

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 25 April 2025

**Public Authority:** Northern Ireland Policing Board

**Address:** Waterside Tower  
31 Clarendon Road  
Clarendon Docks  
Belfast BT1 3BG

#### **Decision (including any steps ordered)**

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1. The complainant has requested information associated with the implications for the Northern Ireland Policing Board (NIPB) of a particular Court of Appeal judgement. NIPB disclosed some information and withheld the remainder under sections 36(2) and 40(2) of FOIA. These exemptions concern prejudice to the effective conduct of public affairs and personal data, respectively. NIPB has subsequently advised that some of the withheld information can be disclosed due to the passage of time. It is continuing to withhold the remainder under section 36(2)(c), 40(2) and also section 42, which concerns legal professional privilege.
2. The Commissioner's decision is as follows:
  - NIPB is entitled to withhold some of the information the complainant has requested under sections 36(2)(c) and 42(1) of FOIA.
  - The timeliness of NIPB's initial response to the request didn't comply with sections 1(1), 10(1) and 17(1).
3. The Commissioner requires NIPB to take the following step to ensure compliance with the legislation:
  - If it hasn't already done so, communicate to the complainant the information that it is no longer withholding under any exemption.

4. NIPB must take this step within 30 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## **Request and response**

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5. The complainant made the following information request to the NIPB on 27 July 2024:

"1. ALL material concerning the IMR [Independent Medical Referees] training, procedures, and processes" that were supplied to the SMP [Selected Medical Practitioner] and the IMRs between 2017 - 2023. This includes any digital material shared with them or as Dr \*\*\*\* has described any folders of paperwork.

2.The "assessment method policy" (Detailed in an FOI that was removed from the NIPB website in 2019) This document is from 2017 and is separate to the SMP guidance.

3. The process maps relating to the SMP and the IMR/appeals process produced by the NIPB and agreed by them in 2020.

4. A full and unredacted copy of the paper called "The Implications of the McKee & others v The Charity Commission for Northern Ireland document"

6. NIPB responded on 17 September 2024. It disclosed information relevant to parts 1, 2 and 3 of the request, and directed the complainant to the Ministry of Justice in respect of information provided to IMRs. NIPB also disclosed some of the information requested in part 4 but made redactions under sections 36(2)(b) and (2)(c) and section 40(2) of FOIA.
7. The complainant requested an internal review on 18 September 2024. NIPB didn't provide one within the recommended time scale and the complaint was accepted for further investigation without an internal review having been carried out.
8. In its submission to the Commissioner, NIPB has advised that due to the passage of time, it has withdrawn its application of the exemptions under section 36(2) and 40(2) to some of the information it's withholding but is continuing to withhold the remainder under sections 36(2)(c) and 40(2). It has now also applied section 42 of FOIA (only) to certain information.

## Reasons for decision

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9. In their request for an internal review, the complainant indicated that they considered that NIPB held further, relevant information.
10. However, their complaint to the Commissioner of 14 November 2024 is focussed on the timeliness of NIPB's response and its application of section 36. Based on that complaint and NIPB's final position, this reasoning focusses on NIPB's application of section 36(2)(c) and section 42(1) of FOIA to information within scope of the complainant's request. Finally, it will consider procedural aspects of NIPB's handling of the request.

### Section 36 – prejudice to the effective conduct of public affairs

11. The requested information relates to the Court of Appeal's 2020 judgment in *McKee & Others v Charity Commission for Northern Ireland* ('the McKee decision'). This ruled that the Charity Commission for Northern Ireland ('the Commission') couldn't delegate its decision-making functions to staff. This meant that all Commission decisions had to be made by Commissioners, not staff following manuals. The judgment, which overturned a High Court decision in May 2019, declared almost 7,500 regulatory decisions made by staff to be unlawful.
12. Under section 36(2)(c) information is exempt information if, in the reasonable opinion of a qualified person, its disclosure would or would be likely to otherwise prejudice the effective conduct of public affairs.
13. The qualified person (QP) in this case is NIPB's Chief Executive. The Commissioner is satisfied that this individual was authorised as the QP under section 36(5) of FOIA.
14. NIPB has provided the Commissioner with a copy of the submission it provided to the QP. From that submission the Commissioner accepts that the QP gave their opinion that the exemption was engaged. The submission indicates that the QP gave their opinion on 13 September 2024 which was before NIPB provided its response on 17 September 2024. The opinion was therefore given at an appropriate time.
15. The QP also re-stated their opinion that section 36(2)(c) was engaged in email correspondence dated 9 April 2025.
16. The QP was originally provided with a summary of the request. They were advised which section 36(2) exemptions were being considered, including section 36(2)(c), and the exemptions were explained. The QP was advised why the prejudice envisioned under section 36(2)(c) could occur.

17. The QP was advised that the McKee decision is much like the Police (Northern Ireland) Act 2000 (the Police Act) which sets out NIPB's own powers and responsibilities.
18. The purpose of the meeting to which the requested information relates was to discuss the implications of the judgement, NIPB's current process and NIPB's revised process and risks.
19. The QP's opinion was that disclosing the information "would" cause the envisioned prejudice as the work to which the information relates remained 'live' and subject to consultation.
20. It's important to note that 'reasonableness' in relation to the QP's opinion isn't determined by whether the Commissioner agrees with the opinion provided but whether the opinion is in accordance with reason. In other words, is it an opinion that a reasonable person could hold? This only requires that it's a reasonable opinion, and not necessarily the most reasonable opinion.
21. The Commissioner considers that the QP had sufficient background knowledge and was provided with sufficient information to enable them to form an opinion on the matter.
22. The Commissioner considers it to be a reasonable opinion that disclosing the redacted information at the time of the request would or could prejudice NIPB's ability to consider and develop its response to the McKee decision. The impact of disclosure is discussed further under the public interest test consideration.
23. Finally, the Commissioner has considered the likelihood of the envisioned prejudice occurring.
24. The Commissioner hasn't been persuaded that disclosing the withheld information would cause prejudice - that is, would be more likely to than not - because NIPB hasn't made a compelling case to support this. He will accept the lower level of likelihood, however.
25. At the time of the request, NIPB was considering the impact of the McKee decision ie the matter was 'live.' The Commissioner therefore finds that the opinion that disclosing the disputed information would be likely to impact negatively on that process is a reasonable opinion. The information to which NIPB has applied section 36(2)(c) of FOIA therefore engages that exemption. The Commissioner has gone on to consider the associated public interest test.

## **Public interest test**

26. In their request for an internal review, the complainant argued that the requested information wasn't contentious. They considered that it should be published in full on NIPB's website for any applicants going through the Ill Health Retirement or Injury On Duty Award (IODA) process.
27. In its submission to the Commissioner, NIPB has acknowledged that disclosing the requested information would be in line with FOIA's spirit and its requirement for public bodies to be open and transparent. It would also help promote accountability.
28. NIPB said that the work it has undertaken in respect of the IODA process generally, and specifically in relation to the Charity Commission decision [ie McKee decision] has generated considerable debate amongst, and communication from, interested parties. Therefore, NIPB noted, it could be argued that there's a public interest in releasing the information.
29. NIPB has presented the following public interest arguments against disclosure:

"The issues arising from the McKee & Others v The Charity Commission for Northern Ireland judgement are 'live' and are still being actively pursued by relevant third parties.

Release of the requested information at this time would adversely impact upon the current operation of the Board's Police Pensions & Injury Benefits Branch. It is believed that full release of this information would generate an unsustainable increase in the volume of requests for information which would impact on the Board's ability to focus on the review, and other business.

Release of all information into the wider public arena at this time could lead to interested parties amongst the general public and amongst elected representatives to 'lobby' the Board on individual cases

The release of this information is of interest to the requestors, and may be of interest to other individuals who have a direct involvement with the Injury on Duty process. However this is not the same as being of interest to the public at large which is what releasing this information under the FOIA is intended to be."

30. The Commissioner has accepted that disclosing the information being withheld under section 36(2)(c) would be likely to prejudice the effective conduct of public affairs; matters associated with the McKee decision were 'live' at the time of the request and disclosure would be likely to divert NIPB's resources.

31. He has considered whether, in July 2024, the public interest in the information was such that it would justify causing the above prejudice.
32. When he considers the balance of the public interest, the Commissioner takes account of the weight of the QP's opinion, the timing of the request, and the severity and extent of the envisioned prejudice.
33. First, the Commissioner considers that NIPB's QP had the requisite knowledge of how their organisation works and the consequences of any disclosure. The Commissioner has therefore given their opinion a measure of respect.
34. Of particular relevance here, at the time of the request and NIPB's response, the process of considering the ramifications of the McKee decision were still 'live.'
35. The public interest in NIPB being able to conduct its affairs without prejudice will be greater if the issue is ongoing and live at the time of a request.
36. Interfering with the process the NIPB had undertaken, by disclosing the information, would be likely to impact negatively on NIPB. The Commissioner is satisfied that there's greater public interest in NIPB being able to focus on deliberating and consulting on its response to the McKee decision, without being diverted by interested parties' questions and requests while that process is still ongoing.
37. The Commissioner acknowledges the complainant's interest but considers that NIPB has presented stronger arguments. There's undoubtedly an interest in the impact of the McKee decision on how NIPB operates. However, the Commissioner finds that the degree of wider public interest isn't sufficient to warrant causing the envisioned prejudice.
38. On balance therefore, the Commissioner accepts that, at the time of the request and response, the public interest favoured maintaining the exemption under section 36(2)(c).

## **Section 42 – legal professional privilege**

39. NIPB has applied section 42(1) to some of the information it's withholding.
40. Under section 42(1) of FOIA, information in respect of which a claim to legal professional privilege could be maintained in legal proceedings is exempt information.

41. The purpose of legal professional privilege (LPP) is to protect a person's ability to speak freely and frankly with their legal advisor in order to obtain appropriate legal advice. It recognises that a person needs to lay all the facts before their advisor so that the weaknesses and strengths of their position can be properly assessed. Therefore, LPP evolved to make sure communications between a lawyer and their client remain confidential.
42. There are two types of LPP – advice privilege and litigation privilege. The Commissioner understands that NIPB considers that the information it's withholding attracts advice privilege.
43. The Commissioner has reviewed the information being withheld, which concerns discussions NIPB has had with its legal advisors. He's satisfied that this information can be categorised as legal advice that attracts LPP. NIPB was therefore correct to apply section 42(1) of FOIA to it. However, section 42 is subject to the public interest; even though the information attracts LPP it may still be disclosed if there's sufficient public interest in its disclosure.
44. In its submission, NIPB has cited the same public interest arguments for disclosure that it provided in its section 36 submission.
45. Against disclosure, NIPB has argued that maintaining legal privilege would safeguard openness in all communications between NIPB and its legal advisors to ensure access to full and frank legal advice. It said that this is fundamental to the administration of justice.
46. The Commissioner appreciates the complainant's interest in the information they've requested, and the wider interest in transparency, but he agrees with NIPB that the balance of the public interest favours withholding it. LPP carries with it a very strong inherent protection due to the nature of the information that it covers, and the function that it plays in administering justice. Arguments for disclosure in this case aren't sufficiently strong to overturn that protection.
47. The Commissioner's decision is therefore that NIPB is entitled to apply section 42(1) of FOIA to the information it's withholding and the public interest favours maintaining this exemption.

## **Procedural matters**

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48. Under section 1(1) of FOIA a public authority must (a) confirm whether it holds the information an applicant has requested and (b) communicate the information if it's held and isn't exempt from disclosure.



49. Under section 10(1) the authority must comply with section 1(1) within 20 working days following the date of receipt of the request. And under section 17(1) it must provide a refusal notice in respect of any exempt information within the same time scale.
50. In this case, the complainant submitted their request on 27 July 2024 and NIPB didn't communicate information or issue a refusal notice until 17 September 2024. NIPB therefore didn't comply with sections 1(1), 10(1) and 17(1) of FOIA.

## **Other matters**

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51. Provision of an internal review isn't a formal requirement of FOIA but is a matter of good practice. The Commissioner advises that in the majority of cases a review should be provided with 20 working days of the request for one.
52. In this case, in its response to the request, NIPB offered to carry out an internal review if the complainant wasn't satisfied. The complainant requested a review on 18 September 2024, but NIPB didn't then go on to provide one. The Commissioner has recorded this for monitoring purposes.
53. Finally, the Commissioner hasn't made a formal decision about NIPB's application of section 40(2) of FOIA to certain information. However, he's reviewed the information in question, and he considers that it's the personal data of a specific individual – he understands this is the individual named in the request – and disclosing this information wouldn't be lawful.



## Right of appeal

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54. 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  
LEICESTER  
LE1 8DJ

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

55. 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.
56. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Cressida Woodall**  
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**Information Commissioner's Office**  
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