

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 17 August 2010**

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

### Summary

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The complainant requested information from the Northern Ireland Office (the NIO) relating to the lapse of a security licence in 2006. The NIO initially refused the requested information under sections 44 and 31 of the Act. At internal review stage the NIO released most of the information, redacting a small amount of information under section 42 of the Act. Following the Commissioner's intervention the NIO subsequently also applied sections 38 and 40 to some of the redacted information. The Commissioner finds that the exemptions have been correctly applied, and that the NIO acted correctly in refusing to provide some of the requested information. Therefore the Commissioner requires no further steps to be taken. However the Commissioner has noted a number of procedural breaches of the Act.

### The Commissioner's Role

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

### Background

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2. Maybin Support Services (which has since been renamed "Resource NI") was at the time of the complainant's request the largest security firm in Northern Ireland, and was contracted by the Northern Ireland Office (the NIO) to provide security staff for the Court Service and the

Public Prosecution Service. For ease of reference the Commissioner has referred to Maybin, rather than Resource, throughout this Notice.

3. In early August 2006 Maybin confirmed that it had been operating without a valid security licence, in contravention of Schedule 13 of the Terrorism Act 2000, which requires anyone offering or providing security guard services for reward to obtain a licence from the Secretary of State.
4. Licences are granted for a period of one year, and are not automatically renewed. Instead applications for a fresh licence must be received at least 14 days before expiry of the licence currently held. If an application is not received by the renewal date it is assumed that there is no longer an intention to provide security services.
5. Provision of security guard services without a licence is an offence punishable by 5 years' imprisonment, and it was a matter of public record at the time of the request that the NIO had passed information to the Police Service for Northern Ireland (the PSNI) for possible investigation of an offence.

## The Request

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6. On 5 December 2008 the complainant requested the following information from the NIO:

"...a copy of the ministerial report prepared for the Security Minister Paul Goggins into the circumstances surrounding the lapse of Maybin Support Services Security Licence."

The report had been mentioned in a press article in August 2006. The complainant also requested:

".... any ministerial response to the report and any related correspondence. I am also seeking the date on which the NIO reported the lapse of Maybin/Resource NI's security licence to the PSNI and/or Prosecution Service".

7. On 31 December 2008 the NIO advised the complainant that it needed to extend the time limit for responding to the request in order to consider the public interest in disclosure in relation to sections 36 and 43 of the Act. The NIO estimated that it would take another 30 days to reach a decision regarding the balance of the public interest and stated that a substantive response would be issued by 12 February 2009.

8. On 12 February 2009 the NIO extended this deadline for response again until 20 February 2009 but on that date wrote again to the complainant stating that a substantive reply would not be issued until 6 March 2009. Similarly, on 6 March NIO extended the deadline for response again until 20 March 2009.
9. On 13 March 2009 the complainant contacted the NIO to express his frustration at the delay in responding to his request. The complainant reminded the NIO of the Commissioner's guidance which suggested that the time to be taken to consider the public interest should not exceed 40 working days. The complainant pointed out that the NIO had taken 67 days to consider the public interest in relation to his request.
10. On 14 March 2009 the NIO advised the complainant that his request was being refused. The NIO cited the exemptions at sections 44 (prohibitions on disclosure), 31(1)(b) (prejudice to the apprehension/prosecution of offenders) and 31(1)(c) (prejudice to the administration of justice) of the Act. In relation to section 31, the NIO contended that the public interest favoured the maintenance of these exemptions.
11. In relation to the second part of the request, the NIO stated that it did not hold any correspondence relevant to the report but confirmed that it had reported the lapse in Maybin's security licence to the PSNI on 2 August 2006.
12. On 1 April 2009 the complainant requested an internal review of the NIO's decision.
13. The NIO did not provide its internal review response until 28 August 2009. The review upheld the original decision not to disclose the report at the time of the request. However given the passage of time and the fact that the court case involving Maybin had concluded, the NIO agreed to release most of the report. The NIO redacted a small portion of the report, citing section 42 (legal professional privilege). The NIO also advised the complainant that it had redacted junior officials' names as they were not considered relevant to the request.

## The Investigation

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### Scope of the case

14. On 23 October 2009 the complainant contacted the Commissioner to complain about the way his request had been handled. Specifically the complainant was unhappy regarding the delay in the processing of both his request and his internal review and the change in exemptions cited to withhold the requested information. The complainant suggested that this may have been a deliberate attempt by the NIO to frustrate his access to the requested information. The complainant was also unhappy that he appeared not to have received the complete report as requested.
15. Although the requested information was originally refused under sections 44 and 31 of the Act, the NIO issued a revised refusal notice following the internal review. Therefore the Commissioner's investigation in this case has focused on the NIO's handling of the case and the information withheld under section 42 as set out in the NIO's revised refusal notice dated 28 August 2009. The Commissioner has also given consideration to the withholding of an official's name under section 40(2).

### Chronology

16. On 22 April 2010 the Commissioner wrote to the NIO requesting a copy of the withheld information. The Commissioner also asked a number of questions relating to the handling of the complainant's request. In particular the Commissioner asked for the NIO's representations regarding the excessive delays both in responding to the request and processing the internal review.
17. In particular the Commissioner queried the NIO's decision to redact the name of an official from the report on the basis that it was not relevant to the request. The Commissioner asked the NIO whether it was seeking to rely on the exemption at section 40(2) in relation to this personal information.
18. On 21 May 2010 the NIO responded to the Commissioner providing further detailed arguments in relation to its delay in processing the request and the internal review and its application of the exemption at section 42.
19. In relation to withholding the name of an official, the NIO remained of the view that the actual information requested by the complainant did

not specifically include the names of staff. However the NIO now sought to apply sections 38 and 40 as it felt that disclosure of the identity of an individual involved in the licensing regime specifically designed to deter paramilitary activity would leave the individual concerned vulnerable to threats and intimidation.

## **Analysis**

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### **Withheld information**

20. In his complaint to the Commissioner the complainant had queried whether or not he had been provided with a copy of the original report.
21. The Commissioner notes that the Act provides for access to information rather than documents. However it will often be most straightforward for a public authority to provide a copy of relevant documents, rather than reproduce the information in a separate document. In this case the Commissioner has had sight of the requested information and the information provided to the complainant and is satisfied that this is the same report.

### **Exemptions claimed**

#### **Section 40(2) – personal information**

22. Section 40(2) provides an exemption from disclosing third party personal data if to do so would contravene any of the data protection principles as set out in Schedule 1 to the Data Protection Act 1998 (the DPA).
23. The NIO argued that the official named in the report was employed in a junior position at the time of the request and not operating in a public facing role. Consequently disclosure of the name of this official would contravene the first data protection principle in so far as it would be unfair. The NIO reminded the Commissioner of the sensitivity of that individual's role (working in a licensing regime specifically designed to deter paramilitary activity in the security industry).
24. The NIO cited previous occasions when terrorist groups had procured the names of NIO staff and this had lead to concern by such individuals that they would be vulnerable to threat and intimidation.
25. The Commissioner's approach to considering whether a disclosure is fair under the first data protection principle for the purposes of section

40(2) is to balance the consequences of any disclosure and the reasonable expectations of the data subject with general principles of accountability and transparency.

26. In this instance the Commissioner accepts that a junior official working in a sensitive area of work would have reasonable expectations of privacy, including that their name would not be disclosed. The Commissioner is of the view that it may still be fair to disclose the requested information if it can be argued that there is a more compelling public interest in disclosure. This could include the need to demonstrate accountability and transparency in the spending of public funds.
27. However the Commissioner is not persuaded that in this instance the disclosure of the name of a junior official who played an administrative role in the vetting process for security licences would contribute to the public's understanding either of the vetting process or the spending of public funds.
28. In view of the above the Commissioner accepts that the exemption at section 40(2) is engaged in this instance. As the Commissioner has determined that section 40 is engaged in relation to withholding the official's name he has not gone on to consider the exemption at section 38.

### **Section 42(1) – legal professional privilege**

29. The NIO argued that a small section of the report had been redacted because it constituted legal advice provided to the NIO by legal advisors from the Home Office.
30. Section 42(1) provides an exemption from disclosing information to which a claim of legal professional privilege can be made (see legal annex). Legal professional privilege (LPP) protects the confidentiality of communications between a lawyer and client. There are two types of privilege – litigation privilege and, as in this instance, legal advice privilege.
31. Advice privilege will apply where no litigation is in progress or being contemplated. In such cases the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice. In-house legal advice will also attract LPP.
32. In this case the Commissioner is satisfied that the exemption is engaged as the withheld information constitutes legal advice. However

the exemption at section 42 is a qualified exemption and it is therefore necessary to consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the requested information.

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

33. The NIO accepted that there is a general public interest in releasing information that has informed government decision-making and that demonstrates government's relationship with legal advisers.
34. The Commissioner recognises that there is a general public interest in the NIO disclosing information on a particular topic.

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

35. The NIO contended that there was a strong public interest in the government having access to frank legal advice, which is best served by keeping such advice confidential. The NIO argued that often legal advice will involve the analysis of the potential legal weaknesses of the government position and the routine release of legal advice would create reluctance on the part of officials to seek such advice which could lead to decisions being taken that were legally unsound.
36. Furthermore disclosure of legal advice could equally result in legal advisers presenting their advice in more guarded terms which in turn could lead to less effective decision making.

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

37. The Commissioner's view is that there will generally be an initial weighting in favour of maintaining the exemption under section 42 due to the importance of the concept behind LPP, namely, safeguarding the right of any person to obtain free and frank legal advice which goes to serve the wider administration of justice.
38. However, it is not an absolute exemption and where there are weightier countervailing factors, then the public interest in maintaining the exemption will not outweigh the public interest in disclosing the information. In *Bellamy v the Information Commissioner* (EA/2005/0023), the Information Tribunal confirmed that: "There is a strong public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest" (paragraph 35).

39. In this instance, although the advice was fairly recent it was unlikely to impact on a large number of individuals. In relation to the transparency of a public authority's actions, the sort of public interest likely to outweigh maintaining the exemption must be where there is reason to believe that the authority is misrepresenting the advice which it has received or where it is pursuing a policy which appears to be unlawful as opposed to curiosity as to what legal advice has been received.
40. In other words disclosure of the legal advice must result in genuinely greater transparency where the authority's course of action is open to significant doubt. As per the arguments above, in this particular instance the Commissioner is not persuaded that this is the case.
41. The Commissioner considers that the well established and persuasive public interest arguments in protecting legal professional privilege must be accorded due weight and importance. Therefore, on balance, the Commissioner has concluded that in the circumstances of this case, the public interest arguments in favour of disclosure are insufficiently strong to override or equal the strong generic public interest arguments in favour of maintaining the section 42 exemption.

## **Procedural Requirements**

### **Section 10: time for compliance**

42. Section 10(1) provides that –

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

43. The complainant's request was made on 5 December 2008. The NIO did not explicitly confirm that it held the requested information until 14 March 2009, at which point it provided some of the requested information. The NIO failed to provide this information to the complainant within twenty working days of the date of the request. Therefore the Commissioner finds that the NIO breached section 10(1) of the Act.

### **Section 17: refusal of the request**

44. Where a public authority refuses a request for information it is required under section 17 of the Act to provide the applicant with a 'refusal notice' explaining the exemption or exemptions relied upon (see legal annex). This notice must be provided within the timescale set out in



section 10(1), i.e. no later than twenty working days following the date the request was received.

45. The NIO's refusal notice of 28 August 2009 was issued well outside the statutory time limit and failed to specify and explain the application of all of the exemptions upon which the NIO relied. The Commissioner therefore finds a breach of section 17(1)(a), (b) and (c).
46. 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.
47. The NIO sought to extend the time for response in order to consider the public interest in relation to sections 36 and 43 and then issued a refusal notice under sections 44 and 31. The Commissioner is of the view that the NIO extended the timescale for response to consider the application of exemptions, whereas such extension is only permitted in order to consider the public interest.
48. The Commissioner concludes that the NIO also extended the time to consider the public interest test unreasonably, a breach of section 17(3).

## **The Decision**

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49. The Commissioner's decision is that the NIO dealt with the following element of the request for information in accordance with the Act:
  - The NIO correctly withheld the information falling within the scope of sections 40(2) and 42(1) of the Act.
50. However the NIO failed to comply with the following requirements of the Act:
  - 10(1) in failing to provide the requested information to the complainant within twenty working days of the date of the request
  - 17(1)(a), (b) and (c) in failing to issue a valid refusal notice to the complainant
  - 17(3) in unreasonably extending the time to consider the public interest test in relation to qualified exemptions.

## **Steps Required**

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51. The Commissioner requires no steps to be taken.

## **Other Matters**

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52. Although they do not form part of this decision notice the Commissioner wishes to highlight the following matters of concern.
53. The Commissioner has issued guidance on the time limits on carrying out internal reviews under the Act. This guidance explains that in the Commissioner's opinion 20 working days constitutes a reasonable amount of time to conduct an internal review. In exceptional circumstances it may be reasonable to take longer but in no circumstance should the total time taken exceed 40 working days. In this case, the NIO received correspondence from the complainant dated 1 April 2009 asking it to conduct an internal review of its handling of his request. The NIO did not inform the complainant of the outcome of the review until 28 August 2009.
54. The Commissioner considers the time taken for completion of the internal review in this instance to be excessive and unreasonable.

## Right of Appeal

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

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

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

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

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

**Dated the 17<sup>th</sup> day of August 2010**

**Signed .....**

**David Smith  
Deputy Commissioner**

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

## Legal Annex

### Freedom of Information Act 2000

#### Time for Compliance

**Section 10(1)** provides that –

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

**Section 10(3)** provides that –

“If, and to the extent that –

(a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or

(b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied, the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.”

#### Refusal of Request

**Section 17(1)** provides that –

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

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies.”

**Section 17(2)** states –

“Where–

(a) in relation to any request for information, a public authority is, as respects any information, relying on a claim –

(i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is

relevant to the request, or  
(ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and  
(b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,  
the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached."

**Section 17(3)** provides that –

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

- (a) 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 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."

## **Health and Safety**

**Section 38(1)** provides that –

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.

## **Personal information**

**Section 40(1)** provides that –

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

**Section 40(2)** provides that –

"Any information to which a request for information relates is also exempt information if-

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

### **Legal Professional Privilege**

**Section 42(1)** of the Act provides that:

'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.'

### **Prohibitions on disclosure**

**Section 44(1)** provides that –

"Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it –

- (a) is prohibited by or under any enactment,
- (b) is incompatible with any Community obligation, or
- (c) would constitute or be punishable as a contempt of court."