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**Submission to the 30-year Rule Review**

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## Introduction

As long ago as 1981 the Wilson committee, on Modern Public Records, commented that the introduction of freedom of information legislation “would clearly undermine completely the principle of the 30 year norm.”<sup>1</sup>

The predication has proved correct. Because the Freedom of Information Act 2000 is fully retrospective it has from the outset opened the doors to a wealth of material previously available only after 30 years.

Some of this has included internal policy discussions within government. Although disclosure of this information has often been resisted by government, decisions of the Information Commissioner and Information Tribunal have, in a number of significant cases, led to its release. In some cases relatively sensitive policy material has now been disclosed only a few years or, in some cases, a few months after the decisions to which they relate.

We think the normal period before such material is proactively released in The National Archives could now be reduced substantially, preferably to 15 years. If necessary, this change could take place in two stages, starting with a reduction to 20 years, followed by a subsequent change (perhaps 5 years later) to 15 years. These periods would also mark the point at which the exemptions in question could no longer be used in responding to individual FOI requests.

## Internal deliberations

A number of exemptions may be relied on by a public authority seeking to protect its internal discussions from disclosure. These are:

- the exemptions in *section 35(1)* of the FOI Act (information relating to the formulation or development of government policy, ministerial communications, and the operation of a ministerial private office<sup>2</sup>)

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<sup>1</sup> ‘Modern Public Records. Selection and Access.’ Report of a Committee Appointed by the Lord Chancellor. Chairman, Sir Duncan Wilson. Cm 8204, March 1981, paragraph 217

<sup>2</sup> Section 35(1) also exempts information relating to the provision of advice the Law Officers

- the exemptions *in section 36(2)* of the FOI Act (information whose disclosure in the reasonable opinion of a qualified person would be likely to prejudice collective ministerial responsibility, inhibit the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation or otherwise prejudice the effective conduct of public affairs)
- where the request is for environmental information, the exception for internal communications in *regulation 12(4)(e)* of the Environmental Information Regulations 2004 (EIRs).

These exemptions are all subject to the public interest balancing test in section 2(2)(b) of the FOI Act and regulation 12(1)(b) of the EIRs. These permit an authority to withhold information only if:

“in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”

In practice, it is the outcome of this test which determines whether information will be disclosed.

### **The Tribunal's approach**

The Information Tribunal set out guiding principles in the first case that it dealt with involving internal deliberations. This was a request for high level minutes held by the Department for Education and Skills.<sup>3</sup>

The Tribunal has rejected any 'blanket' approach to the withholding of policy discussions and stated, in part:

- (i) The central question in every case is the content of the particular information in question. Every decision is specific to the particular facts and circumstances under consideration. Whether there may be significant indirect and wider consequences from the particular disclosure must be considered case by case.
- (ii) No information within s.35(1) is exempt from the duty of disclosure simply on account of its status, of its classification as minutes or advice to a minister nor of the seniority of those whose actions are recorded.

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<sup>3</sup> Information Tribunal, Department for Education and Skills v Information Commissioner and The Evening Standard, EA 2006/0006, 19 February 2007

- (iii) Subject to principle (iv), which we regard as fundamental, the purpose of confidentiality, where the exemption is to be maintained, is the protection from compromise or unjust public opprobrium of civil servants, not ministers. Despite impressive evidence against this view, we were unable to discern the unfairness in exposing an elected politician, after the event, to challenge for having rejected a possible policy option in favour of a policy which is alleged to have failed.
- (iv) The timing of a request is of paramount importance to the decision. We fully accept the DFES argument, supported by a wealth of evidence, that disclosure of discussions of policy options, whilst policy is in the process of formulation, is highly unlikely to be in the public interest, unless, for example, it would expose wrongdoing within government. Ministers and officials are entitled to time and space, in some instances to considerable time and space, to hammer out policy by exploring safe and radical options alike, without the threat of lurid headlines depicting that which has been merely broached as agreed policy...
- (v) When the formulation or development of a particular policy is complete for the purposes of (iv) is a question of fact. However, s. 35(2) and to a lesser extent 35(4), clearly assume that a policy is formulated, announced and, in many cases, superseded in due course. We think that a parliamentary statement announcing the policy, of which there are examples in this case, will normally mark the end of the process of formulation. There may be some interval before development. We do not imply by that that any public interest in maintaining the exemption disappears the moment that a minister rises to his or her feet in the House. We repeat – each case must be decided in the light of all the circumstances. As is plain however, we do not regard a “seamless web” approach to policy as a helpful guide to the question whether discussions on formulation are over.”<sup>4</sup>

In the DfES case itself and all other decisions involving these exemptions published to date the Tribunal has (with one partial exception) required the disclosure of the internal material concerned.

These decisions are summarised below, with particular attention to the age of the information which the Tribunal has ordered to be disclosed.

The Tribunal considers whether information should have been *disclosed at the time that it was requested*, rather than at the time of its own decision. In the cases to date, the age of the deliberative information whose disclosure was ordered has varied from 3 months to 6 years. This represents a substantial contraction of the

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<sup>4</sup> paragraph 75

period of time that might have been expected prior to FOI, even under the more open approach represented by the Waldegrave initiative.<sup>5</sup>

No Tribunal decision to date has addressed the possible disclosure of cabinet minute (though the Information Commissioner has recently ordered disclosure of the cabinet minutes dealing with the war in Iraq).<sup>6</sup> The comments of the then Chief Justice, Lord Widgery in the Crossman Diaries case, more than 30 years ago are also re

“my considered view is that I cannot believe that the publication at this interval of anything in volume 1 would inhibit free discussion in the cabinet of today, even though the individuals involved are the same, and the national problems have a distressing similarity to those of a decade ago. It is unnecessary to elaborate the evils which might flow if at the close of a cabinet meeting a minister proceeded to give the press an analysis of the voting, but we are dealing in this case with a disclosure of information nearly 10 years later.”<sup>7</sup>

We doubt that cabinet minutes are in any event the most sensitive type of material covered by the relevant exemptions. We think that a 15 year period (or, in the interim a 20 year period) for policy related materials (provided they do not also require protection on other grounds such as defence or international relations) is likely to be feasible.

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<sup>5</sup> This refers the initiative set out in the 1993 ‘Open Government’ white paper, by the then Chancellor of the Duchy of Lancaster, William Waldegrave, to “give consideration to blocks of records which, although not 30 years old, may be releasable” and to “consider *ad hoc* requests from historians made as a result of the Chancellor of the Duchy of Lancaster’s invitation to let him know of blocks of records closed for longer than 30 years which they consider should be released.” Cm 2290, paragraph 9.28.

<sup>6</sup> Information Commissioner, Decision Notice FS50165372, Cabinet Office, 19.2.08. In this decision the Commissioner accepted that passages in the minutes likely to harm international relations should be withheld. This is clarified in the Information Commissioner’s accompanying press release of 26.2.08

<sup>7</sup> Lord Widgery C J, *Attorney-General v Jonathan Cape*, [1975] 3 All ER 484 at 496

## THE TRIBUNAL'S DECISIONS ON INTERNAL COMMUNICATIONS

### DfES school funding minutes<sup>8</sup>

FOI s. 35

In the DfES case, the Tribunal ordered the disclosure of minutes of meetings of the department's Board (which consists of the permanent secretary and heads of directorates) to discuss a schools funding crisis. The most recent of these, from July 2003 was 18 months old at the time of the request.

The former cabinet secretary, Lord Turnbull, gave evidence to the Tribunal, saying that disclosure of minutes of bodies as close to ministers as those involved here had not been foreseen and would strike at the heart of civil service confidentiality.

The Tribunal, however, found that the public interest in maintaining the exemption, at the time of the request in January 2005 was "tenuous, at best". The issues considered at the meetings had led to the announcement and introduction of a new policy framework and a new funding settlement. The Tribunal concluded that the time and space for private thinking, whose importance it had acknowledged in its principles, "had been available and put to good effect". It ordered disclosure of the minutes, which are now available of the DfES website.<sup>9</sup>

### DWP and identity cards<sup>10</sup>

FOI s. 35

The Tribunal ordered the disclosure of a 3-month old assessment by the Department of Work and Pensions of some of the costed benefits to it of introducing identity cards. The assessment had been prepared in October 2004 to help the Home Office develop a business case for the identity cards project. It was requested in January 2005.<sup>11</sup>

The Tribunal found that the policy decision involved, to proceed with the Identity Cards Bill, was "well formulated and developed by the time of the Request". The

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<sup>8</sup> Information Tribunal, Department for Education and Skills v Information Commissioner and The Evening Standard, EA 2006/0006, 19 February 2007

<sup>9</sup> [http://www.dfes.gov.uk/foischeme/subPage.cfm?action=collections.displayDocument&i\\_documentID=307&i\\_collectionID=204](http://www.dfes.gov.uk/foischeme/subPage.cfm?action=collections.displayDocument&i_documentID=307&i_collectionID=204)

<sup>10</sup> Information Tribunal, Secretary of State for Work and Pensions v The Information Commissioner, EA 2006/0040, 5 March 2007

<sup>11</sup> In fact the request was made late in 2004, before the FOI Act had come fully into force, but the DWP dealt with it under the Act and the Tribunal treated the request as if it had been made in January 2005.

information was “mature information” which contributed to the government’s Regulatory Impact Assessment on the project which had concluded that “the Government was satisfied that the benefits of the identity cards scheme justified the costs”. The Tribunal found that potential harm from its disclosure was relatively low but the benefit of making it available in January 2005 would have been to assist the public and MPs to understand government thinking on the identity cards legislation that was before Parliament at that time. The requested information is now available on the DWP website.<sup>12</sup>

### **BBC Governor’s meeting<sup>13</sup>**

**FOI s. 36(2)**

The Tribunal ordered the disclosure of the minutes of the meeting of the BBC Board of Governors held on 28 January 2005 at which they discussed the Hutton Report, published earlier that day, into the events surrounding the death of Dr David Kelly. Amongst other things, the meeting decided to accept the resignation of the BBC’s Chairman and Director-General. The minutes were requested in February 2005, at which point they were 13 months old. The Tribunal held that this was when they should have been disclosed.

The minutes had been withheld under section 36(2) of the FOI Act, on the grounds that their disclosure would be likely to inhibit the free and frank exchange of views for the purposes of deliberation. However, the Tribunal found that the balance of public interest favoured disclosure. It noted that while the contents of the minutes were important they were not of great sensitivity, since the decision to part company with the director general had immediately been made public. It observed that the “requests were made more than a year after the meeting and at a time when the matters discussed at the meeting were (so far as the evidence goes) no longer the subject of deliberations within the BBC”.

The minutes are now available on the BBC website.<sup>14</sup>

### **Vauxhall Tower planning permission<sup>15</sup>**

**EIR reg 12(4)(e)**

The Tribunal ordered the disclosure of two submissions containing the advice of officials to John Prescott, the then Deputy Prime Minister, on whether to grant planning permission for the construction of a tower block near Vauxhall Bridge in

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<sup>12</sup> [www.dwp.gov.uk/foi/2007/apr/](http://www.dwp.gov.uk/foi/2007/apr/)

<sup>13</sup> Information Tribunal, Guardian Newspapers and Heather Brooke v Information Commissioner and BBC, EA/2006/0011 and EA 2006/0013, 8 January 2007

<sup>14</sup> [http://www.bbc.co.uk/bbctrust/news/press\\_releases/11\\_01\\_2007.html](http://www.bbc.co.uk/bbctrust/news/press_releases/11_01_2007.html)

<sup>15</sup> Information Tribunal, The Rt Hon Lord Baker of Dorking v The Information Commissioner and The Department For Communities and Local Government, EA/2006/0043, 1 June 2007

London. The submissions were made in December 2004 and February 2005. The minister's decision was made in July 2005, at which point the submissions were 5 and 7 months old respectively.

The Information Commissioner found that the department had been correct to withhold the submissions prior to the minister's decision but that they should have been disclosed afterwards, *minus* any advice and opinion contained in them. The Tribunal, however, held that the submissions should have been disclosed *in full* once the decision had been made. It took particular note of the fact that all advice at earlier stages in the planning process, from local authority officials, was publicly available.

The documents, now available on the DCLG website, show that the officials agreed with the planning inspector that planning permission should be refused. The minister, however, disagreed and granted permission.<sup>16</sup>

## OGC gateway reviews<sup>17</sup>

FOI s. 35

The Information Tribunal ordered the release of the 'gateway reviews' used in assessing progress in developing the government's identity cards programme. These were carried out by the Office of Government Commerce in June 2003 and January 2004 and requested in January 2005. The more recent of these would thus have been 1 year old at the time the Tribunal considered it should have been disclosed.

The gateway reviews in this case were considered to form part of the policy formulation process as the Identity Cards Bill would not have been published without them. Both the Commissioner and the Tribunal found that the balance of public interests favoured disclosure.<sup>18</sup>

This decision was recently quashed by the High Court, on the grounds that the Tribunal breached Parliamentary Privilege by relying on a select committee's opinion in its findings.<sup>19</sup> However, the court upheld the key elements of the Tribunal's approach to section 35 and the public interest test. It rejected the government's view that where the section 35 exemption applied a presumption against disclosure is automatically established and that any disclosure is harmful to

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<sup>16</sup> [www.communities.gov.uk/corporate/about/freedom-of-information/disclosure-log/disclosurelog2007/vauxhalltower/](http://www.communities.gov.uk/corporate/about/freedom-of-information/disclosure-log/disclosurelog2007/vauxhalltower/)

<sup>17</sup> Information Tribunal, Office of Government Commerce v The Information Commissioner, EA/2006/0068 and 0080, 2 May 2007

<sup>18</sup> The Tribunal also found that disclosure would prejudice OGC's functions in relation to examining the efficient use of resources (section 33) but that the public interest balance favoured disclosure.

<sup>19</sup> Office of Government Commerce v Information Commissioner & Anor [2008] EWHC 737 (Admin) (11 April 2008)

the public interest.<sup>20</sup> It also found no error of law in the Tribunal's finding that, following the government's decision to proceed with the Identity Cards Bill, an important policy had been decided and the need to preserve space for its private thinking had diminished.

## **1999 Budget<sup>21</sup>**

**FOI s. 35**

Papers relating to the 1999 budget decision to cut the basic rate of income tax from 23% to 22% were requested under the FOI Act.

The Treasury identified extracts from 4 relevant budget submissions but refused to disclose them under section 35(1) of the FOI Act. The Information Commissioner ordered their disclosure. Although the Treasury appealed it later released the majority of the information, continuing to withhold just two passages from one submission. These related to options that had been considered but not adopted in the 1999 budget.

The Tribunal ordered disclosure with the exception of references to one matter where it held that to disclose the information, as of 2005, might encourage ministers to seek advice "on only a restricted range of options, thereby reducing the quality of the policy formulation process". No further information is available on the specific nature of the withheld information. The remaining material has been published on the Treasury website.<sup>22</sup>

## **ECGD Sakhalin<sup>23</sup>**

**EIR reg 12(4)(e)**

The Tribunal has ordered the release of submissions made by government departments to the Export Credit Guarantee Department (ECGD) in connection with a proposed oil and gas extraction project off the Sakhalin island, north of Japan. The project involved substantial environmental risks from oil spills, particularly to the highly endangered Gray Whales, whose numbers were thought to be as low as 100.

The submissions, made in March 2003, were requested under the EIRs in March 2005, so would have been 2 years old at the time the Tribunal considered that they should have been disclosed.

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<sup>20</sup> Paragraphs 20(c) and 78

<sup>21</sup> Information Tribunal, *HM Treasury v The Information Commissioner*, EA/2007/001, 7 November 2007

<sup>22</sup> [www.hm-treasury.gov.uk/media/8/E/foi\\_onepercent051207.pdf](http://www.hm-treasury.gov.uk/media/8/E/foi_onepercent051207.pdf)

<sup>23</sup> Information Tribunal, *Friends of the Earth v Information Commissioner and Export Credit Guarantee Department*, EA/2006/0073, 20 August 2007

At the time of the request, the government had indicated that it would support the project in principle, subject to a number of mainly environmental conditions. ECGD argued that disclosure would prejudice collective decision making and the frankness and candour of official advice.

The Tribunal accepted that no final decision on the application had been made but found that the actual contents of the documents themselves were either not sensitive or “if anything, likely to improve the quality of the deliberative process” if disclosed. It concluded that the balance of public interest favoured disclosure. ECGD appealed against this decision to the High Court on a point of law. Although the court considered that there were some errors in the Tribunal’s approach, it held that they were not central to its decision and the appeal was dismissed.<sup>24</sup> The documents, consisting of submissions to ECGD from the Department for Environment, Food and Rural Affairs, the Foreign and Commonwealth Office and the Department for Trade and Industry were subsequently disclosed to the requester, Friends of the Earth.<sup>25</sup>

The above summaries describe, as far as we are aware, all Tribunal decisions to date which involve decisions under the FOI/EIR exemptions relating to policy formulation, the frankness of discussions and internal communications. They demonstrate the degree to which the 30 year principle has ceased to apply in relation to policy formulation material.

In some cases the government itself has taken a relaxed view about the accelerated disclosure of internal discussions. The most notable example is perhaps the disclosure in February 2005 of documents assessing the consequences of Britain’s 1992 exit from the Exchange Rate Mechanism.<sup>26</sup> At the time of disclosure, the oldest of these documents was 13 years old. Although some passages were withheld under section 35 (including references to 13 year old economic forecasts) the Treasury itself privately acknowledged that use of the exemption after this period of time was unlikely to withstand challenge.<sup>27</sup>

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<sup>24</sup> Export Guarantee Department v Friends of the Earth [2008] EWHC 638 (Admin) (17 March 2008)

<sup>25</sup> See: “Britain ignored risk of whale extinction in rush for oil and gas”, Geoffrey Lean, Independent on Sunday, 13.4.08 <http://www.independent.co.uk/environment/nature/britain-ignored-risk-of-whale-extinction-in-rush-for-oil-and-gas-808485.html>

<sup>26</sup> [http://www.hm-treasury.gov.uk/about/information/foi\\_disclosures/2005/foi\\_erm\\_2005.cfm](http://www.hm-treasury.gov.uk/about/information/foi_disclosures/2005/foi_erm_2005.cfm)

<sup>27</sup> An internal Treasury note accidentally released to the BBC in 2005 revealed that the Treasury’s Legal Advisers had “advised that in view of the age of these forecasts it could be difficult to sustain the argument that they should not be disclosed if Ms Newman [*the requester*] complains about their non-disclosure. They consider that the Information Commissioner may well take a different view on the application of the public interest test in this case.”

[http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/09\\_05\\_foi\\_template280105.pdf](http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/09_05_foi_template280105.pdf)

## A chilling effect?

Would the adoption of a 20 or 15 year period for the proactive release of such policy materials be likely to inhibit seriously the frankness with which views are expressed or recorded?

We suspect that the prospect most likely to inhibit officials or ministers in what they record is the risk of *contemporaneous* disclosure. The prospect of a leak, or unattributable briefings by ministers at odds with their colleagues, at a time when it is capable of influencing a pending decision, may cause some to reflect before recording views which could be seen as contentious or unpopular. By contrast, prospect of disclosure perhaps 15 years in the future is unlikely to be considered at all.

Other more immediate concerns are likely to be the possibility of disclosure in the course of judicial review<sup>28</sup> or in political memoirs by recently retired ministers or advisers. Alastair Campbell, who stood down as Tony Blair's press secretary in 2003, but waited until Mr Blair left office in 2007 before publishing a volume of diaries, provides a rare example of delay before publication.<sup>29</sup> More commonly, memoirs appear within a year of the individual leaving office.<sup>30</sup> The *authorised* access to papers by former ministers writing their memoirs, is a further

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<sup>28</sup> See for example, disclosures as a result of the recent judicial review of the government's decision to drop the investigation into the BAE-Saudi arms deal. The correspondence disclosed included sensitive exchanges between the then prime minister and attorney general, some of which took place as recently as December 2006. The correspondence is now available at: [www.thecornerhouse.org.uk/pdf/document/RedactedDocsRW2.pdf](http://www.thecornerhouse.org.uk/pdf/document/RedactedDocsRW2.pdf)

<sup>29</sup> 'The Blair Years. Extracts From the Alastair Campbell Diaries', Hutchinson, London, 2007

<sup>30</sup> According to the Public Administration select committee: "Recent years have seen the publication of a number of diaries and "instant memoirs" by former ministers, diplomats and special advisers describing their careers, and more are promised. In 2003 Robin Cook published memoirs of his time in Cabinet, and his resignation from Cabinet earlier that year. In 2004 Clare Short, who had resigned as a minister in May 2003, followed his example. In 2004 Derek Scott, who had been economic advisor to the Prime Minister between May 1997 and December 2003, published *Off Whitehall* which caused intense interest at the time, and was trailed as "the book that the Cabinet Office tried to suppress". In autumn 2005 two more former officials published tales from their time working in the Blair administration: special adviser Lance Price's *A Spin Doctor's Diary: Inside Number 10 with New Labour* and Sir Christopher Meyer's *DC Confidential: The controversial memoirs of Britain's Ambassador to the US at the time of 9/11 and the Iraq war*. Former British Ambassador to the United Nations Sir Jeremy Greenstock's *The Cost of War*, due for publication in autumn 2005, has not yet appeared, and Craig Murray, former Ambassador to Uzbekistan, has published a memoir, *Murder in Samarkand*." *Public Administration committee, Fifth Report, Session 2005-06, Whitehall Confidential? The Publication of Political Memoirs, HC 689-I, 25 July 2006, paragraph 1.*

consideration.<sup>31</sup> In addition, the FOI Act itself now raises the possibility of disclosure in response to an individual FOI request long before the records are considered to be historical.

### **Other exemptions**

Under sections 63 and 64 of the FOI Act, once a record reaches the age of 30 years, a number of exemptions are disapplied and can no longer be used to withhold information. The section 35 (formulation and development of government policy) and section 36 (effective conduct of public affairs) exemptions dealt with in this paper are amongst these.

But other exemptions are also deactivated after 30 years. These are the exemptions for information otherwise accessible to the applicant (section 21), information intended for publication (section 22), relations between UK administrations (section 28), investigations and proceedings (section 30(1)), court records (section 32), audit functions (section 33), communications with the Royal Household (section 37(1)(a)), legal professional privilege (section 42) and commercial interests (section 43).<sup>32</sup>

In addition, the exemption relating to honours (section 37(1)(b)) is only disapplied after 60 years<sup>33</sup> and the law enforcement exemption (section 31) is not disapplied until 100 years.<sup>34</sup> The remaining exemptions are never lifted and can apply regardless of the age of the information.

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<sup>31</sup> The late Richard Crossman referred to this issue in the context of the change to the previous 50 year rule. In his entry for August 5 1965 he wrote: "Since both the First Secretary and the Chancellor had to be away at the beginning Harold [Wilson] had put in as a filler a paper proposing to reduce the ban on the publication of state documents from a fifty- to a thirty-year rule. This was a very modest reform, long overdue. Yet only Tony Crosland and I were prepared to support the P.M. and Gerald Gardiner against the civil servants. We had read aloud to us, first by Michael Stewart and then by James Callaghan, the departmental briefs provided for them by their officials. Here was a Labour Foreign Secretary objecting that a reduction of the ban on publications to a thirty-year rule might damage the reputations of civil servants active during the Munich period while they were still alive. I pointed out that the present ban, quite apart from all its other drawbacks, was rendered intolerable by the permission which a Cabinet Minister, particularly a Prime Minister, can obtain to use official documents denied to academic and objective historians for writing his memoirs. If we are going to go on exercising the right to turn out memoirs which are often nothing but personal *plaidoyers*, there is a powerful case for letting the historians get at the documents as soon as possible. This formed the main discussion but I wasn't surprised to find that not a word of my argument was retained in the Cabinet minutes." The Crossman Diaries. Selections from the Diaries of a Cabinet Minister 1964-1970, Edited by Anthony Howard, Mandarin, 1991, pages 133-134

<sup>32</sup> Freedom of Information Act, section 63(1) and 64(1)

<sup>33</sup> Freedom of Information Act, section 63(3)

<sup>34</sup> Freedom of Information Act, section 63(4)

We assume any proposal to reduce the 30 year rule will affect the period for which some or all of these exemptions remain available. We are not in a position to comment on all of them. However:

- Some of these exemptions protect interests which for which are also protected by other exemptions. For example, the extremely broad exemption for investigations and proceedings (section 30(1)), applies amongst other things to all information obtained by investigating authorities which *could have* led to criminal proceedings, even if none were actually brought or even contemplated. It is often justified by the need to reassure potential witnesses that any statements they make will not be disclosed under the FOI. However, witness statements themselves are already liable to be protected by the exemptions relating to confidential informants (section 30(2)), the prevention or detection of crime (section 31(1)(a)), the apprehension or prosecution of offenders (section 31(1)(b)), the administration of justice (section 31(1)(c)), personal information (section 40) and breach of confidence (section 41). This exemption could be disapplied at a relatively early point, making access to peripheral information more accessible, without undermining what is said to be its core purpose.
- The exemption for commercial interests (section 43) often covers information which is also protected by the exemption for breach of confidence (section 41). Confidential business information whose possession gives the a business an advantage over its competitors, might qualify for protection under section 41 even after the section 43 exemption had been disapplied.
- The exemption for the conferring of honours (section 37(1)(b) is currently disapplied only after 60 years.<sup>35</sup> We question why this prolonged period should be necessary given that information about living individuals considered for honours would qualify for protection under section 40 (personal information) during their lifetime. After their death confidential references may still be protected under section 41, so long as the reference giver had not waived confidentiality or died. In any event, it is not clear why information relating to honours (but not that relating to, say, the appointment of office holders) should qualify for the extended protection represented by the retention of the exemption for 60 years.

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<sup>35</sup> Freedom of Information Act, section 63(3)

- The law enforcement exemption (section 31) is currently only lifted after 100 years.<sup>36</sup> It is difficult to see in what circumstances information would need to be withheld for that period, which is well beyond the point at which any prosecution for an old offence could be brought. It has been suggested that extended protection may be necessary to protect the descendants of offenders or informants where the risk of reprisals may span generations.<sup>37</sup> However, such protection is already provided by the exemptions for confidential informants (section 30(2)) and the safety of an individual (section 38(1)(b)).
- There can be no good grounds for the future publication exemption (section 22) to be disapplied only after 30 years. The equivalent exemption under the Scottish FOI Act permits information to be withheld for a maximum of 12 weeks.<sup>38</sup> The present review provides an opportunity to limit the lifespan of this exemption.
- A number of exemptions are available indefinitely. These include the exemptions for national security (section 24), defence (section 26), international relations (section 27), the economy (section 29), health and safety (section 38), personal data (section 40) and breach of confidence (section 41). We recognise that prolonged protection may occasionally be needed in most of these areas. Some safeguard is provided by the fact that these exemptions are generally available only where prejudice to the specified interest can be shown and are also subject to a public interest or other balancing test. However, it is not obvious that the exemption for the interests of the economy should be in this category at all. Insofar as the perceived risk is that the disclosure of old material might reignite historical disputes, resulting in trade reprisals against the UK, the international relations exemption should provide any necessary protection. That aside, we find it difficult to see in what circumstances records of discussions taking place say, 20 or more years ago, could be capable of damaging the UK's economy today and suggest that this exemption be disapplied after an appropriate period.

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<sup>36</sup> Freedom of Information Act, section 63(4)

<sup>37</sup> Government Response to the Third Report From the Select Committee on Public Administration (Session 1998-99) on The Freedom of Information Draft Bill. <http://www.publications.parliament.uk/pa/cm199899/cmselect/cmpublicadm/831/83104.htm>

<sup>38</sup> However, the equivalent Scottish provision contains a separate exemption for information obtained from a continuing programme of research. Freedom of Information (Scotland) Act 2002, section 27

- The exemption for information whose disclosure is prohibited by statute (section 44), also applies indefinitely. This is an absolute exemption, which is not subject either to a harm test or to the Act's public interest test. We believe this exemption should be subject to the Act's public interest test from the outset. Failing this, the public interest test should apply after a set period. The security bodies exemption (section 23), which becomes subject to the public interest test after 30 years, provides a precedent for such an approach.<sup>39</sup> A similar approach should also be adopted in relation to section 44, though after a shorter period of time.
- The exemption for Parliamentary privilege (section 34) should not remain an absolute exemption indefinitely, but should either be disapplied after a fixed period or made subject to the public interest test.
- The Parliamentary veto, exercisable under section 36(7) (which has been used to overrule the Commissioner's decision that the names of MPs' staff should be published<sup>40</sup>) should not be capable of applying for 30 years, as at present. In our view any veto should lapse after a maximum of 5 years.

### **Environmental information**

The Environmental Information Regulations contain no mechanism for exceptions, such as that for internal communications, to be disapplied after 30 years or any other period. This means that cabinet records dealing with environmental policy could be withheld beyond 30 years even though equivalent discussions on other subjects would have to be disclosed. The EIRs should be amended to bring them into line with whatever new provisions replace the 30 year principle under the FOI Act.

### **Resource implications**

Adopting a shorter period than 30 years as the basis for disclosure in The National Archives will presumably have significant resource implications, since in the initial years it will require large volumes of additional information to be assessed for disclosure. We hope such practical concerns will be reflected in practical solutions (such as the phasing-in of proactive release, or targeting those classes of records

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<sup>39</sup> Freedom of Information Act, section 64(2)

<sup>40</sup> Information Commissioner, Decision Notice FS50073128, House of Commons, 4.9.06

in greatest demand) and not by adopting more limited changes to the 30-year principle itself. This would unnecessarily limit the scope for improvements in the way in which individual FOI requests for older information are dealt with. Decisions on the length of time for which particular exemptions should be available should be based on the public interest arguments for and against earlier disclosure and not on any consideration of the workload implications for TNA itself.

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*Maurice Frankel*

*23 April 2008*