REVISED GUIDANCE FOR REVIEWERS ON HONG KONG

HONG KONG

July 1996

I. General

1. The period up to the transfer to China of sovereignty over Hong Kong on 1 July 1997 is politically very delicate. Until that date the United Kingdom retains responsibility for the effective administration of the territory, while seeking to ensure a successful transition to Chinese sovereignty under the agreed "one country two systems" formula. During this period HKG will also be engaged in negotiations with the Chinese in the Joint Liaison Group (JLG) established under the Sino-British Joint Declaration of 1984.

2. Any injudicious release of documents before the transfer of power could complicate the task ahead. Some papers could reveal prematurely our likely position in the Sino-British negotiations or could provoke hostile Chinese or local reactions.

3. Sensitivities will be no less after 1997, especially in the case of political records transferred from HKG to British ownership in 1997 for which special arrangements apply as set out in the Paving Submission (Annex 1) agreed by the Lord Chancellor in 1996. Copies of papers on FCO files which fall into the categories proscribed in the Paving Submission should be subject to the same retention period of 50 years from 1997.

4. The main collections of records for review from 1996 onwards (with due release dates) are listed in the Review Schedule at Annex II. This guidance also applies to papers on the files of other government departments. Reviewers should err on the side of caution in considering the release of papers on Hong Kong, referring cases of doubt to political departments and agencies in the usual way. Up to 30 June 1997, the Hong Kong Government (HKG) must be told in advance of any release likely to be controversial. After that, the British Consul-General in Hong Kong and Hong Kong Department (or its successor) should be consulted well before the due release date of any classified documents, especially those that are future-related.

II Key areas of sensitivity

5. It is impossible to draw up a complete list of subjects that are sensitive in the Hong Kong context, and judgement will be needed in reviewing all papers. Reviewers should note the following key sensitive areas:
12. The majority of HKG records will remain in the territory after the transfer of sovereignty. Certain records (as listed in Annex II) are being transferred or copied to the FCO. They will become British records on 1 July 1997 and should be treated as set out in the Paving Submission. In particular the Lord Chancellor has agreed that transferred papers in the following categories should be retained under Section 3(4) for 50 years from the date of British ownership (1997) without decennial review. The following categories will not be due for release before 2048.
13. The HKG are content for all other records that are to be transferred or copied to the UK, as well as others already here, to be reviewed for release to the PRO in the normal way. A list of those that have been copied to the UK will be provided to the Chinese authorities, and these duplicates will have the status of "shared records". The Chinese will be informed at least three months in advance which of these duplicate records are to be released.

14. In principle records in the categories listed in paragraph 12 above will be separated from the remainder before being transferred to the UK. Reviewers should however be alert to the possibility that some may have escaped the net; any papers coming up for review that appear to fall within these categories must be flagged for possible retention.

Revised July 1996
CONFIDENTIAL

March 1996

Dear Nicholas,

HONG KONG GOVERNMENT RECORDS

I enclose a copy of my submission to the Lord Chancellor which covered yours. As you will see, both the Parliamentary Secretary and the Lord Chancellor have endorsed the course set out in the paving submission. I thought it right that I should make specific mention of the fact that this will amount to an exception to the White Paper. I will let the MR know that the Lord Chancellor has seen and endorsed the submission.

I also enclose the Instruments, signed by the Lord Chancellor, relating to the records considered at the last meeting of the Advisory Council, together with the relevant Schedules.

Yours,

ROBERT WRIGHT
RETENTION OF PUBLIC RECORDS: RECORDS OF THE HONG KONG GOVERNMENT

Issue
1. I attach (at A) a submission from the Director of Modern Records at the PRO seeking your (Lord Chancellor) approval in principle for the retention, in the Foreign and Commonwealth Office, of certain Hong Kong Government (HKG) records of special sensitivity for 50 years after their transfer to United Kingdom Government ownership on 1 July 1997.

Recommendation
2. Your Advisory Council on Public Records has considered and approved the submission in draft. The Master of the Rolls has approved the final submission. I accordingly invite you, if you are content, to endorse your approval of the proposed course of action on the submission.

Timing
3. Routine, although the FCO is anxious to reassure the HKG as soon as possible.

Background
4. This is set out in what is a paving submission: individual applications for retention will be considered by the Advisory Council in the ordinary way. However, this course does represent an explicit exception to that set out as government policy in the White Paper on Open Government in that these HKG records will not be subject to decennial review (see para. 8 of the submission at A; cf. para. 9.24 of the White Paper at G.) You will recall that the wording of para. 9.24 caused difficulty when we were considering the retention of Cabinet Secretaries' Notebooks. In this case, however, the point of seeking retention, as opposed to extended closure, is to prevent release of the fact that such records are being withheld (see para. 5 of the submission). This will, therefore, amount to an undisclosed exception to the White Paper, but one which the Advisory Council - which acts as the guardian of the public interest in these matters - has specifically endorsed.
5. I have attached the following:
   A. Submission from the Director of Modern Records at the PRO
   B. My letter (as secretary to the Advisory Council) to the MR of 17.11.94
   C. The MR’s letter to me of 21.11.94
   D. The submission as considered by the Advisory Council in December 1994
   E. Extracts from the minutes of the Advisory Council of 6 December 1994
   F. My letter to the MR of 1 March 1996
   G. The MR’s letter to me of 5 March 1996
RECOMMENDATION

1. This submission seeks your approval, under section 3(4) of the Public Records Act 1958, that certain Hong Kong Government records be retained in the Foreign and Commonwealth Office (FCO) for 50 years after their transfer to United Kingdom Government ownership on 1 July 1997.

BACKGROUND AND ARGUMENT

2. Records of the Hong Kong Government (HKG) are not United Kingdom public records, and do not therefore fall within your Ministerial responsibilities. Your lawyers have advised, however, that any originals or filmed copies that have passed or may in future pass into the ownership of the Foreign and Commonwealth Office for their Departmental use will become United Kingdom records on 1 July 1997, the date on which sovereignty over Hong Kong reverts to China. When they become United Kingdom records, they will need to be treated in accordance with the Public Records Acts.

3. The vast majority of HKG records will remain in Hong Kong after the transfer of sovereignty on 30 June 1997. But some are already held by the FCO, and others will be transferred to the United Kingdom in the first half of 1997. The HKG are concerned that some of these records are particularly sensitive.
7. These records are also important to the FCO as material for the work of the Sino-British Joint Liaison Group, which will continue in existence until 1 January 2000.

8. In view of these particular circumstances, the FCO and we agree with the HKG that the categories of sensitive records in paragraph 4 above ought to be retained by the FCO for 50 years after they become United Kingdom records, without decennial review, and irrespective of the date on which the records were created. The FCO therefore proposes to apply for an approval for retention for an initial period of 50 years of HKG records in these categories when they are transferred to British Government ownership.

9. The HKG are content for all other records which will be transferred or copied to the UK, and other

10. Such an approach would not preclude the transfer of any records which could be made publicly available in the Public Record Office.

11. The FCO wishes you to be advised of this proposal, and, if you indicate that you are content with what is proposed, to be able to reassure the Government of Hong Kong. The Advisory Council on Public Records has seen and approved this proposal. May I therefore invite your approval in principle to the course of action outline above?

PUBLIC RECORD OFFICE
February 1996

NICHOLAS COX
Director of Modern Records
The Rt Hon Sir Thomas Bingham
Master of the Rolls
Royal Courts of Justice
Strand
LONDON WC2A 2LL

Your reference
Our reference
Date 17 November 1994

Covering CONFIDENTIAL

Dear Sir Thomas,

ADVISORY COUNCIL ON PUBLIC RECORDS

Thank you for your letter of 14 November and your kind remarks. Your letter to the Lord Chancellor has arrived but the advice to the Lord Chancellor will be dealt with by my colleague who now deals with the operational side of the PRO.

On a totally different subject, I enclose a draft submission by the PRO to the Lord Chancellor on records of the Hong Kong Government (HKG). The draft has been agreed in revised form by the PRO and the FCO and agreement to the revised draft is at this moment being sought from the Hong Kong Government. It is in the form of a paving submission which sets out the policy for handling HKG records when ownership of the records transfers to the UK government. The intention is that the transfer of ownership should take place at the moment of transfer of sovereignty of the territory to China in 1997. It is only at that point that the records will become UK public records and fall to be handled under public records legislation. The Hong Kong Government wishes those records that are sensitive to be retained by FCO during the fifty year period of the special arrangements for the territory provided for under the Joint Declaration and possibly, depending on political developments during this period, for longer.

Any applications subsequently made to retain HKG records would of course be placed before the Advisory Council.
FCO Hong Kong Department are now anxious to move ahead with the paving submission as quickly as possible. Nicholas Cox has asked for my comments on the draft - of which I have none. My purpose in writing to you is, firstly, to let you see the draft submission and, secondly, to seek your view as to whether the draft submission should be placed before the Advisory Council at its December meeting.

I am conscious of your letter to the Lord Chancellor of 1 July, relating to guidance to reviewers of records relating to the Royal Family in which, having seen the guidance, you stated: "I do not understand the Advisory Council's remit under section 1(2) of the 1958 Act to be limited to issues of principle, and often the Council is of course concerned to offer advice on specific classes of documents. But I do not think there is anything in this guidance on which the Council would wish to comment, and the current approach would appear to be much preferable to the rules previously in force."

When the submission reaches the Lord Chancellor, he may well ask what the Advisory Council's view is. If you are content with the submission and you do not consider that it need go before the Council, I would of course tell him that you had seen and approved it but that it had not been considered necessary to place before the Council itself. I would emphasise that any future applications for retention would be considered by the Advisory Council when they were made.

If you feel that it should be considered by the Council, I will place it on the agenda for 6 December. There is some urgency because, as I have said, the FCO Hong Kong Department wish to move ahead as quickly as possible. Nicholas Cox informs me that they would be unhappy if the matter had to wait until the March meeting. The revised draft is now being cleared with Hong Kong: out of caution Nicholas Cox has made them aware of the date of the December meeting.

I look forward to hearing from you.

Yours sincerely,

Robert Wright
Secretary
Robert Wright, Esq.,
Secretary,
Advisory Council on Public Records,
Lord Chancellor’s Department,
Trevelyan House,
30 Great Peter Street,
London SW1P 2BY.

Dear Robert,

Advisory Council on Public Records

Thank you very much indeed for your letter of 17 November 1994.

I have read with great interest both what you say and what is contained in the draft submission of the PRO that you enclose. This is, I suppose, a new situation in as much as the independence of previous colonies has not involved the introduction of a new foreign power. I imagine that there is accordingly no set procedure which governs the present situation.

I am myself inclined to share your view that the draft submission is, as it stands, acceptable. I do, however, think that it should be placed before the Advisory Council. If, as I would expect, the Council has no substantial point to raise on the submission, then I feel that it would help the Lord Chancellor to know that. If, on the other hand, the Council do have doubts or amendments to suggest, then again it would seem to me desirable that the Lord Chancellor should have the opportunity to consider those points. I feel that in principle it is important that the Council should be consulted on matters such as this, and that confidence should be placed in their judgment, and so I think that in all the circumstances it would be best if this were included in the agenda for the December meeting. If it is felt that these papers should not be widely circulated before the meeting, then the only course is to make the papers available at the meeting, but I think this is a course to be avoided if we can.

Please let me know if these views cause you any difficulty. I would be very happy to discuss them on the telephone.

Yours ever,

[Signature]

From: The Rt Hon. Sir Thomas Bingham

ROYAL COURTS OF JUSTICE
STRAND, LONDON, WC2A 2LL

Telephone: 071-936 6002
936 7475

CONFIDENTIAL

21 November 1994
CONFIDENTIAL

ADVISORY COUNCIL ON PUBLIC RECORDS

HONG KONG GOVERNMENT RECORDS

The views of the Council are sought on the attached submission to be placed before the Lord Chancellor, inviting his approval in principle that certain original or copied records of the Hong Kong Government should be retained by the Foreign and Commonwealth Office for 50 years after they pass into the ownership of that department, at the time of the transfer of sovereignty to China in 1997. Copies of Hong Kong Government records, and some originals, will be passing into the care of FCO between now and the time of the transfer of sovereignty.

These records are not now covered by the Public Records Act, which, in general, defines public records as those belonging to Her Majesty, whether in the United Kingdom or elsewhere, in right of Her Majesty’s Government in the United Kingdom. They will become public records when the transfer of ownership of them to the United Kingdom Government occurs on 1 July 1997. Any applications thereafter to retain any particular records of the Hong Kong Government will be placed before the Advisory Council.

This submission is being made now because the Hong Kong Government wishes to be reassured that those records that are sensitive will be able to be retained by the Foreign and Commonwealth Office during the 50 year period of the special arrangements for the territory provided for under the Joint Declaration, and possibly, dependent on political developments in that period, for longer. The categories of records that it regards as sensitive are set out in the submission. The great majority of the copies to be passed to this country will be able to be transferred to the Public Record Office and made available when they are thirty years old.

PUBLIC RECORD OFFICE
November 1994

NICHOLAS COX
Director of Archival Services
RECORDS OF THE HONG KONG GOVERNMENT

Recommendation

1. This submission seeks your approval, under Section 3(4) of the Public Records Act 1958, that certain Hong Kong Government records be retained in the Foreign and Commonwealth Office for 50 years after their transfer to United Kingdom Government ownership on 1 July 1997.

Background and Argument

2. Records of the Hong Kong Government (HKG) are not United Kingdom public records, and do not therefore currently fall within your Ministerial responsibilities. Your lawyers have advised, however, that any originals or filmed copies that pass into the ownership of the Foreign and Commonwealth Office (FCO) for their departmental use will become United Kingdom public records, and will consequently need to be treated in accordance with the provisions of the Public Records Acts.

3. The HKG have reviewed their records to establish which records will or will not be left behind in Hong Kong after 1997.

5. These records are important to the FCO as they will need sufficient material for the work of the Joint Liaison Group which will continue in existence until 1 January 2000. They will also be required to counter any political arguments that may arise about our actions in Hong Kong (for example the “sell-out” argument), and for research purposes.

6. The HKG have asked that certain sensitive records should be retained in the FCO for at least 50 years after 1997.
7. We have consulted the FCO on Hong Kong's request.

In view of Hong Kong's particular circumstances, the FCO and we agree with the HKG that the categories of sensitive records in paragraph 6 above ought to be retained by the FCO after their transfer to the United Kingdom.

8. The Hong Kong Government wishes sensitive material to remain in the custody of the Foreign and Commonwealth Office, while its sensitivity remains, and not to be transferred to the Public Record Office. The Foreign and Commonwealth office is therefore proposing to apply for an approval for the retention of those Hong Kong Government records which are more than 30 years old, when they come into its ownership. They would expect to apply initially to retain such records for a period of 50 years, without decennial review, but then to resubmit applications to retain as necessary. The HKG are content for all other records which will be transferred to be subjected to the normal review and release procedures, using Section 5(1) of the Public Records Act. Such an approval, if given, would not preclude the transfer of any records as can be made publicly available to the Public Record Office (for instance, the HKG have microfilmed a substantial number of files of historical value).

9. The Foreign and Commonwealth Office wishes you to be advised of this proposal and also to be able to reassure the government of Hong Kong, if you indicate that you are content with what is proposed. May I therefore invite your approval in principle to the course of action outlined above?

PUBLIC RECORD OFFICE
December 1994

NICHOLAS COX
Director of Archival Services
4. Hong Kong Government Records AC(94)12

The Chairman indicated that the submission, and the issues it raised, were very sensitive and would need to be treated as such.

Dr Cox noted that the text of the submission was now to be put by HKG before the Executive Council early in 1995 (who might amend details, but not the principle). On paragraph 4, Dr Cox stated that while "1985" should read "1995", in fact the HKG now wanted to send all records to this country in 1997, not in a staged process.

It was emphasised that the submission represented a recommendation of principle to the Lord Chancellor: individual applications for retention of records would be placed before the Advisory Council in the usual way.

It was agreed that the submission would be approved, although "since the late 1970s" would be added at the end of 4(i) and applications for retention under the submission would be regarded as for 50 years and no longer in the first instance.
From the Secretary

The Rt Hon Sir Thomas Bingham
Master of the Rolls
Royal Courts of Justice
Strand
London WC2A 2LL

Covering CONFIDENTIAL

March 1996

Dear Sir Thomas,

HONG KONG GOVERNMENT RECORDS

I enclose a final version of the submission concerning the retention of Hong Kong government records which you may recall we discussed at the Council meeting in December 1994. I propose to place it before the Lord Chancellor for his approval, subject to any comments which you may have. It is a paving submission; any application for retention of records would be placed before the Council in the usual way.

I enclose copies of the following:

- Nicholas Cox’ letter to me of 21 February
- The revised submission
- My letter to you of 17 November 1994
- Your letter to me of 21 November 1994
- The submission considered by the Advisory Council
- Extract of the minutes of the Council’s meeting on 6 December 1994

I look forward to hearing from you.

Yours sincerely,

[Signature]

ROBERT WRIGHT
5 March 1996

Robert Wright, Esq., Secretary, Advisory Council on Public Records, Lord Chancellor’s Department, Selborne House, 54-60 Victoria Street, London SW1E 6QW.

Dear Robert,

Hong Kong Government Records

Thank you very much for your letter of 1 March 1996. I have read the revised submission, which appears to be very much in line with what the Council considered at its meeting in December 1994.

I am entirely happy that you should place the submission before the Lord Chancellor for his approval.

Yours ever,

[Signature]

From: The Rt.Hon. Sir Thomas Bingham
9.22 Records relating to the Royal Family will be treated in the same way as all other records and only closed for longer than 30 years if they fall into one or more of the three criteria governing closure.

RETENTION

9.23 As stated in paragraph 9.8 (ii) above the Public Records Act makes provision for records to be retained by departments. There are two main categories of records which are retained rather than closed. These are, first, records which are retained for administrative reasons, usually because they are awaiting review, or are in constant use. There are secondly, records whose sensitivity is such that no date can be put on their potential release, most of which fall into one of the categories for which the Lord Chancellor has given ‘blanket’ approval to retain.

These categories are:

- Security and intelligence material (renewed in February 1992);
- Civil and Home Defence material (now under review);
- Atomic Energy - pre-1956 defence-related material (now under review);
- Atomic Energy - post 1956 defence-related material (to be reviewed in 2006);
- Personal records of civil servants - retained for administrative purposes.

9.24 Records retained by departments for other than administrative reasons are subject to regular review i.e. at least every ten years and, in the same way as closed records, subject to the test of ‘actual damage’ caused by release. Thus when the sensitivity has passed the record will be released.

EXPLANATION OF THE REASONS FOR CLOSURE/RETENTION

9.25 Hitherto when records have had to be closed for longer than 30 years or retained by departments no reason has been given other than to say that the provisions of the Public Records Act 1958 permit such closure or retention in accordance with agreed criteria. This is because Governments