

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date 28 January 2008

**Public Authority:** Northern Ireland Court Service  
**Address:** Windsor House  
9-15 Bedford Street  
Belfast  
BT 2 7LT

### Summary

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On 29 November 2005 the complainant made a request to the Northern Ireland Court Service ("NICS"), for documentation, notes (handwritten, electronic or otherwise), telephone records received into and emanating from NICS in relation to emails and letters sent by the complainant. NICS claimed that they did not hold some of the information and applied section 36 (2) (b) (i) and (ii) and section 42 (1) to the remainder. The Commissioner finds that NICS did hold some of the information requested and have breached sections 1(1) (a), section 17 (3) (b) of the Freedom of Information Act ("the Act") The Commissioner is satisfied that some of the requested information is exempt under section 42 of the Act and that the balance of the public interest lies in maintaining the exemption in this case. The Commissioner finds that the section 36(2)(b)(i) and (ii) exemption is engaged in relation to remainder of the information. However, he finds that the public interest lies in the disclosure of the information and he requires NICS to disclose this. The Commissioner is also satisfied that some of the information is exempt information by virtue of section 21 as it is available to the applicant by other means.

### 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 Act. This Notice sets out his decision.

### The Request

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2. On 29 November 2005, the complainant made a request to the Northern Ireland Court Service ("NICS"), for documentation, notes (handwritten, electronic or otherwise), telephone records received into and emanating from NICS in relation to emails and letters sent by the complainant to NICS on dates specified by the complainant. (The Commissioner has included a full text of the request at Annex A of this decision notice).

## The Investigation

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### Scope of the case

3. On 3 April 2006 the complainant contacted the Information Commissioner (“the Commissioner”) to complain about the way her request for information had been handled. The complainant specifically asked the Commissioner to consider the following points: *“I would like to complain, firstly, about the refusal of the Court Service to furnish me with material held and requested under points 1-5 of my original request on November 29 2005”*. The complainant also complained about NICS delays in processing her request. This decision notice deals solely with those items at 1-5 of Annex A. For completeness, however, the Commissioner has quoted all of the original request at Annex A.
4. The complainant also raised other issues that are not addressed in this notice because they are not requirements of Part 1 of the Act. Those issues included the circulation of correspondence between certain NICS staff, the press office and the complainant. The Commissioner did in the course of his investigation raise these issues with NICS for clarification purposes only.

### Background to the Request

5. The complainant’s request relates to a series of media enquiries which she made between 18 October 2005 and 24 November 2005. The Commissioner, having had sight of the media enquiries, has included an overview of these enquiries in his decision notice at Annex B as background to the complainant’s request as they form the basis of the complainant’s request under the Act.
6. The complainants media enquiries mainly relate to a statutory inquiry under the Health and Personal Social Services (NI) Order 1972 (the Hyponatraemia inquiry). The purpose of this inquiry was to investigate the deaths of three children, Lucy Crawford, Raychel Ferguson and Adam Strain. Documentation in relation to this inquiry is available to the public on the inquiry’s website (<http://www.ihrdni.org>) The inquiry has since been suspended pending a police investigation of the matter. On 21 October 2004 a UTV (Ulster Television) Insight programme ‘When Hospitals Kill’ focused on the deaths of these children. The complainant’s media enquiries also relate to the work and involvement of the Coroner’s Service which also investigated the deaths of the children. The Commissioner is aware that the deaths and the subsequent inquiry have attracted much media attention.
7. The NICS was established in 1979, by the Judicature (Northern Ireland) Act 1978. NICS was formerly answerable to Parliament through the Secretary of State for Constitutional Affairs (now the Secretary of Justice as of June 2007). NICS facilitates the conduct of the business of the Supreme Court, county courts,

magistrates' courts and coroners' courts.<sup>1</sup> NICS are included in the definition of government department (see section 84 of the Act) and are therefore a public authority for the purposes of the Act.

## 8. Chronology

9. On 29 November 2005 the complainant made a request for a number of items of information relating to previous media enquiries made by her ("the request").
10. On 22 December 2005, NICS informed the complainant that they were extending the time limit in responding to the request due to consideration of the public interest. NICS informed the complainant that they were considering the public interest test for sections 31, 36, 41, and 42 of the Act. The Commissioner is aware that section 41 is an absolute exemption under section 2(3) of the Act and does not require a public authority to consider the public interest test as conferred by section 2(2)(b) of the Act. NICS informed the complainant they would respond to her by the 30 January 2006. On the 30 January 2006 NICS wrote to the complainant to further extend this time period.
11. On 10 February 2006 NICS responded to the request advising the complainant that it held no information in relation to points 5 to 9 of the request and considered the remainder to be exempt under section 36 (2) (b) (i), section 36 (2) (b) (ii) and section 36(2)(c) of the Act. NICS also stated that some of the information was exempt by virtue of 42 (1) and section 41 (1) of the Act. The complainant requested an internal review of this decision.
12. On 27 March 2006 after completing an internal review, NICS informed the complainant that that it held no information in relation to points 1(vii), 4, 5, 6(x) and (xi), 7 and 9 of the request. In relation to points 1(iv), (v) and (vii) and 3 of the complainant's request, (email exchanges between the complainant and NICS) NICS provided these to the complainant.
13. **The Commissioner's Investigation**
14. On 3 April 2006 the complainant wrote to the Commissioner to seek a decision under section 50 of the Act in relation to NICS handling of the request and in particular items 1 to 5 of that request. On the 2 January 2007 the Commissioner wrote to NICS to begin his investigation. The Commissioner asked NICS a series of questions to ascertain what information was held at the time of the request by NICS. NICS provided the Commissioner with an explanation as to what was held in relation to the request as well as a copy of the withheld information.
15. NICS confirmed to the Commissioner on 24 January 2007 that they were satisfied as a result of their internal review that section 36 (2) (b) (i) and 36 (2) (b) (ii) exemptions applied to all of the withheld information. NICS also confirmed that it held information in relation to items 1 to 5 of the request. In their view this was exempt by virtue of section 42 of the Act. NICS provided a list of that information.

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<sup>1</sup> For further reference as to the role of the NICS please see 'A guide for users for the Northern Ireland Court Service,' 'About the Court Service' [www.courtsni.gov.uk](http://www.courtsni.gov.uk).

NICS confirmed that they no longer wished to rely on section 41 (1) of the Act in relation to the remainder of the information. However NICS claimed this was exempt by virtue of section 36 (2) (b) (ii).

16. The Commissioner was provided with a copy of all of the withheld information. Having had sight of this and having considered the application of the exemptions in this case, the Commissioner contacted the complainant and NICS to attempt informal resolution of the complaint. The Commissioner was of the view that the information withheld under section 36 could be disclosed under the Act. NICS undertook to address the possibility of informally resolving the complaint and stated that they were taking legal advice on the issue.
17. On 5 April 2007 the Commissioner telephoned NICS to confirm if the legal advice regarding the possibility of informal resolution of the complaint had been received. As a result of advice received, NICS informed the Commissioner that it was preparing a submission for the relevant minister and that the Commissioner would be informed of her decision.
18. In the absence of a response from NICS on the 13 April 2007 the Commissioner enquired as to the minister's decision on informal resolution of this complaint, asking that it be provided within 10 days. On the 17 April 2007, NICS responded to the Commissioner stating that *"I can assure you that the Court Service will endeavour to expedite matters associated with consulting our minister, but would advise you that we have no control over how long this process will take."* NICS undertook to respond to the Commissioner as soon as it was in a position to do so.
19. On 25 May and 31 May 2007, the Commissioner contacted NICS for a response. On 31 May 2007, NICS confirmed to the Commissioner that a review of the file was necessary, in order to see if the information withheld under section 36 remained exempt. At this point NICS confirmed that they in fact had not sent any submission to the minister, as previously indicated to the Commissioner.
20. In light of this delay, the Commissioner enquired as to why NICS had failed to inform him of this fact. The Commissioner asked NICS to provide by close of business on Friday 1 June 2007, a final response as regards 'informal resolution'. The Commissioner expressed serious concern that previous response times in the investigation of the complaint had not been met by NICS.
21. On 1 June 07, the Commissioner received a fax from NICS, apologising for the delay and advising that NICS were now in the process of providing a submission to the minister.
22. On 11 June 2007, almost three months after the issue of informal resolution was first raised by the Commissioner, NICS confirmed to the Commissioner that it would not disclose the withheld information under section 36. The Commissioner informed the complainant of the NICS response and his views on the application of the exemptions in this case.

### 23. Analysis of the Exemptions and Information held by NICS

- 24 NICS confirmed to the complainant that it did not hold information relating to items 1(vii), 4, 5, 6(x) and (xi) and 7 and 9 of the request. However, the Commissioner's investigation in this case relates solely to NICS response to points 1 to 5 of that request. The Commissioner has considered therefore whether information in relation to items 1 to 5 was in fact held by NICS at the time of the request.
25. Item 1 of the request relates to:-  
*"All documents and notes-handwritten, electronic and otherwise-emanating from anyone in NICS and/or held by anyone in NICS relating in any way to e-mails sent by (name inserted) (the author of the request) to either Patricia Quinn or Jill Herron of the NICS Press Office on the following dates:  
(vii)November 11 2005; Subject: UTV Insight enquiry"*
26. The Commissioner asked NICS whether it holds this information. In response, NICS confirmed that it did not receive the relevant email. The Commissioner asked NICS to confirm any internal enquiries made to verify the assertion that this email had not been received. NICS confirmed to the Commissioner that no member of NICS staff had a record of this e mail. In response to the Commissioner's enquiries, the complainant stated that she did not keep read receipts on any of the emails sent to NICS. In the absence of any evidence to prove that that this e mail had in fact been received by NICS, the Commissioner concludes that this e mail was not in fact received by it.
- 27 Item 4 of the request relates to media enquiries made to the Coroner's service, as follows -  
  
*"All documentation and notes- handwritten, electronic and otherwise – **received into** NICS relating in any way to i-ix and sections 2 and 3 of this request"*
- NICS advised the Commissioner that because the Coroner's Service was an 'integral part of the Court Service', such information was not (in their view) 'received into' NICS. Therefore it was not held by NICS.
28. The Commissioner notes that the Coroners Service is a creature of statute wholly independent of NICS, although it does receive administrative assistance from NICS. Accordingly the Commissioner has construed, 'received into' as including that information received from the Coroner's Service by NICS. Therefore the Commissioner finds that the information referred to at item 4 above, is held by NICS for the purposes of the request.
29. Section 1(1) (a) of the Act requires public authorities to confirm whether it holds information of the description specified in a request under the Act. NICS in this case did not confirm to the complainant that it did hold information caught by item 4 above. The Commissioner has also considered therefore whether that information is exempt by consideration of section 36, and has set his conclusion at paragraph 57 below.

30. Item 5 of the request is as follows:

“Records of all telephone calls made and received relating in any way to (i)-(ix) and sections 2 and 3 of this request;

NICS advised the Commissioner that it does not keep records of telephone calls, nor does it have a policy of keeping such records. NICS have confirmed that its staff have discretion in this regard and may keep a record where follow-up action would be required in a particular case. NICS advised the Commissioner that they have asked relevant staff whether such records exist. In light of their response, the Commissioner is satisfied that NICS do not hold information caught by item 5 above.

**31. Procedural Matters**

32. The Commissioner has considered whether the refusal notice dated 10 February 2006 and issued by NICS complied with the requirements of section 17 of the Act. The Commissioner considers that the notice did not meet the requirements of this provision in that it failed to provide the information required by section 17(3) (b) to the complainant within a reasonable time. Section 17 (3) (b) is as follows

*“ A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1) (b) or (2) (b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming –*

*(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”.*

33. The Commissioner notes that the request was received by NICS on 29 November 2005. NICS issued their refusal notice on 10 February 2006. NICS had informed the complainant of extensions of time to consider the public interest test on 22 December 2005 and 20 January 2006. The Commissioner has noted that in this case NICS already extended the period of time to consider the public interest test twice before the refusal notice was issued. The Commissioner notes that the request was received some 11 months after the full implementation of access rights under the Act. He has had sight of the withheld information and is satisfied that in light of its contents and the timing of the request that the time taken by NICS to issue their refusal notice was unreasonable in the circumstances.

**34. The Application of the Exemptions**

**35. The section 21 Exemption**

The Commissioner notes that some of the withheld information is already in the public domain (by virtue of newspapers, legal journals and the internet). This public information was gathered by NICS for the purposes of providing background information in dealing with the complainant's media enquiries. The

Commissioner is of the view that it is information which is reasonably accessible to the applicant by other means and is therefore exempt information under section 21 (1) of the Act which states:

*“21(1) Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.”*

36. Section 21 creates no exemption for public authorities from the duty to confirm or deny whether they hold information under section 1(1a) of the Act. Accordingly, where a request is made for information which is reasonably accessible to the applicant by another means, a public authority will still be under a duty to confirm or deny whether it holds such information. The Commissioner as a matter of good practice considers that public authorities in such instances may wish to point the requester to where the information is reasonably accessible to them by other means, for example by providing the link to the appropriate website. NICS did not so in this case.

37. **The Section 36 exemption -**

NICS have claimed that some of the information is exempt by virtue of section 36(2) (b) (i), (ii) of the Act. Section 36 (2) provides:

*“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 the Act.*

.....

*(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, ...”*

38. The Commissioner is mindful that section 36 creates an exemption designed to protect the effective conduct of public affairs. The application of this exemption is dependent on the reasonable opinion of a qualified person that the disclosure of the relevant information would have an inhibitory effect. The qualified person must record that in their reasonable opinion an inhibition to the free and frank provision of advice/exchange of views for the purposes of deliberation would, or would be likely to be, caused if the relevant information were disclosed

39. The Commissioner notes that the opinion of the qualified person in this case was not obtained at the time of the request but was obtained at the internal review stage. Although NICS confirmed to the Commissioner that the qualified person in this case at both the request and internal review stages was Bridget Prentice, Parliamentary Secretary for the Department of Constitutional Affairs. Evidence was supplied to the Commissioner that Ms Prentice had only considered the request on 23 March 2006, giving her approval for the use of section 36. This opinion was given following two NICS submissions along with a recommendation from the NICS to the minister. This post dates the request over four months. The Commissioner has commented on this in the other matters section of this decision notice.

#### 40 Reasonableness and the public interest test.

Following on from the dicta in the Information Tribunal's ruling of *Guardian Newspapers Limited v Heather Brooke*<sup>2</sup> (the Brooke decision) and the Information Commissioner and the British Broadcasting Corporation<sup>3</sup> (the BBC decision") the Commissioner considered two further questions (i) was this opinion of the NICS reasonable, and (b) if it was, whether the public interest in maintaining the exemption was outweighed by the public interest in not maintaining it.<sup>4</sup>

#### 41 (i) Reasonableness

Following the Brooke decision, the Commissioner notes that in assessing the 'reasonableness' of the opinion of a qualified person under section 36 the opinion must be both reasonable in substance and reasonably arrived at<sup>5</sup>. The Commissioner notes that the Tribunal concluded that the qualified person should take into account relevant matters and ignore irrelevant matters. The Tribunal's reasoning for this approach is contained at paragraph 64 of the Brooke decision as follows:

*"The provision that the exemption is only engaged where a qualified person is of the reasonable opinion required by s 36 is a protection which relies on the good faith and proper exercise of judgement of that person. That protection would be reduced if the qualified person were not required by law to give proper rational consideration to the formation of the opinion, taking into account only relevant matters and ignoring irrelevant matters. In consideration of the special status which the Act affords to the opinion of qualified persons, they should be expected at least to direct their minds appropriately to the right matters and disregard irrelevant matters."*

#### 42 (ii) Objectively reasonable.

In order to satisfy the statutory wording the substance of the opinion must be "objectively reasonable"<sup>6</sup>. The Tribunal rejected the suggestion that in order to be reasonable, an opinion need only be 'an opinion within a range of opinions', but acknowledged that "*on such matters there may (depending on the facts) be room for conflicting opinions, both of which are reasonable.*"<sup>7</sup> The Commissioner has established (on the basis of information provided to him by NICS) that the qualified person in this instance was presented with two submissions detailing the background to the complainant's request and summarising her media enquiries. The submissions recommended she give authorisation for the application of the section 36 exemption and included several public interest factors for her to consider. In one submission, Ms Prentice was given a sample of emails and documents from the withheld information but was not shown the entirety of the withheld information.

<sup>2</sup> Appeal no 2006/0011

<sup>3</sup> Appeal No EA/2006/0013

<sup>4</sup> See *Guardian Newspapers Limited and Heather Brooke and the Information Commissioner and the British Broadcasting Corporation Appeal no EA/2006/0011 and EA 2006/0013*, 6 January 2007, para 28

<sup>5</sup> EA/2006/0013 at para 64

<sup>6</sup> The Brooke decision, Appeal 2006/0011 at para 60

<sup>7</sup> *ibid*



- 43 The Commissioner considers that the process of the decision making is important to the question of reasonableness under section 36. The Commissioner notes that in this case the decision to apply section 36(2) (b) (i) and (ii), whilst authorised by the minister was taken without sight of all of the withheld information. However he is mindful that the minister was presented with detailed submissions and a recommendation from NICS staff. She was also provided with a short background to the request to inform her decision.
- 44 The Commissioner is of the view that the reasonableness of the opinion of a qualified person under section 36 must be assessed on the particular facts of each case. The Commissioner is aware that, due to the workings and time constraints of Government many ministers rely on civil servants to present them with coherent viewpoints to arrive at a final decision. In this case, the Commissioner notes that the minister was provided with a recommendation which, having considered NICS representations, she followed. The withheld information in this case was voluminous and the Commissioner is satisfied that the sample given to the qualified person was a representative sample. The Commissioner does not consider it necessary for the minister to have viewed the entirety of the withheld information in this case.
45. The Commissioner is of the view, therefore, that the decision of the qualified person was both reasonably arrived at and objectively reasonable in this case. He has therefore concluded that the exemption at section 36 is engaged. The Commissioner notes that some of the withheld information comprises email exchanges between NICS officials providing advice to each other on how to respond with the complainant's media enquiries. The Commissioner is satisfied that this information is exempt under section 36(2) (b). Some of the withheld information comprises email exchanges between NICS officials debating the handling of the said media enquiries and the Commissioner is satisfied that this information is exempt under section 36(2) (b) (ii) of the Act. In light of this, the Commissioner must consider the balance of the public interest factors identified by NICS in relation to the information which is exempt under section 36 of the Act.
- 46 **The Public Interest Test.**
- 47 There is an assumption in favour of disclosure operating throughout the Act. The twin duties, to confirm or deny (section 1(1) of the Act) and to communicate information (section 1(1) (b) of the Act) operate subject to the application of the limiting provisions in sections 2, 9, 12 and 14 of the Act. In this case, the assumption in favour of disclosure will operate subject to the application of the section 36 and 42 exemptions.

Section 36 is a qualified exemption and the public interest test must therefore be considered in light of the actual information that has been withheld. That test is set out at section 2(2) (b) of the Act:-

*"2(2)(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."*

#### **48 Public interest factors in favour of maintaining the exemption.**

49 NICS has advised the Commissioner that its staff would not give their views freely and frankly in future when dealing with the media, if asked to provide advice on handling a media enquiry if that is their job to do so. NICS arguments to the Commissioner in this regard have been general and do not specifically address the content of the withheld information. However, the Commissioner has had sight of the withheld information and recognises the public interest in allowing officials to engage freely and frankly and with candour in order to provide advice without detriment to the quality of that advice. The Commissioner considers there is a strong public interest in advice being given freely so that decisions can be taken carefully and with due consideration.

50 The Commissioner notes the specific NICS concerns in this case that some of the withheld information may be distressing to families of those involved in the identified inquests. NICS also contend that release of the withheld information may have an adverse affect on any ongoing proceedings. The Commissioner is aware that at the time of the request the inquiry into the deaths referred to at paragraphs 5-7 above was deferred pending the outcome of PSNI investigations and decisions being taken by the Public Prosecution Service. Whilst the Commissioner is always mindful of distress caused to any person, and he has taken such factors into account as regards applicability of exemptions in this case, he recognises that the section 36 (2) (b) (i) and (ii) exemptions, relate to the inhibitory effect of disclosure on the free and frank provision of advice or to the free and frank exchange of views for the purposes of deliberation and not the 'adverse effect' or harm that may arise to any external investigations.

#### **51 Factors in favour of releasing the information**

52 The Commissioner notes that NICS had provided the complainant with responses to her media enquiries at the time of the request. A record of the outcome of the inquests to which some of these enquiries relate has been in the public domain through coverage by the local press<sup>8</sup>. This has formed part of an inquiry chaired by John O'Hara QC upon which transcripts of the hearings to date are available on the inquiry website.<sup>9</sup> The Commissioner considers that there is a strong public interest in as much detail about these sensitive and high profile issues being available publicly at an appropriate time in order to further inform public debate about the issues at the inquests.

53 The Commissioner considers that there is a strong public interest in openness and transparency of the work of senior NICS officials. This transparency is necessary in order for aid public understanding of the advice giving processes. The deliberations of officials on such high profile matters help inform public

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<sup>8</sup> The Impartial reporter 'Hospitals fundamental errors led to baby deaths' [www.inpartialreporter.com/archive/2004-02-19-19/news/story7513html](http://www.inpartialreporter.com/archive/2004-02-19-19/news/story7513html)

- 'Baby's death was preventable' BBC website 18<sup>th</sup> March 2004
- 'Public enquiry opens into children's deaths' 03/02/2005 Irish Examiner
- 'Police ask death inquiry to delay' Wednesday 27 July 2005 BBC news website

<sup>9</sup> See <http://www.ihrdni.org> 'The inquiry into Hyponatraemia – related deaths'

debate on these matters and scrutiny of those deliberations improves decision making at every level in government.

**54 Where does the balance of the public interest lie?**

55 The Commissioner has identified competing public interest factors in this case and must consider where the balance lies. In doing so he is mindful of the assumption of openness referred to at para 47 above of public interest. The Commissioner has considered the dicta in the Department for Education and Skills v Information Commissioner<sup>10</sup> (“the DFES case”) in relation to the inhibitory effect of disclosure on the advice giving process:

*“in judging the likely consequences of disclosure on officials’ future conduct, we are entitled to expect of them the courage and independence that has been the hallmark of our civil servants since the Northcote-Trevelyan reforms. These are highly-educated and politically sophisticated public servants who well understand the importance of their impartial role as counsellors to ministers of conflicting convictions”.*

56 The Commissioner has had sight of the withheld information and notes the seniority of NICS officials at the NICS dealing with the complainant’s media enquiries. He is mindful of the dicta of the tribunal in the DFES case. He considers that with seniority comes a certain expectation that views attributable to those persons expressed in a professional capacity may be disclosed at some point in the future depending on the facts of each case.

57 The Commissioner is of the view that the withheld information in this case is innocuous and that its disclosure at the time of the request would not have inhibited any future advice giving or deliberations among NICS officials. In any event the Commissioner considers that there is a strong public interest in the advice of officials being open to public scrutiny. This public interest is strengthened in circumstances where the issues are current and debated openly in the public domain as is the case in this instance. In light of this, the background to the request and the live public debate on the inquests at the time of the request, he concludes that the balance of the public interest lay in favour of disclosure of the section 36 information.

**58 The Section 42 exemption - Legal Professional Privilege**

The Commissioner has viewed all of the withheld information and notes that some of it comprises communications as well as legal advice from NICS lawyers. The Commissioner has considered whether these communications were exempt at the relevant time under section 42 (1) of the Act. For this exemption to be engaged, the Commissioner must be satisfied that a claim to legal professional privilege could be maintained in respect of the requested information. Where the Commissioner is satisfied that a claim to legal professional privilege could be maintained he must then consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

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<sup>10</sup> EA/2006/0006 at paragraph 75

59 **What is legal professional privilege?**

Legal professional privilege is an important principle of English law established since at least the sixteenth century which provides for special protection from the disclosure of communications between lawyers and their clients. In the Information Tribunal case of Mr Christopher Bellamy and The Information Commissioner Appeal Number EA/2005/0023 27 March 2006 the Tribunal described the concept of legal professional privilege as,

*“ a set of rules or principles which are designed to protect confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client.*

60 There are two separate categories of legal privilege; legal advice and litigation privilege. Legal advice privilege relates to confidential communications and other documents such as draft statements and reports passing between lawyer and client for the purpose of receiving legal advice in both a litigation and non-litigation context. Communications passing between lawyer and client may be privileged even though litigation may not be contemplated or in progress.

“So far as legal advice privilege is concerned, the rationale is the same, whether litigation is contemplated or not. There are two aspects to this:

(i) the public interest in enabling persons to obtain appropriate legal advice and assistance; and (ii) the recognition by the courts that effective legal advice requires absolute candour between a client and his lawyer. The requisite candour is much less likely to exist if their exchanges are liable to be disclosed.”<sup>11</sup>

61 Litigation privilege relates to confidential communications between a client or his lawyer and third parties that have come into existence after litigation is a real prospect or is pending. The sole purpose of the communications must be to give or get advice in relation to the litigation or collect evidence for use in the litigation.

62 The Commissioner notes that confidentiality is an essential prerequisite to a claim for legal professional privilege. Where legal advice loses confidentiality, because it is in the public domain, privilege will cease to exist. In addition the client in any case may waive privilege. In either of these circumstances, the section 42 exemption will not exist.

63 **Is the section 42 exemption engaged in this case?**

64 The Commissioner has viewed those parts of the withheld information which NICS claim are privileged and can confirm that these consist of confidential communications between NICS and its in house lawyers for the purpose of receiving legal advice. He is satisfied that these communications are such that a claim to legal professional privilege could be maintained in legal proceedings.

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<sup>11</sup> See Bankim Thanki QC, The Law of Privilege, (2006), p8

## 65 **The public interest**

66 Section 42 is a qualified exemption which means that once it has been determined that the exemption is engaged further consideration needs to be given to the public interest test as set out at section 2(2)(b) of the Act. Section 2(2)(b) requires the NICS to consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighed the public interest in disclosing the withheld information. There is a general assumption in favour of releasing information unless the public authority can show on public interest grounds that the information should not be released. If the public interest factors are equally balanced then the information must be disclosed.

## 67 **Public interest factors favouring withholding the information**

68 The Commissioner recognises that there is a strong public interest in enabling persons to obtain legal advice and assistance. It is important that members of the public can have frank communications with their lawyers with a high degree of certainty that the exchanges are not liable to be disclosed without consent and used against them. According to Sir Gordon Slynn in *AM&S Europe Ltd v European Commission* (1983)<sup>12</sup> this public interest,

*“springs no less from the advantages to a society which evolves complex law reaching into all the business affairs of persons real and legal, that they should be able to know what they can do under the law what is forbidden, where they must tread circumspectly, where they run risks.”*

69 The recent Information Tribunal case of *Mr John Pugh MP v the Information Commissioner* stated that it did not accept that there is any inbuilt weight automatically applicable to qualified exemptions, whether class based or not. Section 42 is one such qualified exemption under the Act and will need to be assessed on the particular circumstances of the case. In the *Bellamy* case the Information Tribunal found strong public interest considerations in the ability of legal advice being dispensed without fear or intrusion.

*“it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case.”*<sup>13</sup>

## 70 **Public interest in disclosure of the information.**

71 The Commissioner considers there is a clear public interest in favour of individuals being informed of the reasons behind decision making in terms of advice given by a public authority. The Commissioner further considers that there is a public interest in increasing public confidence and trust in legal advice being dispensed in an equitable and purposive manner to a public authority, which

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<sup>12</sup> (1983) QB 878, 913

<sup>13</sup> *Christopher Bellamy v The Information Commissioner and the Secretary of State for Trade and Industry*, 27.03.2006 appeal number EA/2005/0023

allows the public authority to make informed decisions with all of the relevant knowledge of the law.

**72 Where does the balance of the public interest lie in this case?**

The Commissioner considers that legal professional privilege is a well established principle of the common law and is aware of the strength of the public interest in maintaining such privilege. He considers however that this long established principle must be balanced in every case against the need for openness and transparency and in ensuring scrutiny of the decisions of public authority. The Commissioner is mindful of the recent Information Tribunal ruling in the case brought by Mr John Pugh MP which sets out that the public interest test in relation to section 42 is that set out at section 2 (2) (b) of the Act. The Tribunal state: *“This requires a consideration of the factors in favour of maintaining the exemption and those favouring disclosure and the weight to be attributed to the factors in the circumstances of the particular case in order to determine where the balance lies”*.<sup>14</sup>

The Commissioner is mindful of the fact that section 42 is a qualified exemption and therefore there will be situations where the balance of the public interest will favour disclosure of legally privileged information.

**73** The Commissioner does not consider however, that this is the case in this instance. He has considered fully the background to the request and the actual legal advice. Whilst the Commissioner considers that are public interest arguments in favour of the release of the legal advice in this case which relates to paragraph 71 above, he does not consider that these arguments outweigh the need to maintain the confidentiality of these communications in this case. The Commissioner therefore concludes that in all the circumstances of this case that the public interest lies in favour of maintaining the section 42 exemption in relation to the privileged information.

## The Decision

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**74** The Commissioner's decision is that NICS have not dealt with the complainants request in accordance with the Act in the following respects:

i) NICS incorrectly claimed that they did not hold information in relation to item 4 of the request and therefore breached section 1 (1) (a) of the Act.

(ii) The delay in providing a refusal notice under section 17 was unreasonable and NICS have breached section 17 (3) (b) of the Act.

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<sup>14</sup> Mr John Pugh MP v Information Commissioner 17 December 2007. EA/2007/0055 para 41

(iii) NICS incorrectly concluded at the time of the request that the balance of the public interest lay in maintaining the section 36(ii)(b)(i) and (ii) exemptions to the withheld information.

(iv) NICS correctly applied the section 42 exemption to the legal advice in this case and considers that the public interest in maintaining the exemption outweighs the public interest in disclosing this.

(v) NICS should have applied section 21 of the Act to that information which was accessible to the applicant by other means. NICS failed to do so.

## 75 Steps Required

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

*To release all of the withheld information to the complainant except for the information which is subject to legal professional privilege.*

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

## Other matters

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78 Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

(i) In refusing her substantive request and citing several exemptions, NICS informed the complainant that the section 36 exemption was engaged and the balance of the public interest favoured withholding the requested information. The Commissioner has noted however that the minister did not approve the use of the exemption at section 36 until 23 March 2006 over 1 month after NICS had claimed it was engaged. As the exemption was not engaged when NICS issued their refusal notice the Commissioner considers this was not good practice on the part of NICS and they should have had approval in place before claiming the exemption.

(ii) The Commissioner raised with NICS the issue of their substantial delay in informing the Commissioner of their position as regards informal resolution of this case. The Commissioner considers that this inaction substantially hampered his investigation of this case.

79 **Failure to comply**

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- 80 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.



**81 Right of Appeal**

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82 Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@dca.gsi.gov.uk](mailto:informationtribunal@dca.gsi.gov.uk)

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 28 day of January 2008**

**Signed .....**

**Marie Anderson  
Assistant Commissioner NI.  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Annex A.

Full text of the request sent on November 29<sup>th</sup> 2005 -

“(1) All documents and notes-handwritten, electronic and otherwise-emanating from anyone in NICS and/or held by anyone in NICS relating in any way to e-mails sent by (name inserted) (the author of the request) to either Patricia Quinn or Jill Herron of the NICS Press Office on the following dates:

- (i) October 18 2005; Subject: Disclosure of documents to the Coroner;
- (ii) October 27 2005; Subject: Coroners' Query;
- (iii) November 3 2005; Subject: UTV Insight
- (iv) November 4 2005; Subject: Re: enquiry to Court Service;
- (v) November 8 2005; Subject: UTV Insight enquiry;
- (vi) November 10 2005; Subject: UTV Insight enquiry
- (vii) November 11 2005; Subject: UTV Insight enquiry;
- (viii) November 14 2005; Subject: UTV Insight enquiry;
- (ix) November 24 2005; Subject: UTV Insight,

(2) All documentation and notes-handwritten, electronic and otherwise-emanating from anyone in NICS and/or held by NICS relating in any way to telephone conversations between the complainant and either Patricia Quinn or Jill Herron on October 18/19 or 20 2005; and November 2 2005;

(3) All documentation and notes-handwritten, electronic and otherwise-emanating from anyone in NICS and/or held by anyone in NICS relating in any way to the sending of and the content of a letter to Mr D Hunter, on November 28 2005 by the complainant;

(4) All documentation and notes- handwritten, electronic and otherwise – received into NICS relating in any way to i-ix and sections 2 and 3 of this request;

(5) Records of all telephone calls made and received relating in any way to (i)-(ix) and sections 2 and 3 of this request;

(6) All documentation and notes – handwritten, electronic and otherwise – emanating from anyone in NICS and/or held by anyone in NICS relating in any way to the content of emails sent by the complainant to Winnie Greer on the following dates:

- (i) November 11 2005 (x2); Subject: Request from transcript;
- (ii) November 14 2005; Subject: Request for transcript;
- (iii) November 23 2005; Subject: Request re transcript.

(7) All documentation and notes- handwritten, electronic and otherwise-emanating from anyone in NOCS and/or held by anyone in NICS relating in any way to the content of telephone calls made directly to Ms Greer on November 7,22,23,24;

(8) All documentation and notes – handwritten, electronic and otherwise – received into NICS relating in any way to x-xii ad section 7 of this request;

(9) Records of all telephone calls made and received relating in any way to x – xii and section 7 of this request.

I would be interested in any information held by your organisation regarding my request. I understand that I do not have to specify particular files or documents and that it is the Court Service's responsibility to provide the information I require.

I would like to receive the information on hard copy."

## **Annex B: The Media Enquiries**

### (i) Media enquiry of the 18 October 2005

The complainant submitted a media enquiry 'M20', raising a question about the disclosure of documents to a Coroner investigating a death.

### (ii) Media enquiry of the 27 October 2005

The Complainant submitted a further media enquiry (M29) asking about the circumstances in which a public authority would be permitted to withhold documents from the Coroner.

### (iii) Media enquiry of the 03 November 2005

The Complainant submitted a further media enquiry ("M1") posing questions about the inquest into the death of Raychel Ferguson and documents supplied to the Coroner.

### (iv) Media enquiry of the 24 November 2005

The complainant submitted a media enquiry ('M21') concerning the inquest into the death of Anne McKee.

### (v) Enquiry to Mr David Hunter, Deputy Coroner of the 28 November 2005

The complainant on the 28 November 2005 wrote to the Deputy Coroner investigating the death of Anne McKee. The enquiry was forwarded and dealt with by the NICS press office.

### (vi) Enquiry of the 04 November 2005 to the NICS Information team requesting a Court Transcript