

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 7 February 2011

**Public Authority:** Northern Ireland Office  
**Address:** 11 Millbank  
London  
SW1P 4PN

#### Summary

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The complainant requested information regarding the Belfast District Policing Partnership. The Northern Ireland Office released some information but withheld the remainder on the grounds that it was exempt under section 35(1)(a) and (b), section 36(2)(b)(i), (b)(ii) and (c) and section 42 of the Act. During the Commissioner's investigation the NIO also applied the exemption at section 40(2) to some information.

The Commissioner finds that some of the requested information was properly withheld under sections 35(1)(a) and (b), section 36(2)(i) and (ii), section 40(2) and section 42(1) of the Act. However the Commissioner finds that the public interest in maintaining the relevant exemption does not outweigh the public interest in disclosing some of the information. Therefore the Commissioner requires the NIO to release this information to the complainant.

#### The Commissioner's Role

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the Act). This Notice sets out his decision.

#### Background

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2. The Independent Commission for Policing in Northern Ireland published "A New Beginning: Policing in Northern Ireland" in September 1999.

The "Patten Report", as it was known, recommended that each district council area in Northern Ireland should establish a District Policing Partnership (DPP) whose membership should consist of both elected and independent representatives. The Patten Report recommended that a separate DPP be set up for Belfast, and the Belfast Policing Partnership was established in March 2003.

3. The Police (Northern Ireland) Act 2003 amended the Police (Northern Ireland) Act 2000 and provided that sub-groups be established for each of the police districts in Belfast. Where the overall Belfast DPP is satisfied that a sub-group is carrying out its functions satisfactorily the Belfast DPP is not required to duplicate those functions.
4. Further changes were made to the function and membership of the Belfast sub-groups in the Northern Ireland (St Andrews Agreement) Act 2006.

## The Request

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5. On 23 September 2008 the complainant requested the following information from the Northern Ireland Office (the NIO):

*"All documentation, notes and emails regarding the NIO's involvement in the reconstitution of Belfast DPP"*

6. The NIO acknowledged receipt of the complainant's request on 29 September 2008. The NIO asked for clarification from the complainant as to what he meant by the phrase "*reconstitution of Belfast DPP*" given that different interpretations of the term "*reconstitution*" had been used in respect of previous discussions between the complainant and the NIO.
7. Later that day, the complainant contacted the NIO regarding the clarification of his request. The complainant stated that:

*"According to the Cambridge Dictionary – reconstitution means rewriting; reforming; piecing together.*

*And I think that's what the NIO/NIPD and Belfast DPP did – so could I have all documentation, notes and emails regarding the NIO's involvement in the reconstitution of Belfast DPP?"*

8. On 30 September 2008 the NIO acknowledged the clarification of the complainant's request. The NIO indicated that in light of previous

- correspondence with the complainant, the NIO interpreted the phrase "*reconstitution of Belfast DPP*" to mean the policy of increasing the powers of the sub-groups.
9. On 28 October 2008 the NIO advised the complainant that it was refusing to release the information requested as it was exempt under section 35 and section 36 of the Act. The NIO advised the complainant that it required an extension of time to consider the public interest test in respect of these exemptions.
  10. On 24 November 2008 the NIO wrote to the complainant and advised him that it was also applying section 42 and section 43 to the requested information. The NIO advised the complainant that it required a further period of time to consider the public interest test but would hope to convey the final response to the complainant on or before 15 December 2008.
  11. On 15 December 2008 the NIO provided its substantive response to the complainant. The NIO provided detailed background information to assist the complainant, albeit that some of this fell outside the scope of his request. The NIO also provided some information to the complainant. However, the NIO confirmed that the remainder of the requested information was considered exempt on the basis of sections 35, 36 and 42 of the Act. The NIO confirmed that it had considered the public interest test and had found that the public interest in maintaining the exemptions outweighed the public interest in disclosure of the information.
  12. On 15 December 2008 the complainant requested an internal review of the decision to withhold the information. The complainant was of the view that the reconstitution of Belfast DPP had resulted in members of the public being unable to attend public meetings and "question senior PSNI officers about policing of the city as a whole". The complainant wanted to find out how this had happened, hence his request.
  13. On 6 February 2009 the NIO confirmed that an internal review had been completed. The NIO advised that it was upholding its decision to withhold the requested information.

## The Investigation

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### Scope of the case

14. On 8 February 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant provided background information regarding the history to the Belfast DPP prior to the decision being taken to split the Belfast DPP into 4 sub-groups. The complainant also made reference to other matters regarding this issue. These, however, are outside the remit of the Commissioner and will not be covered further in this Notice.

### Chronology

15. Regrettably the Commissioner's investigation was heavily delayed by the volume and nature of complaints received at his office. On 7 and 12 January 2010 the Commissioner wrote to the NIO. The Commissioner requested a copy of the withheld information, and further representations regarding the exemptions cited. In respect of section 36, the Commissioner asked for specific evidence in relation to the reasonable opinion of the qualified person.
16. The NIO responded to the Commissioner on 26 February 2010. The NIO provided the Commissioner with detailed arguments regarding the application of section 36. The NIO confirmed that it considered section 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) applied to the withheld information.
17. Following further correspondence, the NIO provided the Commissioner with the withheld information on 4 March 2010. The Commissioner noted that the NIO had identified a number of sections within the withheld information that were not considered relevant to the information requested by the complainant. For the information that was considered to fall within the scope of the request, the NIO had identified whether it was considered exempt on the basis of section 35 or section 36 of the Act. However the Commissioner noted that none of the withheld information was identified as being exempt under section 42 of the Act.
18. On 11 March 2010 the Commissioner wrote to the NIO to clarify a number of issues in relation to section 36. The Commissioner asked the NIO to confirm which parts of the information it considered exempt under section 42 together with detailed arguments as to why this exemption applied.

19. On 9 April 2010, the NIO provided the Commissioner with detailed arguments in respect of each of the exemptions, and in particular, reasons why each document was withheld.
20. On further reviewing the withheld information provided by the NIO, the Commissioner noted that some of the withheld information referred to by the NIO in its correspondence of 9 April 2010 had not been provided to him. On 12 April 2010, the Commissioner wrote to the NIO expressing his concerns. The Commissioner asked the NIO to check and clarify the extent of the information it held which was relevant to the complainant's request.
21. On 26 April 2010, the NIO confirmed that some of the withheld information had not been provided to the Commissioner. The NIO apologised and explained that these documents had been overlooked when the other information had been provided to the Commissioner. The NIO also provided the Commissioner with further representations as to why the information should continue to be withheld.
22. On 27 April 2010, the Commissioner received the remainder of the withheld information that should have been provided to the Commissioner in March 2010.
23. On 28 April 2010, the Commissioner asked the NIO to provide further representations as to why some of the withheld information had been identified as being not relevant to the complainant's request. The Commissioner also asked the NIO to provide him with further arguments regarding the application of section 42 to some of the withheld information.
24. On 14 May 2010, the Commissioner received further arguments from the NIO. The NIO advised the Commissioner that it had mistakenly stated in the refusal notice that one document had been released in full, whereas in fact part of it had been withheld. The NIO also clarified that it had incorrectly cited section 43, and did not intend to rely on this exemption.
25. The NIO confirmed that it had considered the names of the civil servants to be not relevant to the complainant's request and therefore had not applied any exemption to these names. Following discussions with the Commissioner, the NIO accepted that the names of the civil servants contained within the withheld information were relevant to the request. At this stage the NIO advised the Commissioner that whilst the names of the senior civil servants could be disclosed, the names of the junior officials were considered exempt on the basis of sections

38(1) and 40(2) of the Act. The NIO agreed to disclose the names of the senior civil servants to the complainant.

26. On 17 May 2010, the Commissioner sought further information from the NIO. The NIO provided this on 28 May 2010.

### **Findings of fact**

27. The withheld information in this case is contained within 11 documents. These documents include the following broad types of information:

- Briefing papers and notes
- Memoranda
- Legal advice on draft legislation
- Names of junior staff

### **Analysis**

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#### **Exemptions claimed**

#### **Section 35(1)(a): formulation or development of government policy Section 35(1)(b): ministerial communications**

28. The NIO identified information contained in six of the 11 documents that it considered exempt under section 35(1)(a) and (b) of the Act. Section 35(1)(a) provides that information held by a government department is exempt if it relates to the formulation or development of a government policy. Section 35(1)(b) provides that information held by a government department is exempt if it relates to Ministerial communications.
29. To engage section 35(1)(a), the information in question must relate to the formulation or development of government policy. The Commissioner takes the view that the formulation of government policy relates to the early stages of the policy process. This covers the period of time in which options are collated, risks are identified, and consultation occurs whereby recommendations and submissions are presented to a Minister. Development of government policy however goes beyond this stage to improving or altering existing policy such as monitoring, reviewing or analysing the effects of the policy.
30. Having reviewed the withheld information, the Commissioner believes that this information clearly relates to the formulation and development of a particular policy, namely the decision to increase the

powers of the Belfast sub-groups in 2003. As such, the Commissioner is satisfied that section 35(1)(a) is engaged in relation to the particular sections of the withheld documents.

31. The NIO has argued that various portions of the withheld information were also exempt under section 35(1)(b) of the Act. The Commissioner finds that this information consists of correspondence between Ministers and therefore these clearly fall within the definition of Ministerial communications. Therefore the Commissioner is also satisfied that section 35(1)(b) is engaged in respect of the information withheld under this exemption.
32. Sections 35(1)(a) and (b) are qualified exemptions and are therefore subject to the public interest test. The Commissioner must therefore consider whether the balance of the public interest lies in favour of maintaining the exemptions or whether it lies in favour of disclosure of the information.

#### **Public interest in favour of disclosing the withheld information**

33. The NIO recognised that there is a general public interest in being able to understand the way in which government works and how decisions are made. Through this, the public is able to see the extent to which various factors influence those decisions.
34. The NIO also accepted that disclosure of this information would provide greater transparency and accountability. This in turn would increase levels of trust and interest in the conduct of public affairs and in particular, the decisions taken in respect of the reconstitution of the Belfast DPP.

#### **Public interest in favour of maintaining the exemptions**

35. The NIO argued that in light of recent political developments in Northern Ireland (namely the transfer of policing and justice powers) the release of this information would undermine confidence and trust between the government and the political parties. The NIO stated that recent talks reinforced the importance of allowing Ministers and political parties the private space to openly and freely engage in sensitive political discussions and how important it was for officials to give opinions freely to Ministers on sensitive political issues.
36. The Commissioner believes that the arguments made by the NIO in favour of maintaining the exemption can be loosely grouped as falling within the following categories, where disclosure would be likely to:

- inhibit the free and frank discussion of possible options, known as a “chilling effect”, which would damage the content and quality of communications between Ministers and their advisers, which would lead to poorer decision making;
  - undermine the “safe space” required for Ministers and officials to formulate, develop and debate different ideas away from external interference and distraction, which would lead to poorer decision making; and
  - undermine the collective responsibility that Ministers have in relation to the specific policy, to allow them to promote and defend the policy and maintain a united front without revealing details of diverging views during the decision-making process, which would undermine government unity and effectiveness. The convention of collective responsibility also incorporates elements of the chilling effect and safe space arguments, but arguments are considered as part of the first two categories above.
37. The NIO stated that the information relates to the formulation and development of policy concerning the extension of the role of the Belfast DPP and its sub-groups. The information indicates how the views freely expressed by government officials, Ministers and political parties helped shape that policy. The NIO advised the Commissioner that if this information were to be released, it could potentially prejudice relationships between the political parties and government officials and lead to poorer decision making in future.

### **Chilling effect**

38. The NIO argued that further policy development could be hindered through the release of information which discussed the options considered or, in relation to the information falling within s35(1), how different policies were implemented. During the course of the Commissioner’s investigation, the NIO confirmed that the policy in respect of the organisation of the DPPs and DPP sub-groups was complete at the time of the request. However, the NIO advised the Commissioner that a current policy process was ongoing which concerned proposals to potentially integrate DPPs and Community Safety Partnerships (CSPs). A consultation paper had been issued in respect of this proposal in March 2010<sup>1</sup>. The NIO argued that there would be a considerable amount of overlap in respect of the

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<sup>1</sup> [http://www.dojni.gov.uk/index/public-consultations/current-consultations/constdoc\\_v1\\_6062\\_scr.pdf](http://www.dojni.gov.uk/index/public-consultations/current-consultations/constdoc_v1_6062_scr.pdf)



discussions that took place regarding the organisation of the DPPs and the forthcoming proposals for the DPPs and CSPs. Therefore the NIO argued that to release the requested information would significantly impact upon this latest consultation and it would therefore not be in the public interest to release the requested information at this time.

39. The Commissioner recognises that both Ministers and civil servants have a responsibility to ensure that the best possible outcome is reached through a series of open discussions. These discussions must be conducted in a way which allows all options to be discussed in a frank and candid fashion, including dissenting and diverging views. However the Commissioner notes that the consultation referred to above was not live at the time of the complainant's request, and in any event was a separate issue from the reconstitution of the DPPs. Therefore the Commissioner is not inclined to attach much weight to this argument.
40. The NIO argued that the disclosure of the information could also have a preventative effect on Ministers having the freedom to express their views openly and frankly. The NIO argued that such discussions are needed for Ministers to be allowed the opportunity to discuss difficult issues with candour and that the release of those details would inhibit that. The NIO was of the view that disclosure of this information could potentially lead to Ministers feeling inhibited from being frank and candid with each other. The NIO argued that the background in which these discussions took place was extremely important bearing in mind the political differences and sensitivities that existed in Northern Ireland at this particular time. If information of this kind were to be disclosed, the quality of future debates that lead to a collective decision would be diminished.
41. The Commissioner believes that this is the "chilling effect" argument. A chilling effect argument is one which is directly concerned with the potential loss of frankness and candour in debate or advice which, as a result, would lead to poorer quality advice and less well formulated policy and decisions. This would clearly not be in the public interest. The Commissioner therefore considers that where this would occur, this would be a strong argument in favour of maintaining the exemption.
42. The NIO also argued that disclosure of the withheld information could lead to officials being reluctant or unwilling to freely express their ideas or communicate candidly, away from the pressure of political debate, on confidential policy matters and possible policy options. This may reduce the quality of debate which is required to ensure that the best

possible option is taken when formulating policy which is politically sensitive.

### **Safe space**

43. The safe space argument is based on the argument that it is in the public interest for Ministers and officials to be able to have a full and open debate away from external scrutiny so as to enable them to reach an agreed position. In light of this the Commissioner considers that once government has successfully determined an issue and agreed a collective position, then "safe space" arguments will no longer apply.

### **Collective responsibility**

44. However, this does not mean that the public interest considerations underlining collective responsibility will completely fall away. The Commissioner accepts that there may be a separate public interest in allowing the Cabinet to promote and defend an agreed position without revealing divergent views. This was the finding of the Tribunal in the case of the *Scottish Office v Information Commissioner*, which stated that:

*"... the long standing convention that Ministers are collectively accountable for the decisions of the Cabinet and are bound to promote that position to Parliament and the general public, regardless of their individual views. During the course of meetings of the Cabinet or of Cabinet Committees or through correspondence, Ministers may express divergent views, but once a decision is taken, the convention dictates that they must support it fully. When decisions are announced as Government policy, the fact that a particular Minister may have opposed it in Cabinet is not disclosed."*<sup>2</sup>

45. In relation to information revealing the views of Ministers, the NIO argued that Ministers need to be able to express their views frankly with the expectation that it can argued freely in private whilst retaining an united front when decisions have been made.

### **Balance of the public interest arguments**

46. The Belfast DPP was reconstituted in April 2008, following several years of discussions involving the formulation and development of the policy. The Commissioner notes that the withheld information contains detailed discussions regarding various and diverging views on how the

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<sup>2</sup> EA/2007/0070, paragraph 82

Belfast DPP would be reconstituted. The documents contain robust arguments as to why some options may be more preferable than others, with other considerations being discarded for a variety of reasons.

47. However, with respect to the timing of the request and the impact it may have on the "chilling effect", the Commissioner notes that the complainant's request was submitted some 6 months after the decision was taken to reconstitute the Belfast DPP. The Commissioner is of the view that where a decision has been taken in relation to the formulation or development of a particular policy, the weight that should be attached to frankness and openness would be reduced as the free and frank discussions have clearly taken place as a decision has already been taken and implemented.
48. The Commissioner notes that the reconstitution of the Belfast DPP was, among other matters, discussed and debated by the then Minister of State, Mr Paul Goggins MP, before Westminster on 2 July 2007<sup>3</sup>. The enabling legislation came into force on 4 September 2007<sup>4</sup>. Therefore the Commissioner is of the view that the policy that was discussed and formed the reconstitution of the Belfast sub-groups and their functions was developed and subsequently implemented. Therefore the Commissioner considers that the weight that could be attributed to the chilling effect may be somewhat diminished as the specific issue was no longer "live" at the time of the request. For the same reason, the need for a safe space in which to consider the issues was no longer required. However, the Commissioner considers that the chilling effect arguments are still relevant as the need to protect collective responsibility will continue to apply after the decision has been taken, particularly where the issues remain sensitive. Therefore the Commissioner accepts this argument, but attaches limited weight to it.
49. The Commissioner is also mindful of the particular political context in which these discussions took place in Northern Ireland. The Commissioner accepts that discussions between Ministers, political parties and government officials would be compromised if individuals were unable to offer opinions and advice freely and openly in relation to sensitive political matters. The Commissioner believes that this is all the more important when it is considered in light of the political context in which these decisions were made.

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<http://www.publications.parliament.uk/pa/cm200607/cmhansrd/cm070702/debtext/70702-0018.htm>

<sup>4</sup> [http://www.opsi.gov.uk/sr/sr2007/nisr\\_20070371\\_en\\_1#f00001](http://www.opsi.gov.uk/sr/sr2007/nisr_20070371_en_1#f00001)

50. The Commissioner also notes that the NIO's primary argument in favour of maintaining the exemption was in relation to the effect it felt disclosure would have on collective responsibility. The public interest in maintaining promoting and defending a united position will by its nature continue to carry weight after the policy has been decided. In considering this, the Commissioner is mindful of the factors identified by the Tribunal in the *Scotland v Information Commissioner* which stated that:

*"Where Ministerial communication does engage the convention of collective responsibility, it is necessary, in particular, to assess whether and to what extent, the collective responsibility of Ministers would be undermined by disclosure. Factors such as the context of the information, whether it deals with issues that are still "live", the extent of public interest and debate in those issues, the specific views of different Ministers it reveals, the extent to which the Ministers are identified, whether those Ministers are still in office or in politics, as well as the wider political context are all matters that are likely to have a bearing on the assessment of the public interest balance".<sup>5</sup>*

51. The Commissioner has therefore also considered whether or not the withheld information reveals the private views of any Ministers. The Commissioner is unable to comment in any great detail as to the contents of the documents as to do so would reveal details of the withheld information. However, the Commissioner notes that, within a number of the documents withheld, policies and opinions of various political parties are expressed. Whilst the parties themselves are named, no particular member of the party is singled out or identified. Nevertheless, the Commissioner accepts that many leading members of the political parties whose views were contained within the withheld information are still active in the political context of Northern Ireland and would be easily identifiable.
52. In balancing the arguments in relation to the public interest, the Commissioner believes that there is a significant public interest in the government being transparent and open in its actions. The Commissioner notes that the decision to reconstitute the Belfast DPP was taken following a report into new policing arrangements following the Belfast (Good Friday) Agreement 1998. The Commissioner notes that the decision to split the Belfast DPP into four sub-groups was due to the fact that Belfast, with a population of 300,000 people, was too big to have just one DPP. Therefore, for the citizens of Belfast and indeed Northern Ireland as a whole, disclosure of this information

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<sup>5</sup> EA/2007/0070, paragraph 87

would be an opportunity for everyone to scrutinise the decisions taken by government in the interests of accountability and transparency.

53. The Commissioner notes the NIO's argument that the withheld information is relevant to the development of a further consultation, namely the consultation involving the integration of the DPPs and the CSPs as outlined above. The Commissioner has considered this argument but does not find that it can attract significant weight in respect of the public interest test as this further consultation was not live or in contemplation at the time of the request.
54. The Commissioner has again taken into account the arguments raised by the NIO in conjunction with the timing of the request. The Commissioner is mindful that there is no inherent weight in withholding information relating to Ministerial communications. However, the fact that many of the views were given freely and candidly in relation to sensitive and political matters is a strong argument in favour of maintaining the 35(1)(b) exemption. The Commissioner notes also that, like the information withheld under section 35(1)(a), this is information that related to a particular policy decision that had already been formulated, developed and implemented at the time of the request. However the Commissioner understands that the issue of policing arrangements continues to be relatively sensitive in the Northern Ireland context.
55. Taking all these considerations into account, the Commissioner has found that, in the circumstances of this case, the public interest in maintaining the relevant exemption does not outweigh the public interest in disclosing some of the information withheld under section 35(1)(a) and 35(1)(b). However the Commissioner is satisfied that the public interest in maintaining the exemption in relation to the majority of the withheld information outweighs that in disclosure.

### **Section 36: prejudice to the effective conduct of public affairs**

56. Section 36(2)(b)(i) and (ii) provides an exemption where disclosure would, or would be likely to, inhibit the free and frank provision of advice, and the free and frank exchange of views for the purposes of deliberation, respectively. Section 36(2)(c) provides an exemption where disclosure would, or would be likely to, prejudice the effective conduct of public affairs in a manner other than that specified in section 36(2)(a) or (b).
57. The NIO claimed that section 36(2)(b)(i) and (ii), and section 36(2)(c) applied to information contained within 6 of the 11 documents. The Commissioner notes that the exemptions at section 35 and 36 are

mutually exclusive, and having inspected the information withheld under section 36 he is satisfied that it would not be exempt under section 35 of the Act.

### Is the exemption engaged?

58. In order to establish whether the section 36 exemption has been applied correctly the Commissioner considers it necessary to:
1. Ascertain who was the qualified person or persons for the public authority in question;
  2. Establish that an opinion was given;
  3. Ascertain when the opinion was given; and
  4. Consider whether the opinion given was reasonable
59. In this case the Commissioner has established that the reasonable opinion was given by Mr Paul Goggins MP, who was Minister of State for Northern Ireland at the time of the request. The Commissioner is therefore satisfied that Mr Goggins was a qualified person for the purposes of section 36(5) of the Act.
60. The NIO provided the Commissioner with a copy of the submission that was given to the Minister which outlined the reasons why this exemption was considered applicable to the requested information. This submission was dated 12 December 2008, and the NIO provided the Commissioner with documentation dated 15 December 2008 that confirmed that the Minister agreed with the submission.
61. In deciding whether the opinion was 'reasonable' the Commissioner has been led by the Information Tribunal's decision in the case of *Guardian Newspapers & Brooke v Information Commissioner & BBC*<sup>6</sup> in which the Tribunal considered the sense in which the qualified person's opinion is required to be reasonable. It concluded that:
- "...in order to satisfy the sub-section, the opinion must be both reasonable in substance and reasonably arrived at."*
62. The submission provided to the Minister included detailed arguments as to why he should form the opinion the exemption was engaged. These can be summarised as follows:
- Officials need free space to be able to discuss difficult and sensitive issues. If the withheld information were to be disclosed this would not be the case. Government officials

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<sup>6</sup> Appeal nos EA/2006/0011 & EA/2006/0013

would be less likely to provide full and frank advice and opinions on the issues under discussion, and this would be likely to prejudice the effective conduct of public affairs.

- Disclosure of the withheld information would also be likely to inhibit the willingness and ability of officials to share opinions in writing and at a sufficient level of detail. This in turn would make it more difficult to establish the appropriate government position on sensitive issues.
- It is essential that government is able to conduct private discussions with key stakeholders, in this case the political parties. Disclosure of the withheld information would be likely to result in parties being less willing to engage with government on sensitive issues.

63. The Commissioner notes that the submission does not specify which limb of section 36 is relevant. However, it does discuss the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation, which the Commissioner equates to subsections 36(2)(b)(i) and (ii) of the Act. Although the submission refers only to the public interest, rather than the engagement of the exemption, it does include detailed consideration of the possible impact of disclosure. Therefore the Commissioner is minded to accept that the opinion was given in relation to these two limbs of the exemption and was based on relevant factors, and was reasonably arrived at.
64. In respect of the prejudice test, the Commissioner notes that the NIO appears to be relying on the “would be likely to prejudice” test, rather than the “would prejudice” test. In the Commissioner’s view this means that the prejudice need not be more likely than not, but must be more than hypothetical or remote. The Commissioner is satisfied that it is reasonable to conclude in this case that there is a more than hypothetical risk of prejudice if the requested information was to be released, and so accepts that the opinion in relation to section 36(2)(b)(i) and (ii) was reasonable in substance. He also accepts that, were the prejudice to occur, it would be real and significant.
65. In light of the above the Commissioner accepts that the exemptions at sections 36(2)(b)(i) and (ii) are engaged in relation to the information withheld under section 36.
66. The Commissioner has also considered the NIO’s reliance on the exemption at section 36(2)(c). In order to engage this exemption, some prejudice other than that protected by another limb of section 36 must be indicated. The exemption at section 36(2)(c) is intended to apply to those cases where it would be necessary in the interest of

good government to withhold information, but which are not covered by another specific exemption.

67. The NIO has not specified which, if any, information it considered exempt under section 36(2)(c) as opposed to section 36(2)(b)(i) and (ii). However, the Commissioner has seen no evidence that section 36(2)(c) has been applied to any information which is not covered by section 36(2)(b)(i) and (ii). He does not, therefore, consider section 36(2)(c) to be engaged in this case.

### **Public interest test**

68. Section 36(2) is a qualified exemption and therefore the Commissioner must consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure of the information. The Tribunal in *Guardian & Brooke* commented upon the distinction between consideration of the public interest under section 36 and consideration of the public interest test under the other qualified exemptions contained within the Act:

*"The application of the public interest test to the s36(2) exemption involves a particular conundrum. Since under s36(2) the existence of the exemption depends upon the reasonable opinion of the qualified person it is not for the Commissioner or the Tribunal to form an independent view on the likelihood of inhibition under s36(2)(b), or indeed of prejudice under s36(2)(a) or (c). But when it comes to weighing the balance of public interest under s2(2)(b), it is impossible to make the required judgment without forming a view on the likelihood of inhibition or prejudice"*<sup>7</sup>.

69. Therefore, in the Commissioner's opinion this means that whilst due weight should be given to the reasonable opinion of the qualified person when assessing the public interest, the Commissioner can and should consider the severity, extent and frequency of prejudice or inhibition to the free and frank exchange of views in order to make a decision in relation to the public interest test.

### **Public interest arguments in favour of disclosing the information**

70. The Commissioner notes that arguments presented in favour of disclosing the information in relation to section 35(1)(a) and (b) are also applicable to section 36(2)(b)(i) and (ii). These can be summarised as:

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<sup>7</sup> EA/2006/0011 & EA/2006/0013, para 88



- The general public interest in being able to understand the way in which Government works and how decisions are made.
- Disclosure of this information would provide greater transparency and accountability, which would increase levels of trust and interest in the conduct of public affairs and in particular, the decisions taken in respect of the reconstitution of the Belfast DPP.

### **Public interest arguments in favour of maintaining the exemption**

71. The NIO pointed out that the information withheld under section 36(2)(b)(i) and (ii) was generated with the expectation that it would not be made publicly available. The NIO argued that there was a strong public interest in protecting the ability of Ministers to discuss difficult issues with candour.
72. The NIO also argued that the government's discussions with political parties regarding the establishment of the Belfast sub-groups were private, and that it was essential that government be able to conduct private discussions with key stakeholders. The NIO reminded the Commissioner of the sensitive nature of the discussions, and of the issues under discussion.

### **Balance of public interest arguments**

73. In favour of maintaining the exemption, the Commissioner recognises the public interest in providing decision makers in public authorities with free thinking space, and allowing them to make objective decisions. The Commissioner recognises that a considerable weight can be attributed to the ability for government to be able to openly and freely discuss sensitive matters without the threat of outside interference or influence which might inhibit free and frank discussion. The Commissioner is aware that, given the very nature of the requested information, there would have been a number of different views discussed over a lengthy period of time. The Commissioner accepts that it is important for Ministers to discuss all possible options when reaching a view on sensitive political issues.
74. The Commissioner has balanced these against the arguments presented in favour of disclosing the requested information. The Commissioner is aware that at the time of the request, the decision relating to these discussions had already been implemented. The Commissioner feels that there is a strong argument in allowing the public to be able to see the robust arguments that were made in favour of one decision over another. This will give the public a clearer

understanding as to the workings of government and will help to instil confidence in the public that the government considered every available option, even the unpopular ones, before a decision is made.

75. The Commissioner has again considered the timing of the request. Even though the information contains details of the frank and open discussions that took place between the government officials and the Ministers, some of these discussions relate to decisions which had already taken place some time before the complainant's request. The Commissioner accepts that given the issues at stake there is a high degree of expectation that differences of opinion would be expressed between the various individuals as part of these discussions, but he also accepts that there would have been an expectation of confidentiality, evidenced by the protective marking on much of the relevant documentation. The Commissioner has found this to be a persuasive factor which significantly increases the likely severity of the potential chilling effect in this particular case, and therefore substantiates the public interest in withholding much of the requested information.
76. On the basis of the above, the Commissioner has concluded that the public interest in maintaining the relevant exemption does not outweigh the public interest in disclosing a limited amount of the information withheld under sections 36(2)(b)(i) and 36(2)(b)(ii). However, the Commissioner finds that, in relation to the majority of the withheld information, the public interest in maintaining the exemption does outweigh that in disclosure.

## **Section 42: legal professional privilege**

77. The NIO withheld information contained in two documents on the basis of section 42(1). Section 42(1) states that information in respect of which a claim to legal professional privilege could be maintained in legal proceedings is exempt information.
78. The Commissioner has first considered whether the withheld information is subject to legal professional privilege. The Commissioner has inspected the withheld information and is satisfied that the documents constitute communications between government officials and legal advisers for the sole or dominant purpose of obtaining legal advice.
79. Legal professional privilege is an established principle which allows parties to take advice, discuss legal interpretation or discuss matters of litigation freely and frankly in the knowledge that such information will be retained in confidence.

80. Advice privilege will apply where no litigation is in progress or being contemplated. In these cases, communications must be confidential, made between a client and professional legal adviser acting in their professional capacity and for the sole or dominant purpose of obtaining legal advice. Communications made between adviser and client in a relevant legal context will attract privilege. In this case, the Commissioner finds that the information in question falls within the definition of legal advice privilege. It is noted by the Commissioner that there is no suggestion that privilege has been waived in this instance.
81. As section 42 is a qualified exemption, the Commissioner must consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

### **Public interest arguments in favour of disclosing the information**

82. The nature of the legal advice surrounds the circumstances surrounding proposed amendments to the Belfast DPP and sub-groups. The NIO recognised that there is some public interest in the disclosure of legal advice which assisted in the deliberation processes undertaken by government. This allows the public the opportunity to acquire a better understanding of the workings of government and its relationships with legal advisers.
83. The Commissioner also believes that by disclosing the reasoning behind public authorities' decisions, there is a greater sense of accountability in relation to actions or decisions that are taken. This would allow for a more informed debate as to how and why decisions are made. The Commissioner believes that this is all the more important in cases where a public authority's decisions have a direct effect on people's lives.

### **Public interest arguments in favour of maintaining the exemption**

84. The NIO argued that government departments needed high quality, comprehensive legal advice for the effective conduct of their business. Without such advice, the quality of the government's decision-making would be considerably reduced as it would not be able to make fully-informed decisions on the basis of the best advice available.
85. The NIO stated that a legal adviser must be able to present all the arguments to their client, including those which do not necessarily support the case in question. The purpose of legal advice is to set out the strengths and weaknesses of a case so that the client can be fully informed of what options are available before a decision can be taken.

If legal advice was disclosed, this could potentially prejudice the government's ability to defend its interests. Such disclosure could unfairly expose the government's legal position to challenge, which could be extremely expensive as well as damaging and embarrassing to the government if the challenges were successful. Such an outcome may well lead to officials being reluctant to seek advice in the first instance so as to avoid this occurring. Such outcomes would clearly not be in the public interest.

86. Additionally, the NIO argued that the disclosure of the legal advice could result in lawyers and clients seeking to avoid making a record of the advice given or the advice sought. The NIO maintained that it would disadvantage the public if the details of legal advice were not correctly recorded for the purposes of accuracy and future reference. However the Commissioner does not accept this argument, as he does not accept that public servants would cease to perform their duties on the ground that the information may be disclosed. Such public servants would be in breach of their professional duty should they deliberately withhold relevant information or fail to record advice given in a manner consistent with this duty.
87. The NIO also stated that it is likely that legal advice given in one context will be helpful or relevant to subsequent issues. Therefore disclosure would mean not only prejudicing the present circumstances of the case, but would also have a significant impact on future cases. The disclosure of legal advice even when no litigation is in prospect may disadvantage the government in future litigation. The NIO argued that individual disclosures could damage the confidential relationship between the lawyer and the client. Therefore it was important that decisions on disclosure are considered in the full context.
88. The Commissioner has considered the age of the legal advice when considering the public interest balance. At the time of the request, the Commissioner notes that the legal advice in document 5 was 6 years old, whereas the legal advice in document 10 was 2 years old. The Commissioner considers that as the later legal advice in particular is comparatively recent legal advice, this is a strong factor in favour of maintaining the exemption.

### **Balance of the public interest arguments**

89. The Commissioner has carefully considered the arguments presented in favour of maintaining the exemption against the arguments favouring disclosure. The Commissioner finds that there is a very strong argument in favour of withholding information that is legally privileged,

and is guided by the Tribunal's decision in *Bellamy v ICO & DTI*<sup>8</sup>. The Commissioner accepts that the concept of legal professional privilege is based on the need to ensure that clients receive confidential and candid advice from their legal advisers. This is a fundamental principle in the legal system and there is a strong public interest in maintaining it.

90. The Commissioner has also considered the age of the advice itself. In the case of *Kessler v Information Commissioner and the Ministry of Defence*, the Tribunal considered that advice which was weeks old was "relatively recent"<sup>9</sup>. In *Kitchener v Information Commissioner and Derby County Council* advice which was 6 years old was described "still relatively recent"<sup>10</sup>. The Commissioner is satisfied that, as of the date of the request, the legal advice is recent and this, with the fact that the advice remained live as at the date of the request, adds considerable weight to the public interest in maintaining the exemption.
91. Taking into account the recent and live nature of the advice, the Commissioner has given considerable weight to the public interest in the public authority being able to avail of legal advice, which could be jeopardised both in quality and quantity if this information was subject to disclosure. In balancing the arguments in favour of disclosure against the arguments in favour of maintaining the exemption, the Commissioner is satisfied that in this particular case, there is a strong public interest in maintaining the exemption of section 42 of the Act. The Commissioner finds that the inherent public interest in protecting the established convention of legal professional privilege is not countered in this case by at least equally strong arguments in favour of the disclosure. Therefore the Commissioner finds that in this case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

### **Section 40(2): personal information of third parties**

92. As indicated above, following discussions with the Commissioner, the NIO accepted that the names of the civil servants contained within the withheld information were relevant to the request. The NIO advised the Commissioner that whilst the names of the senior civil servants could be disclosed, the names of the junior officials were considered exempt on the basis of sections 38(1) and 40(2) of the Act. However the Commissioner is of the view that personal information should generally be considered under section 40 of the Act.

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<sup>8</sup> EA/2005/0023

<sup>9</sup> EA/2007/0043

<sup>10</sup> EA/2006/0044

93. Although it was not initially cited by the NIO, the Commissioner believes it appropriate to consider the late application of section 40(2) to the withheld information. As the NIO agreed to release the names of the senior civil servants, the Commissioner will only investigate whether or not the names of junior officials have been correctly withheld. The Commissioner notes that the NIO identified the names of four junior officials that were considered exempt information.
94. Section 40(2) of the Act is an exemption which relates to the personal information of third parties. This provision creates an absolute exemption for information falling within the definition of personal data which is contained in section 1(1) of the Data Protection Act 1998 ("the DPA"), if certain conditions are met. One of those conditions is where disclosure would contravene any of the data protection principles set out in Schedule 1 of the DPA. The relevant text of the DPA is cited in the Legal Annex attached to this Decision Notice.
95. The NIO advised the Commissioner that it was withholding officials' names because these individuals were not in public facing roles, and they were not personally responsible for decisions taken. In addition the NIO argued that it had a duty of care to officials, particularly given the threat from dissidents. The NIO argued that disclosure of the information would be unfair to those individuals, and would therefore breach the first data protection principle (that personal data must be processed fairly and lawfully).
96. The NIO referred the Commissioner to arguments it had put forward in relation to section 40(2) in respect of a previous complaint handled by the Commissioner<sup>11</sup>. The Commissioner considers this approach to be acceptable, given the Information Tribunal's view in the case of *Secretary of State for Work and Pensions v the Information Commissioner*<sup>12</sup>. In this case the Tribunal found that it was not necessary to release the name of a junior civil servant who had signed off a decision because he was "acting largely on behalf of others" and was "not personally responsible". The Commissioner has also produced guidance on disclosure of personal information relating to public authority staff.
97. Taking account of all the circumstances, the Commissioner considers that the NIO was right to distinguish between junior and senior officials when deciding what information ought to be disclosed. The Commissioner is satisfied that it would be unfair to disclose the names

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<sup>11</sup> Decision Notice reference FS50115412

<sup>12</sup> EA/2006/0040

of junior officials, and such disclosure would breach the first data protection principle.

## Procedural Requirements

### Section 1(1)(b): duty to provide information and Section 10(1): time for compliance

98. Section 1(1)(b) of the Act requires a public authority to provide information to an applicant in response to a request. Section 10 of the Act states that a public authority must comply with section 1(1) promptly, and in any event not later than twenty working days after the request has been received.
99. The Commissioner has decided that as some of the information was incorrectly withheld, the Commissioner believes that the information should have been provided by the NIO to the complainant at the time he submitted his request. The NIO's failure to do this constitutes a breach of section 1(1)(b). Furthermore, by failing to provide this information within twenty working days from the date of the request, the NIO also breached section 10(1) of the Act.

## The Decision

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100. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
  - It correctly withheld some of the information requested under section 42, section 35(1)(a) and section 35(1)(b), and 36(2)(b)(i) and 36(2)(b)(ii) of the Act .
101. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
  - Some of the information, identified in the confidential annex to this notice, served only on the public authority, was incorrectly withheld under section 35(1)(a) and section 35(1)(b) of the Act;
  - Some of the information, identified in the confidential annex to this notice, served only on the public authority, was incorrectly withheld under section 36(2)(b)(i) and 36(2)(b)(ii) of the Act; and

- The public authority breached sections 1(1)(b) and 10(1) of the Act by failing to disclose this information at the time of the request.

## **Steps Required**

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102. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

- Disclose to the complainant some of the information previously withheld under sections 35 and 36 of the Act, identified in the confidential annex to this notice;

103. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

## **Failure to comply**

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104. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.



## Right of Appeal

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105. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals  
PO Box 9300  
Arnhem House  
31 Waterloo Way  
LEICESTER  
LE1 8DJ

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).  
Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

**Dated the 7<sup>th</sup> day of February 2011**

**Signed .....**

**Graham Smith  
Deputy Commissioner**

**Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## **Legal Annex**

### **Section 1 – General right of access to information held by public authorities**

1(1) Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him.

### **Section 10 – Time for compliance**

10(1) Subject to subsection (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.

### **Section 16 – Duty to provide advice and assistance**

16(1) It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.

16(2) Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case.

### **Section 17 – Refusal of request**

17(1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which –

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.

17(2) Where –

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim –
  - (i) that any provision of Part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
  - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
- (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.

### **Section 35 – Formulation and development of government policy**

35(1) Information held by a government department or by the National Assembly for Wales is exempt information if it relates to –

- (a) the formulation or development of government policy,
- (b) Ministerial communications,
- (c) the provision of advice by any of the Law Officers or any request for the provision of such advice, or
- (d) the operation of any Ministerial private office.

### **Section 36 – Prejudice to effective conduct of public affairs**

36(1) This section applies to –

- (a) information which is held by a government department or by the National Assembly for Wales and is not exempt information by virtue of section 35, and
- (b) information which is held by any other public authority.

36(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act –

- (a) would, or would be likely to, prejudice -
  - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
  - (ii) the work of the Executive Committee of the Northern Ireland Assembly,
  - (iii) the work of the executive committee of the National Assembly for Wales,
- (b) would, or would be likely to inhibit -
  - (i) the free and frank provision of advice, or
  - (ii) the free and frank exchange of views for the purposes of deliberation, or
- (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

#### **Section 40 – Personal data**

40(1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.

40(2) Any information to which a request for information relates is also exempt information if –

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.

40(3) The first condition is –

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of “data” in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene –
  - (i) any of the data protection principles, or
  - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemption

section 33A(1) of the Data Protection Act 1998 (which relates to manual data held by public authorities) were disregarded.

## **Section 42 – Legal Professional privilege**

42(1) Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.

42(2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.