprehensive assessment of the benefits and costs.

COLLECTIVE RESPONSIBILITY AND THE ROLE OF MINISTERS

Collective responsibility

'Collective responsibility requires that Ministers should be able to express their views frankly in the expectation that they can argue freely in private while maintaining a united front when decisions have been reached. This in turn requires that the privacy of opinions expressed in Cabinet and Ministerial Committees, including in correspondence, should be maintained.'

Ministerial Code, 2007, section 2 (page 3)

Cabinet collective responsibility lies at the heart of the British system of Cabinet Government. The principle that all members of the Cabinet must be taken to have collective responsibility to Parliament and to the public for the policy of the Government as a whole forms the bedrock of the power of Cabinet decisions to bind the Government (such decisions being binding as a matter of convention, not law). The fact that any Minister requires the collective consent of other Ministers to speak on behalf of Government is an essential safeguard of the legitimacy of Government decisions. This is recognised by the Ministerial Code (as quoted above), and through the Privy Council Oath.¹

The confidentiality of Cabinet proceedings plays a central part in the doctrine of collective responsibility, because it means on the one hand that Ministers can discuss Government policy freely and openly within Cabinet, without the self-censorship induced by the knowledge that what they say is likely to be made public, and on the other hand can present a united front outside Cabinet, without the knowledge that contradictory attitudes and opinions will be revealed. The same considerations apply to Cabinet Committees and to issues discussed between Ministers in correspondence. The doctrine of

¹ The oath states that the swearer: '...shall, in all things to be moved, treated and debated in Council, faithfully and truly declare your mind and opinion according to your heart and conscience; and shall keep secret all matters committed and revealed unto you or that shall be treated of secretly in Council. And if any of the said Treaties or Counsels shall touch any of the Counsellors, you will not reveal it unto him but will keep the same until such time as, by the consent of Her Majesty, or the Council, Publication shall be made thereof.'

collective responsibility, in other words, recognises that absolute unanimity is a constitutional fiction, but also that confidentiality is necessary in order to permit open discussion and debate, and to ensure that all views are aired and considered before a decision is taken.

Once a decision has been taken, a Government needs to be able to be confident that it can be implemented as the collective view of Government, without this being constantly revisited and reviewed. Releasing comments about a particular policy made before collective agreement, could mean that Government ministers find their own personal positions untenable, overriding the concept of Government Ministers signing up to a policy once a collective position has been reached.

The importance of confidentiality is recognised internationally. Under the USA's FOI regime Cabinet records are released to the public at 25 years, as is the case in New Zealand; Canada and Holland operate a 20 year rule although Canada excludes Cabinet confidences from their Access to Information Act; France, Ireland, Norway, Denmark and Australia have 50 year rules.

Frankness and candour: ministers

The quality of any decision making process depends on the frankness and candour with which views are presented and policies are scrutinised. Robust, even fierce, debate promotes effective decision making, the reconciliation of Ministers' true views and the production of better policy. But preserving frankness and candour in the collective deliberation of policy necessarily depends on such deliberation remaining confidential. If ministers cannot confidently expect that their deliberations on policy will benefit from a high level of protection against future disclosure, they may well be reluctant to put forward dissenting and divergent views. Conversely the disclosure of divergent views may mean that it would be harder for the Government to act collectively on a particular issue.

This would be particularly true if the time at which records were released regularly fell within the period in which Ministers remained active in public life. Serving Ministers would find that records were released covering issues and decisions they had been directly involved in, possibly in a different Ministerial role. Equally, senior members of the Opposition could find the debates to which they contributed when in Government released. The Government has taken the view that access to information in policy papers under the FOI Act should be considered according to the same principles, whether or not the papers are those of the Labour Government (since 1997) or its predecessors.

There is of course inevitable contemporaneous speculation in the media about differences of views between Ministers. And some former Ministers publish memoirs recording their experiences in office. But the presumption that official records remain confidential until formally released is important to allowing Ministers the space to argue different points of view across a wide range of topics.

Ensuring the right people are involved in policy decisions

Early disclosures could have another set of effects on decision-making. If it was to become more likely that the proceedings of Cabinet and its Committees were opened to the public sooner, then Ministers may narrow the circle of persons involved in policy decisions, which would be likely to result in more informal and inadequately documented decision-making processes. This would undermine the value of the Cabinet Committee system as a broad based decision-making process.

It could also lead to decisions being taken via unminuted oral opinions or written material becoming a sanitised version of decisions that had already been taken. If sensitive advice was to be given off the record, there might be a danger that full advice would not be provided, and record keeping may suffer.

Clearly, the disclosure of information cannot adversely affect the frankness and candour of the specific information that has already been recorded, or the quality of the decision-making process it informed. Rather that harm is necessarily prospective, and is concerned with the damage that can be done to decision-making in the future.

THE ROLE OF THE CIVIL SERVICE

The impartiality of the Civil Service

One of the key factors behind the development of the 30 Year Rule was that it was judged that thirty years provided a period of time similar in length to the average career of a Senior Civil Servant. Early disclosure of policy discussions could jeopardise the ability of Senior Civil Servants to serve successive administrations, if it became known that they were associated with particularly contentious policies of the previous administration. This could have a negative effect on good government if it damaged good working relations between Ministers and officials.

The risk of these outcomes depends on the length of time before documents are released. There may be little impact from events many years in the past, often when the officials concerned would have been in a more junior position. But the shorter the gap between provision of the advice and its release, the greater the risk that it might engage issues still the subject of political controversy. And there may be particular jobs or roles where views expressed may have a long currency. Examples might include foreign policy, where release of comments about a particular country might have an impact on relationships for some time into the future, or an individual working early in their career in a Private Office or on an especially contentious issue for a Minister of an earlier administration.

Frankness and candour: officials

This leads on to the types of advice provided by Officials to Ministers. Officials need to feel able to give frank advice, in private, to Ministers. Sometimes Ministers may want officials to consider a difficult policy area, and consider options which might have negative effects for some groups, or that need further scrutiny before decisions are taken.

Policy development is a process that will, in general, require many iterations before a policy announcement is made to the public. Some of these stages could and should be done as openly as possible, with full engagement of particular stakeholders or of the public more generally. But Ministers will also want the opportunity to weigh up the issues privately, and to get official advice before accepting or rejecting particular proposals. Officials are expected to give private, honest, informed advice before Ministers make policy decisions.

Frank and open discussion of problems or difficulties is much less likely to take place if those involved operate on the basis that their considerations are likely to be made public within a relative short period. The nature of policy advice would change and become more guarded and arguably less useful.

CONSIDERATIONS RELATING TO ROYAL INFORMATION

It is a fundamental constitutional principle that communications between the Sovereign and her Ministers and other public bodies are confidential in nature. This is so because the Sovereign has the right and the duty to counsel, encourage and warn her Government. The Queen is thus entitled to have opinions on government policy and to express them to her Ministers, but she is constitutionally bound to accept and act on the advice of her Ministers. Any communications which have preceded the giving of that advice remain confidential, because of the need to maintain the political neutrality of the Monarchy in public affairs; this itself is fundamental to the UK system of constitutional monarchy.

The Sovereign remains in office for life, and the current reign is now in its 57th year. It will remain a matter of constitutional sensitivity if the Monarch expressed particular views on a policy or a personality long after the policy has been implemented (and may even have been superseded), or the personality has ceased to hold the relevant office. Communications between the Sovereign and Government Ministers, including those between their respective Private Secretaries, which refer to such matters will remain sensitive during the lifetime and possibly even after the death of the Sovereign.

The Sovereign's position as Head of State, of the Commonwealth and of the Church of England, means that her role covers a broad range of responsibilities and issues beyond those pertaining to central Government. It follows that the Sovereign's relations with and ability to give counsel to officeholders in these institutions rely on correspondence between the parties remaining confidential.

Communications between the Heir to the Throne and Government Ministers, including those between their respective Private Secretaries, may also be sensitive. This is particularly true for communications which reference the views of The Heir to the Throne, where such views are not already in the public domain, and, if so, should remain confidential. In the same way as for Her Majesty it is important that The Heir to The Throne is distanced from controversial party-political debate.

Any fixed timescale set for the release of records will, in some sense, be arbitrary and unable fully to reflect the unique position of the Monarchy's role within and interaction with Government, and the potential longevity of sensitivities. This is well illustrated by the current reign, which far exceeds the boundaries of the current 30 Year Rule. It is important that the constitutional position and fundamental principles of the Monarchy and its records are maintained, with no assumption of release at a fixed period.

CONSIDERATIONS RELATING TO INTELLIGENCE RECORDS

There is no fundamental reason why the particular sensitivities of intelligence agency records should prevent a change in the 30 Year Rule for the routine release of public records. In recognition of those sensitivities, intelligence records are currently retained beyond the normal thirty years. This retention is carried out under approval given by the Lord Chancellor under section 3(4) of the Public Records Act (known as the Security and Intelligence Blanket). This allows the agencies to take account of an ongoing requirement to protect national security and operational effectiveness. The reasons for the 'blanket' arrangements remain compelling and it would be vital to maintain these within any change to the 30 Year Rule. To do otherwise could also conflict with the primary legislation governing the agencies' existence.

The 'blanket' approval covers records dated up to 1981 and is due to be reviewed in 2022. Under the existing arrangements the Lord Chancellor's approval to retain records dated 1982 -1991 will be required in 2012. The introduction of any change to the 30 Year Rule before 2012 would require the Lord Chancellor's approval to be sought before then.

However, although the agencies benefit from the protection afforded by the Security and Intelligence Blanket, any change to the 30 Year Rule which affected other Departments would also affect them. Many Departments hold information received from or related to the agencies. Departments rely upon the reviewing expertise of agency staff to assess the sensitivity of such information. A reduction of the 30 year period would put strain on reviewing resources. This might affect the transition to a shorter time period. Although the increased resource requirement will affect all Departments, the particular nature of intelligence records (e.g. intelligence agency information contained in a document might not be obvious to the reviewer in a mainstream Department) means that the agencies will face a bigger burden than most supporting others in their transition efforts.

Finally, expectations about the results of any change would need to be carefully managed. No expectation should be encouraged that sensitive intelligence material will reach the public domain any faster following a change to the 30 Year Rule.

2. Specific questions posed by the Review Team

Should 30 years remain the point by which government records are normally made available to the public?

Clearly any period, be it 30 years, 20 years or lower, will in some sense be arbitrary. '30 years' was arrived at when the move was made from a '50 year rule' back in the 1960s because of considerations relating to the period of a career, be it in the capacity of a Minister or a senior public servant.

The 30 Year Rule also has its origins other considerations about protecting the functioning of Government, for example, the conventions around the collective responsibility of Cabinet, the relationship between Ministers and officials, and in the policy-making process more broadly.

A judgement needs to be made as to whether 30 years now provides the correct balance between openness and protecting the proceedings of Government.

This is explained in more detail in the section above.

Benefits and risks

The benefits lie primarily in the fact that any reduction would enhance openness and more active participation and engagement in the design and delivery of policy. Even with the FOI Act 95% of the public records being made public are through the current 30 year transfers to The National Archives so that any reduction must logically lead to greater openness. The risks are around issues like the possible impact on the way Government works. This paper examines these risks in greater detail above. This may point towards considering whether the existing restrictions are appropriate for the more sensitive types of information, and reducing for other categories.

What impact would any reduction in the 30-year closure period have on the Cabinet Office and sponsored bodies, and the civil service generally?

There are a range of potential impacts relating to the role of the Civil Service, its relationship with Ministers, and the behaviour of Ministers themselves. There would also be implementation impacts for all Departments. These are spelled out in more detail in the previous section.

As far as the Cabinet Office is concerned, any reduction would have significant resource cost which would primarily fall on our Archives Unit. The proportion of Cabinet Office archives which are transferred to The National Archives is higher than average across Whitehall. This is because we have Prime Ministers' papers, Cabinet and Cabinet Committee papers, records of the Joint Intelligence Committee (JIC), Cabinet Secretary Notebooks; a high proportion of which are kept for permanent preservation.

Options for planning and implementing a transition to any new arrangements

Any reduction in the 30 year transfer period would be easier to manage through a phased approach. The longer a phasing in period, the easier would be the administrative burden. The costs would be commensurately lower depending on the time period of the phasing in. Finding suitable additional reviewers across Government may be particularly difficult if the phasing in period was less than five years. Costings are set out in further detail in the paper, and are based on a five year phasing in of any change.

Freedom of Information

There are some specific issues relating to the exemptions in the FOI Act that would be affected by a change to the 30 Year Rule. Some FOI exemptions lapse automatically at 30 years, whereas others do not. The presumption must be that the great bulk of records would be transferred to The National Archives and opened after whatever period replaced the 30 Year Rule. But it is right to consider the implications if some of the FOI exemptions which now lapse at 30 years automatically lapsed earlier. Examples might include those exemptions relating to commercial confidentiality and to communications with the Royal Family. The issue is whether these exemptions should - like the exemption relating to international relations - continue, so as to protect those records where the public interest in maintaining confidentiality extends beyond the proposed transfer point. Use of the exemptions would, as now, be subject to a balancing test against the public interest in disclosure.

Another issue relating to FOI is whether the prospect that records would be released earlier under a revision of the 30 Year Rule might be coupled with some simplification in the arrangements for cases considered before then. Most of the FOI exemptions involve complex balancing of the interest in maintaining confidentiality against the wider public interest in openness and disclosure. If the 30 Year Rule was shortened, there might be a case for making some classes of documents, such as Cabinet records, automatically exempt from release before then.

Alternatively, different transfer points could be considered for different types of records. This might suggest that some records could be transferred to the Archives sooner than others, and protections applied to other types of records where needed. There is a related issue with the Cabinet Secretary's notebooks some of which may contain detailed attributed views of Ministers, and where there may be a case for their being withheld for longer periods.

3. What types of records does the Cabinet Office hold?

Cabinet and its Committees

The Cabinet Office holds the official record of Cabinet and its Committees until these records are transferred to The National Archives, when they are 30 years old. Until then, these records are managed in line with the principles of collective responsibility and the FOI Act. All records relating to Cabinet and its Committees engage the qualified exemptions in s. 35 of the FOI Act and other exemptions may also apply. This material includes memoranda, correspondence and minutes relating to both domestic and international issues.

When approaching the 30 year point, Cabinet and Cabinet Committee material need high levels of reviewing input because of the potential sensitivity of some of the information in them. These classes are sensitivity reviewed around the 28/29 year point ready for transfer at 30 years.

Cabinet Secretary's Notebooks

The Cabinet Office holds the Notebooks of each Cabinet Secretary. In 2003 a review process began resulting in the release of the first tranche of Notebooks in January 2006, having previously been held for 50 years because of their importance in the maintenance of collective responsibility. The Notebooks are a detailed hand written record of the discussions in the Cabinet, taken by the Cabinet Secretary, with views being attributable to individual ministers.

The Cabinet Office is currently releasing four Notebooks a year, the latest Notebook to be released covered the years 1954–1955. Before release of the Notebooks they are transcribed so that they can first be reviewed and sensitivity cleared. It would be administratively difficult to quicken this painstaking process, and assuming a reduction to 20 years, it would take the Cabinet Office to around 2020 to catch up.

Joint Intelligence Committee (JIC)

The records of the JIC are considered for release when they are 30 years old. The records include information derived from the security and intelligence agencies. A significant proportion of these records come within the scope of the 'Security and Intelligence Blanket' and, as such, are retained in the Cabinet Office under Section 3(4) of the Public Records Act. The review of JIC records and the redaction of sensitive information from records being opened provides a major overhead to the work of our archives unit. A reduction in the closed period would significantly increase the amount of redaction work required before records were transferred.

Information relating to the Royal Family and the Royal Household

The records of the Royal Family and the Royal Household that are held by the Royal Archives fall outside the scope of the Public Records Act. The Royal

Household itself is not a public authority within the terms of the Freedom of Information Act, and is therefore exempt from its provisions.

However, due to the constitutional interaction between the Monarch, as Head of State, and her Government and Prime Minister, the Cabinet Office holds a good deal of Royal material, until it is transferred to The National Archives at the 30 year point. Such material is subject to the provisions of both the Freedom of Information and Public Records Acts.

It is in recognition of the constitutional position of the Royal Family, and the importance of constitutional conventions around, for example, the confidentiality of correspondence, that the exemption at section 37(1)(a) of the Freedom of Information Act exists. All information held by the Cabinet Office relating to correspondence with the Sovereign, other Members of the Royal Family and members of the Royal Household engages this qualified exemption.

Honours

The Ceremonial Secretariat in the Cabinet Office is responsible for honours policy across Government. Records relating to various aspects of the Honours system are held. These can generally be divided into those relating to Honours policy, and those relating to individuals. Policy files will generally be considered for transfer to The National Archives at the 30 year point, but records which relate to the assessment of individual cases will be destroyed.

In recent years, documents relating to the Order of the British Empire, Campaign Service Medals, Honours Scales, the King's Medal for Service, Life Peerages, Medals Policy, the Order of St Michael and St George and the Royal Commission on Honours have been transferred to The National Archives.

Policy advice

The Cabinet Office also has a policy role – sometimes in terms of units within the Cabinet Office with a specific policy function (current examples include the Social Exclusion Task Force or the Office of Third Sector), or advice from the Secretariats or No 10 to the Prime Minister, or advice on potential Machinery of Government changes. These types of papers may be advising on new policy, considering current policy, or weighing different options. They would tend to engage exemptions in section 35 of the FOI Act.

Inherently material relating to the Prime Minister's Office may be amongst the most sensitive held within Government. The Prime Minister will take papers on the whole spectrum of Government activity and needs clear and honest advice about departmental policies, often combined with consideration of alternative options. The Prime Minister will also receive confidential views of his Ministers and external stakeholders (for example, representatives of foreign Governments, business or NGO leaders) – both of whom need to feel that their privacy will be respected if they are to continue to proffer advice.

The Cabinet Office also holds records from the Prime Minister's Office, which are transferred to our Archives Unit at the end of an Administration or on change of Prime Minister by agreement. These papers require a high level of reviewing which is done at the 29 year point before transfer at 30 years.

4. Implementation of change in the Cabinet Office

Cost Implications

The following costs are based on the assumption that all records would be transferred to The National Archives at the same time. These figures would need to be recalculated if records were retained for varying periods depending on their sensitivity.

Reviewing records for transfer to The National Archives currently costs the Cabinet Office £55k each year. In addition, preparing records for transfer to The National Archives currently costs £170k each year.

Each additional year's records that needs reviewing and preparing will add the same amount to the current costs. What this means in a few examples is shown below:

Option a) *'20 year rule' phased in over 5 years*

- The total reviewing cost for the Cabinet Office would rise to £165k per year (a normal year's reviewing, plus two additional years each year)
- The total preparation cost for the Cabinet Office would be £510k per year (a normal year's preparation, plus two additional years each year)

Option b) *'25 year rule' phased in over 5 years*

- The total reviewing cost for the Cabinet Office would be £110k per year (a normal year's reviewing, plus one additional years each year)
- The total preparation cost for the Cabinet Office would be £340k per year (a normal year's preparation, plus one additional years each year)

Option c) *'15 year rule' phased in over 5 years*

- The total reviewing cost for the Cabinet Office would be £220k per year (a normal year's reviewing, plus three additional years each year)
- The total preparation cost for the Cabinet Office would be £680k per year (a normal year's preparation, plus three additional years each year)

Clearly these costs would rise if a shorter period of phasing were introduced. There could be some counterbalancing effect of a reduction in FOI requests for the additional releases but this is speculative and unquantifiable.

It is also worth bearing in mind that a shorter phasing in period may make it difficult to find sufficient numbers of suitable reviewers.