Archival law and archival access in the United Kingdom

ARCHIVAL LAW AND ARCHIVAL ACCESS IN THE UNITED KINGDOM

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INTRODUCTION

This article gives a brief introduction to archives legislation in the United Kingdom (UK) and then explains in more detail current and future legislative provisions for access to archives. It deals only with the archives of government and the law courts; it does not touch upon the position with regard to other parts of the public sector, such as universities, nor the archives of private persons or institutions in private hands.

There is no single piece of archives legislation covering the whole of the UK. Instead there is an assortment of legislation covering different parts of the UK (England, Wales, Scotland and Northern Ireland) or different sectors. Whereas there are some mandatory provisions relating to central government records, legislation for other archives is largely permissive, where it exists at all. The general approach tends to be one of enabling rather than requiring action to be taken.

From 1 January 2005 all part of the UK but Scotland will be covered by a new Freedom of Information Act, enacted by the Parliament at Westminster in November 2000. This will govern access to archives as well as access to information still in the hands of its originators. The latter part of this article describes the main features of this Act. First, though, I shall explain the position in central government, local government and the devolved administrations.[1]

CENTRAL GOVERNMENT

The main archives legislation for central government is the Public Records Act 1958. This Act applies to the records of all government departments, the central courts of law, the armed services, the National Health Service and some non-departmental public bodies. The collective term used for records covered

by this Act is "public records"; it is a term referring to ownership rather than accessibility and public records are not necessarily accessible to the public. The term "records" is defined broadly to include "not only written records but records conveying information by any other means whatsoever". The Act does not apply to the generality of records of the administration of Scotland, or to records of bodies mainly concerned with Scottish affairs. It applies to records of the administration of Wales only up to 1998, when the National Assembly for Wales came into being, however Welsh public records will continue to be treated as UK public records until such time as the National Assembly for Wales makes its own archival provision. Both Scotland and Northern Ireland have their own archives legislation[2] and are currently reviewing the need for new legislation.

The Public Records Act is primarily concerned with records that have been selected for permanent preservation and with the operations of the Public Record Office (PRO).[3] It makes no explicit provision for records management as we know it today – in this respect it is very much a reflection of its time. It places on public record bodies (government departments etc, as noted above) the responsibility of making arrangements for the selection of records for preservation and for their safekeeping. This is to be done under the guidance, co-ordination and supervision of the Keeper of Public Records. It requires departments to transfer to the PRO or to another approved place of deposit records that have been selected for preservation not later than 30 years after their creation, unless their continued retention by the department of origin is approved by the Lord Chancellor, who has ministerial responsibility for the PRO.

The Act provides for public records to be released for research 30 years after their creation unless a variation to that period (either to extend or reduce it) is agreed by the responsible minister and approved by the Lord Chancellor, or unless another Act prohibits their release.[4] The Lord Chancellor is advised on the extended closure or retention of records by his Advisory Council, an independent body chaired by the Master of the Rolls, one of the most senior judges. Its members, appointed by the Lord Chancellor, represent a wide range of different interests, including Parliament, regular users of historical records, archivists and owners of private papers.

The current criteria for the extended closure of records are set out not in the Act but in a 1993 government policy paper *Open Government*.[5] They are:

– exceptionally sensitive records containing information the disclosure of which would not be in the public interest in that it would harm defence, international relations, national security including the maintenance of law and order, or the economic interests of the UK and its overseas territories,

– documents containing information supplied in confidence the disclosure of which would constitute a breach of good faith,
– documents containing information about individuals the disclosure of which would cause either
  (i) substantial distress, or
  (ii) endangerment from a third party
  to persons affected by disclosure or their descendants.

Guidance on interpretation of these criteria is given in *Access to Public Records,* a manual of guidance endorsed by the then Chairman of the Advisory Council.[6] Note that this standard 30-year closure period will disappear when the Freedom of Information Act comes into effect.

The Keeper of Public Records is charged with providing facilities for the public to inspect and obtain copies of records and empowered to do a range of other things for "maintaining the utility of the Public Record Office". These include preparing and making available guides and indexes and providing authenticated copies of records for legal purposes. Similar arrangements are to be in place in other places of deposit for public records.[7]

The PRO provides guidance, co-ordination and supervision of records management in public record bodies by issuing standards and guidance[8] and assigning staff to regular liaison with these bodies. It also co-ordinates and monitors progress in meeting the government's target of introducing electronic records management by 2004. By this means it seeks to safeguard the archives of the future as well as to promote records management to underpin business efficiency.

The Act relates to public records and hence covers only those functions of the new National Archives that are carried out by the Public Record Office. The other part of the National Archives is the Historical Manuscripts Commission (HMC), which is the UK's central advisory body on archives and manuscripts relating to British history other than public records. It includes within its advisory remit private archives and also the archives of other parts of the public sector, such as local authorities. Established by Royal Warrant in 1869, HMC is the principal source of information on the nature and location of archives through its National Register of Archives.[9]

LOCAL GOVERNMENT

Local government legislation distinguishes between "principal councils" and lower tiers of local government. Principal councils are those operating at country or unitary authority level which have the main responsibility for

provision of local services. Lower tier councils are those operating at district and parish level and have lesser powers. Section 224 of the Local Government Act 1972 requires principal councils to "make proper arrangements" for records that belong to or are in the custody of the council or its officers. Proper arrangements are not defined in statute but extra-statutory guidance on the management of current records and of archives was issued in 1999 by the department then responsible for local government.[10] There are no specific monitoring or enforcement provisions.

An earlier Act, the Local Government (Records) Act 1962, had allowed local authorities to promote the use of records under their control and to acquire other records by gift, deposit and loan. This Act was crucial to the development of the country-wide network of local authority archives offices because it gave councils Parliamentary authority to fund the care of deposited records as well as their own. By this means many valuable collections of private origin were acquired and have been preserved in local authority archives offices. However neither the 1962 nor the 1972 Act made maintenance of an archives service a statutory obligation and it is open to councils to make alternative "proper arrangements" for their records. Although there are few gaps in the network of local authority archives services in England and Wales, this is largely the outcome of sustained effort by the archives community and its supporters to make the best of the slender legislative base. Not surprisingly, there is in practice considerable variation in levels of provision for local archive services.

Neither Act made comprehensive provision for access to archives although the 1972 Act did provide for certain local authority records to be available to local government electors and for some information to be exempt from release to the public. More recently, moves towards greater accountability and participation in local decision-making have led to specific legislation for access to current local authority information.[11]

SCOTLAND AND NORTHERN IRELAND

The Public Records Act (Northern Ireland) 1923 established the Public Record Office of Northern Ireland and the office of Deputy Keeper of the Records. Although the Public Record Office of Northern Ireland's primary function is the care of Northern Ireland government records, it also acquires local government records and also records of private origin, as there is no equivalent network of local authority archives offices in Northern Ireland.

The Act provides for the making of rules for the disposal of records not worthy

of permanent preservation but contains no access provisions such as those in the Public Records Act 1958. As a matter of policy a 30-year closure period is applied, with extended periods of closure for particular records as necessary.

The Public Records (Scotland) Act 1937 applies to the records of central government and the courts;[12] local government records are covered by separate legislation. The Act provides for establishment of the Scottish Record Office (now known as the National Archives of Scotland), to which records of the courts and the administration of Scotland are to be transferred, and for the office of Keeper of the Records of Scotland. The Act provides for the issue of regulations about destruction of records not considered worthy of permanent preservation. There are no access provisions such as those in the Public Records Act 1958 and here, too policy provides for a 30-year closure period as the norm.

FREEDOM OF INFORMATION ACT 2000

From 1 January 2005 the access provisions of the Public Records Act will be repealed and access to information in the public records will be governed by the Freedom of Information Act 2000 (FOI Act).[13] This Act applies also to Northern Irish and Welsh public records and to records held by local authorities and other parts of the public sector in England, Wales and Northern Ireland, including Parliament and the Assemblies. Although the Act is intended primarily to provide access to official information it also applies to archives of private origin where they have come into the ownership of the public authority (deposited archives which remain the property of the private sector depositor are outside the scope of the Act). The Act does not apply to Scotland which passed its own similar but not identical FOI Act in 2002.[14] This outline of the FOI Act concentrates on the UK Act.

The FOI Act gives the right to be told whether specified information is held and to be provided with that information. The right is not restricted to UK citizens or residents: anyone, anywhere in the world, can send a request for information to a body covered by the FOI Act (a "public authority").[15] As long as the request is in writing (which includes email), has an address for a reply and describes the information sought, and the necessary fee is paid, the public authority must respond. The right applies irrespective of the date of the information and hence applies to information in archives as much as to information in current records systems. The Act creates an integrated system of access to information in official hands and removes the previous default of withholding records for 30 years.

The authority has 20 working days to say whether it holds the information and provide that information, unless one of the exemptions specified in the Act is being claimed. For certain exemptions there is a further obligation to consider whether the public interest in disclosing exempt information overrides the public interest in withholding it. A further unspecified period is allowed for this public interest test.

The exemptions are, for the most part, concerned with the nature or content of the information. They are consistent with, although not identical to, the exemptions in the Council of Europe Recommendation on Access to Official Information (2002/2).[16] Generally they can be used only if harm would be likely to result from disclosure. Some exemptions have an automatic cut-off date, that is, they cannot be claimed when the information is over a certain age (usually 30 years).

The exemptions that require a further test of the public interest in disclosure are national security, defence, international relations and relations within the UK; the economy; investigations and proceedings conducted by public authorities and law enforcement; audit functions; formulation of government policy, Ministerial communications, the operation of Ministerial private offices and Law Officers" advice; prejudice to the effective conduct of public affairs; communications with Her Majesty and the Royal Household, and the conferring of honours and awards; endangerment of physical or mental health or safety; legal professional privilege; and trade secrets and commercial interests.

The exemptions that are absolute, that is the information can be withheld without considering the public interest in disclosure, are information supplied by or relating to specified security and intelligence bodies, court records, Parliamentary privilege, personal information relating to living individuals where disclosure would breach the data protection principles, information provided in confidence where disclosure would be an actionable breach of confidence, and prohibitions on disclosure in other Acts or incompatible with European Community obligations or amounting to contempt of court. (Note that although the FOI Act does not itself override other Acts prohibiting access to information, it does enable such statutory bars to access to be amended or repealed by Order under the Act.)

An exemption that will be of particular interest to archivists is that the information is already reasonably accessible to the applicant by some other means. An FOI authority can claim an exemption from the obligation to respond to individual requests when it can direct the applicant towards where the information can be found. The expectation is that archives offices will be able to claim this exemption in respect of archives that are catalogued and already available for research. The view of the archives community is that archives

that can be inspected in a search room are "reasonably accessible", especially if the opening hours meet the needs of researchers and the facilities offered are of a good standard. The response by an archives office to a request for information relating to open archives, therefore, is likely to be an invitation to search the catalogues and indexes and either visit the archives office to inspect the archives or, alternatively, to purchase copies.

This exemption cannot be claimed when the archives have not been released for research. If a request is received for archives that are not yet accessible the archives office will be obliged to re-consider whether an exemption need be applied and to release them if not. If a request relates to uncatalogued records the position is more uncertain. It may be possible to claim that the cost of responding would exceed a cost limit set out in Fees Regulations because of the resources required to search uncatalogued archives, or even to catalogue them as a special project. This is one of many uncertainties that are likely to be resolved only after implementation through case law.

Another exemption is for environmental information but in this case its effect is to remove the request from the FOI Act to separate Environmental Information Regulations which will bring into UK law the recent EU Directive on Environmental Information. There is a similar exemption for personal information where the applicant is the subject of the information. In this case the request is removed to the Data Protection Act 1998 which contains the relevant subject access rights.

Disappointed applicants have a right of complaint to the Information Commissioner about non-disclosure or, indeed, any aspect of the handling of their request for information. The Information Commissioner is the independent office-holder who enforces the FOI Act and also the Data Protection Act, thereby enabling privacy and access issues to be considered together. There is also provision for further appeal to an Information Tribunal.

The Act requires the Lord Chancellor (the government minister responsible for FOI) to issue two codes of practice.[17] The first sets out good practice in the handling of requests. It covers such matters as consulting third parties before deciding to disclose information where they have an interest in the matter; transferring requests; providing advice and assistance to applicants; and complaints procedures. The second sets out good practice in "the keeping, management and destruction of [an authority's] records". It covers recognition of records management as a corporate function and assigning the necessary resources to it; having a formal records management policy statement; and creating, keeping and disposing of records. This explicit recognition of the connection between rights of access and records management is one of the strengths of the UK Act.

CONCLUSION

The FOI Act will transform access to official archives in the UK. First, it will remove the current standard 30-year closure period and open up the prospect of earlier access to archives. Second, it will provide a right of appeal against a refusal of access which will enable disappointed applicants to obtain an independent review of the decision to refuse access. It is likely also to improve records management in public authorities which can only be to the benefit of archives and researchers of the future.

Notes

1 The term "central government" is used for UK-wide government functions carried out from departments of state in London. The term "local government" is used for county councils and other unitary local authorities. The devolved administrations are Scotland and Wales, to which certain self-government powers were devolved by the Government of Scotland Act 1998 and the Government of Wales Act 1998, and Northern Ireland, which has had its own government since 1922, alternating with periods of direct rule from London.
2 Public Records Act (Northern Ireland) 1923 and the Public Records (Scotland) Act 1937.
3 On 1 April 2003 the Public Record Office came together with the Royal Commission on Historical Manuscripts to form The National Archives, the Keeper of Public Records becoming the sole Historical Manuscripts Commissioner. The two organisations continue to exist as separate legal entities under present legislation and for convenience this article continues to use the name Public Record Office for the institution overseeing the public records system and holding public records selected for preservation.
4 The 1958 Act provided for release after 50 years but was amended in 1967 to reduce this standard closure period from 50 years to 30 years. The amended Act can be seen on the PRO website at www.pro.gov.uk/about/act/default.htm.
5 Cm 2290 *Open Government,* 1993.
6 The manual can be seen on the PRO website at www.pro.gov.uk/recordsmanagement/access/guide.rtf.
7 Approximately 20% of public records are preserved outside the PRO. For the most part they are records relating to a particular locality which can more usefully be preserved and made available in that locality and so are held by the local authority archives service.
8 These can be seen on the PRO website: www.pro.gov.uk/recordsmanagement.
9 For details of HMC functions and activities, and the National Register of Archives, see www.hmc.gov.uk.
10 This guidance can be seen at www.local-regions.odpm.gov.uk/section224/index.htm.
11 Local Government (Access to Information) Act 1985, Local Government Act 2000.
12 The Act has been amended by the Public Registers and Records (Scotland) Act 1948.
13 This Act can be seen at www.hmso.gov.uk/acts/acts2000/20000036.htm.
14 This Act can be seen at www.scotland-legislation.hmso.gov.uk/legislation/scotland/acts2002/20020013.htm.
15 The Act applies to central and local government, the courts, the National Health Service, state schools and universities, police authorities and many other public bodies. It excludes from its scope the security and intelligence agencies, the Special Forces and units of the armed forces assisting Government Communications Headquarters. These exclusions are

set out in section 84 of the Act (in the definition of "government department") and in Schedule I Part I.

16 cm.coe.int/stat/E/Public/2002/adopted_texts/recommendations/2002r2.htm.

17 The codes can be seen at www.lcd.gov.uk/foi/codesprac.htm

RESUME

LOI ARCHIVISTIQUE ET ACCES AUX ARCHIVES AU ROYAUME-UNI

Cette contribution décrit la législation britannique des archives et s'attache tout particulièrement aux dispositions législatives courantes et futures conditionnant l'accès aux archives. Elle n'aborde que les Archives gouvernementales – centrales et locales – et les cours de justice. Il n'est pas fait référence aux autres institutions du secteur public telles les universités, ou aux archives privées. Il n'y a pas de loi nationale des archives. La législation principale pour le gouvernement central est donnée par la loi sur les *public records* de 1958, amendée en 1967 pour diminuer la période de réserve de consultation de 50 à 30 ans. La loi concerne essentiellement les dossiers sélectionnés pour être versés en archives historiques (préservation sans destruction) ainsi que les opérations du Public Record Office (PRO).

L'article présente les dispositions principales de la loi, la politique d'accès et les responsabilités respectives des départements gouvernementaux et du PRO. Deux passages importants de la loi concernent la réglementation des collectivités locales mais ils ne sont ni prescriptifs ni détaillés. Suit une présentation de la loi sur la liberté d'information (FOI, 2000) qui régira dès janvier 2005 l'accès à l'information officielle, incluant l'information archivée dans les services publics d'archives. Cette loi donne le droit d'information à toute information quel que soit le lieu de sa conservation, à moins d'une exception. La règle des 30 ans ne s'appliquera donc plus. Ce droit n'est pas restreint aux citoyens britanniques ou aux résidants mais les requêtes doivent être formulées par écrit (y compris sous forme de email) et doivent décrire l'information recherchée. Une autre caractéristique de la loi tient au fait qu'elle exige que le Chancelier édicte un code de gestion pratique du records management applicable par l'ensemble des personnes morales assujetties à la FOI.

(Traduction: Frédéric Sardet)