



## **GUIDANCE ON ASSESSING WHETHER DEPOSITED PRIVATE ARCHIVE COLLECTIONS ARE COVERED BY THE FREEDOM OF INFORMATION ACT 2000 (FOI)**

### **1 Purpose of this guidance**

The purpose of this guidance is to:

- (i) Advise archives offices on when and why to undertake a full detailed assessment of whether deposited private archive collections are subject to the FOI Act
- (ii) Set out the factors to be considered in a full detailed assessment and the types of questions to be asked
- (iii) Give some guidance on how to go about the full detailed assessment and
- (iv) Update our advice on what to do if you receive an FOI request involving private archive collections

Please note that this is operational guidance not legal advice. For legal advice you should contact your own legal advisers.

### **2 Some working assumptions**

Certain things must be taken as read when using this guidance:

- FOI applies to information not records. In other words, under FOI, the public have a general right to information but not necessarily a right to copies of document or other medium in which such information is stored. When assessing whether FOI applies to a deposited private archive collection, it is necessary to consider both the information and the medium on which it is held. It is also necessary to keep open the possibility that FOI may apply to some of the information only, i.e. to part of a collection, even though the rest of it falls outside FOI.

- Information contained in private archive collections is only caught by FOI if it is held by or on behalf of a public authority. It is considered to be held by or on behalf of a public authority unless it is held on behalf of a person or body which is not a public authority. The term 'held' is not defined in the Act and there is no single criterion that can be applied in determining whether information is held or not. Consideration of the factors in section 5 below will help you determine the issue
- Archives collections of private origin that are owned by the archives authority are likely to be regarded as 'held' and hence covered by FOI. However, the legal basis on which a collection has been given to an archives service may not be one of straightforward ownership. For example, a collection could be held by the archives service under a trust agreement. In such circumstances the archives service does not own the collection albeit a trust agreement may enable it to deal with the collection in much the same way as an owner. We recommend that you seek legal advice on the ownership of individual collections
- Decisions will have to be made on a case by case basis. The fact that an archive collection is owned by a private individual or body does not automatically take it out of FOI, just as the fact that an archives office has an interest in holding it does not automatically bring it within FOI. The position concerning what is 'held' and what is 'held on behalf of' is more complex than that and the status of each collection can be determined only by testing it against the factors set out in section 5
- The outcome of an assessment is likely to be a finely balanced judgment one way or the other. A few deposited private archive collections may very clearly fall into one category or the other but it is more likely to be a matter of arguing that the balance of probability lies one way rather than the other
- Demonstrating that a private archive collection falls outside FOI will require some form of evidence. An agreement in writing, such as a deposit agreement or exchange of correspondence, is the best evidence but evidence of oral agreements would also be acceptable. Oral testimony about the circumstances or assumptions applying at the time of deposit can also play a part
- It may be more difficult to demonstrate that a private archive collection falls outside FOI if the name of the current owner is not known, or if the beneficiaries of the estate on whose behalf you are claiming it is held cannot be traced

### **3 When and why to undertake a full detailed assessment of whether a deposited private archive collection is subject to the FOI Act**

If you have not done so already, it would be sensible to do an initial assessment of your private archive collections. The purpose of this initial assessment is to:

- Gather information about when each collection was deposited, what agreement was reached and any conditions that apply, e.g. concerning access
- Assess the quality of evidence available for a full detailed assessment
- Assess whether clarification of the deposit agreement would be a useful precursor to full detailed assessment
- Note whether the collection is already available for general access

This will enable you to identify collections which should be prioritised for full assessment. Carrying out a full detailed assessment of a collection will be a complex and time-consuming task and it would be sensible to concentrate resources on where they are most needed, i.e. on collections at risk.

Certainty as to whether information in a particular private archive collection is covered by FOI may not be an issue for you and owners of your collection. This could lead you to decide to opt-in or opt-out a private archive collection from FOI on the basis of an owner's wishes. However, even if all parties concerned are happy to treat the collection as if it were covered by FOI, that will not necessarily mean that it is 'held' for FOI purposes. Whether information is covered by FOI or not can only be established by the full detailed assessment described below and a decision not to go through this process is a risk-based one to be made by each archives office.

Here are some arguments for and against full detailed assessment:

<u>FOR</u>	<u>AGAINST</u>
The archive collection is at risk of withdrawal by the owner unless it is considered to fall outside FOI	The risk of withdrawal by the owner is low
It is proving difficult to apply access restrictions required by the owner	No clear evidence is available
The archive collection is uncatalogued and it is proving difficult to sustain the section 22 exemption (information intended for publication – in this context, an uncatalogued collection identified for action in a cataloguing programme)	The archive collection is already generally available for access
The owner wants it done	

If you decide that you need to do a full detailed assessment of collections, consider starting a programme of assessment. The disadvantage of delaying assessment of a collection until you receive a request for access to it is that you may have difficulty in complying with FOI deadlines (20 working days), especially if several such requests are received at the same time.

#### **4 How to go about a full detailed assessment**

Here are some suggestions as to how you should tackle a full detailed assessment, and action to take following the assessment:

- As recommended in section 3, undertake an initial assessment of private archive collections and select those for which a full detailed assessment should be done, bearing in mind that full assessment will be a complex task with no guarantee of a successful outcome
- Having decided to proceed, gather together all information about when and how you received the private archive collection, the basis on which you hold it and the dealings you have had with the depositor or his successors or representative since the deposit took place
- Contact the depositor or his representative. Remember, he may have relevant documentation on his files that could help in your assessment or may be able to provide details of the assumptions he made at the time of deposit
- Consider seeking legal advice. The depositor may wish to involve his own legal adviser in the process also

- Contact The National Archives to let us know you are embarking on an assessment. We may be able to provide case-specific advice as well as providing general guidance in the light of experience gained in similar exercises elsewhere. We plan to collate information on assessment of private archive collections so that our advice to you can be as informed and helpful as possible
- Assess the archive collection against each factor and record the results. This is not a tick box exercise; you will be aiming to conclude with a well-documented and convincing assessment that can support your case

Whatever the outcome of the full detailed assessment, you should

- Inform the owner and clarify the deposit agreement if necessary
- Amend your finding aids to clarify your current understanding of its status

If the outcome of an assessment is that the collection falls outside FOI and you refuse an FOI request on those grounds, the enquirer may challenge this refusal by complaining to the Information Commissioner. If the Information Commissioner takes the view that the collection falls within FOI and issues a Decision Notice to this effect, you have two options:

- Accept the ruling, handle the enquiry as an FOI request and provide access to the collection unless exemptions apply (see also section 6)
- Appeal to the Information Tribunal. (Remember that an appeal to the Information Tribunal will require your parent body's support)

Please contact The National Archives at this point.

Note that if you have received an FOI request or the Information Commissioner has issued a Decision Notice, you should not de-accession the collection and return it to its owner. Any such action might be regarded as an offence under section 77 of the FOI Act because it is being done to frustrate an FOI request. In addition, non-compliance with a Decision Notice could incur enforcement action which could lead to your being regarded as in contempt of court.

## **5 The factors to be considered in assessing whether or not a deposited private archive collection is 'held' for the purposes of FOI**

All the circumstances of each particular case should be taken into account in any assessment. The guidance below highlights eighteen factors that have

been identified and that are likely to be relevant. However, the list is not necessarily exhaustive and a particular case may throw up other factors that are relevant and should be included in the assessment.

While all eighteen factors should be considered, some are more relevant to private archive collections than others. The weight that will attach to each factor will vary from case to case so a scoring scheme is not practicable. But as a general rule, the more involvement there has been by a public body in creation of the private archive collection, the more public funding there has been for its preservation, the less control the owner has retained over access and use of the collection and the more constrained is his right to withdraw it from the authority, the more it is likely that the collection falls within the FOI Act.

The next part of the guidance will set out each factor and give some examples of how it should be interpreted.

### **Factors relating to custody and handling**

Factor 1, Which organisation has physical custody of the information?

*The term 'custody' in this context relates to physical possession of the information and the medium in which it is recorded. Physical custody of the medium on which the information is held (the artefact) is likely to rest with the archives service if it is a legal entity in its own right. If it is part of a bigger body, such as a university, a local authority, a museum or gallery etc, then custody is with the parent body. It is possible, in some circumstances, that physical custody of the information may rest with one person or body but that rights as to how the information is handled (maintained, accessed, destroyed etc) lies with another person or body. For example, the archives service may store information that has been deposited but be unable, under the terms of the agreement with the depositor, to access it, use it or disclose it to any person without the depositor's consent.*

Factor 2, Where, within the organisation, is the information stored?

*Information in archives is likely to be stored in the archives service or unit, or perhaps in the university library. If, however, the archives are in digital form, they may be on a server maintained or directed by another part of the organisation or even with another organisation contracted to store the information. Some collections may be in more than one format.*

Factor 3, Which individuals within the organisation are administratively responsible for maintenance of, or access to, the information?

*It is simpler to consider the two elements of this factor separately.*

*(a) Maintenance in this context can have a different meaning when applied to information or the medium on which it is recorded. Maintenance of the medium means preservation of*

*the recorded information so that it remains intact, unaltered and capable of being used. In the case of information held digitally, this includes transfer to new storage media and migration to new software. Responsibility for this depends largely on the format of the information and practical arrangements within the archive service. Responsibility for the archives is likely to fall to the operational head of the archives services. In the case of a local archives service this would be the county archivist; in a University Library it would be the head of the library or the head of Special Collections, depending on the extent of delegation by the former to the latter. In practical terms, the actions involved in maintenance will fall to more junior staff under their direction. In the case of digital archives, maintenance of the information may actually be done by IT staff or a contractor on behalf of the archivist and under his or her direction.*

*Maintenance of information, on the other hand, means action necessary to ensure that the information continues to serve the purpose for which it was designed, including correcting errors and updating by adding new information. This type of maintenance does not apply to archives which remain unchanged so as to preserve their historical integrity.*

*(b) Administration of access is the responsibility of the archives service as described at (a), and involves implementing arrangements made as described at factor 17.*

*This factor is relevant to private archive collections.*

Factor 4, Is its handling subject to any formal administrative procedures?

*The only procedures an archives service would have that are relevant here are internal procedures that relate to the information as archived, e.g. accessioning procedures, internal guidelines on cataloguing which conform to accepted professional standards, perhaps security procedures conforming to BS 7799. In the case of digital archives there may be formal procedures covering back-ups, migration, retrieval etc, or standards that the contractor is required to meet.*

Factor 5, Is its handling subject to any contractual agreement?

*There may be a deposit agreement setting out the terms on which the owner is depositing his archives. This may be in the form of a formal document or an exchange of correspondence. However earlier deposits may have less formal documentation and relied on an oral agreement or a common understanding based on conditions prevailing at the time of deposit. The level of enforceability of the agreement will vary from case to case. This factor is particularly relevant to private archive collections.*

## **Factors relating to ownership**

### **Factor 6, Who owns the medium on which information is stored?**

*In the case of hard-copy archives, the depositor is likely to own the medium, unless some trust arrangement is in place. In the case of digital archives held on a server, the medium is likely to be owned by the organisation that owns or contracts for use of the server. This factor is relevant to private archive collections but is a more complex one than might first appear because of the possible permutations of ownership. Legal advice is recommended.*

### **Factor 7, Who owns the information?**

*The likelihood is that the depositor owns the information in the archive collection, although copyright may belong to individuals who corresponded with the depositor and his forebears or predecessors. In some cases the depositor will not own the information, for example information in a collection of client records deposited by the solicitor may belong, at least in part, to the client. This factor is particularly relevant to private archive collections. However, ownership is a complex issue because of the possible permutations and legal advice is recommended.*

## **Factors relating to cost**

### **Factor 8, Who paid for creation of the information?**

*An archive collection is likely to be made up of a mixture of information created by the depositor, his forebears or predecessors, and his employees, and information received by him or them from others. This information will usually have a physical manifestation in documents, which may be letters, maps etc or (increasingly) in electronic media. The cost of creating this information will reflect this mixed origin. The cost of creation of the medium will have been borne either by the depositor (for information created within his office or by his family) or by those others who provided the information. The cost of assembling it all into the archive collection is likely to have been borne by the depositor or his forebears or predecessors.*

*Another possibility is that some information in the archive collection results from activity in some official capacity, e.g. while paid by a public body for carrying out a public job or function. For example, a local councillor's papers may include a mixture of party political and official material. In such cases an official body may have paid for creation of some of the information.*

*This factor is relevant to private archive collections.*

#### Factor 9, Who is paying for its storage?

*Storage, in this context, includes not only use of storage space (either rooms and shelves, etc, or space on a server) but also cataloguing, conservation etc, i.e. costs incurred by holding the archives. It is likely that the organisation with custody is paying for storage but that may not always be the case. For example, the depositor might have provided an endowment or some other financial support, or might be paying for insurance of the archives (private archives are not usually specifically insured by an archives service). Another possibility is that the archive collection has benefited from a grant from a private body such as the Leverhulme Trust, or is covered by Government indemnity. This factor is relevant to private archive collections.*

### **Factors relating to source**

#### Factor 10, Who provided the information?

*This question relates to the source of the archive collection, i.e. who deposited it in the archives office. The depositor will usually be the same person or organisation as the one who owns the medium containing the information, but might instead be someone acting as his agent. Note, however, that with digital archives the current medium is likely to be owned or paid for by the custodian, not the depositor. This factor is particularly relevant to private archive collections.*

#### Factor 11, Who collated or recorded the information?

*The likelihood is that the private depositor and his forebears or predecessors 'collated' the archive collection, i.e. assembled it over time in the transaction of business or personal affairs. This factor is particularly relevant to private archive collections.*

### **Factors relating to function**

#### Factor 12, What is the subject matter of the information?

*The subject matter of deposited private archives can be anything and everything: it depends on the function or responsibilities of the creator and his or her interests and preoccupations.*

#### Factor 13, For what purpose was it created?

*It is likely that the information was created, and then assembled into the archive collection, for private purposes, in order to meet the private or business needs of the depositor, his forebears or predecessors. For example, the archive of a landed estate will result from the administration of the estate and the need to maintain evidence of rights, duties and actions for use by the estate.*

*On the other hand, it is possible that some of the information will have been created in the performance of an official function (see also Factor 8).*

*This factor is particularly relevant to private archive collections.*

Factor 14, For what purpose is it being stored?

*When the information has been deposited in an archives office, it is likely that it is being stored primarily to serve as a resource for historical and other research. However, it is possible that the depositor may also have occasion to use his archive for evidence of his legal rights and obligations and to support his interests in other ways; in such circumstance he benefits directly from preservation of his archive. This factor is relevant to private archive collections.*

Factor 15, Does the public authority have its own interest in the content of the information or only in the fact of its preservation?

*The likelihood is that the archive collection was accepted on deposit because it fit into the archives service's overall collecting remit, i.e. it relates to its geographical catchment area (such as with a county archives service) or to a specialist research area (such as with Warwick University Modern Records Centre's industrial relations archive collections). The public authority, therefore, has a general interest in an archive collection falling within the general criterion of overall relevance, and a continuing interest in being able to acquire similar material. However, it is the end-user, i.e. the researcher visiting the archives service or sending a written enquiry, who has the primary interest in the contents of the information. This factor is relevant to private archive collections.*

## **Factors relating to control**

Factor 16, To whom is any duty of confidentiality owed in relation to the information?

*It is likely that the deposit agreement will indicate whether a duty of confidentiality is owed by the archives service to the depositor. This will usually be in relation to any records not yet publicly accessible, for which the depositor may prescribe special conditions. The deposit agreement may be a written document or an oral agreement. Even where there is no specific provision to this effect, there may have been a common understanding by the depositor and the archives service that certain types of information will be regarded as confidential.*

*Another possibility is that the depositor has a duty of confidence to third parties, for example those who provided him with information, and in such circumstances the duty of confidence will pass from the depositor to the archives service. This factor is particularly relevant to private archive collections.*

Factor 17, Who has a right to have access to and use the information?

*It is likely that the depositor and the archives service have rights of access to the information. (Only exceptionally are boxes sealed and inaccessible to the archives service.) Access by others will be subject to the depositor's instructions which are usually set out in the deposit agreement, in correspondence or by oral agreement. Instructions of this nature vary. Sometimes they require all requests, or requests falling into a specified category, to be referred to the depositor or a nominated representative for individual consideration. In other cases they delegate the decision to the archives service, in some circumstances subject to agreed constraints. This factor is particularly relevant to private archive collections.*

*While access is an important element, there are other aspects of use, such as provision of copies, inclusion in exhibitions and publication in books or on a website. The amount of discretion, if any, given to the archives service by the depositor will be set out in the deposit agreement or in correspondence or will have been agreed orally.*

Factor 18, Who would have the right to require it to be amended, deleted or delivered up?

*It is simpler to consider separately the elements of this factor, which is particularly relevant to private archive collections.*

*(a) The right to have information amended or deleted may be set out in the deposit agreement, in correspondence or agreed orally. By this means there will be clarity as to which decisions may be made by the archives service without reference to the depositor and which decisions are reserved to the depositor.*

*It is common for the right to amend or delete information to operate within some general presumptions:*

*(i) After transfer, the archives service may appraise individual files or other items in an archive collection to assess whether they should be destroyed because they are not worthy of permanent preservation*

*but*

*(ii) There will be no amendment of information within individual files or other items being preserved.*

*(b) The right to have delivered up can include the right to borrow back items on a temporary basis and the right to withdraw the archive collection completely. The deposit agreement or correspondence or oral agreement may set out any limitations on the depositor's rights. These can include a requirement to give a period of notice before removing his collection, a requirement to recompense the archives service for the cost of storage and cataloguing.*

## 6 What to do if you receive an FOI request involving private archive collections

In September 2004 we issued advice on handling FOI requests for private archives collections. Here is an updated version of that advice. Please note that it constitutes working assumptions which you can use in assessing your response to individual requests for information.

- If the archive collection is already open for research and your Publication Scheme contains an appropriate class, claim the exemption at section 21 for information already reasonably accessible. (See our separate guidance on Freedom of Information, Publication Schemes and Paid Research Services for details of how this class should be framed)
- If the archive collection is closed by agreement with the depositor on the basis that it contains confidential information, and disclosure by you of the information would be regarded by him as breach of confidence, claim the exemption at section 41 for information provided in confidence. Note that particular difficulties will arise if the depositor is willing for some enquirers to use the archives but not others. It is not possible under the FOI for some applicants to be provided with information and others not. This is because neither the FOI Act nor the EIRs allow differential treatment of applicants, whether because of the stated purpose of their research or for any other reason
- If the archive collection is uncatalogued, claim the exemption at section 22 for information intended for publication. Note that to claim this exemption successfully, you will need to be able to show the Information Commissioner your efforts to make progress in this area, such as a programme setting out priorities and targets on which action is being taken

Note that once a collection has been treated as if it were subject to FOI, for example, by applying an FOI exemption in response to an FOI request, it may be more difficult subsequently to claim that the collection is not, in fact, subject to FOI.

If you have any questions about this guidance please contact Susan Healy at [susan.healy@nationalarchives.gov.uk](mailto:susan.healy@nationalarchives.gov.uk). If you are about to assess a private archive collection please contact the National Advisory Service at [nas@nationalarchives.gov.uk](mailto:nas@nationalarchives.gov.uk).

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