



## **Advisory Council on National Records and Archives: 15th Annual Report 2017-18**

To the Right Honourable Jeremy Wright QC MP, Secretary of State for Digital, Culture, Media and Sport.

### **Part One – The Advisory Council**

The Advisory Council on National Records and Archives (the Council) is an independent body. It advises you as Secretary of State for Digital, Culture, Media and Sport (the Secretary of State) on issues relating to access to public records. This includes advising you on matters relating to public records generally and representing the public interest in determining which historical records should, exceptionally, not be open to public access, as such records normally are. It was established by the Public Records Act 1958 (PRA) and is a non-departmental public body.

The Council is chaired by the Master of the Rolls, The Rt Hon Sir Terence Etherton, who was appointed with effect from 3 October 2016. Details of the membership of the Council during the period covered by this report are set out in Appendix A, from which it will be seen that, during the course of 2017-18, seven members of the Council stood down and four new appointments were made.

### **The role of the Council**

The Council advises on:

- applications from departments for the retention of public records beyond the age of 20 years, when those selected for permanent preservation are normally transferred to The National Archives
- the balance of the public interest in applications from departments for the extended closure of historical public records and other 'matters relating to the application of the Freedom of Information Act 2000 (FOIA) to information contained in public records that are historical records within the meaning of Part VI of that Act'

- the balance of the public interest in the release or non-disclosure of historical records, an application for the disclosure of which has been made under the FOIA; and
- the preservation of public records in places of deposit and facilities for public access to them.

Through its sub-committee, the Forum on Historical Manuscripts and Academic Research, the Council advises the Chief Executive of The National Archives and Keeper of Public Records on matters relating to private archives outside the public records system.

As its name suggests, the Council's role is advisory. Accordingly, the Council does not:

- make the final decision as to whether, when they become historical, records are transferred to The National Archives closed nor on whether, when a closed record is reviewed after transfer, it should remain closed – these decisions lie with the department whose records they are
- make the final decision on whether a record can be retained by a department – the decision is made by the Secretary of State for Digital, Culture, Media and Sport.

Nor does the Council:

- advise on departments' retention of records under the Security and Retention Instrument 2011
- review departments' decisions on the selection of their records for permanent preservation - this falls under the remit of the Keeper of Public Records.

## **Part Two – The Advisory Council's work in 2017-18**

### **Meetings**

The Council held four meetings this year: in May, July and November 2017 and in February 2018. As well as Council members, meetings were attended by Jeff James, The National Archives' Chief Executive and Keeper of Public Records, and by other representatives from The National Archives who have particular expertise related to the issues considered by the Council.

### **The Advisory Council's procedures and processes**

During the course of the year, the Council completed its review of its procedures and processes, and has implemented a number of changes designed to enhance its independence and effectiveness. For example, two deputy chairs have been appointed – one (Trevor Woolley) for the Council's core business and another (Elizabeth Lomas) for the Forum on Historical Manuscripts. A number of recommendations emerging from the review will be reflected in a revised Code of Practice (under s.46 of the Freedom of Information Act) which will be the subject of a consultation exercise. Among these, the Council seeks to codify that its responsibilities are limited to advising on the balance of the public interest in the release or closure of records and does not encompass the provision of advice on the

use of FOIA exemptions which are not subject to a public interest test ('absolute exemptions').

The Council has, however, been disappointed by the time it has taken for departments to respond to some of its recommendations, such as the institution of a procedure to ensure that the Council is consulted where FOI requests are made for records retained by departments and where the FOIA exemption claimed by the department gives rise to a public interest test. In one case, a recommendation from the review took more than a year to receive a response from your department.

### **Engagement with departments**

During this year, the Department for Digital, Culture, Media and Sport attended a Council meeting to discuss the progress they were making in the review and transfer of their historical records.

Representatives from the Department for Exiting the European Union (DExEU) attended meetings to provide the Council with details of plans to ensure that appropriate records in relation to the EU exit process were created and captured. The Council was also advised that the sensitivity criteria for some records being reviewed for transfer would need to take into account the negotiations for exiting the EU. The Council was content to agree that principle, but requested detailed information about amended criteria in the form of a memorandum or checklist and advised that it would take a case by case view of the cases presented to it for closure.

The Council received retention applications from: Animal and Plant Agency (APHA), Companies House, HM Land Registry, Home Office, HM Treasury, Foreign & Commonwealth Office (FCO); Ofqual, Serious Fraud Office (SFO), Office for National Statistics (FS), Department for Education, Department for Health, Charity Commission, Natural Resources Wales, Department for Digital, Culture, Media and Sport (DCMS), HMRC, Department for Work & Pensions and Cabinet Office.

The Council was content to recommend that permission be given to retain their legacy records for the 12-month period requested by HM Land Registry, SFO, ONS, Department for Education, DCMS. APHA and Companies House were given a one-year retention instead of the requested two years and both were asked to provide a progress report within the year. DWP was given a two-year retention instead of the requested five years; and the Council asked for additional information regarding the record subjects and resourcing.

Ofqual, Charity Commission and Natural Resources Wales were granted a one-year retention but were asked to provide progress updates. HM Treasury, FCO, Home Office and Cabinet Office were given permission to retain records for the requested periods.

The Council considered update papers from the FCO regarding their review of annual department files and from the Home Office, HMRC and Department of Health.

Representatives from the Ministry of Defence provided the Council with an update on plans for the transfer of military service personnel records from the early part of the last century. The department's proposal for the digitisation and ongoing access of these records was considered by the Council, which was content in principle with the transfer proposal but had concerns about the funding of the project and the opportunity for continued public access. The department was asked to return to Council with an update and revised proposal in November. During the year, the Council has received and considered correspondence from a researcher expressing concerns about the timely selection and transfer from the Ministry of Defence of particular record series. While matters of selection are not within the Council's remit – being a matter for the department under the supervision and guidance of the Keeper – the Council will seek further reassurance during 2018-19 from both the department and The National Archives that transfer obligations are being met.

## **Access to Public Records**

- **Closure of records under the Freedom of Information Act**

The Council is responsible for advising you on the application of the FOIA to historical public records, including on applications from departments that wish their records to be transferred to The National Archives closed or partially closed (redacted) under exemptions permitted under the FOIA.

In 2017-18, 74,551 government records were transferred to The National Archives. Over 87.6% of these records were transferred open in full or partially closed and can be viewed at The National Archives by any member of the public who has a reader's ticket. The remaining 8.2% of records were transferred closed, after departmental applications to do so had been scrutinised by the Council and 4.2% were retained in full by the relevant department.

The number of closure applications submitted to the Council increased very significantly this year to 5,974, compared with 4,290 in 2016-17. Around 60% of these applications engaged only absolute exemptions, and so were not subject to a public interest test. Of these, the vast majority involved personal information about private individuals; personal information may be protected from release by the Data Protection Act. In considering applications to close records to the public, the Council focuses on those that invoke exemptions subject to a public interest test. The most common exemptions claimed concern damage to international relations and risks to the health or safety of individuals.

Given the very large volume of applications placed before it, the Council works on the basis of summaries prepared by departments and vetted by The National Archives. The Council will ask for more details and question apparent weaknesses in the arguments for closure until it is satisfied; or until the department withdraws or modifies the request. Occasionally, the Council may insist on one of its members seeing the full record.

The Council queried just under 7% of the applications it received, but the figure rises to around 17% when records only attracting absolute exemptions are excluded. More than half of this year's queries resulted in the applications being amended or withdrawn by departments. In the majority of cases, the Council raised queries which required departments to make the arguments for closure clearer, rather than to alter the duration of closure or the FOI exemption to be applied to the records. While this has provided some reassurance that departments are taking care to ensure that they are applying the correct exemptions, there is still scope for them to improve the quality of the justifications they offer in support of their use. In one case, the Council nominated a member to view a record because it was unpersuaded by the department's justification for closure. As a result, the Council recommended in favour of transferring the record open. If the difference of opinion continues, the Council's new process for dealing with cases of unresolved disagreement (which requires the department to seek approval from its ministers) will be applied. Ultimately, the final decision will rest with the department but if it is contrary to the advice of the Council the disagreement of the Council will be recorded in one of our quarterly communications to you as Secretary of State. Generally, the quality of the applications made by departments for closure have been satisfactory. The Council has, however, had occasion to press departments to produce bespoke explanations for the record concerned rather than offer a generic explanation which fails to address the specifics. In addition, there have been instances when Departments have been slow to respond to queries raised by the Council, or have withdrawn applications only after repeated challenge from the Council.

- **Retention of records under the Public Records Act**

The Council also advises the Secretary of State on applications submitted by departments for the retention of public records under the Public Records Act 1958. The most common grounds for a department to seek to retain records are set out in guidance produced by The National Archives.

The Secretary of State has accepted the Council's advice on every application considered this year.

This year, the Council considered 1,432 retention applications, an increase of 45% on 2016-17 and 80% on 2014-15. As reported last year, the main reasons for the increase are the impact on review teams' workload of the transition to the 20-year rule, which requires departments to review two years' worth of material each year from 2013 until 2023. Additional reasons are:

- a) The introduction of The National Archives' Record Transfer Report in 2014, which provides greater transparency by publishing data on records transferred or retained by departments. This has encouraged departments to make sure that they comply with the PRA and have a retention instrument to allow them to retain historical records for which they have an ongoing business need

- b) That departments are increasingly being required to retain records which they may be asked to make available to inquiries or inquests, for example the Independent Inquiry into Child Sexual Abuse. A new category (no.8) has been added to the list of grounds for retention drawn up by The National Archives to reflect this; and
- c) That departments are making more applications to the Council to retain records on security grounds where that material that would previously have been considered to have fallen under the 2011 Security and Retention Instrument. The criteria for the application of the Instrument are being applied more tightly by departments and more material was considered out of scope of such 'blanket' retention approval.

The following table shows the number of applications for closure and retention considered by the Advisory Council, and the number queried by it. There were three outcomes in the case of queried applications:

- a) Clarification or additional information provided by a department was accepted by the Council and the application was agreed unchanged
- b) The department amended its application so that the closure period was reduced, the reasons for closure more accurately explained, or the amount of information to be closed reduced
- c) The department withdrew its application.

Further information on how the Council scrutinises and challenges the applications it receives is available on the Council's website.

		2014-15	2015-16	2016-17	2017-18*
Closure applications	<b>applications considered</b>	4,250	4,435	4,290	5,974
	<b>applications queried</b>	181	480	506	410
	<b>applications where clarification was received and accepted</b>	105	340	230	117
	<b>applications which were amended by departments and accepted</b>	67	126	206	186
	<b>applications withdrawn by departments following challenge by the Council</b>	9	14	28	27

Retention applications	<b>applications considered</b>	793	952	986	1,432
	<b>applications queried</b>	28	44	116	125
	<b>applications where clarification was received and accepted</b>	21	28	34	32
	<b>applications which were amended by departments and accepted</b>	4	12	38	72
	<b>applications withdrawn by departments following challenge by the Council</b>	3	4	24	11

\*a number of queried cases remained unresolved at the end of the period covered by this report and will be carried forward.

- **FOI Panels**

Records retained by departments and those closed at transfer to The National Archives remain subject to the FOIA and individuals can make an FOI request under the FOIA to have access to them.

When The National Archives receives a FOIA request for access to closed information held there, it follows the procedure set out in Part VI of the Act. Under these provisions, before a request can be refused on the grounds of a qualified exemption, the Secretary of State and the Council must be consulted. The Council will carry out the public interest test, which is necessary before such an exemption can be applied. This is, whether in all the circumstances of the case, the public interest in disclosure is outweighed by the public interest in refusing access to the information in the record. For this purpose, panels of three Council members are convened to consider the public interest in the release or non-disclosure of the requested information. The Council has no advisory role when a request is to be refused citing only absolute exemptions (around 38% of cases).

In most cases, the request concerns information closed at transfer on the grounds that it was either information:

- that, if released, would endanger the safety or physical or mental health of an individual
- that, if released, would damage international relations
- relating to law enforcement.

Cases are carefully scrutinised and debated by panels on the basis of a fresh assessment by the department of the arguments for and against disclosure, taking account of any change in circumstances since the access status of the record was last considered. If they consider it necessary, a panel will request further detail or clarification from the relevant department or The National Archives. Even where they are in agreement that the public interest in closure outweighs the public interest in applying the exemption, the panel may also raise concerns they have about departmental practices and draw attention to inconsistencies between departments in their handling of FOIA requests.

During 2017-18, 26 panels were convened, with 383 cases being considered. Panels challenged 43 of these. Having been provided with more detail, the panels in most cases were able to accept departments' arguments for continuing to apply public-interest based exemptions. However, in two cases, the panels' challenges resulted in the closed records being opened in full and, in two other cases, there was a partial release of the closed information. As in previous years, the majority of FOI requests for closed records sought access to criminal case files, usually relating to historic murder cases. In these instances, the Council is typically called upon to balance the public interest in release against the potential distress which might be caused to victims or their relatives, or (in the case of unsolved crimes) to the risk to the successful prosecution of perpetrators in the future.

The Council has found it necessary to remind departments of the need to process FOI requests promptly so as to leave the Council enough time to probe and challenge, as necessary.

### **Part Three – The Forum on Historical Manuscripts and Academic Research**

The Forum on Historical Manuscripts and Academic Research (the Forum) was established in May 2010. The Forum, in its capacity as a subcommittee of the Advisory Council, provides a means through which the Chief Executive of The National Archives, in his capacity as Historical Manuscripts Commissioner, can seek advice on historical manuscripts (private archives). It is also a place for discussion about academic research issues.

The Forum is chaired by the Master of the Rolls. Membership currently includes Dr Elizabeth Lomas, Deputy Chair, and four additional members of the Advisory Council, all of whom have expertise in academic research and/or knowledge and experience of private archives. During the period covered by this report, three members of the Forum, Dr Christopher Ridgway, Dr Ian Mortimer and Mr Clive Cheesman, all came to the end of their terms.

Meetings of the Forum are attended by the Chief Executive and other staff from The National Archives.



The Forum met once during this year. It has continued to discuss and advise on:

- Revised Terms of Reference for the Forum
- The work of the Research and Academic teams at The National Archives
- *Archives Inspire* and *Archives Unlocked* – strategic visions for The National Archives
- Commemoration of the 150th Anniversary of the Historic Manuscripts Commission
- The improvements to Discovery, The National Archives' catalogue.

In addition, it has considered seven cases dealing with the acceptance by the government of private archives in lieu of the payment of a tax liability under the provisions of the Inheritance Tax Act (1984).

**The Right Honourable Sir Terence Etherton,  
The Master of the Rolls, June 2018**

## Appendix A

### Members of the Advisory Council on National Records and Archives

The Master of the Rolls chairs the Advisory Council. The Master of the Rolls was originally responsible for the safe-keeping of charters, patents and records of important court judgments. Today he is President of the Court of Appeal (Civil Division) and Head of Civil Justice. The current Master of the Rolls is the **Rt Hon Sir Terence Etherton**.

Four new members – Moira Andrews, Liz Copper, John Wood and Peter Gooderham – were appointed to the Advisory Council in January 2018.

During the period covered by this report, one member – Dr William Peace – stood down and seven members – Professor Rodney Brazier, Mr John Collins, Mr John Evans, Ms Sarah Fahy, Mr Stephen Hawker and Mr John Millen – came to the end of their terms.

In September, Ms Hillary Bauer, Ms Lesley Ferguson and Mr Michael Smyth were reappointed for three years; Mr Trevor Woolley was reappointed for four years and Sir John Ramsden was reappointed for one year.

The current members of the Council are:

**Lady Moira Andrews**, Director, Praetor Legal Aid Ltd and ADS Group Ltd; Research Fellow, King's College London; former Government Legal Adviser.

**Ms Hillary Bauer OBE**, adviser on culture and heritage issues; formerly Head of International and Cultural Property Unit, Department for Culture, Media and Sport.

**Ms Liz Copper**, Senior Broadcast Journalist, BBC News; pupil barrister; broadcast journalist, BBC News; Crown Prosecution Service Panel Advocate.

**Ms Lesley Ferguson**, Head of Archives and Engagement, Historic Environment Scotland.

**Dr Helen Forde**, historian and archivist; formerly board member of the Museums and Libraries Association; Chair of the Board of Trustees of the Postal Museum; Vice-President of the Society of Antiquaries.

**Dr Peter Gooderham, CMG**, former Ambassador to the UN and WTO in Geneva.

**Ms Angela Kelly**, Senior Legal Adviser and Examiner of Statutory Rules, Northern Ireland Assembly.

**Dr Elizabeth Lomas**, Senior Lecturer in Information Governance, University College London; formerly Head of Records Management Services for the Royal Household.

**Sir John Ramsden Bt**, formerly HM Ambassador to Croatia; formerly Head, Central and North West Europe Department, Foreign and Commonwealth Office.

**Mr Michael Smyth CBE QC (Hon)**, Member Legal Services Board and Fundraising Regulator; former Head of Government Practice, Clifford Chance.

**Ms Jeannette Strickland**, independent archive and records consultant; formerly Head of Art, Archives and Records Management, Unilever.

**Mr John Wood**, solicitor; Advisory Committee on Business Appointments (ACOBA) Independent Member; formerly Charity Commission for England and Wales Legal Board Member and Board Consultant; formerly Herbert Smith Freehills, Partner, then Consultant.

**Mr Trevor Woolley CB**, non-executive director, Oil and Pipelines Agency; formerly Director General, Ministry of Defence.

The Secretary to the Council is currently **Anne Hardy** of The National Archives.

#### **Members of the Forum on Historical Manuscripts and Academic Research**

Advisory Council members Hillary Bauer, Lesley Ferguson, Elizabeth Lomas, Helen Forde and Jeannette Strickland also sit on the Forum.

The Secretary to the Forum is currently **Anne Hardy** of The National Archives.