

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date 27 February 2007

**Public Authority:** Northern Ireland Office  
**Address:** 11 Millbank  
London  
SW 1P 4PN

### Summary Decision

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1. The Information Commissioner's (the Commissioner) decision in this matter is that the Northern Ireland Office (the 'NIO') has failed to deal with the complainant's request in accordance with the requirements of Part I of the Freedom of Information Act (the 'Act'). That is because the Commissioner considers that the NIO incorrectly applied the section 31(1)(a) exemption to the requested information as a "blanket" exemption to the request. In addition, the NIO failed to provide an adequate refusal notice under section 17 of the Act. Also the NIO failed to provide to the applicant adequate advice and assistance in order to clarify his request in accordance with section 16 of the Act.
2. However, as a result of the intervention of the Commissioner, some of the requested information has now been disclosed. In relation to the remaining information (the 'withheld information'), the Commissioner is satisfied that the NIO has correctly withheld this information and that it is exempt by virtue of sections 23, 24, 31, 36, 40(2), 41 and 42 of the Act.

### The Commissioner's Role

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3. The Commissioner's role is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part I the Act. This Notice sets out his decision in relation to the complainant's request which is referred to at paragraph 5 below.
4. As the complainant has received some of the information covered by his request, this decision notice deals only with the information that remains undisclosed (the 'withheld information').

## The Request

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5. On 10 February 2005, the complainant made a request for the following information to the NIO:

*'...the facts known to HMG [the Government] which links the IRA to the Northern Bank Robbery on Monday December 20<sup>th</sup> 2004'*

*'...All recorded information held by the Northern Ireland Office containing references to, or otherwise, relating to the raid on the Northern Bank's Belfast Cash Centre on December 20<sup>th</sup> 2004. Please also provide copies of those parts of the recorded information containing such references or related information, including the context in which the reference is made...'*

*'... I formally request via the Freedom of Information Act access to the entirety of the information held on this robbery by the Northern Ireland office and HMG overall'. (The 'request')*

6. The NIO issued the complainant with a refusal notice on 7 March 2005 stating that the information he had requested was exempt under section 31(1)(a) of the Act. The NIO also forwarded to the complainant a copy of the Secretary of State's statement about the robbery of 11 January 2005. The complainant wrote to the NIO on 26 March 2005 requesting a formal review of this decision to disclose any other information caught by the request. The NIO reviewed this decision and confirmed to the complainant by letter dated 29 April 2005 that the information was exempt under section 31(1)(b) of the Act and not section 31(1)(a) as previously indicated.

## The Investigation

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### Scope of the case

7. By letter dated 9 May 2005, the complainant appealed to the Commissioner regarding the NIO's refusal to provide the information requested by him.
8. The Commissioner considered whether in relation to the request, the NIO had complied with the requirements of section 1(1) of the Act and in particular whether it had properly applied the exemption cited (section 31(1)(a) of the Act). Although not raised by the complainant as a reason for his appeal, the Commissioner also considered whether or not the NIO had complied with the requirements of sections 16 and 17 of the Act and the Lord Chancellor's Code of Practice on the Discharge of public authorities' functions under Part I of the Freedom of Information Act 2000 (the 'section 45 Code').

## Chronology of the case

9. On 14 July 2005, the Commissioner wrote to the NIO requesting copies of all outstanding documentation relating to the complaint including the initial decision, the notice of refusal and the complainant's request for review. In that letter, the Commissioner sought confirmation of the grounds for claiming the exemption under section 31(1)(a) of the Act. The Commissioner also asked the NIO to identify the information covered by the request.
10. By letter dated 26 August 2005, the NIO accepted that the request had not been processed in accordance with the Act in that it had wrongly applied section 31(1)(a) as an 'umbrella exemption'. The NIO apologised for this failure. At that stage, the Commissioner was provided with a list of the documents containing the information covered by the request and the NIO confirmed it was undertaking a further review. At this point, the NIO disclosed to the complainant further information. This information comprised a total of seven media reports/transcripts about the Northern Bank robbery. This was originally considered by the NIO to be exempt, it being in the public domain and accessible to the complainant by other means at the relevant time (the time of the request). However, the NIO, following discussions with the Commissioner, agreed to release this information to the complainant.
11. In relation the remaining information, on 26 September 2005, the NIO provided to the Commissioner detailed submissions on the application of the following exemptions:
  - Section 21 Information accessible to applicant by other means)
  - section 23 (information supplied by, or relating to, bodies dealing with security matters)
  - section 24 (national security)
  - section 27 (international relations)
  - section 31 (law enforcement)
  - section 35 (formulation of government policy)
  - section 36 (prejudice to the effective conduct of public affairs)
  - section 40 (personal data)
  - section 41 (information provided in confidence)
  - section 42 (legal professional privilege).
12. As a result of discussions with the Commissioner, in September 2005, more information was disclosed to the complainant. This comprised correspondence from the Secretary of State to Lord Alderdice and an internal communication relating to the Secretary of State's statement to the House of Commons on 11 January 2005.
13. In November 2005, the NIO provided to the Commissioner further detailed submissions on the application of sections 23, 24, 27, 31, 35, 36, 40, 41 and 42 of the Act to the request. The NIO also provided its detailed considerations as to why, in relation to the qualified exemptions (sections 24, 27, 31, 35, 36 and 42 of the Act), the public interest weighed in favour of maintaining those exemptions.

14. Given the sensitivity of remaining information, the Commissioner considered that it was necessary to inspect the remaining information and it was agreed with the NIO that an inspection would take place on their premises. It was also agreed that information which it claimed was exempt by virtue of sections 23 and 24 of the Act would not be available on that date. Having regard to the sensitivity of the subject matter, this approach was agreed with the Commissioner in accordance with the Memorandum of Understanding between the Secretary of State for Constitutional Affairs and the Information Commissioner dated February 2005 (the 'MOU').
15. On 22 and 23 November 2005, staff from the Commissioner's office inspected the information which was contained in excess of 80 documents. The Commissioner's staff questioned the relevant NIO officials concerning their approach to the applications of the exemptions in relation to this information. In accordance with Annex 2 of the MOU, at the meeting on 22 November 2005, staff from the Commissioner's office discussed with officials from the NIO the application of the section 23 exemption to some of the information withheld by the NIO. This exemption applies to information held by the public authority relating to or supplied by one of the exempt bodies listed in section 23(3) of the Act. NIO officials declined to discuss the nature or content of information considered exempt under section 23 at that time. Subsequently the Commissioner's staff had sight of some of the material which the NIO claimed was exempt by virtue of section 24 of the Act.
16. After this initial inspection, staff from the Commissioner's office entered into lengthy correspondence with the NIO regarding the nature and extent of the information covered by section 23 of the Act. Eventually in July 2006, sufficient information was provided to the Commissioner by the NIO, to enable him to conclude properly that this exemption did apply to that material.
17. Further inspections of the information were carried out on 16 December 2005, 2, 3 February and 3 July 2006. During these visits, the Commissioner's staff took the opportunity to raise further enquiries in relation to the refusal by the NIO to disclose parts of the information. As a result of the interventions of the Commissioner during the February inspection the NIO provided the complainant with a detailed list of the sources of all of the information falling within the section 21 exemption.
18. During the visit of 16 December, the Commissioner verbally raised with relevant NIO officials, a number of questions in relation to the application of the exemptions. The commissioner's staff also sought evidence of the opinion of the qualified person (in this case the Secretary of State) as required by section 36(5) of the Act. By letter dated 17 January 2006 the NIO provided to the Commissioner sufficient evidence of the Secretary of State's role in relation to the request for these purposes. Further queries were raised by the Commissioner's staff with the NIO in a letter dated 24 January 2006.

19. Although the Commissioner has had sight of part only of the section 24 material, the NIO has provided to him written submissions in December 2005 and again in February 2006. A senior member of the Commissioner's staff has questioned at length, a senior NIO official on two occasions in relation to the nature and extent of the information which the NIO claimed as covered by this exemption. As a result of these detailed enquiries, the Commissioner received sufficient information to assist him in his conclusions in relation to the application of the exemption to this material.
20. As indicated previously, during the course of the Commissioner's investigation, information previously withheld by the NIO was released to the complainant. Again in February 2006, as a result of the continued intervention of the Commissioner, information that had ceased to be sensitive due to the passage of time in this case was disclosed. This comprised a wide range of information including:
  - Correspondence relating to senior politicians and the Secretary of State
  - Correspondence with NIO officials and the Bank of England
  - Draft ministerial statements
  - The report of the duty officer in relation to the robbery
21. In September 2006 the NIO released two further documents to the complainant, which comprised correspondence between Iain Luke MP and the Secretary of State.

## Other Matters

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### The duty to give advice and assistance

22. Although not raised by the complainant initially, the Commissioner has considered whether the NIO met the duty under section 16 of the Act to provide advice and assistance in relation to the request. Part II of the section 45 Code provides guidance on the section 16 duty. This part of the Code makes it clear that the aim of providing advice and assistance is not to determine the motives of the requester of information, but rather to clarify the nature of the information sought. It recommends that appropriate assistance might include among other things providing an outline of different kinds of information which might meet the terms of the request.
23. The Commissioner considers that the request for '*all recorded information*' relating to the Northern Bank robbery was very wide and the NIO ought to have sought to clarify this request. This could have been achieved, in the Commissioner's view, by providing an outline, as far as possible, of the kinds of information held. The Commissioner is mindful of the particularly sensitive nature of some of the information covered by the request. However, the Commissioner is of the view that if the NIO had provided a very general outline of the information

held where possible, this would have assisted the complainant in informing him as to the extent of the information caught by his request.

### **The section 17 refusal notice**

24. In his appeal to the Commissioner, the complainant did not raise the issue of the adequacy of the refusal notice. However, the Commissioner considers that the letter of 7 March 2005 failed to meet the requirements of section 17 of the Act. In particular, although the NIO did identify the exemption claimed in that letter, it did not state as required by section 17(1)(c) why the exemption applied in all the circumstances of the particular case. Further, the NIO did not state the reasons for claiming that in all the circumstances of the case, the public interest in maintaining the exemption claimed outweighed the public interest in disclosing the information. The NIO has now confirmed to the Commissioner its acceptance that the initial refusal letter did not meet the requirements of section 17 and has agreed to have regard to these requirements when providing responses to requests under the Act in future.

### **The withheld information and the exemptions**

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25. The request relates to categories of information held by the NIO and outlined at paragraphs 26 to 91 below. This decision notice relates solely to the withheld information falling within those categories.

### **Section 23: Information supplied by, or relating to bodies dealing with security matters**

26. The NIO has confirmed to the ICO the origins of the material which they claim is exempt by virtue of section 23 of the Act. The Commissioner has had an opportunity to question senior NIO officials about the application of the exemption and to receive submissions in this regard.
27. The Commissioner is mindful that in order to satisfy himself that the exemption applied in this case, he must only consider whether or not as a matter of fact the information was supplied by or relates to one of the security bodies. Unlike some of the exemptions under the Act, the Commissioner is not required to consider the impact of disclosure of such information. The Commissioner has in this case been provided with sufficient evidence as to the source of the information and is satisfied that the material held by the NIO at the time of the complainant's request was supplied by and relates to bodies listed in section 23(3) of the Act. The section 23 exemption is an absolute exemption and since the Commissioner is satisfied that it is engaged, he is not required to consider the application of the public interest test in relation to this particular information.

In light of this, the Commissioner is satisfied that this information is exempt by virtue of section 23 of the Act

## Section 24: The national security information

28. Some of the information covered by the complainant's request relates to national security. The NIO refused to disclose this information to the complainant claiming that at the time of the request it was exempt by virtue of section 24 of the Act. Information is exempt under section 24 if the exemption is required for the purposes of safeguarding national security. This is a qualified exemption, and even if the exemption itself is actually engaged, the information will not be disclosed if the balance of the public interest in all the particular circumstances of the case lies in favour of maintaining the exemption.
29. In support of their arguments the NIO confirmed to the Commissioner that in their view the disclosure of this information at the time of the complainant's request would have prejudiced the ability of officials to process and use national security related information.
30. The Commissioner has considered carefully the submissions made by the NIO as to the applicability of the exemption and the timing of the complainant's request (10 February 2005). The Commissioner is mindful that the Police Service of Northern Ireland (PSNI) investigation into the Northern Bank robbery was under way at the time of the request. The Commissioner notes that the word 'required' is not defined in the Act but is satisfied that in this context it means something more than desirable, in effect it must be 'necessary' to apply this exemption for the 'purposes of safeguarding national security'. The Commissioner notes also that it is not sufficient for the information simply to relate to national security; it can only be withheld if an exemption from the duty to communicate is required for the purpose of safeguarding national security. The expression 'national security' is not defined in the Act. However, the Commissioner does consider that the expression can cover matters such as the defence of the realm and the activities of bodies responsible for investigating threats to national security.
31. The Commissioner is satisfied in relation to this information that at the time of the request exemption from the duty to communicate information (the section 1(1)(b) duty) was 'required' for the purposes of safeguarding national security. That is because the Commissioner considers that to disclose this information at the time of the complainant's request would have been a risk to national security. This risk would have occurred because such disclosure would inhibit the ability of officials to process and use national security related information both in relation to the robbery itself and also in relation to the Government's intelligence efforts generally. The Commissioner is satisfied therefore that in relation to the material identified by the NIO in this category, the exemption under section 24 exemption was engaged at the time of the request. Since this is a qualified exemption, the Commissioner must also consider the public interest factors in favour of maintaining the exemption and in favour of disclosing this information.

## The public interest test in relation to section 24

32. The Northern Bank robbery was at time of the complainant's request the largest bank robbery in the world and was the subject of considerable media interest. Because of its impact on the Northern Ireland peace process at the time, the robbery was and continues to be a matter in which the wider public both nationally and internationally retain a keen interest. However, the Commissioner recognises that what is in the public interest is that which serves the public good and is mindful that this is not necessarily the same as what is of interest to the public.
33. There is a general public interest in openness and transparency in relation to the workings of government so as to ensure accountability and scrutiny of the decision making process. More particularly, in relation to the facts of this case, there is a public interest in ensuring effective oversight of the government's use of national security related information. The Commissioner recognises that these public interest factors have particular weight in the case of the Northern Bank robbery, which at the time of the request had such a major impact on the Northern Ireland peace process.
34. The Commissioner considers that there is also a strong public interest in safeguarding national security as reflected by the section 24 exemption. There is a public interest in ensuring that national security related information remains protected from the public gaze where in any particular case public exposure might prejudice national security. The NIO has informed the Commissioner that disclosure of the section 24 material caught by the request would do so. The Commissioner has carefully considered the context and background to the request and the information caught by this exemption. Having considered these matters, the Commissioner is satisfied that release in response to the request would have prejudiced both the ability of officials to process and use the relevant national security related material, and specifically would affect the Government's national security efforts more generally.
35. The Commissioner accepts the NIO's arguments in this case as to the effect of premature disclosure of the information in response to the complainant's request of 10 February 2005. The Commissioner is mindful also of the public interest in ensuring the accountability of government. The Commissioner has considered the particular sensitivities surrounding the Northern Bank robbery and considers that in light of those sensitivities and the ongoing investigation, that at the time of the request, the public interest lay in maintaining the exemption. The Commissioner is mindful of the dicta of Judge LJ in the case of *ex parte Bright and others*<sup>1</sup> that '*unless there are compelling issues of national security, the public is entitled to know the facts*'. The Commissioner recognises that in this particular case, there were and remains compelling reasons why information falling within this category should not have been disclosed. He is satisfied therefore that the balance of the public interest lay in favour of maintaining the exemption.

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<sup>1</sup> R v Central Criminal Court, *ex parte Bright, Alton and Rusbridger* {2001} EMLR 4



## Section 41: Information provided in confidence

36. Some of the information relating to the complainant's request was information provided to the NIO in confidence.
37. Section 41 provides that:
- “(1) Information is exempt information if –*  
*(a) It was obtained by the public authority from any other person (including another public authority), and*
- (b) The disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”*
38. The Commissioner has considered whether or not this information was provided to the NIO by another person or other body. The Commissioner has considered carefully the documents in which the information referred to at paragraph 36 has been recorded. It is clear from an examination of the documents and the circumstances surrounding the discussions and exchanges giving rise to those documents that this information was provided to the NIO by other persons or bodies. The Commissioner is satisfied therefore that the first limb of section 41 has been met.
39. The Commissioner has also considered whether or not disclosing this information would constitute an actionable breach of confidence. The Commissioner considers that for a breach of confidence to be actionable it must meet the established tests in *Coco v Clarke*<sup>2</sup>. These requirements are that the information must have the necessary quality of confidence; it must be imparted in circumstances giving rise to an obligation of confidence; and there is an unauthorised use of that information to the detriment of the confider.
40. The Commissioner has had sight of the information referred to at paragraph 36 above and has considered whether or not at the time of the request such information was accessible to the public at large or remained undisclosed. The Commissioner has carefully considered the media coverage of the robbery at the time of the complainant's request and considered also the nature of the information and the representations of the NIO in this regard. The Commissioner is satisfied that at the time of the request this information was not accessible to the public at large and therefore had the necessary quality of confidence.
41. The Commissioner is further satisfied having regard to the contents of the information and to the submissions of NIO officials that the information was imparted in circumstances giving rise to an obligation of confidence. Although not a prerequisite in every case, the Commissioner has considered the issue of detriment which may be required for a breach of confidence to be actionable. The Commissioner is satisfied that in this case sufficient detriment could be proved to

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<sup>2</sup> *Coco v Clarke* [1969] RPC 41

ground an action for breach of confidence by the individuals and organisations in question should such information be disclosed without their consent.

42. Although section 41 is an absolute exemption, the Commissioner recognises that in certain circumstances the public interest may override any breach of a duty of confidence. Where there is an overriding public interest in any particular case in disclosing the information the courts have accepted that no duty of confidence is owed. The Commissioner must therefore consider whether there was an overriding public interest at the time of the complainant's request which favoured disclosure of the information referred to at paragraph 36 above.
43. The Commissioner recognises that there is a strong public interest in the accountability of public officials and public bodies generally. The Commissioner also considers that there is a general public interest in ensuring that the decisions of government are open to scrutiny and are reached after careful consideration of all relevant views and opinions.
44. In this particular case, the issue of the robbery and the PSNI investigation attracted a considerable amount of media coverage because of the political impact of the robbery on the peace process. The Commissioner is aware of the extent of information about the robbery already in the public domain at the time of the request and recognises that there is a public interest in informing the public about matters already in the public domain. The Commissioner recognises the degree of worldwide media interest in this robbery and considers that there is a public interest in keeping the public informed of matters of current debate. But in the case at hand, although the Commissioner recognises that there are public interest factors which favoured disclosure in this case; the Commissioner is satisfied that such considerations did not (at the time of the request), override the strong public interest in the maintenance of confidence in this case.

The Commissioner is satisfied therefore that such information is exempt by virtue of section 41.

45. In relation to other information provided in confidence, the NIO also sought to rely on the exemption under section 27(1)(a) of the Act (information whose disclosure would, or would be likely to prejudice to relations between the United Kingdom and any other State). The Commissioner has considered this information and is of the view that it is 'confidential' information, not being information which at the time of the request, was in the public domain. The commissioner is also satisfied that this information has been obtained from a State other than the United Kingdom or from an international organisation or international court, and is therefore exempt by virtue of section 27(2) of the Act. Since the Commissioner has concluded that this subset of the information provided to the NIO in confidence, is exempt by virtue of section 41 of the Act, he does not consider it necessary to detail the arguments in relation to the applicability of other exemptions, neither does he consider it necessary to outline the public interest factors in favour of maintaining the exemptions under section 27(1)(a) and section 27(2).

## Section 40: personal information

46. Information covered by the section 40(2) exemption comprises the following:

- (i) the identity and opinions of individuals on the question of attribution of the robbery
- (ii) the identity of senior NIO officials dealing with the aftermath of the Northern Bank robbery
- (iii) the identity of other individuals

47. In relation to information at subparagraph (i) above, the Commissioner is satisfied that this constitutes personal data within the meaning of section 1(1) of the Data Protection Act 1998 (the 'DPA'). Personal data means

*"... data which relate to a living individual who can be identified –  
from those data, or  
from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller..."*

The definition of personal data in section 1(1) of the DPA includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.

48. The Commissioner is satisfied that the identity of the individuals referred to in paragraph 47(i) and (iii) above is information that relates to those individuals. In relation to the opinions of those individuals concerning the question of attribution of the robbery, the Commissioner is also satisfied that such information relates to those individuals. In arriving at this conclusion, the Commissioner considers that information relates to an individual where there is a sufficiently substantial link between the individual and that information, in this case the opinions given by the relevant individuals.

49. Having concluded that this information is personal data, the Commissioner must therefore consider whether it is exempt by virtue of section 40(2) of the Act. Information is exempt by virtue of this section if its disclosure would breach any of the data protection principles as set out in Schedule 1 to the DPA. The first data protection principle requires personal information to be processed fairly and lawfully, and in addition a data controller processing such information (the NIO in this case) must find an appropriate ground for such processing under Schedules 2 and 3 to the DPA.

50. The Commissioner is satisfied that this information was not accessible to the public at large at the time of the request or subsequently and has the necessary quality of confidence. In light of the submissions of the NIO and having considered the nature of the information, the Commissioner is satisfied that the individuals concerned provided their opinions on this particular robbery in circumstances giving rise to an obligation of confidence. It is the Commissioner's view therefore that it would be unlawful in those circumstances to release this personal information into the public domain. To disclose personal information

obtained from individuals on the basis of an obligation of confidence is in his view also unfair to those individuals. For those reasons, the Commissioner is satisfied that such personal information is exempt because its disclosure would breach the first data protection principle, it being unlawful and unfair to disclose this information into the public domain.

51. In relation to the personal information outlined at subparagraph 47(ii) above, the NIO have claimed a number of exemptions including section 40(2). Furthermore, although the complainant was provided with some of the documents comprising information relating to his request, the actual identity and post of the NIO officials appearing in those documents was redacted. The NIO has advised the Commissioner that in some instances, the identity of the officials is incidental to the request and in other instances the NIO have removed the identifying details relying on sections 40(2), section 36(2)(c) and section 38(1) of the Act.
52. In relation to the identity of individuals and the posts they hold, the Commissioner considered the NIO's reasoning for applying the section 40(2) exemption. The Commissioner has considered carefully the context of this information (namely the aftermath of the Northern Bank robbery). The Commissioner has also had regard to the specific security considerations applicable at the time in Northern Ireland and the need to ensure the safety of those individuals involved. As indicated above, the first data protection principle requires that personal information is processed fairly and lawfully. The Commissioner is satisfied that for reasons of personal security in relation to the particular circumstances of this request, to disclose information concerning the identities of and posts held by the relevant NIO officials would be unfair to them and a breach of the first data protection principle.
53. The Commissioner is mindful of the dicta of the Information Tribunal in the matter of the House of Commons v The Information Commissioner and Normal Baker MP (Appeal Numbers EA/0006/0015 and EA/0006/0016). The Tribunal clarified that when assessing fair processing requirements under the DPA, the interests of individuals who are public officials where their data are processed for a public function, is no longer first or paramount. The Tribunal also considered that where such individuals carry out public functions, hold elective office or spend public funds, they must have an expectation of increased public scrutiny than would otherwise be the case in respect of their private lives.
54. The Commissioner is satisfied that, given the background to the complainant's request, and the context in which this personal information is being processed, there is a risk to the personal security of the NIO officials involved, should their identities and posts be disclosed. In light of these special circumstances, he has concluded that despite their position as senior public servants, it would be unfair to those individuals to disclose their personal information into the public domain.
55. In light of these particular findings regarding the fairness of processing this personal information, the Commissioner does not consider it necessary to decide whether a suitable ground under schedule 2 to the DPA could be claimed by the NIO to allow the disclosure of this information. However, for the avoidance of

doubt, given the particular circumstances of this case and the risks to the individuals involved the Commissioner is satisfied that there is no suitable ground under Schedule 2 to the Act which might apply in this case.

56. Further, since this personal information is caught by the section 40(2) exemption, because this is an absolute exemption, there is no requirement on the Commissioner to apply a public interest test.
57. Although the NIO did raise the issue of the risks to personal safety of the staff involved, the Commissioner being satisfied that section 40(2) applies to their information, he has not considered section 38 of the Act (health and safety).

### **Section 31: Information relating to the criminal investigation**

58. The NIO have claimed that information relating to the criminal investigation which was caught by the complainant's request is exempt by virtue of sections 31(1)(a) and 31(1)(b) of the Act.
59. Section 31 of the Act applies only to information which is not exempt by virtue of section 30 (investigations and proceedings conducted by public authorities). The information requested in this instance was made by the complainant to the NIO and not to the Police Service of Northern Ireland (PSNI) who were conducting the investigation into the Northern Bank robbery. The Commissioner is satisfied therefore that the section 30 exemption does not apply and that it was appropriate for the NIO to consider the provisions of section 31 of the Act.
60. Some of this information could reveal lines of enquiry currently being pursued by the PSNI that may not be exhausted and could provide information which may be of use to criminals in evading detection. The Commissioner accepts the NIO's assertion that to disclose information falling within this category, at the time of the request, would have caused prejudice to the ongoing investigation and could be of use to criminals generally in evading detection. The Commissioner is satisfied therefore that section 31(1)(a) is engaged in relation to this information.
61. In light of the above, the Commissioner need not consider the application of the exemption under 31(1)(b) which relates to information whose disclosure would be likely to prejudice the apprehension or prosecution of offenders. The Commissioner recognises that particular information could be caught by both exemptions. However, the Commissioner is satisfied that the particular information in all the circumstances of this case is exempt by virtue of section 31(1)(a).

#### **The public interest test in relation to section 31(1)(a)**

62. Since section 31(1)(a) is a qualified exemption, the Commissioner has considered both the public interest in maintaining this exemption and in disclosing the information.

- 63 The Commissioner is mindful of the strong public interest in the ensuring that the actions of law enforcement agencies are subject to scrutiny by government so as to ensure accountability at the highest level for decisions taken. There is also a strong public interest in ensuring that the public is kept informed of significant investigations such as the Northern Bank robbery. The Commissioner is mindful of the public interest in ensuring openness and transparency as regards the workings of law enforcement agencies to ensure that investigations and prosecutions are conducted thoroughly and impartially.
64. The Commissioner is mindful of the strong public interest in ensuring the prevention or detection of crime, reflected in the section 31(1)(a) exemption. The Commissioner also considers that there is a public interest in conducting high profile criminal investigations such as this free from the public gaze, in order to ensure that all appropriate lines of enquiry are properly pursued. Premature disclosure of information concerning a criminal investigation can hamper the ongoing enquiries and thus prejudice the success of the investigation.
65. The public good can be served in any case by providing sufficient information to reassure the public that high profile investigations into matters such as the Northern Bank robbery are being fully and actively investigated. The complainant's request was made some weeks after the Northern Bank robbery, when the criminal investigation was under way, and the need for protected space for the investigators and the organisations involved (including the NIO) was greatest. The Commissioner further notes that a significant amount of information concerning the progress of the PSNI investigation was already in the public domain at the time of the request. In light of this, and having regard to the timing of the request and the potential impact of disclosure of information falling within this exemption, the Commissioner is satisfied that the balance of the public interest in all the circumstances of this case lay in favour of maintaining this exemption.

#### **Section 42: Information relating to the advice provided to the NIO by legal advisors**

66. Some of the withheld information relates to legal advice provided to government by legal advisers on the issues arising from the robbery in order to inform their thinking on the issue. The NIO have claimed that this legal advice is exempt by virtue of section 42 of the Act which is a qualified exemption relating to information covered by legal professional privilege.
67. Legal professional privilege is a common law principle which protects from disclosure communications between a professional legal adviser and his/her client reflecting the special nature of the relationship between legal adviser and client. There are two categories of legal professional privilege: litigation privilege, where litigation is contemplated or pending, and advice privilege, where litigation is not in contemplation. The Commissioner has carefully examined the withheld information and is satisfied that advice privilege attaches to the withheld information and that therefore the exemption under section 42 applies.

### **The public interest test in relation to section 42**

68. The Commissioner, being satisfied that the exemption under section 42 is engaged in relation to this advice, has considered the public interest arguments in relation to that exemption. The Commissioner is of the view that there are arguments both for maintaining the exemption and in favour of disclosure.
69. The Commissioner recognises that there is an inherent public interest in the transparency of the decision making of public authorities. There is a strong argument that such transparency will improve the quality of future decisions and promote accountability.
70. The Commissioner recognises that there is a strong public interest in disclosing information where to do so would determine and demonstrate whether public authorities have acted appropriately.
71. The Commissioner recognises that it is in the public interest to disclose information where such disclosure will encourage public participation in and improve understanding of participation in public debate of important issues of the day and that, where public authorities must give reasoned explanations for their decisions, the quality of such decisions may be improved. The Northern Bank robbery was a high profile case with serious implications for the peace process in Northern Ireland. The Commissioner is aware of the nature and extent to which the facts and issues surrounding the robbery have been the subject of both public debate and speculation.
72. The Commissioner considers that there is also a strong public interest in the protection of the long established principle of legal professional privilege. This principle allows clients to seek legal advice and allows for full and frank exchange between adviser and client. The Commissioner accepts that if such advice was to be routinely disclosed, public authorities may be reluctant to seek advice for fear of damaging their position in relation to future proceedings.
73. The Commissioner recognises that it is important that, in matters of such significance as the Northern Bank robbery, that the government was, and remains, able to obtain full and frank legal advice on this issue. As legal advice must be fair, frank and reasoned, the Commissioner recognises that it will inevitably highlight the strengths and weaknesses of the client's position. The Commissioner is satisfied that, in the particular circumstances of this case, the disclosure of the advice would have compromised the ability to obtain full and frank legal advice in order to inform the policy makers in this case. This would in turn have prejudiced the ability of government to make fully informed decisions on the issue of the robbery.
74. The Commissioner is mindful of the strong public interest in protecting the established principle of legal professional privilege. In considering the public interest in this case the Commissioner has had regard to the view of the Information Tribunal as expressed in the matter of Bellamy v The Information

Commissioner (Appeal Number EA/2005/0023). At paragraph 35 of that judgment the Tribunal commented as follows:

*“As can be seen from the citation of the legal authorities regarding legal professional privilege, there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest”.*

75. The Commissioner is not satisfied that in the present case the countervailing considerations outlined above are of sufficient weight to override the *“inbuilt public interest”* in protecting privileged communications between legal adviser and client.
76. Given the significant impact of the robbery on the Northern Ireland peace process the Commissioner recognises that at the time of the request there was a compelling public interest in the allowing government to consider the range of policy options and the legal implications of those options free from public scrutiny. The Commissioner is satisfied therefore that, in all the circumstances of the case, the public interest in maintaining the exemption does outweigh the public interest in disclosure of the withheld information.

### **Sections 35 and 36: Information held on the lines to take for ministers**

77. The Commissioner considered the views of the NIO that information relating to lines to take for ministers in relation to the robbery was exempt by virtue of section 35 and section 36 of the Act. The term ‘lines to take’ covers information in a variety of forms including email exchanges between officials as well as formal briefings to ministers from NIO officials. These contain information and advice to ministers on matters pertaining to the robbery which may have formed the basis of discussion within government as well as the background information upon which the advice was based.
78. The exemption contained in section 35(1)(a) is a qualified exemption and states that information is exempt if it *‘relates’* to the formulation or development of government policy.
79. The Commissioner has viewed the information which the NIO claim is exempt by virtue of this provision. He is satisfied that, while the context in which the advice to the relevant ministers has been provided is the government’s position on Northern Ireland matters generally, he is not satisfied that it relates to the formulation or development of government policy. The Commissioner accepts the NIO’s assertions that disclosure of this information would impact on the ability of officials in the future to provide ministers with candid advice. The Commissioner is satisfied therefore that the exemption under section 35(1)(a) is not engaged and that the exemption under section 36(2)(b)(i) is the more appropriate exemption in this case.



80. In any event, recognising that sensitivity in relation to such matters can diminish with time, as a result of the intervention of the Commissioner, some of the information previously withheld under section 36 was released to the complainant by the NIO. This included exchanges between NIO officials and the Secretary of State on lines to take and correspondence between the Secretary of State and senior politicians.
81. However, a substantial amount of information in this category remains undisclosed and this is in the form of advice and briefings to ministers from NIO officials on the robbery and the appropriate lines for government to take. The NIO seeks to rely on sections 36(2)(b)(i) and 36(2)(b)(ii) in relation to this category of information and have advised the Commissioner that the balance of the public interest lay in maintaining the exemption. Sections 36(2)(b)(i) and (ii) relate to information the disclosure of which would or would be likely to, inhibit the free and frank provision of advice, or the free and frank exchange of views for the purposes of deliberation.
82. The NIO have claimed that the release of this information would have impacted on the ability of officials to provide ministers with candid advice at the time of the request. The Commissioner accepts that this information relates to a matter of high political sensitivity and importance. Therefore he has concluded that its disclosure in this instance would inhibit the free and frank exchange of views for the purposes of deliberation in future instances.
83. The Commissioner has considered the evidence provided by the NIO in relation to the opinion of the Secretary of State concerning the applicability of both the section 36(2)(b)(i) and section 36(2)(b)(ii) exemptions. In light of the Tribunal decision in *The Guardian/Brooks v Information Commissioner* (Appeal Numbers EA/2006/0011 and 0013) the Commissioner is satisfied that given the nature and content of this information that the opinion is '*objectively*' reasonable and a reasonable one in all the circumstances of this case.<sup>3</sup> The Commissioner is satisfied that in this case that opinion is reasonable in substance. Further, having regard to evidence provided by the NIO in this regard, the Commissioner is also satisfied that the opinion was reasonably arrived at.
84. In conclusion, the Commissioner is satisfied that the bulk of the information in this category is exempt by virtue of section 36(2)(b)(i) and that some of it is also exempt under section 36(2)(b)(ii). Since this is a qualified exemption, the Commissioner must now consider the application of the public interest test in relation to these subsections.

#### **The public interest test in relation to sections 36(2)(b)(i) and 36(2)(b)(ii)**

85. The Commissioner has considered the public interest arguments in favour of maintaining these exemptions and in favour of disclosing the information.
86. The Commissioner recognises that there is a public interest in openness and transparency in order to promote accountability in relation to activities of public

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<sup>3</sup> Information Tribunal decision in the Appeal no E/2006/0011 and 0013 at paragraph 60

authorities of government. This is reflected in the scheme of the Act, as the Tribunal says, the 'default 'setting' is disclosure.<sup>4</sup>

87. The Commissioner is mindful that there is also a public interest in ensuring that public authorities and in this case, government is accountable for its decisions. However, the Commissioner is also mindful of the public interest inherent in these exemptions so that public authorities (and in particular, government) have the ability to obtain free and frank advice from officials or exchange of views when necessary to make those decisions. In considering the weight to be given to this factor, the Commissioner has considered the views of the qualified person in this case and has already formed a view that that the opinion was a reasonable one.
88. The Commissioner is satisfied that the balance of the public interest in all the circumstances of this case is in favour of maintaining the exemptions because of the overriding need for government to be fully advised and briefed by its most senior officials. The Commissioner is also satisfied that the disclosure of information in this category would impede the ability of government and its advisers to consider properly the issues arising from matters of such political sensitivity.
89. Therefore in relation to some of this information the Commissioner has concluded that the NIO has correctly applied these exemptions and the public interest test.
90. Some of the information in this category also falls within the section 41 exemption which is dealt with from paragraphs 36 to 46 above. The confidentiality of the information pertaining to such discussions is vital to the management and progression of the political process. The Commissioner has already concluded that this information is exempt by virtue of section 41 as it was information obtained in confidence and therefore it is not necessary for him to decide whether that particular subset of this information engages section 36 of the Act.

## The Decision

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91. In conclusion, the Commissioner's decision is that the NIO did deal with some aspects of the complainant's request in accordance with the Act, but failed to deal correctly with others. The Commissioner is satisfied that the withheld information, i.e. that which has not been released to the complainant during the period of the Commissioner's involvement, was and remains appropriately withheld in accordance with the Act .

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<sup>4</sup> Ibid at paragraph 82

## Steps Required

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92. In light of the above, the Commissioner requires no steps to be taken by the NIO in this case.

## Other matters

93. The NIO has failed to provide the complainant with an adequate refusal notice in this case in accordance with section 17 of the Act. Neither has it provided adequate advice and assistance in accordance with section 16 as required. In addition, the NIO did initially fail to apply the correct exemptions to the request although subsequently information was released to the applicant as a result of the intervention of the Commissioner. In light of these failures, the Commissioner will monitor in future the NIO compliance with the Act.

## Right of Appeal

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94. 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 2<sup>nd</sup> day of February 2007**

**Signed .....**

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

## Legal Annex: Relevant statutory obligations

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### Section 23

- (1) Information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to any of the bodies specified in subsection (3).
- (2) A certificate signed by a Minister of the Crown certifying that the information to which it applies was directly or indirectly supplied by, or relates to, any of the bodies specified in subsection (3) shall, subject to section 60, be conclusive evidence of that fact.
- (3) The bodies referred to in subsections (1) and (2) are -
  - (a) the Security Service,
  - (b) the Secret Intelligence Service,
  - (c) the Government Communications Headquarters,
  - (d) the special forces,
  - (e) the Tribunal established under section 65 of the Regulation of Investigatory Powers Act 2000,
  - (f) the Tribunal established under section 7 of the Interception of Communications Act 1985,
  - (g) the Tribunal established under section 5 of the Security Service Act 1989,
  - (h) the Tribunal established under section 9 of the Intelligence Services Act 1994,
  - (i) the Security Vetting Appeals Panel,
  - (j) the Security Commission,
  - (k) the National Criminal Intelligence Service, and
  - (l) The Service Authority for the National Criminal Intelligence Service.
- (4) In subsection (3)(c) “the Government Communications Headquarters” includes any unit or part of a unit of the armed forces of the Crown which is for the time being required by the Secretary of State to assist the Government Communications Headquarters in carrying out its functions.
- (5) 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) which was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).

## Section 24

- (1) Information which does not fall within section 23(1) is exempt information if exemption from section 1(1) (b) is required for the purpose of safeguarding national security.
- (2) The duty to confirm or deny does not arise if, or to the extent that, exemption from section 1(1) (a) is required for the purpose of safeguarding national security.
- (3) A certificate signed by a Minister of the Crown certifying that exemption from section 1(1) (b) or from section 1(1) (a) and (b), is, or at any time was, required for the purpose of safeguarding national security shall, subject to section 60, be conclusive evidence of that fact.
- 4) A certificate under subsection (3) may identify the information to which it applies by means of a general description and may be expressed to have prospective effect.

## Section 27

- (1) Information is exempt information if its disclosure under this Act would; or would be likely to, prejudice -
  - (a) relations between the United Kingdom and any other State,
  - (b) relations between the United Kingdom and any international organisation or international court,
  - (c) the interests of the United Kingdom abroad, or
  - (d) The promotion or protection by the United Kingdom of its interests abroad.
- (2) Information is also exempt information if it is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.
- (3) For the purposes of this section, any information obtained from a State, organisation or court is confidential at any time while the terms on which it was obtained require it to be held in confidence or while the circumstances in which it was obtained make it reasonable for the State, organisation or court to expect that it will be so held.
- (4) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1) (a) -
  - (a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1), or
  - (b) Would involve the disclosure of any information (whether or not already recorded) which is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.

(5) In this section -

“International court” means any international court which is not an international organisation and which is established –

- (a) by a resolution of an international organisation of which the United Kingdom is a member, or
- (b) by an international agreement, to which the United Kingdom is a party;

“International organisation” means any international organisation whose members include any two or more States, or any organ of such an organisation;

“State” includes the government of any State and any organ of its government, and references to a State other than the United Kingdom include references to any territory outside the United Kingdom.

### **Section 31**

(1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would likely to, prejudice -

- (a) The prevention or detection of crime.
- (b) The apprehension or prosecution of offenders.

### **Section 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 any of the Law Officers or any request for the provision of such advice, or
- (d) The operation of any Ministerial private office.

(2) Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded -

- (a) for the purposes of subsection (1)(a) as relating to the formulation or development of government policy, or
- (b) For the purposes of subsection (1) (b), as relating to Ministerial communications.

- (3) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).
- (4) In making any determination required by section 2(1)(b) or (2)(b) in relation to information which is exempt information by virtue of subsection (1)(a), regard shall be had to the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informal background to decision-taking.

- (5) In this section -

“Government policy” includes the policy of the Executive Committee of the Northern Ireland Assembly and the policy of the National Assembly for Wales;

“The Law Officers” means the Attorney General, the Solicitor General, the Advocate General for Scotland, the Lord Advocate, and the Solicitor General for Scotland and the Attorney General for Northern Ireland;

“Ministerial communications” means any communications –

- (a) between the Ministers of the Crown,
- (b) between Northern Ireland Ministers, including Northern Ireland junior Ministers, or
- (c) between Assembly Secretaries, including the Assembly First Secretary,

And includes in particular, proceedings of the Cabinet or of any committee of the cabinet, proceedings of the Executive Committee of the Northern Ireland Assembly, and proceedings of the executive committee of the National Assembly for Wales;

“Ministerial private office” means any part of a government department which provides personal administrative support to a Minister of the Crown, to a Northern Ireland Minister or a Northern Ireland junior Minister or any part of the administration of the National Assembly for Wales providing personal administrative support to the Assembly First Secretary or an Assembly Secretary;

“Northern Ireland junior Minister” means a member of the Northern Ireland Assembly appointed as a junior Minister under section 19 of the Northern Ireland Act 1998.

## Section 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
- (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, or
    - (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.
- (3) The duty to confirm or deny does not arise in relation to information to which this section applies (or would apply if held by the public authority) if, or to the extent that, in the reasonable opinion of a qualified person, compliance with section 1(1) (a) would, or would be likely to, have any of the effects mentioned in subsection (2).
- (4) In relation to statistical information, subsections (2) and (3) shall have effect with the omission of the words “in the reasonable opinion of a qualified person”.
- (5) In subsections (2) and (3) “qualified person” -
  - (a) in relation to information held by a government department in the charge Of a Minister of the Crown, means any Minister of the Crown,
  - (b) In relation to the information held by Northern Ireland departments, means The Northern Ireland Minister in charge of the department.
  - (c) in relation to information held by any other government department, means the commissioners or other person in charge of that department,
  - (d) in relation to information held by the House of Commons, means the Speaker of that House,



- (e) in relation to information held by the House of Lords, means the Clerk of the Parliaments,
  - (f) in relation to information held by the Northern Ireland Assembly, means the Presiding Officer,
  - (g) in relation to information held by the National Assembly for Wales, means the Assembly First Secretary,
  - (h) in relation to information held by any Welsh public authority other than the Auditor General for Wales, means –
    - (i) the public authority, or
    - (ii) Any officer or employee of the authority authorised by the Assembly First Secretary.
  - (i) in relation to information held by the National Audit Office, means the Comptroller and Auditor General,
  - (j) in relation to information held by the Northern Ireland Audit Office, means the Comptroller and Auditor General for Northern Ireland,
  - (k) in relation to information held by the Auditor General for Wales, means the Auditor General for Wales,
  - (l) in relation to information held by any Northern Ireland public authority other than the Northern Ireland Audit Office, means –
    - (i) the public authority, or
    - (ii) any officer or employee of the authority authorised by the First Minister and deputy First Minister in Northern Ireland acting jointly,
  - (m) in relation to information held by the Greater London Authority, means the Mayor of London,
  - (n) in relation to information held by a functional body within the meaning of the Greater London Authority Act 1999, means the chairman of that functional body, and
  - (o) in relation to information held by any public authority not falling within any of paragraphs (a) to (n), means –
    - (i) a Minister of the Crown,
    - (ii) the public authority, if authorised for the purposes of this section by a Minister of the Crown, or
    - (iii) Any officer or employee of the public authority who is authorised for the purposes of this section by a Minister of the Crown.
- (6) Any authorisation for the purposes of this section -
- (a) may relate to a specified person or to persons falling within a specified class,
  - (b) may be general or limited to particular classes of case, and
  - (c) may be granted subject to conditions.
- (7) A certificate signed by the qualified person referred to in subsection (5)(d) or (e) above certifying that in his reasonable opinion -

- (a) disclosure of information held by either House of Parliament, or
- (b) compliance with section 1(1)(a) by either House,

would, or would be likely to, have any of the effects mentioned in subsection (2) shall be conclusive evidence of that fact.

### **Section 38**

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to -
  - (a) endanger the physical or mental health of any individual, or
  - (b) Endanger the safety of any individual.

### **Section 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 second condition below is satisfied.
- (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 exemptions in section 33A (1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.
- (4) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject’s right of access to personal data).

### **Section 41**

- (1) Information is exempt information if -
  - (a) it was obtained by the public authority from any other person (including

another public authority), and

- (b) The disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.
- (2) The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1) (a) would (apart from this Act) constitute an actionable breach of confidence.

## **Section 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.
- (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.