



## **Guidance for record repositories on loan (deposit) agreements for privately-owned archives**

### **1 Purpose of this guidance**

The purpose of this guidance is to:

- (i) Advise record repositories on the reasons why a Loan Agreement should be drawn up with the depositor<sup>1</sup> of privately-owned archives
- (ii) Provide some guidance on how to go about writing a Loan Agreement for deposited, privately-owned archives
- (iii) Set out the factors that need to be considered when drafting a Loan Agreement for deposited, privately-owned archives

### **2 Some working assumptions**

Certain things must be taken as read when using this guidance:

- **Acquisition**
  - Record repositories typically acquire archives by:
    - (i) Transfer from their parent authority (in the case of its own archives)
    - (ii) Transfer from outside bodies and individuals (as in the case of Acceptance in Lieu allocations or in the restitution of material which had strayed from official custody).
    - (iii) Statutory deposit, in which case the archives are held according to the requirements of specific legislation
    - (iv) Loan, in which case the archives are in the custody of the repository or its parent body but remain in the ownership of an external individual or organisation
    - (v) Gift, bequest or purchase, in which case the archives usually pass outright into the ownership of the repository or the organisation of which it is a part

This guidance deals only with archive collections falling within categories (i) – (iv).

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<sup>1</sup> For the purposes of this guidance, the depositor is assumed to be the owner of the archive collection or his authorised agent and the term depositor is used throughout.

- The status of any archives received by the repository should be agreed at the outset. Deposits of private archive collections should be identified clearly as a gift, purchase or bequest (usually involving a transfer of ownership) or a loan.
  - The term 'permanent loan' has caused many problems<sup>2</sup>. Its inclusion in previous Loan Agreements, whether formal or informal, has led to misunderstandings between depositors and repositories, and between repositories and grant-awarding bodies, when material originally held on loan has subsequently been offered for sale. The term 'permanent loan' should be avoided in any new Loan Agreements, and should be regarded as unsound in any existing agreements, which may therefore need to be renegotiated.
  - Gifts, bequests, or if necessary purchases, are preferable to loans. By this means repositories will secure ownership of the archive collections in question, gain the freedom to manage them at their own discretion and avoid potential difficulties over the expenditure of public money, for example on the conservation of privately-owned archives collections that might subsequently be withdrawn and sold. Note, however, that certain reserved rights may apply to archives that pass into the repository's ownership. Care should be taken in particular in respect of copyright, which will not automatically pass with ownership of the archives. It may be necessary, for example, to include in a loan agreement an indemnification from the depositor in respect of claims for breach of copyright.
- **Deposited Private Archives and the Freedom of Information Act 2000**
    - Archive collections that pass into the ownership of a repository (or its parent body) that is subject to the Freedom of Information Act are likely to become subject to that Act. Collections deposited on loan may also be caught if they are deemed to be 'held by' or 'on behalf of' a body subject to that Act. The term 'held' is not defined in the FOI Act and there is no single criterion that can be applied in determining whether information is 'held' or not. The National Archives has produced guidance on assessing whether deposited private archive collections are covered by the FOI Act which is available on our website at: [http://www.nationalarchives.gov.uk/policy/foi/pdf/guidance\\_private\\_archives.pdf](http://www.nationalarchives.gov.uk/policy/foi/pdf/guidance_private_archives.pdf)
    - Demonstrating that a private archive collection falls outside FOI will require some form of evidence and an agreement in writing, such as a loan agreement, is the best evidence. However this may not provide sufficient evidence on its own to demonstrate that a collection is not 'held' by a body subject to the FOI Act. Supplementary information, such as correspondence, notes of interviews with the depositor and information recording any action that has taken place with respect to the deposited archive, should also be maintained alongside the loan agreement.
    - Even if a collection is deemed to fall outside the FOI Act, it is likely that copies of any of its contents that remain with the archives service after the collection has been withdrawn will come within the provisions of that Act unless the contrary can be shown.

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<sup>2</sup> The term 'permanent loan' is a contradiction in terms and as a result causes many problems with interpretation. If something is a loan, by definition it cannot be made permanently as there is a residual right to recall the item. If there is a residual right to recall the item then it is not loaned permanently.

- **Deposited Private Archives and the Environmental Information Regulations 2004**
  - Any private archive collection that is subject to the FOI Act can be assumed to be subject also to the Environmental Information Regulations (EIR). In addition, even if a private archive collection is considered to fall outside the scope of the FOI Act, information in it may still be subject to the EIR. The assessment to be made here is whether the information is environmental information as defined in the EIR. If it is, it is likely to be subject to the EIR. This is because unlike the FOI Act, the EIR do not provide for exclusion of information that is held on behalf of an individual or organisation that is not subject to the EIR.
  
- **Deposited Private Archives and the Data Protection Act 1998**
  - Any personal information in an archive collection that is about identifiable living individuals may also be subject to the Data Protection Act 1998. This means that repositories may be required to respond to access requests from people who are the subject of the information. One of the effects of a private archive collection being subject to the FOI Act is that more personal information within it may become subject to the Data Protection Act. Guidance on the effects of this is available in the draft Code of Practice for Records Managers and Archivists under section 51(4) of the Data Protection Act, which is on the Society of Archivists' website at: (<http://www.archives.org.uk/professionalissues/revisecodeofpractice.html>)

### **3 Why and how to develop a loan agreement**

- Archivists and their governing bodies who are considering accepting privately-owned archives on loan (sometimes referred to as 'deposits') are strongly advised to enter into an unambiguous Loan Agreement with the depositor. Many repositories already have standard forms for this purpose. They set out the intentions of both parties at the outset of the relationship. If drawn up correctly they will also be a form of contract that may at some point be tested at law. For this reason, in order that the agreement is legally enforceable, we recommend that legal advice on the terms of loan agreements be obtained by both sides independently before they are signed.
  
- The contents of the Agreement should be fully discussed before the loan takes place so that any uncertainties and ambiguities can be addressed and the terms of the agreement can be fully understood, or queried, before it is signed by both parties.
  
- The Agreement should spell out the reasonable rights and entitlements of both parties with respect to the archives in question: for example, the decisions reserved to the depositor and those assigned to the repository, how the archives will be safeguarded; how and under what conditions or restrictions (if any) they should be made available to the public for study or exhibition, and so on.
  
- The Agreement should cater for future change. It should include provision for each party to keep the other informed of any change of address or other material change in their circumstances that might affect the terms of the deposit (for example the transfer of responsibility for a repository from one parent authority to another).
  
- Loans may be either (a) for a specified period, probably with a potential for renewal or renegotiation thereafter, or (b) for an indefinite period, which is the more usual arrangement. If archives are offered on 'indefinite' loan, care should be taken by the

repository to establish the depositor's precise intentions, for example whether the agreement will be subject to periodic review or whether it would be terminated in certain specified circumstances. Depositors offering archives on indefinite loan will generally not be in a position to commit their heirs and descendants to continuing the loan. It is, therefore, important that contact with the depositor is maintained so that the repository is made aware of any transfer of ownership.

#### 4 Checklist of points for inclusion in loan agreements and example clauses<sup>3</sup>

The following points should be considered for inclusion in any loan agreements.

- **Date**
  - Date of the agreement
  - Date of subsequent review of the agreement
  
- **Identity**
  - Identity of the depositor of the archive collection and the owner of the information within it if different  
*e.g. "The depositor, Mr A N Other, acknowledges that he is the owner of the collection. Placing the archives in the custody of the archives service does not alter ownership of the collection. "* (This reflects the assumption that the depositor and owner are one and the same). If the position with regard to ownership of information within the collection is complex, you could add *"This neither affects nor alters legal and intellectual ownership of the information in the collection "*.
  - Identity of the repository and, where applicable, its parent body  
*e.g. "The words 'archives service' means Bassetshire Archives Service of 1 Cathedral Lane, Barchester or any successor body which shall administer the records whilst on deposit."*
  
- **Description**
  - Nature and extent of the material covered by the loan
  
- **Term (period) of the loan**
  - Fixed period or indefinite (subject to certain recall criteria)

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<sup>3</sup> Please note that the 'example clauses' have been incorporated to help drafting, or if necessary redrafting, of loan agreements for the deposit of privately owned archives. They are not intended to be prescriptive. You are advised to include relevant clauses in your loan agreement either as they stand or, if necessary, with amendments agreed with your legal advisers. You may also need to incorporate additional clauses, not included here, to reflect the specific relationship between your archives service and depositor. You should seek legal advice before signing an agreement which departs from a previously agreed form of words.

*e.g. "The agreement shall remain in force for the loan period of x years" or "The agreement shall remain in force unless revoked by the depositor. The depositor may revoke the agreement only under the terms of withdrawal, which are set out in paragraph x".*

- Date at which the agreement will be reviewed, if applicable
- Arrangements for extension (if required)
- Arrangements for addition of archives to the initial loan (if required)

- **Authorisations**

Decisions delegated to the repository or reserved to the depositor. This may alternatively be set out under other specific headings and should include:

- Whether the repository may identify material not wanted, either at the time of deposit or subsequently, and is authorised to dispose of it without further reference to the depositor  
*e.g. "The archives service reserves the right to return to the depositor any records judged not to merit permanent preservation or, by agreement with the depositor, to destroy them".*

- When a collection contains personal information about identifiable living people, whether the depositor is retaining any Data Controller responsibilities<sup>4</sup>

*e.g. "The archives service will become data controller of the records while the records are in the custody of the archives service and will be responsible for compliance with the Data Protection Act 1998".* It will be necessary to amend this clause if the depositor also has Data Controller responsibilities so as to set out the responsibilities being retained, or any special arrangements, e.g. agreement to consult the depositor in specified circumstances .

- Whether any other legal authorisations are required, for example for copyright purposes

- **Services to the depositor**

- Agreement over borrowing back by the depositor during the period of the loan

*e.g. "The depositor is entitled to withdraw records temporarily for up to \_\_\_\_\_ after giving \_\_\_\_\_ notice. The depositor or his agent or representative may be required to prove entitlement to the records or show suitable authorisations before deposited records may be withdrawn. The archives service accepts no liability for loss or damage of records while they are withdrawn".*

- **Storage and maintenance (preservation)**

- The standard of care that will be offered to the archive collection

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<sup>4</sup> The Data Controller is the person or body with formal responsibility under the Data Protection Act for all collection and use of personal data by the organisation, and for maintaining the rights of data subjects.

e.g. *“The records will be stored in the archive service’s repository or one of its branches in conditions no less favourable than those considered by the archives service as acceptable for the storage of the archive service’s official holdings”.*

- Agreement over what the repository undertakes to do by way of sorting, listing, marking and cataloguing and at whose cost, e.g. does the deposit come with an endowment

e.g. *“The records will be listed, as resources allow, by qualified archivists or people working under professional supervision. A copy of the list will be sent to the depositor free of charge. Copyright in all catalogues and finding aids will remain with the archive service.”* You may also want to add *“Catalogue reference numbers may be applied in pencil to the surface of individual records for identification and security purposes”.*

- Whether any conservation will, may or must be undertaken as necessary, at whose cost and with whose consent

e.g. *“Appropriate conservation treatments including the physical repair of records may be carried out by qualified conservators or people working under professional supervision where and when considered necessary by the archives service”.*

- Whether surrogate copies may be made for security or preservation reasons e.g. in microform or digital form

e.g. *“In accordance with current copyright legislation the archive service may copy records for preservation purposes”.*

- Whether any insurance will be provided by the repository or whether the depositor must arrange and pay for this if required and how frequently the archives should be revalued for insurance purposes

e.g. *“Deposited private records are covered by the archive service’s insurance for their physical repair or restoration after damage from whatever cause while in the archive service’s custody. However, no compensation can be provided for the total loss of the records”.* This will need amendment if the insurance has exclusions, e.g. for acts of war, acts of god, etc.

- Arrangements over legal liability for loss or damage to the material while held by the repository.

e.g. *“The archives service will take all reasonable precautions compatible with the provision of public access to preserve the records from damage, loss or theft and additions or fraudulent amendments but shall not otherwise be liable beyond this to the depositor for any damage to or loss or theft of them during the deposit period”.*

- **Access and use**

- Whether requests for access must be referred to the depositor or may be handled by the repository in accordance with arrangements agreed with the depositor

e.g. *“Subject to any restrictions agreed between the depositor and the archives service and to any statutory or common law provisions, the records shall be made available for public access”.*

- Whether any material must be withheld from the public for a specified period e.g. on grounds of confidentiality or liability to third parties

*e.g. "By specific agreement between the depositor and the archives service restrictions should be placed on public access to specified individual records."*

- Whether access to any material should or may be withheld pending conservation

*e.g. "The archives service may restrict access to records which are in need of conservation."*

- Whether the repository may charge for access to the material (if applicable)<sup>5</sup>

- Whether the material may be exhibited without obtaining the depositor's permission on each separate occasion

*e.g. "Records may be exhibited by the archives service, in original, digital or copy form, without further permission from the depositor, subject to clearance of Intellectual Property Rights as necessary" - it may be necessary to amend this clause if the depositor retains authorisation. You may also wish to include, "Requests from other institutions for the loan of records for temporary exhibitions will be referred to the depositor for approval" - it may also be necessary to amend this clause if authorisation is transferred to the archives service*

- Whether copies of the material may be supplied to the public without obtaining the depositor's permission on each separate occasion

*e.g. "Copies of records will be supplied (at a cost) to members of the public only in accordance with current copyright legislation".*

- Whether the material, or extracts from it, may be published by the repository without obtaining the depositor's permission on each separate occasion (i.e. will responsibility for administering copyright be withheld, shared or transferred)

*e.g. "The archives service has the right to publish deposited records in whole or in part in its own publications without seeking the prior permission of the depositor but with due acknowledgement to him" – it may be necessary to amend this clause if the depositor retains authorisation.*

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<sup>5</sup> Note that where the collection contains information subject to the Environmental Information Regulations, a charge cannot be made for on-site access although it can be made for any searches undertaken on behalf of a member of the public.

- Whether the material, or extracts from it, may be published by the members of the public without obtaining the depositor's permission on each separate occasion (i.e. will responsibility for administering copyright be withheld, shared or transferred)

*e.g. "The responsibility for granting consent to members of the public to publish records from the collection will be transferred to the archives service but with due acknowledgement to the depositor" – it may be necessary to amend this clause if the depositor retains authorisation. You may also wish to add "The archives service cannot grant consent on behalf of the copyright owner and responsibility for obtaining copyright clearance rests with the applicant".*

- **Withdrawal**

- The arrangements to apply in the event of the permanent withdrawal of the archive collection. This includes:
  - Whether a fixed period of notice of withdrawal is required
  - Whether the repository should be offered first refusal of purchase, and
  - Whether the repository will be reimbursed for its costs in caring for the material on the depositor's behalf if withdrawal takes place during the agreed term of the loan

*e.g. "In the exceptional case that the depositor decides to reclaim records before the agreement expires, x months notice must be given.<sup>6</sup> The depositor will give the archives service the option to buy the records before they are offered to other parties. A reasonable period will be given by the depositor for appropriate funds to be raised by the archives service. The archives service has the right to claim reimbursement for the cost of cataloguing, administering and storing the records and any conservation/preservation work undertaken. The actual costs will be adjusted to reflect cost of living rises between the date the costs were incurred and the date of reimbursement".*

- Arrangement for copies to be made of the deposited collection in the event of withdrawal, or for disposal of copies already made

- **Keeping information up to date**

- Both parties to the agreement undertake to keep each other informed of change of address, or other material changes affecting the agreement  
*eg "Any change in the name or address of the depositor of the records shall be notified to the archives service. The archives service will not accept responsibility for any consequences, which may arise from the failure to notify such changes."*

- **Conciliation**

- The National Archives is willing to be named as an independent source of conciliation advice between the parties in the event of any dispute arising over the terms of a Loan Agreement.

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<sup>6</sup> There are specific requirements to give notice of withdrawal of certain controlled classes of records. For example, in the case of manorial records, three months notice of withdrawal is required to be given to the Secretary of the Historical Manuscripts Commission under the Manorial Documents (Amendment) Rules 1967, S. 2.

**Contact details:**

If you have any comments on this guidance or questions concerning the issues raised, please contact:

National Advisory Services  
The National Archives  
Kew, Richmond  
Surrey TW9 4DU  
Telephone: 020 8876 3444  
Email: [nas@nationalarchives.gov.uk](mailto:nas@nationalarchives.gov.uk)