



## **Advisory Council on National Records and Archives 14th Annual Report 2016-17**

To the Right Honourable Karen Bradley 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 and represents the public interest in determining which historical records should 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 was appointed as the Master of the Rolls with effect from 3 October 2016. This followed the retirement of The Rt Hon Lord Dyson. The Council particularly wishes to record its gratitude to Lord Dyson for his chairmanship of the Council during his time in office.

Details of the membership of the Council during the period covered by this report are set out in Appendix A.

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

The Council:

- advises the Secretary of State on issues relating to public records that are over 20 years old (historical public records), including public access to them, at the point they are transferred to The National Archives
- advises the Secretary of State on requests from Government departments to retain historical public records under the Public Records Act
- advises departments on the public interest when they propose to refuse access requests for historical records on the grounds of Freedom of Information Act (FOIA) exemptions, examining and challenging the arguments provided by departments to justify such refusals
- through its sub-committee, the Forum on Historical Manuscripts and Academic Research, advises the Chief Executive of The National Archives and Keeper of Public Records on matters relating to private archives outside the public records system.

It also supports government departments and The National Archives by providing independent advice and scrutiny on issues relating to records management and archives.

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

- make the final decision on whether, when they become historical, records are transferred to The National Archives closed or on whether, when a closed record is reviewed after transfer, it should remain closed – the decision lies 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 Culture, Media and Sport
- advise on departments' retention of records under the Security and Retention Instrument 2011
- advise on or 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**

### **Meetings**

The Council held four meetings this year: in May, July and November 2016 and in February 2017.

Jeff James, The National Archives' Chief Executive and Keeper of Public Records attended Council meetings. Meetings were also attended 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**

The workload of both the Advisory Council and departmental knowledge management teams has continued to grow this year as the transition to the 20-year rule continues. To ensure that it is well-prepared for future challenges, the Council has begun a review of its procedures and processes. This will examine all aspects of how the Council operates, and how it interacts with departments, The National Archives, and in particular with the Department for Digital, Culture, Media and Sport (DCMS) as its parent department. The working group carrying out the review is due to report to the Council in July 2017.

### **Engagement with departments**

During this year HM Treasury, the Foreign and Commonwealth Office (FCO) and DCMS attended Council meetings to discuss the progress they were making in the review and transfer of their historical records. The Council had previously agreed to recommend that the departments should be allowed to retain these records provided that they gave these updates.

To ensure that it receives sufficient information from departments about their plans to review the historical records they wish to retain, the Council has introduced a new template for departments to complete. This asks them to provide more details of their holdings, their timetable for review and transfer, and any proposals they may have to prioritise records series, for example because they are of particular historical interest. The Council received applications from the FCO, DCMS, the Department of Health, the Home Office, the Northern Ireland Office and the Cabinet Office. The Council was content to recommend that permission to retain their legacy records for the 12-month periods requested be given to the Cabinet Office, DCMS and the Northern Ireland Office. The requests from the FCO and the Department of Health, who were asking for permission to retain records for up to five years, were agreed on the basis that the departments provide an annual update on progress. In the case of the Home Office, the Council recommended that they be given 12 months in the first instance rather than the requested four years, to allow them to better assess their holdings and to draw up a review and transfer plan.

The Council also considered a three-year retention request and an update from the Department for Business, Energy and Industrial Strategy (BEIS). The initial request was received and agreed before the machinery of government changes which saw the Department for Business, Innovation and Skills merge with the Department for Energy and Climate Change to create BEIS. The Council will continue to receive updates from the new department and will follow with interest the impact of the merger on resourcing and workload.

The Council also met representatives from the Ministry of Defence to discuss the measures it had introduced to improve the quality and consistency of its closure and retention applications. The Council was pleased with the department's commitment to making these improvements and looks forward to building a constructive relationship with them in the future. They also provided an update on their plans for the transfer of military service personnel records from the early half of the last century. The Council recognises the importance of these records to historians and genealogists, and as they are currently held in paper form only, hopes that a cost-effective way can be found to make them accessible through digitisation.

### **Digital records**

The working group which was set up in May 2015 to examine how the Advisory Council could continue to apply proper scrutiny to the increasing number of born-digital records (records not held in paper form) being transferred to The National Archives, concluded its work in July 2016. Members included Council members Stephen Hawker and John Millen, staff from The National Archives and representatives from government departments.

The template that the working group developed to capture the information that the Council required has been rolled out across government and a number of departments have already submitted applications using it.

## Access to public records

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

The Council is responsible for advising the Secretary of State for Digital, Culture, Media and Sport on the application of 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 Act .

In 2016-17, 72,956 government records were transferred to The National Archives. Over 95% of these records were transferred open in full and can be viewed at The National Archives by any member of the public who has a reader's ticket. The remaining 5% of records were transferred closed, or partially closed where extracts were redacted, after departmental applications to do so had been scrutinised by the Council.

The number of closure applications submitted to the Council reduced slightly this year to 4,290, compared with 4,435 in 2015-16. Many of the applications the Council sees attract exemptions that are categorised by the FOIA as 'absolute', and as such are not subject to the public interest test. Most of these cases involve personal information about private individuals which is protected from release by the Data Protection Act. From an analysis of the schedule of applications considered by the Council in February this year, the obligation to protect personal information gave rise to an application for closure at transfer more frequently than any other reason.

The uneven quality of these applications, on which the Council commented in its last annual report, has continued to cause the Council some concern. The Council queried just under 12% of the applications it received, compared with 10% the year before. Almost half of this year's queries resulted in the applications being amended. In the majority of cases, the changes were requested in order 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.

- **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 986 retention applications, an increase of less than 4% on 2015-16, but an increase of more than 25% on 2014-15. A brief analysis of the reasons for the increase carried by The National Archives at the request of the Council suggested that, in addition to 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:

- 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, has encouraged departments to make sure that they comply with the Public Records Act (PRA) and have a retention instrument to allow them to retain historical records for which they have an ongoing business need.
- b) 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.
- c) Departments are making more applications to the Council to retain records on security grounds for 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.

While the increase in the number of applications received since 2015-16 was small, the number of queries raised almost trebled. This was in many cases because departments did not provide sufficient information when presenting their arguments for retention. On occasion there appeared to be a reluctance to respond fully to the Council's queries or to answer the questions posed. In such cases it took longer than should have been necessary for the Council to complete its consideration of a department's proposal. The Council would urge departments to be as open as possible when making their applications and answering queries.

There has also been a noticeable trend for departments to withdraw their applications when challenged, (22 withdrawals this year compared to four in 2015-16). A significant number were withdrawn as soon as the Council raised query, which suggests to us that in such instances the department had not given enough thought to the request. The Council was sufficiently concerned to ask relevant departmental representatives to attend a Council meeting to discuss the matter further.

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.<sup>1</sup>

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<sup>1</sup> [nationalarchives.gov.uk/about/our-role/advisory-council/](https://nationalarchives.gov.uk/about/our-role/advisory-council/)

		<b>2014/15</b>	<b>2015/16</b>	<b>2016/17*</b>
Closure applications	<b>applications considered</b>	4,250	4,435	4,290
	<b>applications queried</b>	181	480	506
	<b>applications where clarification was received and accepted</b>	105	340	228
	<b>applications which were amended by departments and accepted</b>	67	126	194
	<b>applications withdrawn by departments following challenge by the Council</b>	9	14	18
Retention applications	<b>applications considered</b>	793	952	986
	<b>applications queried</b>	28	44	116
	<b>applications where clarification was received and accepted</b>	21	28	34
	<b>applications which were amended by departments and accepted</b>	4	12	30
	<b>applications withdrawn by departments following challenge by the Council</b>	3	4	22

\*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 Freedom of Information Act (FOIA) and individuals can make an Freedom of Information (FOI) request 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 Council must be consulted and carry out the public interest test, which is necessary before such an exemption can be applied. 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 part to play when a request is to be refused citing only absolute exemptions (around 50% 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; or information that would damage international relations; or information 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 with exemptions being applied, they may also raise concerns they have about departmental practices and draw attention to inconsistencies between departments in their handling of FOIA requests.
- During 2016-17, 33 panels were convened, with 400 cases being considered, an increase of 44% from 2015-16. Panels challenged 62 of these. Having been provided with more detail, the panels in most cases accepted 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 another, there was a partial release of the closed information.
- This year for the first time a panel requested to see a record where it had been unable to reach a view based on the information it had been given by the department. A panel member subsequently visited The National Archives to view the record and, after they had done so, concluded that some more of the material should be opened. The department accepted this recommendation and the further extracts were released.

### **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 sub-committee of the Advisory Council provides a means through which the Chief Executive and Keeper of The National Archives in his capacity as Historical Manuscripts Commissioner can seek advice historical manuscripts (independent archives), as well as a place for discussion about academic research issues.

It is chaired by the Master of the Rolls. Its membership includes four members of the Advisory Council, and three additional members all of whom have expertise in academic research and/or knowledge and experience of private archives,

Its meetings are attended by the Chief Executive and Keeper, and other staff from The National Archives.

The Forum met twice during this year and held one informal meeting via conference call. One scheduled meeting had to be cancelled due to a power cut at the venue.

Much of the Forum's focus has been on reformulating its terms of reference to reflect the findings of the review of its role carried out in 2015. It has also continued to discuss and advise on:

- a future exhibition on records held by independent archives
- The improvements to Discovery, The National Archives' online catalogue
- *Archives Unlocked: a new strategic vision for the archives sector*
- The work of The National Archives' archives sector development and academic engagement.

In addition, it has considered six 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 2017**

## 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 safekeeping 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. Three new members – Helen Forde, Angela Kelly and Jeannette Strickland – were appointed to the Advisory Council in July.

Dr Bendor Grosvenor resigned from the Advisory Council and from the Forum in November.

The current members of the Council are:

- **Ms Hillary Bauer OBE**, Adviser on culture and heritage issues; formerly Head of International and Cultural Property Unit, Department for Digital, Culture, Media and Sport
- **Professor Rodney Brazier MVO, Emeritus Professor of Constitutional Law, University of Manchester; Fellow of the Royal Historical Society**
- **Mr John Collins CBE**, Formerly Deliverer of the Vote, House of Commons
- **Mr John Evans**, Freedom of Information Officer, University of Bath; independent historian; former communications adviser, civil servant and journalist
- **Ms Sarah Fahy**, Global Head of Library Services, Know How and Training Department at Allen and Overy LLP
- **Ms Lesley Ferguson**, Head of Collections, Historic Environment Scotland
- **Dr Helen Forde**, historian and archivist; formerly Board member of the Museums and Libraries Association, Chairman of the Board of Trustees of the Postal Museum and Vice-President of the Society of Antiquaries
- **Mr Stephen Hawker CB**, Independent Consultant
- **Ms Angela Kelly**, 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
- **Mr John Millen**, Formerly Policy Director, Ministry of Defence

- **Dr William Peace**, Visiting Senior Research Fellow, International Centre for Security Analysis, Kings College London; formerly Deputy Director for Strategy and Information, Serious Organised Crime Agency
- **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; Chairman Community Links; 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 Trevor Woolley CB**, Formerly Director General, Ministry of Defence

The Secretary to the Council is Beth Watson.

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

Advisory Council members Hillary Bauer, Lesley Ferguson and Elizabeth Lomas also sit on the Forum. The current members of the Forum who do not sit on the Advisory Council are:

- **Dr Clive Cheesman**, Richmond Herald, The Royal College of Arms
- **Dr Ian Mortimer**, historian and historical biographer
- **Dr Christopher Ridgeway**, Curator, Castle Howard

The secretary to the Forum is Patricia Humphries.