



OPERATIONAL SELECTION POLICY OSP42

RECORDS OF DEPARTMENTAL LEGAL BRANCHES

May 2007

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1 Authority

- 1.1 The National Archives' Acquisition and Disposition Policy statements (February 2000) announced the Archive's intention of developing, in consultation with departments, Operational Selection Policies across government. These policies would apply the collection themes described in the policy to the records of individual departments and agencies.
- 1.2 The National Archives' Appraisal Policy statement (August 2004) announced a new emphasis to Operational Selection Policies:

The National Archives will develop generic archival appraisal guidance for categories of records such as those produced by similar types of departments (agencies, regulatory bodies) or those produced by activities common to many departments (research papers, inspection reports). (section 2.4.3.6)

This Operational Selection Policy provides generic archival appraisal guidance for records of policy advice created in departmental legal branches

- 1.3 Operational Selection Policies are intended to be working tools for those involved in the selection of public records. This Policy may, therefore, be reviewed and revised in the light of comments received from the users of the records or from archive professionals, the department's experience of using the policy, or as a result of newly discovered information. There is no formal cycle of review but we would welcome comments at any time. The extent of any review and revision exercise will be determined according to the nature of the comments received.
- 1.4 If you have any comments upon this Policy, please email records.management@nationalarchives.gov.uk
Or write to:

Acquisition and Disposition Policy Manager
Records Management Department
The National Archives
Kew
Richmond
Surrey
TW9 4DU

2 Scope

- 2.1 Legal branches in the principal policy departments will provide (or buy in) legal advice for:
 - Preparation of primary legislation

- Preparation of subordinate legislation
 - Preparation of formal guidance material (eg departmental circulars)
 - International casework
 - Departmental casework having policy/precedent implications
 - Departmental casework related to housekeeping (including contract work in relation to outsourced functions)
- 2.2 Records in departmental legal branches in this Operational Selection Policy exclude prosecution and civil litigation casework records.
- 2.3 The records addressed in this Operational Selection Policy may fall within the scope of any of the Acquisition policy themes.

3 General

- 3.1 Many departmental legal branches maintain their own records independently of records management systems operating across the department as a whole. These records are usually accessed by reference to the branch of law involved; nevertheless, they may be expected to duplicate records of the branches which sought and were supplied with professional legal advice. The archival significance of legal advice turns on the public policy context within which it was sought, and significant advice will be secured for The National Archives through selection of departmental policy files. It follows therefore that, as duplicates, records of legal branches will not normally be selected.

4 Application of international laws and conventions to the United Kingdom (UK), and to UK representatives overseas

- 4.1 Where doubt has existed whether provisions of international laws and conventions have or should have application to the United Kingdom, including to its overseas territories, legal advice will be sought by the responsible domestic departmental policy branch, and the policy branch records will be selected.
- 4.2 Provided the policy branch records have been identified for transfer to The National Archives the legal branch files will not be selected.

5 HMG cases in international courts and tribunals

- 5.1 Advocacy in international cases where HMG is plaintiff or defendant will normally be the responsibility of the Law Officers, and the case records in the Law Officers Department will be selected.
- 5.2 Records generated in departmental legal branches in support of the work of the Law Officers will not be selected.

6 Implementation of European Community legislation within the UK

- 6.1 The European Communities Act 1972 Section 2 (1) provides for British courts to give effect to the rights and obligations which are to have effect within member states without further enactment.
- 6.2 Under section 2 (2) provisions, which are not directly applicable or effective, are not part of the law of the UK until legislation has made them so.
- 6.3 An Operational Selection Policy on UK records of the implementation of EU regulations and directives is currently in preparation.

7 HMG cases in the European Court of Justice

- 7.1 Article 177 of the EEC treaty gives the European Court of Justice jurisdiction to give preliminary rulings on Community law at the request of courts of member states.
- 7.2 Legal advice will be sought by the responsible domestic departmental policy branch on any case to be heard in the ECJ, and the policy branch records will be selected.
- 7.3 Provided the policy branch records have been identified for transfer to The National Archives the legal branch files will not be selected.

8 HMG cases in the European Commission of Human Rights or the European Court of Human Rights

- 8.1 The member states of the Council of Europe drew up the European Convention for the Protection of Human Rights and Fundamental Freedoms in 1950. The United Kingdom ratified the Convention in 1951.
- 8.2 States may refer to the Commission any alleged breach of the provisions of the Convention by another state. The Commission may also receive petitions from individuals or groups if the state party against which complaint is made has recognised the competence of the Commission to receive individual petitions.
- 8.3 Cases may be brought before the European Court of Human Rights only by state parties or by the Commission.
- 8.4 Advocacy in European cases where HMG is plaintiff or defendant will normally be the responsibility of the Law Officers, and the case records in the Law Officers Department will be selected.
- 8.5 Records generated in departmental legal branches in support of the work of the Law Officers will not be selected.

9 UK Government Bills

- 9.1 Only very minor bills can be taken by divisions within their existing resources, so normal procedure will have been the constitution of a dedicated bill team, with its own free standing filing arrangements.
- 9.2 Those records of the bill team recording deliberation of policy and the communication of the policy to Parliamentary Counsel must be selected.
- 9.3 Files simply containing copies of bills and other Parliamentary papers as the successive Parliamentary stages were reached must not be selected.
- 9.4 Provided that either the bill team policy files form a coherent record, or the responsible policy branch incorporated the bill papers within its overall filing scheme, no legal branch files must be selected.

10 UK Statutory Instruments

- 10.1 Registration of rules and orders became compulsory under the Rules Publication Act 1893. Statutory rules and orders and statutory instruments were required to be classified as general or local: the former were required by the legislation to be published, but the local rules, orders and instruments were not.
- 10.2 Individual general statutory instruments are published for sale at the time of laying before Parliament, and they are published collectively in annual editions by HMSO.
- 10.3 Parliament's Table Office ensures that general statutory instruments are laid with the proper authority.
- 10.4 Legal branch files on the preparation and tabling of general or local statutory instruments will not normally be selected for permanent preservation.

11 UK departmental circulars, codes of practice, etc

- 11.1 Archive sets of departmental circulars, codes of practice, etc, aimed at public authorities and others, are preserved by the legal deposit libraries.
- 11.2 Files of policy departments responsible for drafting circulars, codes of practice, etc, will be appraised on their merits.
- 11.3 Legal branch files of drafting advice will not be selected.

12 HMG cases in the House of Lords

- 12.1 The House of Lords has a judicial function in addition to its legislative and deliberative functions. The House is the highest court in the UK -

the supreme court of appeal. It acts as the final court on points of law for the whole of the United Kingdom in civil cases and for England, Wales and Northern Ireland in criminal cases. Its decisions bind all courts below.

- 12.2 At the time of publication of this Operational Selection Policy government policy is to abolish the judicial functions of the House.
- 12.3 In House of Lords cases the government will have been represented by the Law Officers, and the case records in the Law Officer's Department will be selected.
- 12.4 Records of departmental legal branches generated in support of the work of the Law Officers will not be selected.

13 Northern Ireland matters

- 13.1 Northern Ireland has had a devolved provincial government, including its own Law Officers, and its own separate civil service, since 1922.
- 13.2 The archives of the Northern Ireland Government are preserved at the Public Record Office of Northern Ireland.
- 13.3 Since 1969 the Province has been subject to periods of direct rule by UK government ministers.
- 13.4 The respective powers of the two governments have been characterised in legislation from time to time as: transferred; excepted; or reserved.
- 13.5 UK government departments' policy files on the allocation and re-allocation of these powers from time to time will be selected.
- 13.6 UK departments legal branch files of advice on the bases for and operation of transferred, excepted, and reserved powers will not normally be selected, although appraisers should exercise their own judgement.

14 Scotland and Wales matters

- 14.1 Fuller devolution of power to Scotland and to Wales was signalled in the Queen's Speech in November 1975; the policy lapsed with the defeat of the Labour administration in 1979.
- 14.2 UK government departments policy files on the development of the 1970s devolution bills will be selected.
- 14.3 UK legal branch files of advice on the preparation of the devolution bills will not normally be selected, although appraisers should exercise their own judgement.

- 14.4 A new devolution programme was adopted by the new Labour administration of 1997. The legislation passed in 1998.
- 14.5 A Memorandum of Understanding between the UK Government and the Devolved Administrations was published in 2001, in which it was stated that the UK Government would not legislate on devolved matters without the consent of the devolved body.
- 14.6 UK government departments policy files on the development of the 1990s devolution programme, including the Memorandum of Understanding, will be selected.
- 14.7 UK departments legal branch files of advice on the preparation of the 1990s programme will not normally be selected, although appraisers should exercise their own judgement.

15 Channel Islands and Isle of Man matters

- 15.1 The Isle of Man and the Channel Islands are not part of the United Kingdom, but they are part of Her Majesty's dominions.
- 15.2 The inclusion of the Channel Islands and the Isle of Man in the EEC presented constitutional, administrative and economic difficulties: accordingly the islands have been granted associate status under Article 238 of the Treaty of Rome.
- 15.3 The islands continue to have legislative autonomy in most respects; but UK legislation may be extended to the islands by means of Order in Council.
- 15.4 The Crown appoints a Lieutenant-Governor for each of Man and the Bailiwicks of Jersey and Guernsey.
- 15.5 The channel of communication between the islands and the United Kingdom was the Home Secretary until 2003 and has been the Secretary of State for Constitutional Affairs since that date.
- 15.6 Man, Jersey, and Guernsey each maintain their own government archives.
- 15.7 All UK government departments policy files deliberating the fundamental nature of the relationships between the European Community and the islands and between HMG and the islands will be selected.
- 15.8 UK departments policy files deliberating the application of significant aspects of UK government policy to any of the islands will be selected.

15.9 UK departments legal branch files of advice on the preparation of orders in council to apply to the islands will not normally be selected, although appraisers should exercise their own judgement.