

NOTES ON THE LORD CHANCELLOR'S SECURITY AND INTELLIGENCE INSTRUMENT

1. Under section 3 of the Public Records Act 1958 (PRA), records selected for permanent preservation must be transferred to The National Archives (TNA) or other place of deposit appointed by the Lord Chancellor, not later than 30 years after their creation. This period will be reduced to 20 years following the coming into force of section 45 of the Constitutional Reform and Governance Act 2010.
2. However, under the proviso in section 3(4) of the PRA, records selected for permanent preservation may be retained for longer than 30 years (and not transferred to TNA or other place of deposit) if, in the opinion of the person responsible for them, they are required for administrative purposes or for any other special reason and the Lord Chancellor has been informed of the facts and has given his approval.
3. The real risk of prejudice to national security is the 'special reason' in relation to the retention of security and intelligence records. Successive Lord Chancellors have given their approval for the retention of defined categories of security and intelligence records under the proviso - and that approval has been recorded in instruments signed by those Lord Chancellors.
4. Those instruments authorise, rather than require, the retention of records where retention remains necessary for national security reasons. Records retained by public bodies under security and intelligence instruments are reviewed at intervals of no more than 10 years. For the security and intelligence agencies it is their records retention policies that are reviewed at least every 10 years.
5. The original security and intelligence instrument was signed in 1967 and ran for 25 years. However, the Government Response to the Report of the Wilson Committee in 1982 (Cmnd 8531) indicated that each instrument would be reconsidered after 20 years and that those who retained records would have to seek fresh approval from the Lord Chancellor at intervals of no more than 10 years for the retention of each successive batch of records.
6. There have been two security and intelligence instruments since 1967: one signed in 1992 (for records created before the end of 1971), which expired on 31 December 2011, and one signed in 2002 (for records created between 1972 and 1981), which was due to expire in 2022 but has now been revoked - see paragraph 10 below.
7. As the 1992 instrument was to expire at the end of 2011, the Lord Chancellor signed a new instrument on 19 December 2011. This took effect on 1 January 2012 and will expire on 31 December 2021.
8. This instrument records that each person listed in Schedule 1, who is responsible for records falling within the description set out in Schedule 2 (in brief, national security and intelligence records), is of the opinion that those records ought to be retained for a special reason in accordance with the proviso in section 3(4) of the PRA. The special reason is that the transfer of those records to TNA or other place of deposit would create a real risk of prejudice to national security. The instrument also records that the Lord Chancellor has been informed of the facts and has given his approval for the retention of these records.

9. The persons listed in Schedule 1 include certain non-government organisations that hold public records relating to security and intelligence from the time those organisations were public bodies.
10. As well as replacing the approval for the retention of records recorded in the 1992 instrument, the 2012 instrument also revokes the 2002 instrument and brings the records to which that related within the approval recorded in the 2012 instrument. This ensures that, from now on, in the interests of simplicity and transparency, a single instrument governs all of the records that ought to be retained under the proviso in section 3(4) of the PRA for reasons of national security.
11. In short, the new instrument records the Lord Chancellor's approval for the retention of all records that ought to be retained for national security reasons after the period referred to in section 3(4) of the PRA.
12. An approval given under section 3(4) of the PRA is not required to be given in the form of an instrument (or any other form). Accordingly, there is no requirement to lay this instrument before Parliament before or after it is made or publish it in any other way. However, in the interests of greater transparency the Lord Chancellor has decided that the instrument will be made publicly available online.
13. The Lord Chancellor's Advisory Council on National Records and Archives was consulted as part of the arrangements for the new instrument.