



Information Commissioner's Office
Promoting public access to official information
and protecting your personal information

30 YEAR RULE REVIEW

SUBMISSION BY THE INFORMATION COMMISSIONER

Introduction

1. The Information Commissioner welcomes the opportunity to provide input into the review of the 30 year rule. Since coming fully into force in 2005 the Freedom of Information Act has delivered many benefits in placing new types of information into the public domain, often on a proactive basis. We would welcome a reduction in the 30 year period as part of a wider FoI trend which the Commissioner will be seeking to accelerate - towards more routine proactive disclosure.

2. It is important to highlight that public attitudes towards the benefits of open government have shown dramatic improvements over the last three years. ICO research shows a clear shift from around 50% who saw the specific benefits in 2004 to well over 70% in 2006.¹

3. The Commissioner's observations are based on his experience of complaints he has handled under section 50 of the Freedom of Information Act since January 2005.

4. This submission covers the following:
 - a. The Commissioner's position on the 30 year rule.
 - b. Relevant key principles
 - c. Relevant issues that have arisen in decisions that have been made by the Commissioner and the Information Tribunal, including how the Commissioner approaches of the "age of information" as a factor in decisions.
 - d. Subjects of complaints that the Commissioner has received but not yet issued a decision on.

- e. The Commissioner's observations on similar freedom of information regimes overseas.
5. The Commissioner is aware of the concerns raised by the Historian community and attended a British Academy Conference in 2006 where discussions took place amongst leading members of academic community.²

Background – the work of the Information Commissioner's office

6. The Commissioner has a duty set out in section 50 of the Freedom of Information Act to make decisions as to whether a request has been dealt with in accordance with Part I of the Act.
7. The Commissioner has powers to order disclosure in a legally binding decision notice issued under section 50.
8. Details of the performance of the ICO 2006/2007 can be found in the Commissioner's most recent annual report (HC646). During 2006/2007 the Commissioner served 339 decision notices and received 2592 complaints, serving a decision notice in 13% of cases.
9. Either party (public authority or complainant) can appeal a decision notice to the Information Tribunal. The Commissioner is respondent in every Information Tribunal appeal.

The Commissioner's position on the 30 year rule

10. As expressed in the introduction the Commissioner welcomes the opportunity to provide input into the review and sees the review as a positive development in furthering the development of a freedom of regime where greater emphasis is placed on regular proactive disclosure.

¹ Information Commissioner's Office (2007) Freedom of Information: two years on.

http://www.ico.gov.uk/about_us/research/freedom_of_information.aspx

² Scholarship & The Freedom of Information Act: Year One

A British Academy Specialist Workshop convened by Professor Peter Hennessy, FBA, Queen Mary and the National Archives. <http://www.britac.ac.uk/news/release.asp?NewsID=212>

11. The Commissioner would welcome any reduction in the 30 year rule as expressed in the Public Records Act in terms of transfer (leading to earlier reviews of records) and any changes that could be made to reduce the length of time by which a record becomes a "historical record" as set out in section 62 of the Freedom of Information Act so that certain exemptions no longer apply. In particular he highlights reliance on section 35 to withhold ministerial communications under 30 years old.

12. The approach of the Cabinet Office in applying section 35(1)(b) "Ministerial Communications" to all Cabinet Minutes, papers etc less than 30 years old has meant that little information of this age and nature has reached the public domain since 2005. The Commissioner will issue a number of decisions on these matters early in 2008. He highlights that the Freedom of Information and archives regime needs to reflect the changing perception of what constitutes historical records and the reality of information now reaching the public domain via memoirs and other means on a much larger scale. Information, like technology becomes older quicker than ever before and the regime needs to reflect the modern world.

13. The Commissioner has taken a stance on best practice that encourages regular proactive release as the best way to achieve true open government. The Commissioner would therefore welcome any proposals from the review that set out a framework where much more "historical information" is routinely available. This will enable the Commissioner to focus on the cases that essentially protect the "crown jewels" with a focus on the content of information rather than broad withholding of information.

14. There will be freedom of information activity that the Commissioner is not fully aware of. This will include disclosures that are made where no intervention is required by the Commissioner and cases where the requester is refused information but does not make a complaint. In terms of historical research the Commissioner is aware of the concerns academic historians have expressed about making complaints when the process will not be timely enough to give a result in line with other deadlines.

Relevant key principles established by the Commissioner and Tribunal

15. The emerging jurisprudence from the Commissioner and the Tribunal allows a number of principles to be identified:

- each case has to be decided on its own merits – the explicit requirement in both FOIA and EIR for all the circumstances of each particular case to be considered when balancing public interest issues is fundamental;
- there is presumption of – or assumption or default position – of disclosure;
- the “weighing exercise” begins with the scales empty on both sides, but there must be clear evidence to support public interest arguments on either side;
- there is a public interest in understanding the governmental decision-making process and how decisions were made ;
- the content and context of the requested information will invariably be important factors;
- the timing of the request, in relation to the stage of policy formulation, development or implementation, is of “paramount importance”;
- the justification for protecting “safe space” is stronger where it relates to the early stages of policy formulation and development;
- it is too broad to claim that views “along the way” to an ultimate ministerial decision should not be subject to public scrutiny, but the lesser accountability of officials against elected representatives is a factor to be given appropriate weight;
- factors in particular cases, such as the importance of the issue or project and the extent of public expenditure, may be more significant (in public interest terms) than the alleged virtues of safeguarding candour and frankness;
- the Tribunal has been more widely sceptical towards “generalised contentions” or arguments based on “inherent risks”.

Decisions relevant to the review and the approach to the “age of information”

16. As noted above the Commissioner received 2592 complaints 2006/2007. A small proportion of these complaints relate to what could be loosely called “historical information” and other decisions have approached the issue of the “age of information” as a key factor.
17. In the experience of the Commissioner the sort of information that most frequently attracts requests, and subsequently complaints, is more current information whether it relates to an issue or dispute that the complainant is still attempting to resolve, or may provide an explanation to a recent decision affecting that individual or perhaps relates to a public debate of the day.
18. Decisions by the Commissioner and the Information Tribunal have set out guidance on how to approach the “age of information” as a factor. As a general principle the Commissioner takes the view that the harm any disclosure would cause declines over time and applies this principle when either assessing the application of a prejudice based exemption or the public interest in maintaining a class based exemption. This approach has been supported by the Tribunal in a number of its decisions.
19. For example in *DfES v ICO & the Evening Standard* (EA 2006/0006) which related to minutes of the public authority’s senior management meetings from 2003 at which a perceived ‘crisis’ in school funding was discussed the Tribunal found;

“The timing of a request is of paramount importance to the decision. We fully accept the DFES argument, supported by a wealth of evidence, that disclosure of discussions of policy options, whilst policy is in the process of formulation, is highly unlikely to be in the public interest, unless, for example, it would expose wrongdoing within government. Ministers and officials are entitled to time and space, in some instances to considerable time and space, to hammer out policy by exploring safe and radical options alike, without the threat of lurid headlines depicting that which has been merely broached as agreed policy. We note that many of the most emphatic pronouncements on the need for

confidentiality, to which we were referred, are predicated on the risk of premature publicity. In this case it was a highly relevant factor in June 2003 but of little, if any, weight in January 2005.”

20. And again in OGC v ICO (EA 2006/0068 & 0008) where the information in question was a gateway report relating to the feasibility of introducing ID cards. The Tribunal found that;

“We have accepted in DWP and Department for Education & Science v The Information Commissioner that Government needs to operate in a safe space to protect information in the early stages of policy formulation and development. We can understand the need for a similar safe space in relation to examination functions, despite what one witness described as an unusual use in this case of the Gate Zero Review process. However at the time of the Requests the decision had already been taken to introduce ID cards, a Bill had been presented to Parliament and was being debated publicly. We therefore find that in the circumstances of this case that it was no longer so important to maintain the safe space at the time of the Requests.”

21. This approach has not only been adopted in relation to arguments around the disclosure of information relating to government policy but equally to other exemptions such as the commercial information where the sensitivity of prices agreed with a contractor will decline over time, similarly the commercial value of specifications will decline as technology advances.

22. There are cases where although the information is old it may still have relevance to current issues. The Commissioner has dealt with a number of cases involving local authorities where the information relates to property deeds or legal advice in relation to past property disputes. Clearly in such cases the information may still inform current decisions. Occasionally the issues discussed in old information becomes topical again, for example a request made to the DfES for documents (including Cabinet papers) relating to the “Society of Teachers Opposed to Physical Punishment” from 1982 – 1987 took on a new relevance with the recent political debate on the right of teachers to

use reasonable force to control pupils. The Commissioner's decision notice (FS50085945) ordered disclosure of the information withheld under section 35(1)(b) (DfES complied with the decision notice after withdrawing an appeal to the Information Tribunal).

23. The complaints that the Commissioner has received to date related to Cabinet papers and minutes have generally focused on the application of the exemption under section 35(1)(b) "Ministerial Communications". Section 35 is a qualified exemption and is subject to the public interest test. Various other exemptions have been relied on such as sections 23 and 24 (information supplied by or relating to security bodies, information required for the purpose of safeguarding national security) and section 27 (prejudice to international relations). At present the approach of Cabinet Office has been to apply section 35(1) (b) to nearly all requests for information relating to Cabinet minutes, papers and ministerial correspondence under 30 years old. The Commissioner rejects such a blanket approach and, as the Act requires, considers each complaint on a case by case basis. The fact that section 35 has been made subject to the public interest test indicates that Parliament's intention was not that all Cabinet minutes, papers, ministerial correspondence under 30 years old should be withheld.

24. The Commissioner does recognise that maintaining the principle of collective responsibility among Ministers is key to Cabinet government. Underlying that principle is recognition that, while collective responsibility requires Ministers to first agree a policy line and then promote it in public discussion and debate, there may be times when disagreements, even fundamental disagreements, can occur in private before a policy line is agreed. However, when none of the then policy issues are matters of current political or policy debate and none of the then Ministers are, to the best of his knowledge, still in relevant positions in public life now, the Commissioner is much less likely to accept arguments that disclosure would weaken the principle of collective responsibility.

25. In investigating these cases the Commissioner will consider in detail the extent to which the information contained in the minutes and papers of the Cabinet had already been placed in public domain through the publication of official

papers, official histories and the memoirs of politicians. The fact that many of the issues discussed in the minutes have already been publicly aired is likely to dramatically reduce any harm that would flow from their disclosure (particular in relation to need to preserve the principle of the collective responsibility of cabinet). Although much of the information may be in the public domain there is still likely to be a public interest in favour of disclosure as the information revealed the government's decision making process in a relation to an important issue of the day.

26. A number of decisions on the "Cabinet minutes" cases should be available during the first quarter of 2008.

27. In relation to "historical information" the Commissioner would also like to highlight the following that also sets out the careful approach that must taken on a case by case basis and that the advancing age is not always a determining factor of disclosure. These examples involve police cases.

28. Guardian Newspapers complained about a request made to Avon & Somerset Police for files on the trial of Jeremy Thorpe dating back to 1979. The Commissioner found the information could be withheld under sections 30 (Investigations) and 40 (third party personal data) but that 38 (Health and Safety) was not engaged. At the time of the request (Feb 2005) the information was some 26 years old and the complainant had argued, in broad terms, that as the information was approaching the 30 year point at which it would become an historical record, and that this in itself was a factor that favoured disclosure in the public interest. Consideration was also given to the fact that Mr Thorpe was no longer active in public life. Guardian Newspapers appealed the decision to the Information Tribunal which upheld the Commissioner's Decision Notice. At paragraph 36 of its decision the Tribunal stated;

"We make the following findings which bear on the weighing of the competing interests.

i. The passage of time was a double – edged argument, whichever side wielded the sword. It probably reduced the risks of prejudice to future

investigations but it similarly weakened the legitimate public interest in knowing more of the background facts.

ii. There was little, if any evidence of any widespread current interest in the matter, witness the rather unconvincing material that the Guardian was able to marshal.

iii. Mr. Thorpe ceased to be a public figure long ago and has made no attempt to seek a public role – quite the reverse.

iv. The approach of the thirty – year “deadline” provided for by s.63 is irrelevant to our decision for two reasons:

1. Parliament decided on thirty years, not twenty – seven. To use proximity as an excuse for disclosure would be to erode the interval which Parliament chose.

2. It is not certain that disclosure will follow in 2010. Other exemptions may apply.”

In *Hargrave v the IC, The National Archives, and the Metropolitan Police* (EA/2007/0041) a request had been made for information on the investigation into the murder dating back to 1954. The murder was never solved and the requestor believed the murderer had in fact been protected by those in authority and stated that he wished to obtain justice for the dead woman’s family. The request had been refused under sections 31 (Law Enforcement), 40 (third party personal data) and 41 (information provided in confidence). The Commissioner found in his decision notice (ref 79972) that section 31 applied to all the information requested and so did not consider the other two exemptions. Consequently the case was appealed to the Tribunal which in December 2007 upheld the Commissioner’s decision. It found that because of the potential for further developments (in forensic techniques for example) the police’s law enforcement function could still be prejudiced by the disclosure of the information and that because of this the public interest favoured maintaining the exemption.

Freedom of Information and the threat to record keeping

29. Both the Commissioner and the Information Tribunal have dealt with the issue of the threat to record keeping. Both have rejected this “chilling effect” argument. In decision FS50079488 involving ECGD where minutes, agenda

and correspondence connected to meetings between ECGD, CBI and Airbus consortium where withheld the Commissioner noted:

“[The Commissioner] notes the concerns of the ECGD that the prospect of potential disclosure could have a “chilling effect” on the way in which advice or discussions are recorded. However the Commissioner does not accept that the officials responsible for providing advice and recording information would cease to perform their duties on the ground that the information may be disclosed. Such public servants would be in breach of their professional duty as public servants should they deliberately withhold relevant information or fail to behave in a manner consistent with the Civil Service Code. It is a matter for the bodies concerned, including the ECGD, to ensure that their officials continue to perform their duties according to the required ethical standard.”

30. The Commissioner has not been presented with any evidence that records of discussions in government are changing as a result of disclosure made under the Act.

31. In terms of International experience the Commissioner would like to draw the review team’s attention to the study conducted by the National Archives of Canada in 2001 entitled “The Access to Information Act and record-keeping in the federal government”³. The study looked at records before and after the introduction of the Canadian Access to Information Act in 1983. The study concluded:

It does not seem that the promulgation of the ATIA in 1983 had an impact on the way records were created and managed. Other factors limiting the study appear to have had as much or more significance than the Access to Information Act on record-keeping. These constraining factors include the following:

³ National Archives of Canada (2001) The Access to Information Act and record-keeping in the federal government. Report 9 - Access to Information Review Task Force. <http://www.atirtf-geai.gc.ca/paper-records1-e.html>

- *the impact of new technology (computerization, especially personal computers; methods of filing; and government business conducted in non-recording environments);*
- *lack of documentation standards against which to measure changes in record-keeping;*
- *downsizing;*
- *creation of records is an individual human behaviour difficult to measure or determine as motivated by ATIA.*

Forthcoming decisions by the Commissioner relevant to the 30 year rule review

32. A number of complaints that the Commissioner has received but has not yet issued a decision on are also of relevance to this review.

33. The Commissioner would like to highlight the cases listed in annex A as examples of information of likely “historical interest” that have been withheld under the Freedom of Information Act, involving public bodies subject to the Public Records Act. The Commissioner at this stage cannot give an indication as to how these cases will be decided.

Commissioner’s observations on similar freedom of information regimes overseas

34. The Commissioner notes that there no other overseas Freedom of Information regimes that offer a direct parallel to learn from in terms of how exemptions for historical records operate in terms of time limits for exemptions. The Commissioner notes that the Freedom of Information Act 2000 is fairly unique set against other overseas regimes in that it is fully retrospective. He does make some observations about parallels that are relevant below.

35. The Commissioner would highlight the section 21 exemption “Operations of Government” in the Canadian Access to Information Act that came into force in 1983. Provisions in section 21(1) (a) to (d) can only be relied upon if the record came into existence less than 20 years prior to the request. However, there is

much less relevant case law available from Canada because the Information Commissioner is unable to issue legally binding decisions.

36. The proactive approach to publishing Cabinet papers developed in New Zealand is a model the Commissioner would like to highlight⁴. This approach has been driven by a change in culture rather than any specific legislative changes.

37. The exemption in the Irish Freedom of Information Act under section 19 “Meetings of the Government” does not apply after 10 years. The Irish Act however is largely concerned with records created after 1998 and Commissioner has not noted any cases of real relevance to the context of this review.

if the record relates to a decision of the Government that was made more than 10 years before the receipt by the head concerned of the request under section 7 concerned, or

(c) if the record relates to a communication to which subsection (1)(aa) applies and the communication was made more than 10 years before the receipt by the head concerned of the request under section 7 concerned.

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⁴ The Commissioner would highlight this example from the New Zealand Department of Administrative Affairs. http://www.dia.govt.nz/diawebsite.nsf/wpg_URL/Legislative-Reviews-BDMRR-Amendment-Bill-Index?OpenDocument