

# Back to the FOIA: how FOIA affects historical records

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**Paul Gibbons, aka FOIMan, explores FOIA's effect on the keeping of historical records, as well as the challenges confronting archivists tasked with complying with FOIA. Paul is a Member of the Examination Board for the Practitioner Certificate in Freedom of Information**

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**B**efore the Freedom of Information Act ('FOIA'), there were archives. That sentence is true not just for myself (I started my career as an archivist) but from a public accountability perspective as well. These days, researchers are able to access information about how public authorities work in real time (give or take 20 working days).

Prior to FOIA, the public was expected to wait until records became available in a record office to dig behind a public authority's official pronouncements — that, or rely on somebody leaking them. Historian and peer Lord (Peter) Hennessy has observed that releases of public records by the National Archives ('TNA') "...are a form of delayed freedom of information." (Hansard, HoL, 17 January 2012, vol.734)

One of the less obvious things that FOIA did was to establish a statute-based lifecycle for information held by public authorities. In the case of central government departments and other 'public record bodies', that lifecycle was already in place from the 1950s (amended in the 1960s), and FOIA (at least initially) fitted itself around that. However, for other public bodies, FOIA brought new certainty in this regard.

The other thing that FOIA does, of course, is exempt public authorities from the requirement to comply in certain circumstances. In the case of information that is retained for long periods, there usually comes a point when the protection that was once so critical is no longer required. And so FOIA places limits on how long certain exemptions can be applied.

There have been few amendments to FOIA since its enactment, particularly since proposals to make changes are so often controversial. One successful amendment has resulted in reducing the period before a record becomes 'historical', and in so doing has cut the length of time that many exemptions can be applied.

The new right of access to information has had an impact on the way that archivists work. Before FOIA, most public authorities could use their discretion in deciding whether to allow access to records that were retained in their archives. They could take into account both the potential consequences of dis-

closure, and the practicalities of locating documents that may not yet have been catalogued by hard-pressed archivists. FOIA removed that discretion, replacing it with clear rules on handling enquiries. With often vast backlogs of records to process, the idea that poorly resourced archivists would be obliged to spend all their time searching through a mountain of disorganised material filled many in the profession with horror.

Finally, some historians (including Lord Hennessy quoted above), feared that FOIA, and particularly its reputed potential 'chilling effect' on public employees, might lead to 'silence in the archives'. In other words, a fear of committing policy-making to record in case it needs to be disclosed through FOIA could result in a sparsity of evidence for future historians to consult when writing the history of the early twenty-first century.

Which leaves us with a question: Does FOIA assist archivists in bringing order to chaos?

Or does it ensure that our activities today will fade, like Marty McFly and his siblings, from the historical record of the future?

## FOIA and 'historical records'

Part VI FOIA deals with historical records and records in public record offices, and amended (together with Schedule 5) the Public Records Act 1958 ('PRA') and the Public Records Act (Northern Ireland) 1923 ('PRA(NI)'). Requirements under PRA(NI) are substantially similar to those under the PRA, and this article focusses on the PRA.

The PRA established the process by which certain specified public bodies would select and transfer records to the Public Record Office, which currently trades under the name 'The National Archives' ('TNA'), or nominated 'places of deposit', for permanent preservation. Under the Act, most selected records would be made available to the public after 50 years, which was later reduced to 30 years. This was the basis of the so-called '30-year rule'.

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Certain records would be closed for a longer period, perhaps for national security reasons, or to protect the privacy of living individuals.

The PRA only applies to public records bodies. These include central government departments and agencies, the armed forces, and the NHS. Until FOIA, there were no statutory requirements applying to other public authorities to establish when or how records became historical. Section 62 FOIA, however, reinforced and extended the status of the 30-year rule to the rest of the public sector. For the first time it was clear that records older than 30 years were historical records, and would be treated differently to other documents retained by a public authority.

And then came the Constitutional Reform and Governance Act 2010 ('CRGA'). As well as controversially making communications with the Queen and her two closest heirs subject to an absolute exemption for the first time, the CRGA also amended section 62 of FOIA (and the relevant parts of PRA and PRA(NI)) to reduce the 30-year rule to a 20-year rule. This followed a recommendation from a Commission established by Prime Minister Gordon Brown, and chaired by the *Daily Mail* editor Paul Dacre. Transitional arrangements mean that since 2013, and until 2022, TNA are opening two years' worth of historical records from government departments every year, with the length of closure time gradually decreasing from 30 years in 2012 to 20 years in 2023. By the end of 2018 we will be

operating on a 24-year rule.

## Some exemptions die, some just fade away

What does it mean for FOIA though when a record becomes 'historical'? One significant implication is that it

dictates how long an exemption can be applied for in many cases. The following exemptions can no longer be applied to information once it becomes 'historical':

- Section 30(1) — criminal investigations and proceedings;
- Section 32 — court records;
- Section 33 — audit functions;
- Section 35 — policy formulation and development by government departments;
- Section 36 — effective conduct of public affairs (outside Northern Ireland);
- Section 42 — legal professional privilege.

Some other exemptions are given a longer lifespan, potentially still applying after a record becomes historical:

- Section 28 — relations within the UK (30 years);
- Section 36 — effective conduct of public affairs (in Northern Ireland) (30 years);
- Section 43 — trade secrets and commercial interests (30 years);
- Section 37(1)(b) — honours or dignities conferred by the Crown (60 years);
- Section 31 — prejudice to law enforcement etc. (100 years).

There are special rules affecting communications with the Royal Household:

- Section 37(1)(a)-(ac) — communications with the Sovereign, their two closest heirs, and other members of the Royal Family (5 years after the death of the individual(s) in the Royal Family involved in the communication or 20 years after the information was created, whichever is latest);
- Section 37(1)(ad) — communications with the Royal Household (5 years after the death of the Sovereign reigning when the information was created or 20 years after the information was created, whichever is the latest).

Other exemptions don't have a specific cut-off date. However, it is rare that their effect will go on indefinitely. In effect, they just fade away.

Many exemptions are subject to a prejudice test. In most situations, any envisaged prejudice will reduce over time.

It is well documented that time is a relevant factor in considering the public interest. The longer it is since the information was created, the less likely it is that the public interest will continue to favour maintaining a qualified exemption. There will often come a point when the public interest in disclosing information about an international incident, say, outweighs the public interest in protecting evolving relations with a foreign state.

There is a clear end point for the section 40 exemption, since data protection laws only apply to the living. Once it is clear – or can reasonably be assumed – that a person is dead, then section 40 can no longer be applied.

The concept of confidentiality is not eternal. Exemptions such as section 30(2), section 41 and section 43(1) are, as John Wadham puts it in the 2nd edition of *Blackstone's Guide to the Freedom of Information Act*, "subject to an inherent trend towards obsolescence."

Even the exemption protecting information provided by national security

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bodies starts to lose its lustre once records containing it have been transferred to TNA. Section 23 becomes qualified at that point, so the public interest in maintaining it has to be considered. TNA is also unable to rely on sections 21 and 22 in relation to historical records that have been transferred to it.

So exemptions are not eternal, and the point at which information becomes 'historical' is a key turning point in its lifecycle.

## Public record bodies and the National Archives

Public record bodies are listed in Schedule 1 of the PRA, and are not the same as 'public authorities' as defined in FOIA. They include government departments, their agencies and 'arms-length' type organisations such as the Information Commissioner's Office, as well as NHS bodies, and the courts. They are legally obliged to select and transfer records to TNA or another nominated place of deposit. There is a scheme under which, for example, local authority record offices can be certified as being 'places of deposit' for public records. A local magistrate's court's historical records are likely to end up in a local authority record office rather than TNA as a result of this scheme. Similarly, some hospitals are allowed to retain their own archives, or may instead decide to transfer them to a local authority record office.

Part 2 of the section 46 Code of Practice on the management of records sets out how public record bodies should comply with their PRA duties in selecting and transferring records. The process, in summary, is as follows:

Public record bodies must make effective arrangements to determine which records should be selected for permanent preservation. Such records must normally be transferred to the National Archives or an approved place of deposit by the time they become 'historical records'. Under normal circumstances, they will then be opened for public inspection by the

National Archives (or places of deposit).

Exceptions from this rule come to the attention of a body known as the Advisory Council on National Records and Archives ('ACNRA'). A public record body wanting to retain records beyond the point when they become 'historical' must apply to the National Archives for this authorisation. Similarly, if a body believes that transferred historical records ought to remain closed rather than made available for public inspection, they have to submit a schedule to the National Archives indicating which information they consider should remain closed, relating their concerns to relevant exemptions in FOIA. In both cases, the ACNRA will consider the applications and advise the Secretary of State for Digital, Culture, Media and Sport who, formally at least, makes the final decision.

TNA must consult with the relevant Minister of the Crown if a request is received for information in transferred 'closed' files. If an absolute exemption was identified as being relevant to the information on transfer, TNA decides whether the closure can be lifted following this consultation. If a qualified exemption is deemed to apply, the decision on where the public interest lies is made by the Minister in consultation with the Secretary of State for DCMS. In reality, panels made up of ACNRA members advise the Minister on behalf of the Secretary of State. This byzantine consultation process explains why TNA are allowed 30 working days to consider requests, rather than the usual 20.

TNA (and PRO(NI) for that matter) are a special case. Specific rules do not apply to other record offices or archives services within the public sector (aside from where they are storing public records in a PRA 'place of deposit' capacity). Examples of such services include those provided by local authorities, but also many universities.

## Advantages of transferring records to a record office

In respect of non-public records held by public authorities, there are advantages to depositing records with a record office. Wark Parish Council last year explained to an applicant that the information it was searching for could be found in the council's minutes which were available for inspection in the County Record Office. The Information Commissioner accepted that the council was in effect applying section 21, since the information was otherwise accessible to the applicant (ICO Decision Notice FS50662278, 1st August 2017). The only caveat to this is that information solely available through a visit to a record office searchroom will not be accessible to all possible applicants. Where this is the case, authorities will need to consider how else they can meet their FOIA obligations.

As long as a record office provides 'appropriate and reasonable access' to records, a plan to make information available in their facilities will constitute 'publication' for the purposes of section 22, the exemption for future publication. To take advantage of this, according to the ICO Guidance 'Information intended for future publication and research information' (sections 22 and 22A)' (copy at [www.pdpjournals.com/docs/8878891](http://www.pdpjournals.com/docs/8878891)) the facilities must be:

- clearly advertised;
- readily available;
- accessible; and
- easy for the public to use (e.g. through provision of catalogues and indexes).

## Does FOIA apply to all records held by record offices?

Not every record held by a public authority record office will be subject to FOIA. Records which are 'deposited' by private businesses or individuals under an agreement

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which sees them retain control over the records are unlikely to be subject to FOIA, as they will be held 'on behalf of another person' (section 3(2)(a)). Where a public authority 'deposits' records, FOIA obligations will normally be retained by them rather than the record office.

In situations where records are 'donated' (i.e. gifted) to the record office, they will be held by the authority to which the record office belongs, whatever the origin, and will therefore be subject to FOIA.

### How can archivists manage FOIA obligations?

Archivists concerned about the impact of FOIA on their resources should remember that they have the same tools to manage this as any other public official. In addition, archivists are highly information literate, and often expert at understanding the relationships between records, their legal status, and of course at organising information for assessment and disclosure.

The first thing to be cautious about is accepting records without understanding their status. Where possible, archivists should refuse or limit deposits or donations from public authorities (and indeed by departments within their own authority) until records are close to becoming 'historical'. Certainly they do not want to take on responsibilities for records whilst the activities they relate to are still in effect 'live' and therefore more likely to be subject to FOIA requests. If they do accept a deposit of records, it will be essential that any deposit agreement includes a service level agreement setting out how any FOIA requests will be handled, as well as what the depositor expects of the record office if it is approached for access. Archivists will also need to warn private sector

stakeholders of the implications of FOIA before accepting records from them, and may advise them to deposit rather than donate records if they want records to be closed for a considerable period (and could decide to charge them for storage in these circumstances).

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One problem facing many record offices is the dreaded backlog. If a FOIA request is received for information in records that have yet to be catalogued, this will present obvious challenges. However, it need not be a significant problem for archivists.

If the department or organisation that created the records managed them well, and transferred the records in an organised way, including usable finding aids, then it should not generally be difficult to retrieve requested information. If it is not well organised, it will be harder. Many archivists will be involved to a greater and lesser extent with their authority's records management programme, and the ability to influence the quality of transfers to the record office is one reason why this is desirable.

As indicated above, the exemption for future publication (section 22) can be applied where there is an intention to make records available for inspection in a record office's searchroom or, indeed, online. However, this exemption only applies where it would be reasonable to delay disclosure, and where the public interest favours such a delay. The longer it is likely to be before records are processed, the less likely it is that it will be reasonable to rely on this exemption. If a record office wants to be able to rely on this exemption, a written cataloguing plan should be in place, allowing the record office to demonstrate their intention to 'publish', and ideally not too far in the future.

Other tools used to 'manage the burden' of FOIA will be useful to archivists if they are required to

handle requests relating to 'backlog' information. If records are not well organised on transfer, it may be a difficult and time-consuming process to establish whether information is held, to locate it, to retrieve it, or to extract it. In these circumstances, section 12 will come into play if it is estimated that these activities will exceed the appropriate limit of £450. In some cases, it may even be possible to argue that the scale of the task of reading through large volumes of transferred information to establish whether exemptions apply would constitute an unreasonable burden to the extent that the request can be refused as vexatious under section 14.

Unless the above provisions apply, archivists will need to play their part in answering FOIA requests for information that has been transferred to their custody. There may, however, be other reasons why the information might not be disclosed – namely if exemptions apply.

### Exemptions and personal data in the archives

Information contained in transferred records will remain subject to exemptions until it becomes 'historical' or else the exemptions 'fade away' as described earlier. Archivists dealing with requests for information that they are responsible for in this category will have to apply relevant exemptions as in any other case. Depending on the exemption, they will need to consider whether information falls within its coverage, the extent to which disclosure would, or would be likely to, prejudice a particular interest, and the public interest in disclosing or withholding the information. Archivists, or the FOI Officer in their authority, will also need to issue a response in a section 17 refusal notice for any information that they believe should be withheld.

One issue that causes archivists particular concern is the existence of personal data within records that they have inherited. Once a person has died, generally any problems with disclosure of such data will disappear, as data protection law only regulates processing of data about the living. However, given the vast quantities of information held

within record offices, there will often be situations where it is impossible for archivists to know whether or not individuals are dead.

In such situations, assumptions will have to be made. The snappily-titled 'Code of Practice for Archivists and Records Managers under section 51 (4) of the Data Protection Act 1998', published by TNA in 2007 as a result of a collaboration between TNA and three other bodies to aid compliance with the Data Protection Act 1998 ('DPA'), makes some recommendations about these assumptions (based on practice that was then current in the archives profession):

- assume a lifespan of 100 years;
- if the age of an adult data subject is not known, assume that he was 16 at the time of the records;
- if the age of a child data subject is not known, assume he was less than 1 at the time of the records (Code of Practice, p.28)

The exemption for third party personal data at section 40 will be applicable in circumstances where either it is known that an individual is alive, or when it is possible that they are alive based on the above criteria. However, archivists should ensure that they consider requests for information under FOIA on a case-by-case basis. Before the arrival of FOIA there was an assumption that census data would always remain closed for 100 years. A decision of the Commissioner in 2006 removed this certainty (FS50101391, 11th December 2006).

TNA had applied the exemption at section 41 to information in the 1911 census, but the then Commissioner Richard Thomas took the view that disclosure of the requested information would not meet the common law definition of a 'breach of confidence'. He did, however, offer guidance as to when information in the census (and presumably in other historical records contexts) might still meet this definition. This would be where information would constitute 'sensitive personal data' under the DPA (the equivalent of 'special category data' under the General Data Protection Regulation) or "other information which is obviously private information and which, on any objective

test, will be confidential in nature." (para. 38) The decision suggested examples that would fall under these categories in the census would include:

- details of infirmity or other health-related information;
- information about family relationships which would usually have been kept secret, for example:
- information that a child who was being raised as the child of the head of the household was in fact the offspring (perhaps illegitimate) of another family member; and
- information relating to very young children who were born in prison and whose birthplace is not recorded on their birth certificate." (para. 39)

### Will there be 'silence in the archives'?

Following this exploration of the impact of FOIA on historical records and the record offices that home them, what of fears that future historical research might be damaged by FOIA? To return to Lord Hennessy's remarks in the House of Lords in January 2012:

"FOI, to be candid, is not an unmixed blessing for scholars because it has led to greater caution in what is written down."

As in other contexts, debate rages as to the truth behind Lord Hennessy's criticism. In evidence to the post-legislative scrutiny of the same year, the academics of UCL's Constitution Unit commented that they were unable to find conclusive evidence of a chilling effect. Even to the extent that it existed, they pointed to the fact that there may be other factors causing this greater caution, such as the risk of leaks.

Ironically then, we will have to leave it to the historians to decide whether FOIA has been as damaging as they feared.

### Conclusion

FOIA hasn't replaced record offices as a means for holding public authorities to account. As Lord Hennessy commented:

"...access is a matter of linkages embracing with FOI the output of the public records system..."

Archivists will be affected by FOIA though, as many of the records in their custody will remain subject to the Act. There are, however, numerous means for managing their obligations from terms of deposit through to exemptions. The extent of the protection offered by the latter will often reduce over time, and given the stage that archivists will be involved in a record's lifecycle, they may be the most affected by this.

Unless anyone encounters a mysterious DeLorean in their neighbourhood, we will have to wait a good while before we find out whether FOIA has damaged the historical timeline.

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