

## Closing historic public documents: lay scrutiny of closure requests

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Public records created by the United Kingdom government, including the devolved Government of Wales, but not of Scotland, are controlled under the provisions of the *Public Records Act 1958*, as amended by subsequent legislation.<sup>2</sup> That Act specifies what is to become of documents created by the Government and certain other bodies. In operation, it interacts with the *Freedom of Information Act* (FOIA) and the *Data Protection Act*. Like legislation in most national systems, the *Public Records Act* specifies the age of a document by when a decision must be made about whether it is likely to be of historic interest, or should be destroyed.<sup>3</sup> Documents selected for permanent preservation are then transferred to The National Archive (TNA), or a designated place of deposit.<sup>4</sup> Also like most other countries, the UK makes provision to temporarily close some files selected for long-term preservation.

The *Public Records Act* is unusual in that it provides, in Sections 1(2) and 1(2A), a system of lay scrutiny of closure requests. That scrutiny is made by an independent non-governmental public body, the Advisory Council on National Records and Archives, which advises the Minister responsible for the operation of the Act, who was until the end of 2015, the Lord Chancellor. The Secretary of State for Culture, Media and Sport assumed that responsibility in December 2015.

This brief paper outlines the role of the Advisory Council in closure decisions made in conformity with this legislation. It does not provide details of the 'exemptions', which specify the grounds on which a document, or part of a document, can be closed. Sections 21 – 44 of the *Freedom for Information Act*,<sup>5</sup> set out the criteria. Interpretation of the exemptions is aided by advice made publicly available, for example by the Information Commissioner's Office.<sup>6</sup> Experience as a member of the Advisory Council shows that misunderstanding of its role often derives from ignorance about the potential fate of documents created by Government, partly from confusion about the terminology used in technical flowcharts that map the decision processes, and partly from the interaction

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An earlier version of this paper was presented as part of the information provided to the conference 'Threats to Openness in the Digital World' held at Northumbria University in November 2015 <https://threats2openness.wordpress.com/>. I am grateful for the discussion after my presentation, which has enabled me to clarify some points in this version.

<sup>2</sup> <http://www.legislation.gov.uk/ukpga/Eliz2/6-7/51>. This and other websites used in the notes were checked on 10 January 2016.

<sup>3</sup> The age of a document when a decision about its fate must be made has been progressively reduced from 50 years to 30, and recently to 20 years. A planned transition from 30 to 20 years is taking place to ease the pressure on Departments and TNA that would have resulted from an 'instant transition' that would have created a very large legal backlog.

<sup>4</sup> Designated 'Places of Deposit' authorized under section 4 of the Public Records Act include county record offices where many documents created by NHS bodies are deposited, (see for example, <https://www.ntw.nhs.uk/fileUploads/1405522343MR-PGN-07b-AppB-ApprovLocalPlacesDeposit-V02-Iss1-Oct12.pdf>) and creating bodies, such as Kew Gardens, which preserve their own historic documents. Places of Deposit may also contain documents other than those created by Government and its Agencies, see for example, <http://www.nationalarchives.gov.uk/archives-sector/approved-places-of-deposit.htm>.

<sup>5</sup> <http://www.legislation.gov.uk/ukpga/2000/36/part/II>.

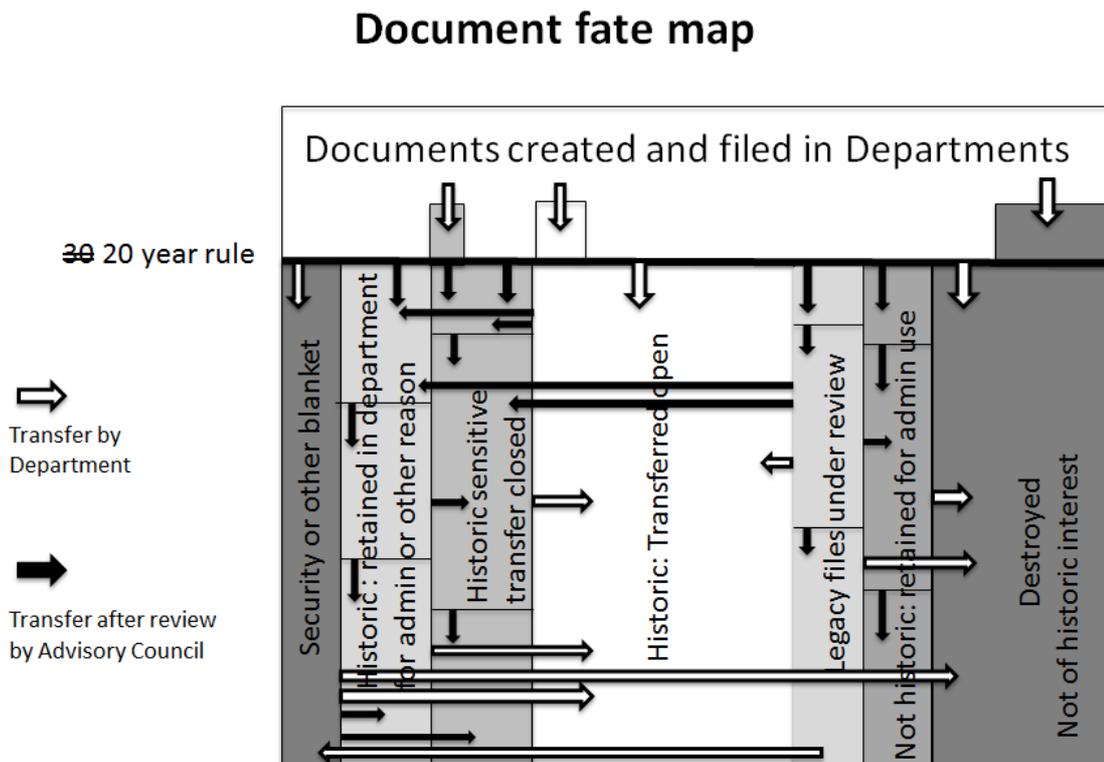
<sup>6</sup> <https://ico.org.uk/for-organisations/guide-to-freedom-of-information/refusing-a-request/>.

between the decision processes at various parts of the system. The implications of a successful request for access to a closed historic document under the *Freedom of Information Act* have also been misunderstood, as has the nature of the membership of the Council itself.

### The fate of public documents

Figure 1 maps the potential fate of a document created by Government. I use the term *document* to mean both a paper record, or one created and held electronically. While electronic records provide opportunities to think much more radically about the nature of the record, for many years record creators will continue to transfer, and in some cases create, paper documents, or electronic ones that are the equivalent in their structure to paper records; and of course The National Archives will continue to house already transferred paper records. In essence, although probably not in some practical detail, for some time to come electronic records can be thought of as equivalents of traditional paper records, and they are not distinguished in the outline schema in Figure 1.

Figure 1: The possible fate of UK Government documents



The ultimate fate of any document is either *destruction* or *open* in the TNA or a designated Place of Deposit, but the age of the document at which this outcome is reached varies depending upon the circumstances of retention or closure  
 Note: (i) The width of categories in the diagram does *not* indicate the relative number of documents in each. (ii) The '20 year rule' line indicates that a decision about the long term preservation of a document should have been made at this time. (iii) 'Lateral' transfers between categories may be made at any time, and the position of the indicator arrow has no temporal significance. (iv) Transfers into retained categories require approval, and are of limited duration, which is determined by the reason for retention; further retention requires a new approval.

**Criteria for selection for permanent preservation.** Many records created for the operation of government are by their nature essentially ephemeral, and to continue to hold them in perpetuity would provide very little information of public importance, and they would be

unnecessarily expensive to process and store. Take a trivial example: records of travel expenses paid to individual unsuccessful applicants for appointments are unlikely to be useful past the period when the payments are audited, but the audited summaries appearing in departmental accounts might be worth preserving. Similarly, application forms of unsuccessful applicants should probably be considered ephemeral, and destroyed after a brief period, although retaining a copy of successive versions of standard application forms is historically useful. Preserving regular samples of departmental summary statistics of the gender, ethnic, nationality or disability status derived from monitoring pages now routinely attached to application forms might also be historically informative.

So the first decision about a document, or class of documents, is whether it has lasting historical value. The TNA itself has some direct influence on final incorporation into the collections, especially if the material being considered is “a very large collection or [has an] unusual or difficult format”. In such cases, TNA's Records Decision Panel may recommend solutions to TNA's executive team, for example to produce a surrogate in another format or work with a partner to fund a format shift.<sup>7</sup> An example of a format shift is the recently released '1939 Register', a paper record listing members of every household on 29 September 1939, digitised and made available, for a fee, by a genealogical organization 'in association with The National Archives'.<sup>8</sup> Such major deviations from the norm of preserving documents in their original format are referred to the Advisory Council.

The National Archives provides advice to departments on selection criteria.<sup>9</sup> Operational Selection Policies have been developed, and can be found on the TNA website.<sup>10</sup> For example, OSP28 covers the Government Communications Headquarters (i.e., GCHQ) and its predecessors.<sup>11</sup> The key GCHG selection themes include:

- End Product Intelligence Reports;
- Directorate registered files ... where the files contain original GCHQ policy development in the form of correspondence, minuting, reports, etc.: (*there are 10 criterion areas listed, e.g. Relations with intelligence agencies and related bodies of allied nations; Major GCHQ investigations and operations and records on important intercept targets, key historical events and causes célèbres in a security context; Records accounting for GCHQ's expenditure*);
- Registered files of GCHQ divisions ... [which] satisfy one or more of the criterion (*sic*);
- Unregistered files ... [which] satisfy one or more of the criterion (*sic*);
- GCHQ internal histories;
- All registers and other means of reference to registered files and files on targets to allow future analysis and research into records not deemed worthy of permanent preservation;
- Photographic and/or video or film collections which demonstrate themes.

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7 <http://www.nationalarchives.gov.uk/documents/records-decision-panel-selection-decision-tree.pdf>

8 <http://www.findmypast.co.uk/1939register>. Free access to the digital version is provided within the TNA reading room.

9 <http://www.nationalarchives.gov.uk/documents/information-management/access-to-public-records.pdf>, is 'a toolkit for practitioners involved in the sensitivity review and transfer of public records to The National Archives and other archives services'. It contains links to other relevant documents.

10 <http://www.nationalarchives.gov.uk/information-management/manage-information/selection-and-transfer/selecting-records/osp-subject/>.

11 <http://www.nationalarchives.gov.uk/documents/information-management/osp28.pdf> pp. 6-7

GCHQ has been used as an example because it is a useful reminder that documents chosen for historic preservation are *not* automatically available for viewing at the TNA; nor are documents not selected for preservation automatically destroyed at the point of decision.

**Documents selected for permanent preservation.** Selected documents will be transferred *open* to TNA, and available for consultation by any person, *unless* the transferring department considers making them available would be contrary to the provisions of the FOIA, either because they are engaged by an absolute exemption (for example, would reveal the identity of a person protected by another Act), or are covered by a 'public interest' exemption (for example, there is a significant risk of compromising the health or safety of an individual or group). In that case the responsible person may decide that they are covered by a blanket retention decision (see below) and will be retained in the Department without further reference to any other body. Documents not covered by the security or other blanket may also be retained in the department, if the Advisory Council is persuaded that they have higher sensitivity than documents that can be held in TNA. By their nature, many of the files selected for preservation by GCHQ will be covered by the security blanket and not listed in TNA's catalogue,<sup>12</sup> but some are listed. For example HW 79 is an *open* record (unsurprisingly, as it is snapshots of the GCHQ's public website), as is the record of messages passed to the Prime Minister during World War II (HW 1). TNA's catalogue does not list any documents created by GCHQ with a closure status 'Closed or retained document, open description'; thus, by implication, files created before 1985, which would otherwise have been transferred, or considered for retention by the Advisory Council, are retained under the security blanket. Some files associated with GCHQ but created by another department are catalogued and shown as retained. Two examples will suffice: CAB 130/282, 'Defence review implications for GCHQ: Meeting 1' of 1966 is retained by the creating department, the Cabinet Office; WO 32/18673, 'GCHQ financial arrangements' covering the period 1959-1965, is retained by the Ministry of Defence. The first document has obvious implications for disclosing, and the second is likely to allow inferences about, operational scope and methods, so can be retained by the department. Note that the *existence* of these documents is not secret, and the file titles are listed in the catalogue.

The Advisory Council also considers requests to *close* documents for a specified period upon transfer to TNA. As well as national security matters the Advisory Council considers whether the document contains other sensitivities covered by FOIA –for example, if releasing them *open* would adversely affect international relations, law enforcement, or formulation of Government policy, or if they are communications with the Sovereign, contain personal data, or have a high probability of compromising an individual's safety (for example, reveal the identity of informers). Examples of such documents from creators other than GCHQ include J 82/1796, a file on an arson case of 1971, closed until 2048 because it 'contains sensitive personal information which would substantially distress or endanger a living person or his or her descendants' (closed under FOIA section 38); HLG 121/308, a Rent Assessment Panels representative case file from 1986, closed until 1 January 2017, almost certainly because it contains 'personal information' on a tenant and or landlord (FOIA section 40), and CO 926/1135/1, two folios closed until 2021 from an otherwise open file on the Turkish community in Cyprus, closed because opening them would 'prejudice International relations' (FOIA section 27). It is my impression, although I do not have the data to check, that the Advisory Council's pressure on Departments seeking to close whole

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<sup>12</sup> <http://discovery.nationalarchives.gov.uk/>

files has resulted in less requests for complete closure of files on transfer, but increasingly selective requests to close only extracts, or for the redaction of parts, of files.

As indicated in Figure 1, transfers before the statutory transfer date are possible, if it is clear to the Department that the files are very unlikely to be needed again. The Advisory Council is not consulted unless, when the documents become 'historic documents' at the defined transfer age, continued retention or closure is desired.

***Documents not selected for permanent preservation.*** Documents that are not selected for permanent preservation must be destroyed at or before 20 years have elapsed (or 30 years for documents created in some years until the transition to the 20-year rule is completed), *unless* they need to be retained for administrative use; for example the need to maintain building plans while the property is still in use. However, permission is required for such retention. The Advisory Council considers such requests and, where a request is supported, sets a limit on the duration of the permitted retention. These periods vary, depending in the nature of the request. At or before the end of that period, the department may destroy the document without further reference to the Advisory Council, or it may request a further period of retention. The horizontal lines within the 'retained' categories shown in Figure 1 represent these decision points, where consent is required for departments to retain documents.

***Decision backlogs.*** Note that there is one other category of document that, if consent is granted, may legally be retained by departments. This category represents a backlog in Departments, which have not made a decision about the long-term status of some of their documents at the due transfer date. Those files that have not been processed when they should have been are termed 'legacy' files. An important role for the Advisory Council has been to put pressure on Departments to reduce their holdings of legacy backlogs by requiring them to present realistic plans to reduce the backlog, including milestones that can be monitored. In conjunction with the change from a 30-year to 20-year transfer rule, TNA collects, and publishes, Record Transfer Reports, which include details of Department's transfer expectations.<sup>13</sup> As well as helping TNA plan ahead, these public departmental projections also apply pressure for the backlog to be reduced.

When reviewed, files can be transferred into any of the other categories, after scrutiny by the Advisory Council where necessary. The possibility of files being transferred using one of the blanket exemptions without Advisory Council scrutiny is shown in Figure 1.

***Blanket retention approvals.*** Creating departments may retain certain categories of documents under a blanket approval. These have the effect of not requiring a case to be presented to the Advisory Council for every document for which the case would be essentially the same. The so-called 'security blanket' is the one that attracts most attention. The text of the relevant statutory instrument, which is limited to documents selected for

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<sup>13</sup> <http://www.nationalarchives.gov.uk/about/our-role/transparency/record-transfer-report/>. The spring 2015 report showed that the 21 transferring bodies that account for 90% of files selected for preservation held over 260,000 legacy files. Departments varied greatly in the number of files held. The Foreign and Commonwealth Office still had over 112,000 legacy files: just under 30,000 had been selected for permanent preservation of which around 16,000 were expected to be transferred by 2015, just over 15,000 were awaiting destruction but the remainder were still to be reviewed; the Ministry of Justice had just over 3,000 legacy files, all of which were scheduled for transfer in 2015; the Department for Work and Pensions reported that it held no legacy records.

permanent preservation, is published on-line. The Advisory Council was consulted as part of the preparation of the instrument.<sup>14</sup>

Documents that are sensitive on security grounds are not the only classes of document for which blanket approval has been approved.<sup>15</sup> For example, toward the end of 2015 the Advisory Council received representations from National Health Service officials who pointed out that the transition to a 20-year transfer rule conflicted with a requirement of the NHS that creators hold certain types of documents for more than 20 years. There are over 400 individual NHS units that hold such documents, and which would require consent to retain them. The Advisory Council recommended that a blanket instrument be approved so that relevant NHS officials could certify that documents to be retained met criteria specified in the application. In this case, the retention approval includes documents that are ultimately likely to be destroyed but needed for administrative purposes, including patient care, beyond 20 years from creation. Files that are finally selected for permanent preservation in this case are more likely to be deposited in a Place of Deposit than in TNA.

**Re-categorization of document status.** The horizontal arrows in Figure 1 illustrate the ways in which documents can be re-categorized. Changes when the specified retention periods have been reached have been discussed above. *Closed* documents may either move to *open*, or permission for continued closure may be sought. Non-historic *retained* documents may be destroyed or have retention permission renewed. Historic *retained* documents may have retention renewed, or become *open* at TNA. Files retained under a blanket approval that are not moved to *open* may, with Advisory Council approval, be placed in another retained category or be transferred *closed*. Two types of movement require some explanation.

Movement from closed to open status at TNA is shown as being possible other than at the end of a specified retention period. This can result from a Department independently reconsidering the classification of a document, or, importantly, a successful Freedom of Information request for access to a closed document. If a Department does not believe that the requested document should be provided, it must show which of the FOIA's exemption categories are met, and if one of the categories claimed is subject to a public interest test, a panel of members of the Advisory Council must agree that the benefits of openness are outweighed by the potential damage or harm that could be caused. Note that the panel considers a request to keep the document closed without knowing the reasons for the request or the identity of the person who requested access. This is because a decision to provide access results in the document being accessible to any person, not just to the requestor.<sup>16</sup> When panels challenge a Department's request for continued closure they may ask for consideration to be given to redaction rather than closure of the whole document. For example, in one case after a number of iterations the relevant department finally agreed that it was in the public interest for the contents of a file to be opened, subject only to the redaction of the name of a person contained in one telegram.

The other lateral movement indicated in Figure 1, from an open file in TNA to a file retained either in the Department or closed within TNA, also requires explanation. It can

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<sup>14</sup> *The Lord Chancellor's security and intelligence instrument* (2012), and explanatory notes, are available as pdf files at <https://www.gov.uk/government/publications/signed-instrument-for-the-retention-of-public-records>.

<sup>15</sup> <http://www.nationalarchives.gov.uk/documents/information-management/access-to-public-records.pdf>, pages 23-4.

<sup>16</sup> When I first joined the Advisory Council, panel members were provided with the text of the request, but not the identity of the requestor. This sometimes introduced an extraneous issue into the views of some panel members, and I argued, successfully, that the decisions should be made without having this information.

result if a file was transferred open and the Department subsequently concludes that it was in error to do so. There have also been cases where files had been transferred *open* after careful consideration, but a changed context rendered these files serious candidates for closure.

Such re-closure is rare, and is subject to detailed scrutiny by the Advisory Council, which has required personal attendance by Departmental officials seeking to reverse the status of a document. The length of time the document has been open, and the number of times it has been seen, are relevant considerations.

### **Gaps in lay scrutiny**

Figure 1 shows there are two circumstances when the fate of a document escapes independent scrutiny. The first is transfer under one of the blanket retention provisions, but the approved criteria are known.

Perhaps the most significant gap is that the authority of the creating department alone is sufficient for a document to be destroyed. Some safeguard is provided by requirements in the Operational Selection Procedures, such as the one quoted above for GCHQ which specifies selection and retention of 'All registers and other means of reference to registered files and files on targets to allow future analysis and research into records not deemed worthy of permanent preservation'<sup>17</sup>. Destruction schedules may also be kept, but not all OSPs are explicit about this. But neither of these provisions can restore a document that has been destroyed. At best, it will be possible to retrospectively analyse destruction/preservation practices.

However, it is difficult to see how an extensive lay scrutiny could operate before documents are sent for destruction. It would certainly be very expensive. The costs would arise in Departments and in the lay scrutiny mechanism.

Most OSPs contain a statement such as this:

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.<sup>18</sup>

Perhaps the best compromise would be for the Advisory Council to gradually review existing OSPs, and be consulted on any revisions of them, or their equivalent if modified for the deposition of digital records; the Advisory Council was consulted about the OSP for GCHQ quoted above. It might also help if all OSPs were explicit about categories of documents that would routinely be destroyed, so that some discussions could take place about whether it was desirable to preserve a sample set collected at, say, 10-year intervals. Such representative case files have been preserved in some cases, as exemplified above by Rent Assessment Panels.

### **The Advisory Council**

When I first joined the Council, its membership was still structured in accord with the need to provide advice under the *Public Records Act* section 2(1). There were three

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<sup>17</sup> <http://www.nationalarchives.gov.uk/documents/information-management/osp28.pdf> Op. cit. p. 7

<sup>18</sup> <http://www.nationalarchives.gov.uk/documents/information-management/osp2.pdf>, paragraph 1.2.

members of parliament nominated by political parties, and at least one of each of the following categories: an owner of a private archive, a journalist, a practicing historian, a professional archivist not from TNA, a family historian/genealogist, a 'user of archives'. There was also provision for 'other interested individuals'. The implementation of the *Freedom of Information Act*, and the insertion of section 2(1A) into the *Public Record Act*, created a responsibility to scrutinise requests for closure and retention in accordance with the FOIA exemptions. When membership renewals were needed, a sub-committee of the Council discussed membership criteria. The subcommittee suggested that the membership categories were no longer fit for purpose, and paramount consideration was placed on ensuring that skills and experience gaps in the Council were filled. The Advisory Council currently contains members appointed after open advertisement and does not contain pre-specified categories of members. Members are appointed from a range of occupations, in Government and in the private sector.

Membership, and changes to it, are announced online via the website of the TNA, as news announcements and/or as parts of the summaries of meetings and Annual Reports.<sup>19</sup> The Annual Reports, especially, provide an overview of the work of the Council and the way it exercises its scrutiny, and these will not be summarized here.

An additional role of the Council is to provide advice to TNA's Chief Executive in his role as Historical Manuscripts Commissioner. It does so through its sub-committee 'The forum on historical manuscripts and academic research'. This important function is not central to the concerns of this paper, and will not be discussed; details are provided in the Advisory Council's Annual Reports.

### **The role of the Information Commissioner**

The Information Commissioner's remit under the FOIA includes historic documents deposited closed at TNA, or retained with approval within originating Departments. If a Freedom of Information request is made to TNA and all the exemptions that applied at time of closure are no longer 'engaged', for example if evidence is provided that the person being protected by the 'Personal data' exemption has died, then the file is opened. If the only exemptions that remain engaged do not include a public interest test, then the application for access may be refused on those grounds without reference to an Advisory Council panel. As mentioned above, the Advisory Council *is* consulted where a public interest test is a required consideration for an exemption claimed to keep *closed* documents in the custody of TNA.

Normal appeal provisions of the FOIA apply, so an applicant refused access can appeal using the mechanisms of that Act. Thus historic documents are not privileged, and items cannot, as has sometimes been suggested, be placed in TNA to hide them away as *closed*. Indeed, the existence of the document is normally revealed in the catalogue.

### **Conclusion**

The combination of the Advisory Council and the Information Commissioner, backed up as a last resort by the Courts,<sup>20</sup> provides a substantial element of independent scrutiny. If better known, there should be improved public understanding of the national records, and an appreciation of the mechanisms used to provide rigorous assurance that documents are

<sup>19</sup> See <http://www.nationalarchives.gov.uk/news/969.htm> for the new appointments made in October 2014. <http://www.nationalarchives.gov.uk/about/our-role/advisory-council/>, provides links to details of the membership, Annual Reports, and meeting summaries.

<sup>20</sup> [https://www.supremecourt.uk/decided-cases/docs/UKSC\\_2014\\_0137\\_Judgment.pdf](https://www.supremecourt.uk/decided-cases/docs/UKSC_2014_0137_Judgment.pdf), for an example of a Supreme Court decision in a complex case, involving letters written to Ministers by HRH Prince Charles.

closed for reasons specified in legislation, and not just to save the Government or its officials from embarrassment.