

The National Archives

Terms of Loan (Deposit) for privately owned archives: Guidance Note for record repositories

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Acquisition in general

Record repositories typically acquire material

- by transfer from their parent authority (in the case of its own archives); or, from outside bodies and individuals;
- by statutory deposit, in which case the archives are held according to the requirements of specific legislation;
- by gift, bequest or purchase, in which case the archives pass outright into the ownership of the repository;
- on loan, in which case the archives while being in the custody of the repository remain in the ownership of an external individual or organisation.

The National Archives strongly recommends repositories, whenever possible in future negotiations, to prefer gifts, bequests, or if necessary purchases, to loans. By this means repositories will:

- secure ownership of the archives in question;
- gain the freedom to manage them at their own discretion;
- avoid potential difficulties over the expenditure of public money on privately-owned material, for example on the conservation of material which might subsequently be withdrawn and sold.

It should be remembered, however, that ownership of archives by a public body that is subject to the Freedom of Information Act 2000 will carry obligations for giving access to the material under the terms of the Act. Also, even with material which passes into the repository's outright ownership there may be certain reserved rights of other parties, for example copyright (ownership of which does not usually pass with ownership of the archives), and the rights of individuals under the Data Protection Act.

Guidance is given below on the terms of loan agreements in cases where a loan appears to be the only way forward to suit both parties.

Loan Agreements

Archivists and their governing bodies considering taking in privately-owned archives on loan (sometimes referred to as 'deposits') are strongly advised to enter into an unambiguous Loan Agreement with the owner. Many repositories already have standard forms for this purpose, although few if any have been tested at law. They may therefore need to be interpreted with some caution, but to be seen in general as a token of the intent of both parties at the outset of the agreement.

The contents of the Agreement should be fully discussed before the loan takes place so that any uncertainties and ambiguities can be addressed before signature, and the terms of the agreement can be fully understood, or queried, by both parties.

The Agreement should endeavour to spell out the reasonable rights and entitlements of both parties with respect to the archives in question: for

example how the archives will be safeguarded; how the repository may catalogue, mark, pack or repair them; how and under what conditions or restrictions (if any) they may be made available to the public for study or exhibition, and so on. A checklist of these and further issues that might be covered is appended to this Guidance Note.

It should be remembered that, in the very nature of a loan, the material in question will remain the property of the owner and not that of the repository, and that the owner's permission should be sought before any action in respect of the loaned archives that is not specifically covered by the Loan Agreement is undertaken by the repository. Each party to the agreement should undertake to keep the other(s) informed of any change of address or other material change in their circumstances that might affect the terms of the deposit (for example the transfer of responsibility for a repository from one parent authority to another).

Period (term) of the loan

Loans may be either (a) for a specified period, probably with a potential for renewal or renegotiation thereafter, or (b) for an indefinite period.

In the case of the offer of archives on 'indefinite' loan, care should be taken by the repository to establish the depositor's precise intentions, for example whether the agreement will be subject to periodic review or whether it would be terminated in certain specified circumstances. Owners offering archives on indefinite loan will generally not be in a position to commit their heirs and descendants to continuing the loan, and in the event of the owner's death it will usually prove necessary to renegotiate the loan with the new owner. The repository cannot assume that the loan will continue in perpetuity, even if that appears to be the original lender's intention.

Avoidance of the term 'permanent loan'

The law does not recognise the term 'permanent loan'. Its inclusion in previous Loan Agreements, whether formal or informal, has led to misunderstandings, both between owners and repositories and between repositories and grant-awarding bodies when material originally held on loan has subsequently been offered for sale.

The initial transfer should therefore be stated as either a gift (a permanent transfer of ownership) or a loan. The term 'permanent loan' should be avoided in any new Loan Agreements, and should be regarded as unsound in any existing agreements, which may therefore need to be renegotiated.

Checklist of points for inclusion in loan agreements

Date

- of the agreement
- of any periodic review of the agreement

Definitions

- the identity of the lender/depositor
- the identity of the repository and, where relevant, its parent body
- the nature and extent of the material covered by the loan
- the ownership of the material

Term (period) of the loan

- a fixed period or indefinite (plus any specific conditions)
- arrangements for additions to the initial loan (if required)
- arrangements for the destruction/return to the lender of e.g. any duplicate material, papers not considered relevant to the repository's collections or needs (eg on grounds of historical content or confidentiality)
- access by the owner during the period of the loan

Storage and maintenance

- the standard of care that will be offered to the archives (sometimes stated as not being a lesser standard than that accorded to the governing body's own archives)
- what the repository may do by way of sorting, listing, marking and cataloguing
- whether any conservation will, may or must be undertaken as necessary (at whose cost and with whose consent)
- whether for security or preservation reasons surrogates may be made e.g. in microform or digital form
- whether any insurance will be provided by the repository or whether the owner must arrange this if required; how frequently the archives should be revalued for insurance purposes
- any legal liability for loss or damage to the material while held by the repository.

Access

- to the public at large, subject to what (if any) conditions on the part of the owner
- whether any material must be withheld from the public for a specified period e.g. on grounds of confidentiality or liability to third parties
- whether any material must be withheld pending conservation
- whether (if applicable) the repository may charge for access to the material
- whether the material may be exhibited without obtaining the owner's permission on each separate occasion
- whether copies of the material may be supplied to the public with or without the owner's consent
- whether the material, or extracts from it, may be published either by the repository or by the public with or without the owner's consent

- whether copies of the catalogue and/or images from the originals may be used e.g. on the repository's website without seeking the owner's separate permission on each occasion
- arrangements for obtaining copyright consents

Withdrawal

- whether, and if so in what circumstances, the owner may temporarily withdraw material during the term of the agreement
- what arrangements will apply in the event of the permanent withdrawal of the material (eg whether a fixed period of notice of withdrawal is required, whether the repository should be offered first refusal of purchase; whether in the event of a withdrawal the repository will be reimbursed for its costs in caring for the material on the owner's behalf).

Keeping information up to date

- onus on parties to the agreement to keep each other informed of change of address, or other material changes affecting the agreement

Arbitration

The National Archives is willing to be named as an independent arbiter between the parties in the event of any dispute arising over the terms of a Loan Agreement.

Further reading

The issues covered in this Guidance Note are treated at greater length in GEA Raspin, "The transfer of private papers to repositories" (Society of Archivists Information Leaflet No 5 (1988), which also includes some specimens of loan agreements.

Contact details:

If you have any comments on this leaflet or questions concerning the issues raised, please contact The National Archives: Historical Manuscripts Commission, Kew, Richmond, Surrey TW9 4DU, Telephone 020 8876 3444, Email: enquiry@nationalarchives.gov.uk