

EXPLANATORY MEMORANDUM TO
THE PUBLIC RECORDS (TRANSFER TO THE PUBLIC RECORD OFFICE)
(TRANSITIONAL AND SAVING PROVISIONS) ORDER 2012

2012 No. 3028

1. 1.1 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 for changes to the Public Records Act 1958 (“the 1958 Act”) which have been introduced to reduce the date by which certain public records selected for permanent preservation must be transferred to The National Archives or other place of deposit appointed by the Lord Chancellor from 30 to 20 years following the date on which a record was created.

2.2. The transitional and saving arrangements contained in this Order apply for a period of 10 years, starting on 1 January 2013. These arrangements are required in order to manage the logistical and resource implications associated with the change, in particular phasing in the move to a 20 year rule over a 10 year transitional period, in which two years’ worth of records will be transferred every year.

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

3.1 None

4. Legislative Context

4.1 Section 3(4) of the 1958 Act provides that public records selected for permanent preservation by the person responsible for them are to be transferred by that person to the Public Record Office (which has operated as part of The National Archives since 2003) or other place of deposit authorised by the Lord Chancellor no later than 30 years following the date of their creation.

4.2 Section 45(1)(a) of the Constitutional Reform and Governance Act 2010 (“the 2010 Act”) amends section 3(4) of the 1958 Act so that the deadline for transfer is reduced to 20 years from the date of a record’s creation. Section 45(1)(b) of the 2010 Act inserts a new section 3(4A) into the 1958 Act to provide that for a period of 10 years beginning with the commencement of section 45 of the 2010 Act the new 20 year deadline for transfer takes effect subject to any transitional, transitory or saving provision made by order. Sections 45(2) and (3) of the 2010 Act provide powers for the Lord Chancellor to make such provision by Order.

4.3 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, in part, section 45(1) with effect from 1 January 2013. The Commencement Order provides that section 45(1) is not brought into force in respect of records of a description specified in the Schedule to that Order (public records of local interest which are transferred to local places of deposit). Commencing section 45(1)(a) in this way means that the new 20 rule will not apply to such records. Similarly, the effect of partially commencing section 45(1)(b) is that the 10 year transitional and saving period provided for by new section 3(4A) of the 1958 Act does not start to run for records described in the Schedule until it is brought into force in respect of those records.

4.4 Accordingly, the present Order makes transitional and saving provisions under section 45(2) and (3) of the 2010 Act in respect only of the public records caught by the partial commencement of section 45(1)(a) (mainly records of central government transferred to The National Archives), and for the 10 year period beginning with that commencement.

4.5 A related Order, The Freedom of Information (Definition of Historical Records) (Transition and Saving Provisions) Order 2012 is being made to come into force at the same time as this Order. That Order will make transitional and saving provision in light of the bringing into force by the Commencement Order of section 46 of, and parts of Schedule 7 to, the 2010 Act in full (i.e. for all records). These provisions in the 2010 Act have the effect that certain exemptions in Part 2 of the Freedom of Information Act 2000 (“FOIA”) that would otherwise potentially apply upon receipt of a request for information under that Act cease to apply once a period of 20 years has elapsed, which begins with the start of the year following that in which the record was created. A fuller explanation of those changes can be found in the Explanatory Memorandum to that Order..

5. Territorial Extent and Application

5.1 The public records changes apply in England and Wales only, as Northern Ireland and Scotland have their own public records 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 Public Records (Transfer to the Public Record Office) (Transitional and Saving Provisions) Order 2012 are compatible with the Convention rights.

7. Policy background

7.1 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 FOIA to additional bodies and post legislative scrutiny of that Act, it also included a commitment to commence section 45 of the 2010 Act.

7.2 The reduction of the 30 year rule to a 20 year rule followed an independent review of the 30 year rule under the last Government which recommended that the record transfer deadline be reduced. The move to a 20 year rule will make thousands of government records available to the public earlier than previously possible, providing greater openness and accountability, and strengthening democracy through more timely scrutiny of Government policy and decision-making. The move to a 20 year rule does not impact what kind of records are selected for permanent preservation, it only makes them available earlier, and sensitive information in records may continue to remain closed for longer periods in line with exemptions under the FOIA.

7.3 On 13 July 2012 Lord McNally, Minister of State for Justice, made a written ministerial statement announcing the Government's intention to bring into force the new 20 year rule, initially only for records which are to be transferred to The National Archives and approximately 70 specialist places of deposit. These specialist places of deposit are mainly trading funds and cultural institutions maintaining their own archives and collecting institutions such as the Imperial War Museum.

7.4 In addition to The National Archives and specialist places of deposit, there are 116 places of deposit in the local government sector appointed by the Lord Chancellor under section 4 of the 1958 Act that provide preservation and access for public records of local interest. Full commencement of the 20 year rule would also reduce the transfer deadline for these places of deposit under the 1958 Act. However, views expressed by the local authorities maintaining these places of deposit and representatives of the archives sector highlighted that it would be challenging for them to comply with the 20 year rule at the current time, due to the scale of the challenge in accessioning double the amount of records each year. For this reason, the Commencement Order has carved out of the 20 year rule those records which are ordinarily transferred to local places of deposit. Subject to a full assessment of the impact of the change on local places of deposit the Government intends to commence the transition to a 20 year rule for records selected for preservation at these remaining local places of deposit at a later date (possibly 2015).

7.5 The transitional and saving arrangements in this Order therefore apply to those records not carved out of the 20 year rule by the Commencement Order. The arrangements are designed to ensure that there is a managed approach to the introduction of the 20 year rule so that it is not disproportionately burdensome for bodies transferring public records or archives receiving them.

7.6 To this end the saving arrangement preserves the 30 year rule for records created in 1983 with the transitional arrangements for records created between 1984 and 2001 applying subsequently. The transitional arrangements are expressed in the table in the Schedule to the Order (reproduced in Annex A). The table then has the effect that a record created in a year specified in the left hand column must be transferred no later than the end of the year specified in the right hand column. This will result in two years' of

selected records being transferred to The National Archives in every year of transition and specialist places of deposit in each of the 10 years of transition.

8. Consultation outcome

8.1 Section 45 of the 2010 Act does not require the Lord Chancellor to consult any individual or body prior to making this Order. During the independent review of the 30 year rule carried out in 2008-09, the review team received evidence from a wide range of stakeholders including politicians, senior civil servants, historians, the media and the public. Over 100 individuals and bodies responded to the review team's consultation, and the views of 2,300 members of the public were obtained through an opinion poll the review team commissioned. The evidence received was considered in the review team's report. As a result, it was not considered that a public consultation was necessary before implementing the changes proposed by the 2010 Act or the transitional and savings provisions included in this Order. In preparation for the move to a 20 year rule The National Archives and departments which transfer public records have been consulted and are actively involved in streamlining the records transfer process to lessen the impact of the change on departmental resources.

9. Guidance

9.1 Transferring public records first requires the selection, sensitivity review, cataloguing and preparation of the relevant records and consequently requires careful planning to meet the statutory deadline. Processing two years' worth of records per year through transition is a major undertaking for both The National Archives and transferring departments.

9.2 The National Archives, in consultation with transferring departments, has reviewed the selection and transfer process, plus its guidance and training offered to departments to support implementation of the 20 year rule in as cost-effective way as possible.

9.3 Guidance giving an overview of the clarified and streamlined process is published on The National Archives' website and a version of the transition timetable contained in the Schedule to this Order will be added prior to commencement of transition on 1 January 2013. New transfer documentation is being produced including planning tools that help with transferring records to meet statutory deadlines as these are brought forward.

10. Impact

10.1 An Impact Assessment has been prepared for both this Order, the related Freedom of Information (Definition of Historical Records) (Transitional and Saving Provisions) Order 2012 (SI 2012/3029) and the associated Commencement Order (SI 2012/3001 C.119). At present, the transition to the 20 year rule provided for in the 2010 Act is only being commenced for records selected for preservation at The National Archives (mainly

from central government departments) and the 70 specialist places of deposit comprising trading funds and cultural institutions maintaining their own archives or collecting institutions such as the Imperial War Museum.

10.2 Implementation of the transition commenced by this instrument and the associated Commencement Order is being phased over 10 years to reduce the impact of a major logistical operation by spreading it over that period and to enable its funding from existing departmental budgets. The instrument has no regulatory impact outside the central government sector.

10.3 The impact on the public sector is an estimated implementation cost of £34 - £38m (at current prices), offset by the transparency benefits, as detailed in the impact assessment. 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 any economic impact.

10.4 No potential cost savings were identified in implementation planning to make the case for a single implementation, either across all public record bodies at once, or at one time as opposed to phased in over a 10 year period.

10.5 The impact on business, charities or voluntary bodies is negligible. There are four unusual places of deposit outside the public sector which will be impacted by this order: two are within archives of privatised former public corporations where the public records date from before privatisation and consequently are no longer accruing. The other two are archives attached to ancient charitable hospital foundations in turn associated with publicly-funded National Health Service tertiary care providers.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 Government departments will report to The National Archives, acting on behalf of the Lord Chancellor as the Minister responsible for the public records system, on planning and actual progress achieved against the transfer timetable set out by the transitional arrangements. The National Archives will publish this data on its website annually through the transitional period, starting in January 2013. A post implementation review will be carried out in 2018, at the midpoint of the transition.

12.2 By the time transition is complete, the instrument will have been a 'once and for all' measure that can be repealed, and the current workflow of transferring a year's selected records in each calendar year will resume.

13. Contact

13.1 Oliver Lendrum at the Ministry of Justice Tel: 020 3334 4619 or email oliver.lendrum@justice.gsi.gov.uk or Malcolm Todd at The National Archives Tel: 020 8392 5208 or email: malcolm.todd@nationalarchives.gsi.gov.uk can answer any queries regarding the instrument

Annex A

Transitional timetable for reduction in the time at which certain records are transferred under the Public Records Act 1958

<i>Year record created</i>	<i>Transferred not later than the 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