

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 30 June 2010

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

Summary

The complainant requested information held by the Northern Ireland Office (the NIO) relating to the Smithwick Tribunal. The NIO refused to disclose the information, citing sections 23, 24, 26, 27, 31 and 36 of the Act. The Commissioner is satisfied that section 23, section 27(1)(a) and section 31(1)(c) have been applied properly in relation to the withheld information. In relation to the information withheld under 27(1)(a) and section 31(1)(c) the Commissioner is satisfied that the public interest in favour of maintaining the exemption outweighs the public interest in favour of disclosing the information. Therefore the Commissioner finds that all of the requested information has been properly withheld, and requires no steps to be taken.

The Commissioner's Role

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

Background

2. The Smithwick Tribunal was established to examine the murders of two members of the then Royal Ulster Constabulary (the RUC, the Northern Ireland police force which later became the Police Service of Northern Ireland). On 20 March 1989 RUC Chief Superintendent Harry Breen and RUC Superintendent Robert Buchanan travelled to Dundalk Garda

Station, in the Republic of Ireland, for a meeting with a Senior Garda Officer (An Garda Síochána is the Irish police force). The RUC officers were murdered as they returned to Northern Ireland after the meeting, and the Provisional IRA subsequently claimed responsibility for these murders (the Breen-Buchanan murders).

3. In 2001 the British and Irish Governments appointed Peter Cory, a retired Canadian Supreme Court Judge, to investigate and to report into allegations of collusion between Irish and British security forces and paramilitaries in six instances, including the Breen-Buchanan murders.
4. Judge Cory produced a report in relation to each case he was asked to consider. In relation to the Breen-Buchanan murders, Judge Cory recommended that there should be a public inquiry to be conducted by an independent Tribunal.
5. The Smithwick Tribunal¹ was established by Resolutions passed by the Irish Parliament in March 2005, and by Instrument entitled Tribunals of Inquiry Evidence Act 1921 (Establishment of Tribunal) Instrument 2005. The sole member of the Tribunal is His Honour Mr Justice Smithwick.
6. The function of the Smithwick Tribunal is to inquire into:

"suggestions that members of the Garda Síochána or other employees of the State colluded in the fatal shootings of RUC Chief Superintendent Harry Breen and RUC Superintendent Robert Buchanan on the 20th March 1989"
7. At the date of issuing this Notice, the Smithwick Tribunal was scheduled to commence public hearings in October 2010.
8. The Commissioner notes that the complainant submitted identical requests to the Northern Ireland Office (the NIO) and to two other public authorities, namely the Ministry of Defence² (the MOD) and the Police Service of Northern Ireland³ (the PSNI). The Commissioner has issued Decision Notices in relation to each public authority separately, and the Decision Notice in this case relates only to the NIO.

¹ Information on the Smithwick Tribunal can be found at <http://www.smithwicktribunal.ie>

² Decision Notice FS50210845

³ Decision Notice FS50210849

The Request

9. On 18 January 2007 Mr Dowling submitted a request to the NIO under section 1(1) of the Act:

“Under the Act, I would like to access all documents held by the NIO in relation to an inquiry which is currently underway in Ireland – The Smithwick Tribunal. The Tribunal has been underway for some months and is investigating claims of collusion between the Irish Police in the town of Dundalk and the provisional IRA which led to the murders of RUC Chief Supt. Harry Breen and Supt. Robert Buchanan on March 20, 1989 in South Armagh”

10. On 16 February 2007 the NIO wrote to the complainant to advise that it required further time to consider the public interest test in relation to a number of qualified exemptions claimed. The NIO advised that these included sections 24, 27, 31 and 38, although it did not explain why these exemptions were considered to be engaged.
11. On 27 July 2007 the NIO again advised the complainant that it required additional time to consider the public interest. This time the NIO cited the exemptions at sections 27, 31, 36 and 38 of the Act.
12. On 1 October 2007 the NIO wrote to the complainant to confirm its view that the requested information was exempt under sections 23(1), 24(1), 27(1)(a), 31(1)(c), 36(2)(b)(i), 36(2)(b)(ii), 36(2)(c), 38(1)(a), 38(1)(b), 40 and 42(1) of the Act.
13. On 22 November 2007 the complainant requested an internal review of the NIO's decision not to release the requested information. The NIO acknowledged the complainant's request on 3 December 2007. Following a number of holding letters, by August 2008 the complainant had not received a substantive response to his request for an internal review.

The Investigation

Scope of the case

14. On 12 August 2008 the complainant contacted the Commissioner to complain about the way his request for information had been handled. Although the Commissioner acknowledged receipt of the complaint,

owing to the volume of complaints he was unable to commence his investigation at that stage.

15. The NIO wrote to the complainant on 11 September 2008 to communicate the outcome of the internal review. The NIO upheld its decision to withhold the information under sections 23, 24, 27(1)(a), 31(1)(c), 36(2)(b)(i) and (ii), section 38, 40 and 42(1). The NIO withdrew reliance on section 36(2)(c), 42(1) and 23 in relation to a small number of documents. The NIO also claimed reliance on sections 21, 27(1)a, 31(1)(c) 38, and 42(1) to a small number of documents. Finally, the NIO also applied section 36(2)(b)(i) to documents previously considered exempt under section 36(2)(c).
16. On 14 November 2008 the complainant advised the Commissioner that he remained dissatisfied with the NIO's response to his request. The complainant accepted that some of the requested information might be exempt. However he was of the view that the NIO had not properly considered the extent to which information could be disclosed.

Chronology

17. Regrettably, owing to a heavy workload the Commissioner did not commence his investigation into this complaint until January 2010.
18. On 23 February 2010 the Commissioner wrote to the NIO and asked for a copy of the withheld information together with a schedule or list of that information to identify which piece of information was being withheld under which exemption. The Commissioner also asked the NIO to explain its handling of the request and the application of the exemptions claimed.
19. Following further correspondence with the Commissioner, on 10 June 2010 the NIO provided a copy of the schedule of information held in relation to the request. This schedule detailed the withheld information and indicated which exemptions were applied to which pieces of information. The NIO provided a further detailed submission on 29 June 2010.

Findings of fact

20. The NIO holds over 100 pieces of information relevant to the complainant's request. They include the following:

- Documents detailing discussions between government departments and internally within the NIO on how to respond to the Smithwick Tribunal's requests
- Details of correspondence and discussions between the Government and the Smithwick Tribunal
- Discussions between government departments relating to the Smithwick Tribunal and areas of its work
- Advice from officials to Ministers
- Advice and views from legal advisers

Analysis

Exemptions claimed

21. The NIO claimed various exemptions in relation to respective documents, and most of the documents have more than one exemption applied. For ease of reference the Commissioner has first considered the NIO's application of section 23 as it is an absolute exemption. The Commissioner has then moved on to consider exemptions at section 27(1)(a) and section 31(1)(c), as these exemptions, taken together, cover all of the withheld information. If the Commissioner finds that any withheld information is not exempt under these provisions he will consider the other exemptions claimed.

Section 23: information supplied by or relating to, bodies dealing with security matters.

22. Section 23 provides that:

"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).

(3) The bodies referred to in subsection (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
- (l) the Service Authority for the National Criminal Intelligence Service
- (m) the Serious Organised Crime Agency".

23. The NIO advised the Commissioner that the information falling within the scope of the request which was exempt under this section did so because it related to a body or bodies that fell within section 23(3) of the Act.
24. The exemption at section 23 is class based, so the NIO was not required to demonstrate that disclosure of the relevant information would have any kind of adverse effect. In the circumstances of this case the level of detail which the Commissioner can include in this Notice about the NIO's submissions to support the application of this exemption, is very limited. This is because inclusion of any detailed analysis is likely to reveal the content of the withheld information itself.
25. The Commissioner is satisfied that the information withheld under section 23 does fall under this exemption, therefore he finds that the exemption was correctly applied.

Section 27: prejudice to international relations

26. The exemption at section 27(1)(a) applies if its disclosure would, or would be likely to, prejudice relations between the United Kingdom and any other State. In this case the NIO advised the Commissioner that disclosure of the withheld information would be likely to prejudice relations with the Republic of Ireland.
27. The Commissioner is assisted by the First-tier Tribunal (Information Rights) in the case of Campaign Against the Arms Trade v The Information Commissioner and Ministry of Defence (EA/206/0040) where it commented on the nature of the prejudice which the section 27(1)(a) exemption is designed to protect:

"Prejudice is not defined, but we accept that it imports something of detriment in the sense of impairing relations or interests or their promotion or protection and further we accept that the prejudice must be 'real, actual or of substance'..."

28. In that case the First-tier Tribunal went on to say that:

"...prejudice can be real and of substance if it makes relations more difficult or calls for a particular damage limitation response to contain or limit damage which would not have otherwise have been necessary. We do not consider that prejudice necessarily requires demonstration of actual harm to the relevant interests in terms of quantifiable loss or damage."

29. The NIO argued that disclosure of the withheld information in this case would be likely to prejudice the UK's relationship with the Smithwick Tribunal. The NIO noted that this in itself was not sufficient to engage the exemption at section 27(1)(a). However, as the Smithwick Tribunal is sponsored by the Irish government, the NIO was of the view that any damage to its relationship with the Smithwick Tribunal would be likely to have an adverse effect on its relationship with the Republic of Ireland.

30. The NIO advised the Commissioner that the UK and Irish governments were cooperating fully in relation to the Smithwick Tribunal. The NIO explained that Judge Smithwick had "specifically requested" that no information be released into the public domain while the Tribunal's work was ongoing. The NIO was of the view that disclosure of the withheld information in this case could have a serious prejudicial effect on the Smithwick Tribunal, which would be likely to prejudice the UK's relationship with the Republic of Ireland as argued above.

31. The Commissioner is mindful of Judge Smithwick's explicit objection to the disclosure of the withheld information, and has had sight of correspondence from Judge Smithwick to this effect. The Commissioner may not refer to this in detail as to do so would reveal exempt information. However, the Commissioner is satisfied that Judge Smithwick expressed reasoned and detailed objections to disclosure of the withheld information.

32. The NIO also put forward a number of more detailed and specific arguments to the Commissioner. Again, the Commissioner is mindful of the need to ensure that he does not disclose exempt information in this Notice. However the Commissioner is satisfied that, given the nature of the withheld information, and the arguments put forward by the NIO, that disclosure of the withheld information in this particular case would be likely to make relations more difficult with the Republic of Ireland. Therefore the Commissioner is satisfied that the exemption at section 27(1)(a) is engaged.

33. In finding that the exemption at section 27(1)(a) is engaged, the Commissioner accepts that disclosure of the withheld information would be likely to prejudice relations between the UK and the Republic of Ireland. However, the exemption is qualified so the Commissioner must now consider where the public interest lies. Section 2(2) provides that exempt information must still be disclosed unless, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosing the information.

Public interest arguments in favour of disclosing the requested information

34. The NIO recognised that disclosure of the requested information could demonstrate to the public the extent of the NIO's cooperation with the Smithwick Tribunal.
35. The Commissioner is also aware that the Breen-Buchanan murders remain an unsolved crime. Although the murders were one of six cases where serious allegations of collusion were made and which were considered by Justice Judge Cory, this is the only case from which an inquiry was established in the Republic of Ireland. The issue of suspected or alleged Garda collusion with paramilitaries is both politically sensitive and emotive, and the Commissioner appreciates the public interest in the work of the Smithwick Tribunal both in Northern Ireland and in the Republic of Ireland. Therefore the Commissioner acknowledges the public interest in the public being sufficiently informed about the progress of the Smithwick Tribunal to be able to reach informed opinions on the matter.

Public interest arguments in favour of maintaining the exemption

36. The NIO put forward a number of detailed arguments as to why the public interest in this case favoured maintaining the exemption. The Commissioner notes that the Smithwick Tribunal was established by the Irish government as a result of Judge Cory's report, which itself was commissioned by the UK and Irish governments. Although the murders themselves took place in Northern Ireland, the function of the Smithwick Tribunal is to consider allegations of collusion between a member or members of An Garda Síochána or other employees of the Irish State and paramilitaries in the Breen-Buchanan murders. This meant that the work of the Smithwick Tribunal was considered sensitive and significant by both governments.
37. The NIO argued that, as the Smithwick Tribunal has not yet held any public hearings, any disclosure of information or evidence by the NIO into the public domain could pose a real and significant risk to the

effectiveness of the Smithwick Tribunal. The NIO further argued that, if the UK government was seen as responsible for the disclosure of information that damaged the effectiveness of an Irish inquiry, this would be likely to have a significant and detrimental impact on current and future relations between the UK and Irish governments. The NIO was of the firm view that this would not be in the public interest.

Balance of the public interest arguments

38. The Commissioner has taken account of the significant public interest in informing and educating the public about issues of historical and political significance, however sensitive they may be. In this case, given the context of the murder of the RUC officers being allegedly attributed to collusion, the Commissioner appreciates the public interest in disclosing the information. The Commissioner also acknowledges the strength of the public interest in being informed why it has taken this length of time since the murders and the publication of the Cory report to establish the Smithwick Tribunal.
39. The Commissioner is also mindful that the Smithwick Tribunal was established as a public inquiry in the Republic of Ireland, and considers that it is for the Smithwick Tribunal to decide at that point what information is made public and what it would not be appropriate to disclose. That is not to say that this is an alternative to the provisions of the Act, however, it certainly weighs in the public interest balance in relation to potentially undermining the Tribunal process. However, the Commissioner recognises that at the time of the complainant's request the Smithwick Tribunal had not yet held any public hearings. Indeed, at the time of drafting this Decision Notice the Smithwick Tribunal was still in its investigative phase. Therefore the Commissioner concludes that the Smithwick Tribunal was at the time of the request, and remains now, at a crucial stage which requires protection from unnecessary public scrutiny. The Commissioner is of the view that there would need to be strong public interest arguments in order to override the authority of an inquiry established by another State.
40. The Commissioner also appreciates the importance generally of maintaining good relations with other States, particularly in relation to sensitive and historically difficult issues. The Commissioner is mindful that the Smithwick Tribunal, and the preceding Cory Report, was established as a result of significant negotiation and cooperation between the UK and Irish governments. The Commissioner accepts that disclosure of the withheld information would be likely to make UK-Irish relations more difficult, which would be likely to have a knock-on effect on the political situation in Northern Ireland. In the circumstances of this particular case the Commissioner considers this

to be a strong argument in favour of maintaining the exemption at section 27(1)(a).

41. In light of the above, the Commissioner finds that there are considerably strong public interest arguments in favour of maintaining the exemption, and that these far outweigh the public interest in disclosing the withheld information.

Section 31(1)(c) - law enforcement

42. Section 31(1)(c) provides an exemption where disclosure of the information in question would, or would be likely to, prejudice the administration of justice. The full text of section 31 can be found in the Legal Annex attached to this Decision Notice.
43. Following the First-tier Tribunal decision in *Hogan v Information Commissioner*⁴ the Commissioner uses a three step test to indicate whether prejudice would or would be likely to occur from the disclosure of the information in question:
1. Identify the prejudice in the exemption;
 2. consider the nature of the prejudice in question; and
 3. consider the likelihood of the prejudice in question occurring.

Identifying the prejudice

44. The NIO has argued that disclosure of the requested information would prejudice the "administration of justice". This term is not defined in the Act, but the NIO considered it to include the effective operation of the Smithwick Tribunal as a public inquiry.
45. The Commissioner considers that the administration of justice can be interpreted broadly, and accepts the NIO's argument in this respect on the facts of this case. The Commissioner notes that the Smithwick Tribunal was established to provide a public inquiry into the Breen-Buchanan murders, and in this sense the Tribunal is very much an instrument of justice. Although the Commissioner is aware that the Tribunal has no powers to bring prosecutions, or to recommend that individuals be prosecuted, the Commissioner is of the opinion that the Smithwick Tribunal plays an important part in the administration of justice in investigating two particularly sensitive murders, as well as the allegations of collusion that may have assisted in the crime.

⁴ EA/2005/0026, EA/2005/0030

Nature of the prejudice

46. When making his assessment regarding the prejudice test, the Commissioner must consider not only whether the prejudice identified can be said to have a real, detrimental or prejudicial effect but also whether or not the nature of the prejudice can be adequately linked back to the disclosure of the information in question.
47. In this case, the NIO argued that disclosure of the withheld information into the public domain would cause prejudice in a number of respects. The NIO argued that disclosure would:
- prejudice the Smithwick Tribunal's ongoing work
 - undermine the free and frank exchange of views between the UK Government and the Smithwick Tribunal;
 - discourage individuals or organisations who have relevant information from assisting the Tribunal if they have a concern that information they provide (or that may reveal the fact of their co-operation with the Tribunal) could be disclosed;
 - undermine the candidness of individuals interviewed by the Tribunal if they are alerted in advance to particular lines of inquiry being pursued; and
 - prejudice the planned review of the Breen-Buchanan murders by the PSNI's Historical Enquiries Team.
48. The Commissioner accepts the arguments put forward by the NIO in relation to the nature of the prejudice that could potentially occur if the requested information was to be disclosed into the public domain. Therefore the next step is to decide what level of prejudice would exist to the administration of justice.

Likelihood of prejudice

49. With regard to the degree of likelihood of prejudice (i.e. would, or would be likely to), the Commissioner has been guided on the interpretation of the phrase from a number of First-tier Tribunal decisions. In respect of the phrase '*would prejudice*', the Commissioner notes the comments of the Tribunal in the case of *Hogan* where the Tribunal found that this places a much stronger evidential burden on the public authority to discharge⁵. Whilst it would not be possible to prove that prejudice would occur beyond any doubt whatsoever, prejudice must be more probable than not.

⁵ EA/2005/0030

50. The NIO drew the Commissioner's attention to the fact that the Smithwick Tribunal was "currently gathering evidence... in preparation for oral hearings". It is therefore clear to the Commissioner that the issue of the Smithwick Tribunal is still "live". As the Commissioner has accepted the NIO's arguments in relation to the nature of the prejudice, he considers that the fact that the case is not complete increases the likelihood of prejudice.
51. The NIO also argued that any disclosure of any information during the investigative stage of the Smithwick Tribunal would have a detrimental effect on the effectiveness of the process more generally. The NIO drew the Commissioner's attention to Judge Smithwick's responsibility to gather evidence and seek cooperation from those parties having information to assist the Tribunal. The NIO argued that disclosure of the withheld information would discourage persons who have vital information from coming forward, or being less candid, if they felt that any evidence they imparted would be disclosed. Therefore, any disclosure of information (inadvertent or otherwise) which resulted in a lack of cooperation would prejudice either the preliminary work of the Tribunal or the Tribunal itself when convened. Judge Smithwick's opening statement⁶ is very clear:

'Paragraph II of the resolution of the Houses of the Oireachtas notes the possibility that the Tribunal may have to seek evidence from persons who are not compellable to give evidence. This provision anticipates the possibility that there may be persons or institutions outside the State who may be in a position to assist the Tribunal in its task. As and when such person or bodies are identified by the Tribunal, they will be called on to co-operate. It is to be hoped that such co-operation will be voluntary. However, if a person or agency outside the State declines to co-operate, the terms of reference provide for a mechanism for seeking to ensure such co-operation. Paragraph II provides that the Tribunal can report the fact that an individual or an agency is not co-operating, or not co-operating sufficiently to the Clerk of the Dáil for consideration by the Houses of the Oireachtas in conjunction with the Minister for Justice, Equality and Law Reform, having regard to the public interest'.

52. The Commissioner notes that the NIO did not claim that potential witnesses would definitely be deterred from co-operating with the Smithwick Tribunal. However the Commissioner accepts the NIO's concern that, if this did happen, the impact of a lack of confidence and cooperation would prejudice the effectiveness of the Tribunal.

⁶ <http://www.smithwicktribunal.ie/smithwick/HOMEPAGE.html>

Therefore the Commissioner considers that the potential impact would be sufficiently detrimental to satisfy him that the likelihood of prejudice has been correctly applied. Whilst it is impossible to state with certainty that prejudice would occur, the nature of the information requested and the context in which it is held by the NIO makes it more probable than not that the Smithwick Tribunal would be jeopardised if the information was to be released.

53. The NIO also reminded the Commissioner that the HET plans to review the Breen-Buchanan murders. The HET is an investigation team set up by the PSNI in 2005 to re-examine all deaths attributable to the security situation in Northern Ireland between 1968 and 1998⁷. The role of the HET is twofold: to assist the bereaved families with any “unanswered questions” relating to their losses, and to provide a thorough re-evaluation of each unsolved case. Therefore the NIO was of the view that disclosure of the withheld information would not only prejudice the administration of justice in terms of the Smithwick Tribunal, it would also adversely affect the HET’s review of the murders.
54. In light of the above the Commissioner is satisfied that disclosure of the withheld information would prejudice the administration of justice. Therefore the Commissioner is satisfied that the exemption at section 31(1)(c) is engaged.

Public interest arguments in favour of disclosing the information

55. Section 31(1)(c) is a qualified exemption and is therefore subject to the public interest test under section 2(2)(b) of the Act. Section 2(2)(b) provides that exempt information must still be disclosed if:

“in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure of the information”.

56. The NIO accepted that there was a general public interest in disclosure of information relating to any murder investigation. Likewise the Commissioner is of the view that there is a considerable public interest in the public being assured that justice is done. As set out above, the Commissioner is mindful that the Breen-Buchanan murders remain an unsolved crime. The Commissioner accepts that the situation in Northern Ireland is unique and that many sections of the community are still seeking to understand who is responsible for many of the unsolved crimes. The Commissioner further understands and accepts

⁷ www.psni.police.uk/index/departments/historical_enquiries_team.htm

that in Northern Ireland the passage of time does not assuage the strength of feeling in relation to such events and that there have been other high profile inquiries established (such as the Bloody Sunday Inquiry) that demonstrate this.

57. The Commissioner recognises that the public need to be able to have confidence and trust in such inquiries which they may not have felt in the past. The Commissioner understands that disclosing information relating to the Smithwick Tribunal may provide greater transparency of the formation and workings of the Tribunal and the cooperation with that Tribunal of affected UK government departments and others. Such transparency and understanding could provide confidence and trust in the process for the entire community in Northern Ireland.
58. The NIO also recognised that, although the murders took place in 1989, the Smithwick Tribunal was established in 2005 and has not yet held any public hearings. The NIO considered that there was a legitimate (albeit limited) public interest in releasing information about the Smithwick Tribunal given this delay.

Public interest arguments in favour of maintaining the exemption

59. The NIO was of the view that there were strong public interest arguments in maintaining the exemption, given the nature and likelihood of the prejudice that would occur if the information were to be disclosed.
60. As set out above, the NIO was of the view that disclosure of the withheld information would cause substantial harm to the effectiveness of the Smithwick Tribunal. The NIO considered that there was a strong public interest in protecting the Smithwick Tribunal's work, especially in light of the circumstances under which it was established (ie the context of political developments in the government of Northern Ireland).
61. The NIO argued that it would not be in the public interest for it to disclose information which could discourage individuals or organisations from assisting the Smithwick Tribunal. The NIO pointed to the significance and sensitivity of the Smithwick Tribunal and the issues it is tasked with investigating. It would not be in the public interest for the Smithwick Tribunal to be unable to gather the necessary and relevant information it required to discharge its duty.
62. The NIO also argued that it would not be in the public interest to disclose information which would prejudice the HET's review of the Breen-Buchanan murders. The complainant disputed the strength of

this argument, arguing that the HET's investigation could not be prejudiced because it was unlikely that this investigation would result in any prosecutions. However, whilst the NIO accepted that the HET aimed primarily to assist bereaved families, this in itself depended on the HET being able to conduct a full and thorough re-evaluation of a case. This was considered to be a strong public interest argument in favour of maintaining the exemption and preventing prejudice to the administration of justice.

Balance of the public interest arguments

63. The Commissioner is mindful that there may be situations where information can and should be disclosed even when section 31(1)(c) is engaged. There are however other situations in which it would not be in the public interest to disclose information withheld under section 31(1)(c). It is for the Commissioner to decide, taking into account the circumstances of the particular case, whether or not the information should be withheld or disclosed.
64. The Commissioner recognises the significance of the Smithwick Tribunal in that it resulted from the UK and Irish governments agreeing the need for an independent inquiry into allegations of collusion between An Garda Síochána and the Provisional IRA. In addition to the international relations dimension, the Commissioner considers that the Smithwick Tribunal represents an acknowledgement that such serious allegations needed to be fully investigated, in order for the public to have confidence in the two governments' handling of historical and sensitive issues relating to Northern Ireland. Therefore the Commissioner has attached considerable weight to the public interest in ensuring the effectiveness of the Smithwick Tribunal.
65. The Commissioner has carefully considered both the NIO and the complainant's arguments in relation to the HET review of the Breen-Buchanan murders. The Commissioner does not consider the likelihood of a prosecution being brought to be the most important factor in weighing up these arguments. Rather, he is inclined to accept that the aim of assisting families and establishing what happened in a particular case is an important part of the justice process, in that it can help bereaved relatives understand why no-one has been charged in relation to the murders. Therefore the Commissioner has attributed significant weight to this argument in favour of maintaining the exemption.
66. The Commissioner has carefully considered the arguments in favour of disclosing the withheld information, and those in favour of maintaining the exemption. The Commissioner is persuaded that there is a clear

public interest in allowing the Smithwick Tribunal to progress as effectively as possible, according to the wishes of the UK and Irish governments in establishing it. The Commissioner also considers that there is a strong public interest in avoiding prejudice to the HET review of the murders. The Commissioner concludes that the balance of the public interest in all the circumstances of the case lies clearly in favour of maintaining the exemption at section 31(1)(c).

Other exemptions claimed

67. As the Commissioner is satisfied that all of the withheld information is exempt under the exemptions already considered, he has not gone on to consider the other exemptions claimed. However the Commissioner did seek and obtain detailed submissions in relation to all exemptions relied upon by the NIO.

Procedural Requirements

Section 17: refusal notice

68. Where a public authority refuses a request for information it is required under section 17(1) of the Act to provide the applicant with a 'refusal notice' explaining the exemption or exemptions relied upon. This notice must be provided within the timescale set out in section 10(1), no later than 20 working days following the date the request was received.
69. Section 17(2) provides that a public authority may take additional time to consider the public interest in relation to a qualified exemption, if the authority is satisfied that the exemption is engaged. However the refusal notice issued under section 17(1) must still explain which exemptions are being relied upon, and how they apply to the requested information. Section 17(3) provides that the authority must issue a further notice within a reasonable time, explaining the authority's consideration of the public interest test.
70. The complainant submitted his request to the NIO on 18 January 2007. On 16 February 2007, within the time for complying with section 1(1), the NIO informed the complainant that it held the information, was refusing to disclose it and cited some general exemptions (without subsections). The NIO informed the complainant that additional time was required to consider the public interest test.
71. The NIO issued its substantive refusal notice on 1 October 2007, over eight months after the request was first made. At this stage the NIO did cite fully the exemptions it was relying on.

72. The Commissioner has issued guidance (Awareness Guidance 11) on what he considers a reasonable time to consider the public interest. Generally the Commissioner expects that it should take no longer than 20 working days, and in no case should it take longer than 40 working days. The Commissioner notes that the NIO acknowledged that taking eight months to consider the public interest was unacceptable. The NIO advised the Commissioner that it has since reviewed its request handling procedures to help prevent this length of delay recurring in relation to future requests.
73. The Commissioner finds that the NIO's refusal notice of 16 February 2007 breached 17(1)(a), (b) and (c) as it did not explain fully which exemptions were being relied upon, and how they applied to the withheld information. The Commissioner also finds that the NIO breached section 17(3) in that it failed to provide the complainant with its reasoning in relation to the public interest test within a reasonable time.

The Decision

74. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.
- The NIO was correct to withhold information in reliance on sections 23(1), 27(1)(a) and 31(1)(c) of the Act.
75. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- The NIO breached sections 17(1)(a), (b) and (c), and 17(3) of the Act in relation to its refusal notice.

Steps Required

76. The Commissioner requires no steps to be taken.

Other matters

77. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matter of concern:

Internal review

78. The complainant requested an internal review on 27 November 2007 but did not receive the outcome of the review until 11 September 2008. Therefore the NIO took nearly ten months to conduct the internal review and communicate the outcome to the complainant.
79. Part VI of the section 45 Code of Practice comments that internal review procedures encourage a prompt determination of the complaint. The Commissioner has also published guidance in which he advises that internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days.
80. The Commissioner does not consider ten months an acceptable time to conduct an internal review in any particular case. The Commissioner has had separate discussions with the NIO regarding its case handling procedures, and would expect that steps have been taken to avoid a recurrence of this level of delay.

Right of Appeal

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

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

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

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

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

Dated the 30th day of June 2010

Signed

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Principal Policy Adviser**

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Legal Annex

Freedom of Information Act 2000

Section 17(1) provides that -

A public authority which ... is to any extent relying:

- on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request, or
- on a claim that information is exempt information

must, within the time for complying with section 1(1), give the applicant a notice which –

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

Section 17(3) provides that -

A public authority which ... is to any extent relying:

- on a claim that in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information, or
- on a claim that in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information

must either in the notice under section 17(1) or in a separate notice within such time as is reasonable in the circumstances, state the reasons for claiming -

- (a) that, on a claim that in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information, or
- (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

Section 23(1) provides that –

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).

Section 23(3) provides that –

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.

Section 27(1) provides that –

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.

Section 31(1) provides that –

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

- (a) the prevention or detection of crime,

- (b) the apprehension or prosecution of offenders,
- (c) the administration of justice,
- (d) the assessment or collection of any tax or duty or of any imposition of a similar nature,
- (e) the operation of the immigration controls,
- (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,
- (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),
- (h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or
- (i) any inquiry held under the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment.