

**EXPLANATORY MEMORANDUM TO**  
**THE FREEDOM OF INFORMATION (DEFINITION OF HISTORICAL RECORDS)**  
**(TRANSITIONAL AND SAVING PROVISIONS) ORDER 2012**

**2012 No. 3029**

1. This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

**2. Purpose of the instrument**

2.1 This Order provides for transitional and saving arrangements in relation to changes to the Freedom of Information Act 2000 (“the 2000 Act”) made by the Constitutional Reform and Governance Act 2010 (“the 2010 Act”) that are to come into force from 1<sup>st</sup> January 2013. These changes reduce, in the interests of promoting public understanding about the machinery of government, the lifespan of certain exemptions in the 2000 Act from 30 to 20 years.

2.2 The transitional and saving arrangements contained in this Order apply for a period of 10 years, starting on 1 January 2013. This phased introduction of the changes to the 2000 Act is broadly intended to align the lifespan of the relevant exemptions with changes to the Public Records Act 1958 (“the 1958 Act”) which have been introduced to reduce, from 30 to 20 years, the date by which certain public records must be transferred to the National Archives) or other place of deposit appointed by the Lord Chancellor. The changes to the 1958 Act are subject to parallel transitional and saving arrangements which are to be made by separate Order following the commencement of the changes to the 1958 Act.

**3. Matters of special interest to the Joint Committee on Statutory Instruments**

3.1 None

**4. Legislative Context**

4.1 Under section 62(1) of the 2000 Act, as enacted, a record becomes an historical record from the end of 30 years, which period begins with the start of the year after that in which it was created. The effect is that certain exemptions in Part 2 of the 2000 Act cease to be available in respect of a historical record. If an exemption applies, a public authority within the meaning of the 2000 Act does not, depending on the circumstances, have to comply with the obligation to confirm that it holds recorded information or to disclose such information if it holds it. This 30 year period reflects the requirement in section 3(4) of the 1958 Act that a public record selected for permanent preservation must be transferred to the Public Record Office (which has operated as part of The National

Archives since 2003) or other place of deposit 30 years after the date on which the record was created.

4.2 Section 45(1) of the 2010 Act provided that the 30 year transfer period for public records should be reduced to 20 years, subject to a ten year period in which transitional, transitory or saving provision could be made to manage the practical effects of that that reduction. As a consequence of the change to that rule, section 46(1) of and paragraph 4(2) of Schedule 7 to, the 2010 Act amend section 62(1) of the 2000 Act so that the period at the end of which a record becomes a historical record is 20 years. Paragraph 5 of Schedule 7 makes related amendments to the 2000 Act with the result that the following exemptions will cease to be available after the 20 year point:

- a. section 30: investigations and proceedings conducted by public authorities;
- b. section 32: court records;
- c. section 33: audit functions;
- d. section 35: formulation and development of government policy;
- e. section 36: prejudice to effective conduct of public affairs (except in relation to Northern Ireland); and
- f. section 42: legal professional privilege.

4.3 Paragraph 4(3) of Schedule 7 inserts a new section 62(2A) which provides that the reduction to a new 20 year period takes effect subject to any transitional, transitory or saving provision made by the Secretary of State for a ten year period running from the day on which paragraph 4 of Schedule 7 is brought into force. Section 46(2) and (3) provide the Secretary of State with the power to make an Order which contains such provisions.

4.4 On 29 November 2012 the Lord Chancellor made the Constitutional Reform and Governance Act 2010 (Commencement Order No. 7) Order 2012 (“the Commencement Order”) which commences, for certain records, section 45(1) and, for all records, section 46(1) and the relevant parts of Schedule 7 with effect from 1<sup>st</sup> January 2013.

4.5 Accordingly, the present Order makes transitional and saving provisions under section 46(2) and (3) of the 2010 Act for the ten year period beginning with that commencement.

## **5. Territorial Extent and Application**

5.1 The 2000 Act changes apply to public authorities in England, Wales and Northern Ireland; but not to those Scotland which are subject to separate freedom of information legislation.

## **6. European Convention on Human Rights**

6.1 Lord McNally has made the following statement regarding Human Rights:

In my view the provisions of the Freedom of Information (Definition of Historical Records) (Transitional and Saving Provisions) Order 2012 are compatible with the Convention rights.

## **7. Policy background**

- What is being done and why

7.1 In February 2010, following an independent review, the previous Government announced that the rule under which public records must be transferred to the National Archives or other place of deposit after 30 years should be reduced to 20 years. It also announced, following a recommendation from the review team, that it would introduce a similar reduction in the maximum duration of a certain number of exemptions in the 2000 Act from 30 to 20 years. The Government had concluded that in the interests of promoting public understanding about the machinery of government it was appropriate that after 20 years, the exemptions now set out at paragraph 4.2 above will cease to have any application to official information.

7.2 Provision was made in the 2010 Act to achieve these aims.

7.3 In January 2011 the Government announced a package of measures to meet and support Coalition Agreement commitments on transparency. In addition to such measures as the extension of the 2000 Act to additional bodies and post legislative scrutiny of that Act, it also included a commitment to commence sections 45 and 46 of, and the relevant parts of Schedule 7 to, the 2010 Act.

7.4 At present, the Commencement Order brings into force the 20 year rule for records other than those ordinarily selected for preservation and transferred to non-specialist local archives. A fuller explanation of this policy and the reasons for it can be found in the Explanatory Memorandum to The Public Records (Transfer to the Public Record Office) (Transitional and Saving Provisions) Order 2012. That Order makes provision for the transitional and saving arrangements which apply to the transfer of records during the ten years following commencement of the 20 year rule on 1 January 2013.

7.5. The transition provided for by the present instrument broadly reflects those arrangements, save for the fact that it applies to all records and not just those for which the 20 year rule relating to the transfer of public records under the 1958 Act has been commenced in part. To this end the saving provision preserves the 30 year rule for records created in 1983. The transitional arrangements for records created between 1984 and 2001 are expressed in the table in the Schedule to the Order (reproduced in the attached Annex). The effect is that a record created in a year specified in the left hand column will become a historical record at the end of the year specified in the right hand column.

## **8. Consultation outcome**

8.1 No specific consultation has been undertaken on the reduction in the duration of the exemptions in the 2000 Act affected by these changes. There is no statutory requirement to hold any such consultation.

## **9. Guidance**

9.1 Ministry of Justice guidance on the application of exemptions under the 2000 Act will be updated to reflect the new changes.

## **10. Impact**

10.1 An Impact Assessment has been prepared for both this instrument, the Commencement Order (SI 2012/3001 (C. 119)) and the associated Transitional and Savings Order for the 1958 Act provisions (SI 2012/3028).

10.2 The impact on the public sector is an estimated implementation cost of £34.7 - £38.5m, offset in the impact assessment by the transparency benefits. This instrument does not redistribute burdens between parts of the public sector and its financial effects are focused within central government. It is not envisaged to have economic impact.

10.3 No potential cost savings were identified in implementation planning to argue for a single implementation, either across all public records bodies or at one time as opposed to over a ten year period.

10.4 The impact on business, charities or voluntary bodies is negligible.

## **11. Regulating small business**

11.1 The legislation does not apply to small business.

## **12. Monitoring & review**

12.1 The 2000 Act regulator is the Information Commissioner and implementation of the 2000 Act changes will be subject to review by him in the course of normal complaint handling, and by the First Tier Tribunal in the event of appeals against his decisions.

12.2 By the time transition is complete, the instrument will have been a “once and for all” measure that can be repealed. The normal workflow of transferring a year’s selected records in each calendar year will have resumed whilst the 2000 Act changes will have been absorbed into normal 2000 Act administration.

### **13. Contact**

Oliver Lendrum at the Ministry of Justice Tel: 020 3334 4619 or email:  
[oliver.lendrum@justice.gsi.gov.uk](mailto:oliver.lendrum@justice.gsi.gov.uk) can answer any queries regarding the instrument.

**Timetable for reduction in the maximum duration of Freedom of Information Act 2000 exemptions**

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<i>Year record created</i>	<i>Becomes historical record at end of:</i>
1984	2013
1985	2014
1986	2014
1987	2015
1988	2015
1989	2016
1990	2016
1991	2017
1992	2017
1993	2018
1994	2018
1995	2019
1996	2019
1997	2020
1998	2020
1999	2021
2000	2021
2001	2022

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