21 February 2017

 **Researching a nineties case-present obstacles**

This paper is written as much to inform me as it is my audience. It sets out my experiences of and research into the operation of the Public Record Office or the National Archives, which I will refer to, as Kew, for shorthand.

Most of you are way ahead of me as experts in this field. My aim is to provide a look through fresh eyes as to the operation of Kew and in particular to look at the problems faced with research into more recent events.

As an example I am using the murders of my parents in 1990.

They were killed by PIRA on 6th June that year.

Since 2002 I have been in correspondence and dialogue with numerous agencies , trying to effect a more rigourous investigation into the deaths.

My basic premise, which has emerged with more emphasis over the years, is that , whilst PIRA may have admitted the murders, there is State involvement, maybe as significant as the murder of Pat Finucane and others.

The various figures, bandied about in the media , suggest that a significant proportion of PIRA volunteers were working for the State in one of its guises, RUC Special Branch, the Security Service, popularly known as MI5 , the Secret Intelligence Service MI6 , the Army or some other body yet to be uncovered.

The significance of that involvement is that the State may have had prior knowledge of the act, subsequent knowledge, both, or more horrifically, been complicit in instigating the act.

Far fetched?

Let me give you an example or two. It is likely that the State facilitated the murders of leading Loyalists, aside from obvious State involvement in the killing of Finucane.

The Sandy Lynch case. Lynch, an informer, has been told by his handlers that he is to be detained by PIRA but that they , his handlers, are on to it , so not to worry. In the famous scene in the home of Veronica Ryan and her partner, in the bedroom, Lynch , blindfolded, is confronted by Scapaticci and Maguire, both widely regarded as agents of the State. Lynch has made a statement of admission. It has been vetted by persons unknown and not present in the house. Scapaticci and Maguire leave. Some time later Danny Morrison arrives and the police and army swoop. Morrison is arrested in a nearby house and ultimately sentenced to eight years in prison. He was released in 1995 and in 2008 his conviction, and those of the householders were quashed. The State did not oppose the applications but refused to give an explanation in open court. A secret file was presented to the Court of Appeal and a secret hearing was conducted. Interestingly, a Section 35 reference was then made by the Director to the Chief Constable as to whether offences had been committed relating to non disclosure. That still has not seen the light of day and I think is now in the Operation Kenova ambit.

It is clear that the operation was a “sting” of some nature. But what was its purpose? Was it a speculative operation or was Morrison the target? If so, to what end? One theory is that Morrison was proving to be a hawk in the ongoing negotiations with HMG. So who benefitted from his removal from talks? HMG? Probably. The doves? Assuredly. So was Morrison the object of a State operation removing an obstacle and agreed between HMG and certain sections of SF/PIRA?

So with the murders of my parents. My father had been retired from the RUC three years and, according to PIRA ‘rules’ he was no longer a target. So why kill him?

Gerry Adams said: *“the attack was patently not a good operation. I have said it was wrong and this is my position. I don’t have to defend every action the IRA engages in”.*

On Saturday 9 June , the Irish Times reported more fully. Adams said that he could not condone the killings and that the “*IRA itself…had made it clear that retired members of the British Crown forces were not targets…What I am saying is what I said yesterday. That I cannot condone that incident in which those two people were killed and I won’t even attempt it.”*

So what were the consequences of the murders? There was the usual public outrage. My father usually was accompanied by my mother, so any scouting would have shown that. The murder of two pensioners enabled the doves to ascend further up the moral high ground, at the expense of free hawks, such as Maguire, who subsequently, according to Ed Moloney, threw his lot in behind the doves. So the doves benefitted form the murders. So who motivated them? Could it be that state agents were encouraged to kill my father on some pretext? Could it be that the encouragement came from the state, as a way of embarrassing and further isolating the hawks, thus facilitating the ‘peace process’?

Fantastical? Any more so that any other killing with state involvement?

That is the background to my research. I am not particularly interested in the active service unit which carried out the murders. I have named them in “Seftonblog” some time ago. I want to know about State involvement. The answer is hidden in the State’s papers.

And so to Kew.

The system is user friendly and the staff and polite and helpful. The Friday hamburgers are vegetarian.

Prior to my first session, as advised by Ciaran , I made a list of files that interested me.

For example:

CAB 163/483 Technical Scrutiny 1981-1988

CAB 163/441 Irish Terrorism papers and general correspondence October 1984 –February 1985

These and others are annotated with “retained by the department under section 3.4”

So how does Kew operate this system?

**The legislation**

The Public Record Act was passed in 1838 “to keep safely the public records”.

The Grigg report recommended a new system for preserving records and the Public Records Act 1958 implemented many of its recommendations. For the first time a statutory, general public right of access was given after fifty years , with exceptions.

The Public Records Act 1967 reduced the period to thirty years, allowing access to WW1 records. This also brought into focus the need to protect sensitive documents and a regime was put in place for that.

The Freedom of Information Act 200 replaced [in January 2005] those parts of the 1958 act that related to access to records.

Further legislation has resulted in the period for which records must be transferred to twenty years. This new regime started in 2013.

See the Constitutional Reform and Governance Act 2010.

The National Archives received the records relating to 1990 in 2016. So far, little relating to 1990 has appeared. It may be assumed that the records which pertain to my parents will be subject to the same restrictions as before. Because of a more general and seemingly looser release of records relating to the 1970s, it may be , because of the particular interest by NI researchers that tighter control is now exercised

Though I have no direct evidence of that.

So what are they?

Section 1 :the secretary of state is responsible for the public records. The present secretary of state is Karen Brady. An advisory council on public records has been established to advise in particular on how members of the public are affected by its work. This includes the operation of the Freedom of Information Act 2000. The council is chaired by the Master of the Rolls, a senior judge and is to report every year. The present master of the Rolls is Sir Terence Etherton , famous for having been one of the three Court of Appeal judges who ruled on Brexit and whom the Daily Mail described as an openly gay Olympic swordsman. Educated at , surprise- St Paul’s and Cambridge. Other members are Angela Kelly, legal advisor and examiner of statutory rules to the Assembly and Trevor Wooley, former director general of the MOD.

Section 2 : [4] [c] :the Keeper of Public Records has power to regulate the conditions under which members of the public may inspect public and other records or use the facilities of the Public Record Office. The present Keeper is Jeff James, who started off life in the Royal Navy.

Section 3 : regulates the selection and preservation of public records.

The Keeper of public Public records is to make arrangements for the selection , preservation and safekeeping of those records. The Keeper is responsible for the supervision of this function.

Of great importance is section 3 [4] which is quoted in a number of instances in my list for inspection. It is worth quoting it here.

*(4)*

*Public records selected for permanent preservation under this section shall be transferred not later than twenty years after their creation either to the Public Record Office or to such other place of deposit appointed by the Secretary of State under this Act as the Secretary of State may direct:*

*Provided that any records may be retained after the said period if, in the opinion of the person who is responsible for them, they are required for administrative purposes or ought to be retained for any other special reason and, where that person is not the Secretary of State, the Secretary of State has been informed of the facts and given his approval.*

Here is the official explanation for a section 3 [4] retention. The Lord Chancellor no longer exercises the decision making power.

**“Documents retained by department**

The Catalogue refers to certain documents being "Retained by Department under Section 3.4". Request asked what this means.

**Information provided** "Retained by Department under Section 3.4" in the Catalogue means that the record has been kept by the responsible government department or agency under section 3(4) of the Public Records Act 1958 (rather than transferred to The National Archives).

There is a copy of the Act on The National Archives Website at http://www.nationalarchives.gov.uk/policy/act/act.htm

A government department may wish to retain a record after it is 30 years old for several reasons, the two most common reasons being (1) the record is still required by the department for administrative use or (2) the presence in the record of sensitive material. In such a case the department must apply for the Lord Chancellor's approval, and the application is scrutinised by the Advisory Council on National Records and Archives in the United Kingdom. If retention is approved, the record is shown in the Catalogue as 'Retained by Department under Section 3.4'.

This part of the Public Records Act was not repealed or altered by Freedom of Information legislation. However, you have the right under FOI legislation to request access to the record from the government department that is retaining it.

Date of disclosure: 23 September 2005 “

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***Northern Ireland.***

*(1)*

*It shall be lawful for any government department or other body or person having the custody of any public records relating exclusively or mainly to Northern Ireland to transmit those records to the Public Record Office of Northern Ireland.*

So it is possible that seemingly GB records are in fact at PONI. It might be worth asking PONI about this.

What are departmental records?

Answer in the schedule to the Act.

*Departmental records*

*2*

*(1)*

*Subject to the provisions of this paragraph, administrative and departmental records belonging to Her Majesty, whether in the United Kingdom or elsewhere, in right of Her Majesty’s Government in the United Kingdom and, in particular,—*

*(a)*

*records of, or held in, any department of Her Majesty’s Government in the United Kingdom, or*

*(b)*

*records of any office, commission or other body or establishment whatsoever under Her Majesty’s Government in the United Kingdom,*

*shall be public records.*

*Power to add further categories of records and to determine cases of doubt*

*7*

 *(2)*

*A question whether any records or description of records are public records for the purposes of this Act shall be referred to and determined by the Secretary of State and the Secretary of State shall include his decisions on such questions in his annual report to Parliament and shall from time to time compile and publish lists of the departments, bodies, establishments, courts and tribunals comprised in paragraphs 2, 3 and 4 of this Schedule and lists describing more particularly the categories of records which are, or are not, public records as defined in this Schedule.*

More detail on the role of the Council . Here is what Kew says about it .

*The Council:*

*•advises the Secretary of State on issues relating to public records that are over 20 years old (historical public records), including public access to them, at the point of transfer to The National Archives*

*•advises on requests from government departments to retain historical public records under the Public Records Act*

*•advises on the public interest when departments want to keep historical public records closed under Freedom of Information Act (FOIA) exemptions, examining and challenging the evidence provided by departments to justify such requests*

*•through its sub-committee, the Forum on Historical Manuscripts and Academic Research, advises the Chief Executive and Keeper of The National Archives on matters relating to private archives outside the public records system.*

*It also supports government departments and The National Archives by providing independent advice and scrutiny on issues relating to records management and archives.*

*Principles*

*Openness and objectivity underpin the Council’s work in considering applications for the retention or closure of records. The Council’s guiding principle is to support information being made public. That principle will only be set aside when there are clear grounds to do so, based on public or the national interest, or sensitivity about personal data. It regularly challenges government departments to provide evidence to justify requests for documents to remain closed.*

1. *Access to Public Records*

*•Closure and retention*

*The Council is responsible for advising the Secretary of State for Culture, Media and Sport on the application of FOIA to historical public records. It also advises him on applications submitted by departments for the retention of public records under the Public Records Act 1958.*

*In 2015-16, 41,784 government records were transferred to The National Archives, an increase of over 6,000 on the previous year. The vast majority of these were transferred open and can be viewed at The National Archives. However, in a small proportion of cases, historical information contained in records which are being transferred attracts certain exemptions under the*

*FOIA, for example personal information or details which could harm the national interest. In these cases government departments must submit an application for permission for the records or extracts to be closed at transfer which is considered by the Council.*

*The Council will reach a conclusion only when it is fully satisfied that a department has made a convincing argument for closure or retention. Wherever possible the Council asks departments to consider redaction of the sensitive information rather than the closure of whole files. Where members agree that the information given by a department is inadequate or unclear, they will decline to approve the application until sufficient detail has been provided or any points of confusion have been resolved. They are also keen to make sure that departments are not wishing to keep information closed simply to avoid embarrassment rather than for any objective reason reached after an impartial review of the records.*

*Where a department wishes to retain records, the Council will often challenge either the need for retention or the length of the requested retention period. It may ask the department to explain requests arising from a review backlog and to put in place, or to accelerate, plans to catch up as quickly as possible. It will also ask to have sight of these plans before agreeing that the records can be retained. In many cases the Council will ask a department to submit a revised application which addresses the queries that it has raised. However, where it has more serious concerns about the nature of a particular application or in cases which raise new or unfamiliar issues, it can and will ask departmental representatives to attend a Council meeting to discuss the matter in more detail. Where it has asked a department to present a timetable for transfer before agreeing retention, it will request regular updates on progress.*

*Both records retained by departments and those closed at transfer to The National Archives remain subject to the FOIA and individuals can make an FOI request to access them.*

*The Council’s casework has continued to increase substantially. In 2015-16 the number of closure and retention applications submitted to the Council was 5,387, an increase of almost a third on 2013-14, when a ten-year transition period was started to implement the reduction from a 30-year to a 20-year rule for historical records. The effect of this has been to increase the number of records due for review each year.*

*The Council queried almost 10% of the applications it received, significantly more than the 4% of applications in 2014-15. The increase is partially due to changes to the way in which the Council now operates. Until last year members raised questions on applications at Council meetings and where these were answered immediately to the Council’s satisfaction, either by other members or by staff from The National Archives, they would not be taken forward as queries. Under new processes introduced in September, members submit their queries in writing two weeks before meetings. A query may be straightforward, for example where a member notes that the department has made an error in the calculation of the closure period it is requesting, or it may*

*be a matter of simple clarification such as a member asking whose personal information is being protected if that is not stated in the application. More critically members may question a department’s use of a particular exemption and ask for a stronger argument for its use to be set out. They may also challenge the reason for closing or retaining specific information at all and ask a department to provide an explanation as to why, for example, release would harm the UK’s international relations. These queries are collated and the Council then receives written responses from departments, or The National Archives where appropriate, to all of these queries for discussion at the meeting. As a result the consideration Council is able to give to the most contentious cases has been enhanced, with the improved processes enabling it to give more thorough and considered scrutiny to the more sensitive and difficult applications. It has also led to more comprehensive documenting of all of the issues raised by members. This helps the Council to identify any trends in the types of questions it is routinely asking even where the individual query itself is not of special significance, and as a result informs the guidance and feedback for departments.*

*However, the increase in the number of queries is also the result of what the Council sees as the more uneven quality of the applications it receives. In its last report the Council noted that there had been considerable improvement in the quality of the information provided by departments. Unfortunately, as this year has progressed, the Council has become concerned that this momentum has not been maintained. In particular it has perceived a tendency by some departments to fall back on the use of stock phrasing when trying to justify the application of certain exemptions. This suggests that they are not giving sufficient consideration to each application. This impression is reinforced by the fact that there has been an increasing number of cases where departments either withdraw or amend their applications significantly upon challenge by the Council. We recognise that departmental records management and reviewing teams are faced with increased workloads due to the transition from the 30- to the 20-year rule and other pressures. However, we would urge them to pay attention to the guidance and support provided by The National Archives, and to act on the feedback they receive from it and from the Council, to ensure that their applications are sufficiently well considered and presented to be approved.*

*The following table shows the number of applications for closure and retention considered by the Advisory Council, and the number queried by it. There were three outcomes in the case of queried applications:*

* 1. *a)  Clarification or additional information provided by a department was accepted by the Council and the application was agreed unchanged.*
	2. *b)  The department amended its application so that the closure period was reduced, the reasons for closure more accurately explained, or the amount of information to be closed reduced.*
	3. *c)  The department withdrew its application.*

*In addition, this year departments withdrew 11 applications for retention and instead agreed that the records should be transferred to The National Archives but requested that some or all of the material be closed under FOI exemptions.*

*2013/14*

*2014/15*

*2015/16*

*Closure*

*applications*

*applications considered*

*3,603*

*4,250*

*4,435*

*applications queried*

*141*

*181*

*480*

*applications where clarification was received and accepted*

*25*

*105*

*340*

*applications which*

*were amended by departments and accepted*

*32*

*67*

*71*

*applications withdrawn by departments following challenge by the Council*

*2*

*9*

*14*

*Retention applications*

*applications considered*

*459*

*793*

*952*

*applications queried*

*3*

*28*

*44*

*applications where clarification was received and accepted*

*2*

*21*

*25*

*•FOI Panels*

*Panels of three Council members are convened to consider the public interest in the release of closed information held in The National Archives, when this is requested as part of a FOIA request.*

*In most cases the closed information is either: information that if released would endanger the safety or physical or mental health of an individual; information that would damage international relations; or information relating to law enforcement. Cases are carefully scrutinised and debated by panels. If they consider it necessary, a panel will request further detail or clarification from the relevant department or The National Archives. Even where they are in agreement with exemptions being applied, they may also raise general concerns or issues they have about departmental practices and draw attention to inconsistencies between departments in their handling of FOIA requests.*

*During 2015-16, 28 panels were convened, with 278 cases being considered, an increase of 8% from 2014-15. Panels challenged 54 cases. Having been provided with more detail, the panels accepted departments’ arguments for continued closure in most cases. In two cases they remained of the view that public interest lay in disclosure and the departments subsequently opened the records.*

Observations

The Council is only an advisory body on records. I have not been able to ascertain, so far, how often the Minister overrules their advice. She has the final , statutory say under Section 3 [4]. The routine seems to be:

* the papers are submitted to Kew as required by section 3 [4]
* the relevant department applies for exemption
* the Council considers the application
* it applies its criteria
* it is 90% certain that the Council will agree with the application
* it makes a recommendation to the Minister
* the Minister exercises her power under section 3 [4]
* the file is unavailable to the public

In the last year the Council appears to have challenged only about 500 applications. Of these it sought clarification and when that was forthcoming , it approved over 300.