

Information in the public domain and access to Historical records at The National Archives*

1. Introduction

1.1 The Advisory Council requested a paper on the interpretation of, and response to, information being in the public domain in the context of applications to close historical records. This paper seeks the Council's views as to when information can be considered to be within the public domain and to what extent that fact invalidates closure applications for historical records. It highlights some areas where the distinction may not be clear-cut and factors the Council may wish to consider when looking at applications. These factors tend principally to revolve around the fairness of making personal information available, balancing the right of the individual to privacy with the public interest in the release of information. The primary assumption though is that information that is in the public domain should not be closed in historical records.

2. Information in the public domain

2.1 The phrase "in the public domain" is not a legal term and relates to land ownership as well as intellectual property rights such as patents and copyright. For the purpose of this paper it is taken to mean information publicly available irrespective of copyright restrictions that may affect further re-use of that information¹. It is information that has been published or can be readily acquired by an interested member of the public. There is a wide and increasing range of sources of information that is publicly available including:

- the internet
- newspapers and magazines
- broadcasts
- government guidance, statistics, reports, white papers etc.
- electoral roll information
- local authority records
- companies house information
- information in open public records
- copies of birth marriage and deaths registers
- information read out or provided as evidence in open court

¹ The Oxford English Dictionary definition of the Public Domain is "The state or condition of belonging or being generally available to all, esp. through not being subject to copyright."

3. Access to historical records at The National Archives

3.1 The Freedom Of Information Act 2000 (FOI Act) governs access to the information in historical records². Where departments seek to close records on transfer to the archives they do so under the exemptions in this Act: requests to review the status of closed records post transfer are conducted under the same legislation. There is an exemption in the FOI Act for information accessible by other means (section 21). This covers information that authorities have a statutory obligation to publish or have done so via publication schemes. However, this exemption is removed for information contained in historical records at The National Archives (FOI Act section 64), presumably because this ensures the public have the same right to have information communicated to them without having to inspect the record in person.

4. Public domain factors when considering closure applications

4.1 Normally information that is readily available to the public should not be closed in historical public records but there are some issues that the Council and departments may wish to consider when determining the access status of records:

Equating what level of detail is in the public domain compared to what is in records

4.2 Although some information about a topic is in the public domain it may not be in as much detail as in a particular record, e.g. allegations that have been aired but not substantiated. It may not be appropriate for information that expands on these unsubstantiated allegations in public records to be released by the government. Partial information may have also been released via leaks, unattributed sources to journalists or unauthorised memoirs. Again this is not sufficient to conclude that similar official or more detailed information on a topic should be released.

4.3 Another example is criminal case files. Case files of the Court Service are created before trial and transcripts of proceedings are not added to them. Therefore it is impossible to determine from the file which documents were read out in court or whether any evidence was heard in the absence of the jury and the public. There will be information on the court case file, the prosecution file and potentially a police investigation file that was not aired in court, e.g. alternative leads or witness statements that were considered too weak to use. This additional information may be innocuous and releasable in historical records but parts of it may not as they may include unsubstantiated allegations. In the criminal field there are several websites and books that speculate on the detail of crimes and the motives of those involved: this does

² Public Records Act 1958 Section 5(3) "It shall be the duty of the Keeper of Public Records to arrange that reasonable facilities are available to the public for inspecting and obtaining copies of those public records in the Public Record Office which fall to be disclosed in accordance with the Freedom of Information Act 2000"

not warrant the release of all the circumstances of a crime including those details that may damage the mental health of a victim's immediate family (scene of crime photographs) or details of victims who did not press charges.

4.4 A further example is where aggregated statistics are in the public domain (often on departmental websites) but information in the raw data is still considered to be sensitive because it identifies those supplying data where assurances of confidentiality have been given. This is the reason for closing census schedules but also applies to a number of dataset tables that have been closed on transfer for the lifetime of individuals.

Passage of time between initial availability of information and its release in historical records

4.5 This issue occurs in court case files. Although the judicial process is an open one, child victims or children of victims who witness attacks may not be aware of all the case detail and there is the risk of mental damage if all the evidence available at a trial is made readily available thirty years later at The National Archives. The most common example is photographs of murder victims where surviving children are known to exist which warrant closure at transfer under FOIA section 38 as endangering the mental health of individuals. It is not just that the individual would find the detail disturbing but knowing that third parties would have access to it that causes the endangerment. When considering FOI requests both the Ministry of Justice and Crown prosecution Service teams consider this issue especially regarding disturbing photographs.

5. Conclusion

5.1 Initially there seems no reason for closing information that has been in the public domain but the Council and departments will be considering what impact releasing particular information in historical public records might have at that time of release particularly on individuals. Information is not necessarily permanently in the public domain although technology makes this more likely to be the case. This paper has identified areas where further consideration may be required in balancing the protection of privacy against the wider public interest in information being available.

*This paper is a redacted version of a restricted paper that went before the Advisory Council in November 2008.