Neutral Citation No: [2020] NIQB 69 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **TRE11355** *ICOS No:* *Delivered:* **25/11/2020**

Formatted Table

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

_____

IN THE MATTER OF AN APLICATION BY WILLIAM HOLDEN FOR JUDICIAL REVIEW

AND IN THE MATTER OF A CONTINUING DECISION OF THE PUBLIC RECORDS OFFICE OF NORTHERN IRELAND

AND IN THE MATTER OF A CONTINUING DECISION OF THE NORTHERN IRELAND COURTS AND TRIBUNAL SERVICE

_____

TREACY J

Introduction

[1] The Applicant, William Holden, has sought disclosure of an inquest file held by the Public Records Office of Northern Ireland ("PRONI"). He seeks leave to quash the decision of the PRONI that it would only disclose that inquest file upon receipt of a signed undertaking which limits the use that any disclosed information can be put to.

[2] The Applicant also challenges the redaction of certain information from the disclosure under The Freedom of Information Act 2000 ("the 2000 Act") where that information was already in the public domain.

[3] At an advanced stage of these proceedings it became clear that the Northern Ireland Courts and Tribunal Service ("NICTS") had made a decision in 2013 that Rule 38 of the Coroners Rules 1963 would no longer apply to historical inquest papers which had been transferred to PRONI. This development prompted the joinder of the NICTS and amendment of the Order 53 statement seeking relief against the decision to disapply Rule 38.

Factual Background

[4] The Applicant was arrested on 16 October 1972, when aged 17, by members of the British army. He was detained and questioned by the military in respect of the murder of a Private Frank Bell. He was subsequently transferred to police custody, wherein he is said to have signed a short statement confessing to the murder.

[5] The Applicant pleaded not guilty at trial. He relied on alibi evidence at the trial. The admissibility of the confession was also at issue at trial. The Applicant contended that while in military custody he was ill-treated, assaulted, subjected to water torture/boarding and threatened with death at gunpoint. The Applicant was convicted of murder on 15 April 1973 and sentenced to death. The death penalty was subsequently commuted to a life sentence. The Applicant spent 17 years in prison, prior to his release on life licence.

[6] Following the making of representations to the Criminal Cases Review Commission ("CCRC"), the Applicant's convictions were referred to the Northern Ireland Court of Appeal on the basis that they were unsafe. The representations cited the work of an investigative journalist and the evidence he could provide in support of the Applicant's contentions on the use of water torture/boarding. The representations also relied on new evidence from a former member of the British army and medical orderly who arrived at the scene of the shooting in the immediate aftermath and indicated that the trajectory of the shot relied upon by the prosecution at the trial could not have been correct. This man had provided an account to a local journalist.

[7] The CCRC decided to refer the Appellant's conviction to the Court of Appeal and the basis upon which they decided to refer the decision is in reliance on information which "could not have been obtained by Mr Holden or his representatives". This material has been provided to the Court of Appeal by way of a confidential Annex. The contents of the confidential annex were such that the CCRC took the view that there was a real possibility that, as per paragraph 94 of the CCRC decision:

(a) The Court will be unable to conclude that the new evidence would not have made any difference to Lord Lowry CJ's ruling on the admissibility of the admissions to the Army and/or the confessions of the RUC;

(b) The Court will be unable to conclude that the confessions to the Army and/or the RUC, if admitted, would have resulted in a verdict of guilty had the jury been told of the new evidence;

(c) The Court will consider that the new evidence and the circumstances of Mr Holden's arrest and detention provide *prima facie* grounds for concluding that his convictions are unsafe and that there are no sufficiently countervailing factors to displace this *prima facie* conclusion.

Formatted: Indent: Left: 0 cm

[8] Ultimately the defence had disclosed to them 2 documents from the Confidential Annex which the Court ruled were relevant. These were the Blue Card Rules applicable in 1972 (which governed the circumstances in which someone could be arrested and questioned by the military) and a statement of evidence from a soldier, which confirmed that the military had been proactively seeking the Applicant. The convictions were quashed by the Court of Appeal on 21 June 2012 on the basis that the non-disclosure impacted on the safety of the Applicant's conviction and could have supported an application to exclude the confession evidence.

[9] Additionally, the Applicant complained of issues in relation to his ill-treatment and the circumstances of his confession that did not form the basis of his referral, as set out above.

[10] Since his conviction was quashed the Applicant has pursued a claim for compensation as a consequence of miscarriage of justice pursuant to section 133 of the Criminal Justice Act 1988. The statutory scheme places the onus on the Applicant to submit proofs. The Applicant has also issued civil proceedings against the Ministry of Defence and Chief Constable of the Police Service of Northern Ireland.

Request for the Inquest File

[11] In furtherance of the above, the Applicant's solicitors corresponded with PRONI seeking access to the documentation used during and generated as a consequence of the inquest in respect of Private Bell, including all statements of evidence post-mortem evidence, medical and engineering reports, maps, photographs and the inquest findings ("the inquest file"). PRONI has confirmed that they hold an inquest file. Given the allegations which had been made against him, the Applicant would have been entitled to status as an Interested Party before any inquest.

[12] Amongst the information sought are details in relation to the trajectory of the shooting, any ballistic evidence and the relevant post-mortem report, which documentation may assist in supporting an application for compensation, inasmuch as it supports the conclusion that the Applicant suffered a 'miscarriage of justice'.

[13] PRONI responded to the Applicant's solicitors' request for disclosure by proposing to deal with the matter partially by way of undertaking, binding the signatory to keep the disclosed documentation in the strictest confidence. A prohibition on sharing the documentation with any third party, without the express permission of PRONI, with an exclusive exception for the purpose of obtaining legal advice or 'relevant expert opinion required in connection with the formulation of any such advice' or for making an application to the Attorney General that he direct that an inquest be conducted, is contained in the relevant undertaking.

[14] The Applicant seeks to judicially review decisions of PRONI regarding their request that he and his solicitors sign an undertaking before any disclosure is made pursuant to an undertaking procedure operated by PRONI. His solicitors wrote to PRONI challenging the application of the undertaking scheme and seeking disclosure of the full inquest file.

[15] Pursuant to his request for disclosure of the inquest file, documentation has been disclosed to the Applicant's solicitor after application of the Freedom of Information Act 2000 and the Data Protection Act 1998.

[16] The Applicant was concerned that the documentation received does not represent the full inquest file given the indications of PRONI that the undertaking scheme operates to afford greater access to material than that which would be available to an applicant who declines to sign the undertaking, but pursues a statutory route to accessing documentation. This appears from correspondence dated 30 January 2015 and 13 February 2015.

[17] It was subsequently confirmed that the documentation provided pursuant to the 2000 and 1998 Acts represented the full file and no further documentation would have been provided had the Applicant's solicitor provided the undertaking.

[18] The Applicant remained concerned that had the undertaking been provided he would have received fuller information in the sense that there would have been fewer redactions to the materials. PRONI reviewed the redactions to the documentation provided and released a revised version with fewer redactions. Three categories of redaction remained in the revised file being:

(a) Redactions under section 31 of the FOIA ("Law Enforcement"). Following a balancing exercise the Department of Culture, Arts and Leisure ('DCAL') Minister accepted that this exception was engaged in relation to the weapon serial number and concluded that the public interest lay in not disclosing that information.

(b) Redactions under section 40 FOIA ("Personal Information"). The minister concluded that this exemption was engaged in relation to *'names and/or addresses of individuals or other personal identifiers'*.

(c) Redactions under section 41 FOIA ("Information Provided in Confidence"). This is an absolute exemption concerned with preventing the disclosure of information which otherwise would be construed as being a breach of confidence. The information redacted under this head related to medical treatment administered to Private Bell.

Formatted: Indent: Left: 0 cm

[19] In his engagement with the PRO, the Applicant relied on Rule 38 of the Coroners (Practice and Procedure) Rules (Northern Ireland) 1963 ("the Coroners Rules") and contended that he, as a properly interested person within the meaning

of the coronial legislation, would automatically have had an entitlement to view the papers without charge, and, for a small charge, obtain copies of the papers. Very latterly in the proceedings, during the first hearing date, the first Respondent first contended that in 2013 NICTS had disapplied Rule 38 of the Coroner's Rules to inquest files transferred to PRONI. This necessitated the joinder of NICTS as a Respondent and the amendment of the Order 53 statement to seek to quash that decision to disapply Rule 38.

Relief Sought

[20] The applicant seeks the following relief:

(a) A declaration that the undertaking that the PRO seek is unreasonable, unlawful, ultra vires and of no force of effect.

(b) An order of certiorari to quash the continuing decision of the PRO to refuse to provide disclosure of the full inquest file in the absence of receipt of the signed undertaking;

(b)(i) An order of certiorari quashing the decision of the Public Records Office Northern Ireland refusing to provide disclosure of all such information as is in the public domain and further quashing the decision to redact information which is in the public domain.

(c) An order of certiorari quashing the decision of the PRO refusing to provide disclosure of all such information as is in the public domain and further quashing the decision to redact information which is in the public domain.

(d) An order of certiorari quashing the decision of the NICTS to refuse to apply Rule 38 of the Coroners Rules to all inquest files transferred by Coroners to the PRO.

(e) A declaration that the decision of the NICTS refusing to apply Rule 38 to all inquest files transferred by Coroners to the PRO is *ultra vires*, unlawful and of no force or affect.

Grounds for Relief

[21] The Applicant sought the relief on the following grounds:

(a) The impugned undertaking is unlawful and should be so declared and quashed because it is irrational. It explicitly acts to frustrate and undermine the pursuit of legitimate legal remedies by introducing a prohibition on the use of disclosed documentation in court cases without the permission of the PRO. Furthermore, the permission of the PRO must be obtained before any

disclosure may be shared or used in litigation, including in circumstances where one might wish to bring proceedings against the PRO.

(b) The impugned undertaking unreasonably obstructs access to justice by denying access to material that should assist in achieving this objective.

(c) The impugned undertaking unreasonably affords an applicant for disclosure more disclosure than the statutory route available through application of the 2000 Act.

(d) In operating the undertaking procedure, the PRO has erred in law and misdirected itself as to the legislative requirements and nature of its statutory duty.

(e) The decision of the PRO in seeking to apply the undertaking procedure is *Wednesbury* unreasonable and the PRO has reached a conclusion which no reasonable public authority, properly directing itself, could, in the instant circumstances, have reached.

(f) The PRO has failed to take all relevant and/or material considerations into account (or gave them appropriate weight) and, in particular, take into account:

(i) Rule 38 of the Coroners (Practice and Procedure) Rules (Northern Ireland) 1963, as amended, which provides that the Applicant as a properly interested person within the meaning of the coronial legislation would automatically have had an entitlement to view the papers, without charge, and, for a small charge, obtain copies of the papers.

(ii) The fact that mere transfer of the inquest file to the PRO, the purpose of which was to preserve the papers, should not operate to obstruct an entitlement to access to the papers.

(iii) That the depositions making up the inquest file are prepared in the knowledge that the information contained within them is likely to be the subject of oral evidence in a public court and the operative presumption is that the statements will go into the public domain. Furthermore, that many, if not all, of the depositions will in fact have gone into the public domain, in that those persons who gave the information contained in the depositions will have been called to give evidence and the material is, in effect, therefore, already in the public domain.

(iv) The fact that in other like circumstances, such as where disclosure is provided with confidentiality conditions to an accused in a criminal

case, there is ordinarily no prohibition on the use of the material in other court proceedings, for instance in judicial review applications.

(v) That the impugned undertaking compromises the ability of the solicitor to properly represent and act for the client. In this case, in preparation for the successful appeal, the Applicant's solicitors were required to engage with non-experts, including those in the field of journalism, in order to properly represent the Applicant. These engagements were necessary and proved most fruitful. The inquest file may disclose information that would require the pursuance of lines of enquiry with non-experts and thus necessitate the disclosure of information contained in the inquest file to persons not envisaged in the undertaking.

(g) Further or in the alternative, the PRO misdirected itself and/or acted unlawfully in refusing to disclose material to the Applicant, which material is in the public domain, because of the Applicant's refusal to sign an undertaking.

(h) The decision of NICTS to disapply Rule 38 of the 1963 Rules to inquest files transferred to PRO is ultra vires, the NICTS has no power, or is acting outwith its powers in determining that Rule 38 of the Coroners Rules has no application to files transferred to the PRO.

(i) The Applicant as a properly interested person within the meaning of the Coroners Rules has a presumptive entitlement to access to the inquest papers by virtue of Rule 38, in seeking to misapply Rule 38 the NICTS is acting unlawfully and in breach of the Applicant's rights.

(j) The Applicant as a properly interested person within the meaning of the Coroners Rules had a legitimate expectation that he would obtain access to the inquest papers, the NICTS in purporting to misapply Rule 38 of the Coroners Rules has acted in breach of his legitimate expectation.

(k) As previous practice illustrates, the NICTS can obtain physical copies of inquest files from PRO upon request. The transfer of the inquest file to the PRO for preservation of the papers should not operate to obstruct a statutory entitlement to access the papers. The approach of NICTS operates to frustrate the intention of same.

Applicable Legislation

[22] ***Rule 36 Coroners (Practice and Procedure) Rules 1963***

> "Any document (other than an exhibit at an inquest) in the possession of the coroner in connection with an

inquest or post-mortem examination shall, unless a court otherwise directs, be retained by the coroner for at least ten years.

Provided that the coroner may at any time deliver any such document to any person who in the opinion of the coroner is a proper person to have possession of it."

[23] ***Rule 38 Coroners (Practice and Procedure) Rules 1963***

"(1) A coroner may, on application and without charge, permit any person who, in the opinion of the coroner, is a properly interested person to inspect any report of a post-mortem examination, or any notes of evidence or any document put in evidence at an inquest.

(2) A coroner may, on application and on payment of a fee of £1.00 per sheet, furnish to any properly interested person a copy (including an electronic copy or copy made by photography or other similar process) of all or part of the record of the evidence at an inquest including any report of a post-mortem examination, or any other document put in evidence."

[24] ***Public Record Act (Northern Ireland) 1923***

"An Act to establish a Public Record Office of Northern Ireland for the reception and preservation of certain public records appertaining to Northern Ireland, and for the purposes connected therewith.

1. Establishment of a Public Record Office of Northern Ireland

(1) There shall be established a Public Record Office of Northern Ireland for the reception and preservation of public records to which this Act applies.

(2) This Act shall apply to the following public records:

(a) Northern Ireland records, that is to say, all records of any court, Government department, authority or office in Northern Ireland with respect to which the

Parliament of Northern Ireland had power to make laws, and

(b) Imperial Records, that is to say, public records appertaining to Northern Ireland to which this Act may be applied by any order made by the Governor of Northern Ireland in Council under the provisions of this Act, and not being Northern Ireland Records.

3. **Removal of accumulating records to the Record office**

As soon as such Northern Ireland records have been so delivered to the person appointed to receive then in pursuance of such warrant, such NI records shall be deemed to be in the custody of the Minister of Finance and shall forthwith be removed to and deposited in the PRONI, and shall be subject to the rules made under this Act…

4. **Validity of records after removal**

The removal of any NI record to the PRONI by and in accordance with this Act shall not in any manner affect the legal authenticity of that record, but any such record deposited in that PRO and there kept under the authority of this Act, shall be taken to be in its legal place of deposit, and every such record so removed shall be of the same legal validity in all courts and proceedings as if such record had not been removed

5. **Deposit of documents in Record Office by trustees or other persons**

It shall be lawful for any trustee or other person having the custody of any deeds or documents, which in the opinion of the [Department for Communities] are fit to be deposited in the Public Record Office of Northern Ireland, so to deposit the same with the permission of the [Department for Communities], and subject to any rules to be made under this Act, in a repository which may be provided for that purpose in the said Public Record

Office, and any deeds or documents so deposited shall be deemed to be Northern Ireland records in the custody of the [Department for Communities].

5a **Access to Public Records**

It shall be the duty of the Deputy Keeper of the Records of Northern Ireland to arrange that reasonable facilities are available to the public for inspecting and obtaining copies of those public records in the PRONI which fall to be disclosed in accordance with the FOIA 2000.

…

9. **Rules for management of Record Office**

The Minister of Finance shall (without prejudice to the provisions of this Act with respect to the disposal of valueless documents) have power to make rules for carrying this Act into execution, and, in particular, with respect to any or all of the following matters:

…

(b) The admission of persons to the use of NI records… in his custody."

Arguments

Applicant's Written Submissions

[25] The Applicant submits that he is a properly interested person within the meaning of the coronial legislation. Consequently, had the Coroner's Service retained the inquest file, the Applicant would automatically have had an entitlement to view the papers, without charge and, for a small charge, obtain copies of the papers. The Applicant further submits that the proposition that the transfer of the papers to PRONI, particularly when the purpose of the transfer was to preserve the papers, would operate to obstruct an entitlement to access the papers is untenable. The Applicant had a legal entitlement to obtain the documentation from the Coroner's Service and the mere act of transferring the papers to PRONI for preservation should not obstruct the Applicant's entitlement to sight of the documents.

[26] The Applicant argues that a reasoned explanation as to why, when such material could have been obtained from the Coroner's Service, it could now be refused without signing an undertaking has not been provided by PRONI.

General Propositions in Relation to the Inquest File

[27] While an inquest file is prepared from the file submitted by the police to the Coroner, the inquest file and the depositions contained therein are the property of the Coroner, and not the police. The Coroner prepares depositions from statements made by the police in circumstances where he considers that the statements contain material relevant to his function, the conduct of the inquest. Whilst the original statements may have been police property the depositions prepared by the Coroner's Service for the purpose of the inquest are not.

[28] The depositions are prepared in the knowledge that the information contained within them is likely to be the subject of oral evidence in a public court, a Coroner's court. The expectation of those who make statements to the Coroner, or for that matter to the police in the course of a criminal investigation, is that in due course they may be called to give evidence, either in a criminal trial, or in a Coroner's inquest. The operative presumption is that the statements will go into the public domain, through one or other procedure.

[29] Many, if not all, of the depositions will in fact have gone into the public domain, in that those persons who gave the information contained in the depositions will have been called in to give evidence. The material is, therefore, already in the public domain.

[30] The Applicant contends that PRONI ought to have had regard to the aforementioned factors before reaching its decision and that these factors do not appear to have been factored into its decision-making.

The Impugned Undertaking

[31] The Applicant argues that the undertaking is unlawful and should be so declared and quashed because it is irrational. It explicitly acts to frustrate and undermine the pursuit of legitimate legal remedies by introducing a prohibition on the use of disclosed documentation in court cases without the permission of PRONI. Furthermore, the permission of PRONI must be obtained before any disclosure may be shared or used in litigation, including in circumstances where one might wish to bring proceedings against PRONI.

[32] Signatories to the undertaking must undertake not to publish or disseminate the information released to them, to keep the information confidential, not to copy the documentation, save for when instructing counsel or legal representatives with a view to obtaining advice or making submissions to the Attorney General and not to use the documentation in court cases without the express permission of PRONI.

[33] The undertaking unreasonable obstructs access to justice by denying access to material that should assist in achieving this objective.

[34] In this particular case, in preparation for making submissions to the CCRC and for the successful appeal, the Applicant's solicitors were required to engage with many people, including those in the field of journalism, in order to properly represent the Applicant. These engagements were necessary and proved fruitful. The inquest file may disclose information that would require the pursuance of lines of enquiry with non-experts and thus necessitate the disclosure of information contained in the inquest file to persons not envisaged in the undertaking. The undertaking compromises the ability of the Applicant's solicitors to properly represent and act for the Applicant, their client.

[35] Further, the wording of the undertaking on the face of it, at least, appears to act to fetter the ability of the Applicant's solicitor to share disclosed documentation with the Applicant, her client, in the absence of him too signing the undertaking. The client is not listed as a person to whom the undertaker may disclose documentation. This may be inadvertent but it illustrates the breadth and irrationality of the terms of the undertaking.

[36] The undertaking unreasonably affords an applicant for disclosure more disclosure than the statutory route available through application of the 2000 Act. In correspondence dated 30 January 2014 PRONI stated that:

> 'since you have chosen not to invoke the extra statutory procedure for disclosure of information held by PRONI, it is proposed to address the issue of disclosure of the inquest file to you pursuant to the provisions of the Data Protection Act and Freedom of Information Act'. The correspondence also states that the Applicant's solicitor 'fails to appreciate that the undertaking procedure… is designed to facilitate properly interested persons in obtaining such documentation **to a greater extent than would be the case if the documents were subject to release (and redaction) pursuant to the Freedom of Information Act.'**

[37] Clarification was sought about the statement that the undertaking procedure will operate to afford an undertaking applicant greater access to material than that which would be available to an applicant who declines to sign the undertaking, but pursues a statutory route to accessing documentation by relying on the provisions of the 2000 Act. In the event that such distinctions, including those relating to release and redaction, would be made between applicants who pursue the undertaking and those who decline to do so, a reasoned explanation for the drawing of those

distinctions was sought. It was contended that the operation of a two tier disclosure regime is unreasonable and unlawful.

[38] PRONI confirmed in correspondence dated 13 February 2015 that the undertaking is about *'giving effect to the Minister's wish that inquest and other relevant records should be voluntarily made available to those properly interested persons who have a valid reason for wishing to view or obtain such records'*. It is conceded by PRONI that the level of disclosure provided under the undertaking procedure may be greater than that provided under the 2000 Act as there may be a large number of potential exceptions to disclosure when applying the 2000 Act.

[39] It is submitted that in operating the undertaking procedure, PRONI has erred in law and misdirected itself as to the legislative requirements and nature of its statutory duty.

[40] The decision of the PRO in seeking to apply the undertaking procedure is *Wednesbury* unreasonable and the PRO has reached a conclusion which no reasonable public authority, properly directing itself, could, in the instant circumstances, have reached.

[41] The PRO has failed to take all relevant and/or material considerations into account (or gave them appropriate weight) and, in particular, take into account:

(a) Rule 38 of the Coroners (Practice and Procedure) Rules (Northern Ireland) 1963, as amended, which provides that the Applicant as a properly interested person within the meaning of the coronial legislation would automatically have had an entitlement to view the papers, without charge, and, for a small charge, obtain copies of the papers.

(b) The fact that mere transfer of the inquest file to the PRO, the purpose of which was to preserve the papers, should not operate to obstruct an entitlement to access to the papers.

(c) That the depositions making up the inquest file are prepared in the knowledge that the information contained within them is likely to be the subject of oral evidence in a public court and the operative presumption is that the statements will go into the public domain. Furthermore, that many, if not all, of the depositions will in fact have gone into the public domain, in that those persons who gave the information contained in the depositions will have been called to give evidence and the material is, in effect, therefore, already in the public domain.

(d) The fact that in other like circumstances, such as where disclosure is provided with confidentiality conditions to an accused in a criminal case, there is ordinarily no prohibition on the use of the material in other court proceedings, for instance in judicial review applications.

(e) That the impugned undertaking compromises the ability of the solicitor to properly represent and act for the client. In this case, in preparation for the successful appeal, the Applicant's solicitors were required to engage with non-experts, including those in the field of journalism, in order to properly represent the Applicant. These engagements were necessary and proved most fruitful. The inquest file may disclose information that would require the pursuance of lines of enquiry with non-experts and thus necessitate the disclosure of information contained in the inquest file to persons not envisaged in the undertaking.

(f) That the outworking of the undertaking is such that it would act to fetter the ability of the Applicant's solicitor to share disclosed documentation with the Applicant in the absence of him too signing the undertaking. The client is not listed as a person to whom the undertaker may disclose documentation. In such circumstances, the undertaking may undermine the processional relationship between solicitor and client and interfere with the discharge of a solicitor's professional obligations to the client.

(g) The fact that the denial of access to the full inquest file is likely to materially affect both the conduct of and the outcome of civil proceedings against the Ministry of Defence and Chief Constable of the Police Service of Northern Ireland.

(h) The fact that the Applicant is being caused distress and inconvenience by his inability to access the full file.

[42] By the time this matter came to hearing it was clear that the Applicant in fact had the entire inquest file and, by reference to the Court of Appeal judgment and the Applicant's own copy of the papers for the original criminal trial, were able to work out all the redacted content. The Applicant however argued that there was a fundamental issue about the process whereby redactions were made of material that was already in the public domain.

[43] In correspondence dated 21 December 2016, the Solicitor to the Attorney General confirmed that the pilot scheme has been replaced, in part, by statute. The Crown Court Files Privileged Access Rules (Northern Ireland) 2016 ("the 2016 Rules"). His note read:

> "The process launched by the DCAL Minister in January 2015 has been replaced by the 2016 Rules which came into operation on 30th March 2016. PRO is still processing requests under the Minister's pilot scheme but all new applications are dealt with under the Rules".

The 2016 rules also require applicants to sign an undertaking.

First-Named Respondent Arguments

[44] PRONI argues that the pilot scheme which contained the undertaking was not an abuse of public power with regard to the granting of access to public records, but an attempt to enhance the extent and speed of access to such records.

[45] As regards the redactions of documents, the first-named Respondent contends that it has acted properly and proportionately on the basis of information available to it at the time when the redactions were made.

[46] The Respondent's duties and powers with respect to records are governed by the Public Records Act (NI) 1923. That Act, in and of itself, does not impose upon PRONI any duty to make records available to a member of the public; rather, the 1923 Act empowers the Respondent to make them available. There is therefore no right of a member of the public to call for delivery of documents under the 1923 Act. The Applicant does not appear to argue that there is such a duty.

[47] The Applicant criticises the Respondent by reference to duties and powers arising under Rule 38 of the Coroners (Practice & Procedure) Rules 1963. Those rules grant powers to a coroner as to the release of information. Those Rules cannot and do not comprise the framework by which PRONI - as holder of public records - should afford access to records held by it.

[48] The Applicant's skeleton posits a scenario in which 'it would be unreasonable for a Coroner to refuse to provide the information given the applicant's status as a properly interested person'. That may or may not be correct, but it is not a basis upon which PRONI may properly be criticised in these proceedings. Indeed, it is clear from affidavit evidence that decisions as to what documents might be released under the 1963 Rules were made by the NICTS, not by the Respondent.

[49] Accordingly, it is submitted that the Respondent is not guilty of any failure to discharge statutory duty or breach of statutory right vis-a-vis the Applicant.

[50] The Respondent submits that the key considerations which informed the creation and the contents of the Pilot Scheme - namely a wish to afford earlier and greater access than might be the case under other legislation - are entirely relevant, proper, reasonable, and weighty considerations. It further submits that in order to ensure all relevant considerations were taken into account the Respondent carried out a consultation with a broad range of consultees in relation to the proposed scheme.

[51] The Respondent submits that the decision to formulate the pilot scheme and the undertaking was a lawful and proper exercise of its powers taken on the basis of all relevant considerations.

[52] The pilot scheme was a pro-active attempt to provide a solution to a matter of genuine public concern, namely, the provision of early and greater access to records than would be the case under other applicable legislation, but not in any way to the exclusion of rights under that other legislation. It is a decision 'within the range of reasonable responses' of a public record holder faced with the problem of facilitating early and extensive access to records by those who have genuine interest in those records.

[53] In relation to the redactions, the Respondent notes that this argument did not form part of the Applicant's original complaint and submits that PRONI acted properly and reasonably in relation to the redactions.

Second-Named Respondent's Arguments

[54] NICTS argues that PRONI does not hold the documents on behalf of the Coroner. Documents transferred to PRONI are in the custody of the DCAL. As such, following deposit with PRONI the Coroner no longer holds any documents or records that can be furnished by him under Rule 38. It is not that Rule 38 is being misapplied as alleged by the Applicant, but simply that the Coroner no longer holds any documents to release.

[55] The only person to whom a request can be made under Rule 38 is the Coroner and no such request was made to the Coroner in this case.

Discussion

[56] The real mischief in this case is the inability of the Applicant to access, pursuant to Rule 38, as a properly interested person, the inquest file of Private Bell. The reason that he was not able to so access is that legal advice was received in 2013 that erroneously narrowed the scope of Rule 38.

[57] Rule 38 provides:

> "(1) A coroner may, on application and without charge, permit any person who, in the opinion of the coroner, is a properly interested person to inspect any report of a post-mortem examination, or any notes of evidence or any document put in evidence at an inquest.
>
> (2) A coroner may, on application and on payment of a fee of £1.00 per sheet, furnish to any properly interested person a copy (including an electronic copy or copy made by photography or other similar process) of all or part of the record of the evidence at an inquest including any report of a post-mortem examination, or any other document put in evidence."

[58] The advice received in 2013, which is relied upon in the argument of NICTS, narrows the scope of Rule 38 so that that rule only applies to inquest papers within the possession and control of the coroner. There is, quite simply, no basis for such a narrow reading of Rule 38. Nothing in the 1923 Act governing PRONI, or in the FOIA, or anywhere else calls for such a reading. Rule 38 has never been repealed. The archiving of Rule 38 documents does not mean the relinquishment of legal control. The power, and its exercise, under Rule 38 remains vested in "a coroner".

[59] The answer to this case then is that Rule 38 should be applied to the Applicant's request.

[60] The pilot scheme and the impugned undertaking fettered the presumptive right of a properly interested person to full access to the inquest file (subject to the Coroner's full consideration of matters relevant to disclosure) and it was therefore unlawful to apply that scheme to the applicant in this case. The lawfulness of that scheme and the impugned undertaking as it might have applied to other parties (i.e. parties who are not properly interested persons) is beyond the scope of these proceedings.