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	Delivered:	**18/03/2026**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE POLICE SERVICE OF NORTHERN IRELAND

Applicant

v

INFORMATION COMMISSIONER

Respondent

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Craig Dunford KC (instructed by the Crown Solicitor's Office) for the Applicant
Peter Hopkins KC with Christopher Knight (instructed by the Information Commissioner) for the Respondent

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Before: Keegan LCJ, Treacy LJ and Humphreys J

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KEEGAN LCJ (*delivering the judgment of the court*)

Introduction

[1] This is an application for leave to appeal a decision of the Upper Tier Tribunal ("UTT") of 28 July 2025, leave to appeal to the Court of Appeal having been refused by the same UTT on 25 September 2025. The UTT decision under challenge followed a First Tier Tribunal ("FTT") decision of 8 August 2024 which was effectively an appeal against an information notice dated 22 June 2023, issued under section 51(1)(a) of the Freedom of Information Act 2000 ("FOIA").

Background

[2] The broad background is explained in the various comprehensive decisions of the tribunals which we will not repeat. In summary, the complainant in this case sought information by way of a request to the Police Service of Northern Ireland ("PSNI") on 22 May 2020 regarding gold mining in Northern Ireland. For present purposes, the relevant part of the request relates to a consent order that was generated between the parties relating to:

> "Any record of talks between gold mine companies discussing security costs."

[3] It is clear from the information notice that the PSNI provided the Information Commissioner ("the Commissioner") with copies of the requested information after some correspondence in relation to this issue, save for legal advice on the basis of legal professional privilege claimed by the PSNI.

[4] Para [12] of the information notice which we have been taken to is the nub of the decision made by the Commissioner. Therein it is stated:

> "Having inspected the information provided the Commissioner remained of the opinion that he needed sight of all of the requested information. He wrote to the PSNI on 1 June 2023 confirming his understanding that section 51 of the Freedom of Information Act provides that he may issue an information notice requiring a public authority to provide him with any information he reasonably requires in order to make a decision in a particular case. This will generally include any information withheld in response to an information request under the Freedom of Information Act. The Commissioner advised there is no provision for a public authority to refuse to provide to the ICO information that falls within the scope of the request solely on the basis that it is legally privileged."

[5] The information required was thereafter directed to be provided within 30 calendar days of the date of the information notice. The decision was that the remaining withheld information fell within the scope of the complainant's request.

[6] Thereafter, two specialist tribunals have dealt with this matter and rejected the PSNI arguments which are made against this decision. It is fair say that these arguments have developed and have been refined during the hearings before the tribunals and today by Mr Dunford KC.

This application

[7] Two arguments are advanced at this hearing for leave to appeal before the Court of Appeal which we have conducted as a rolled-up hearing. First, that the UTT was wrong to dismiss the argument that a notice under section 51(1)(a) of FOIA must satisfy the reasonable requirements condition found in section 51(1)(b) and, second, that the power to require the production of information covered by legal professional privilege does not extend to section 50 as a matter of necessary implication.

[8] We have been greatly assisted by the skeleton arguments that have been filed in this case which from both sides are of high quality. We have had the opportunity to read them in advance of today and we have listened carefully to the arguments made orally. We do not intend to detract from the assistance we have got by virtue of providing a summary of our outcome having considered the arguments made.

[9] The appellate test has most recently been stated by this court in the case of *Belvoir Logistics Ltd and Shane Tinnelly v The Driver and Vehicle Agency* [2026] NICA 11 at paras [7]-[11] of the judgment of the court.

[10] Article 2 of the Appeals from the Upper Tribunal to the Court of Appeal Order 2008 is the relevant provision which provides:

> "Permission to appeal to the Court of Appeal shall not be granted unless the appellate court, considers that—
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> (a) the proposed appeal would raise some important point of principle or practice; or
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> (b) there is some other compelling reason for the relevant appellate court to hear the appeal."

[11] We note the jurisprudence in this area that also reiterates the speciality of the tribunals hearing cases of this nature. Mr Hopkins has rightly pointed out that on a leave to appeal application of this nature, the Court of Appeal approaches an appeal from an expert tribunal with an appropriate degree of caution as it alone is the judge of fact.

[12] A preliminary issue which has been raised by Mr Hopkins, which has some merit, is whether this is in fact an academic appeal. He makes this point on the basis that various factual findings have not been appealed which is an obstacle for the PSNI application. Also, as has been frankly recognised by Mr Dunford, para [12] of the information notice means that the outcome is unalterable whatever this appellate court decides which is pause for thought in a case which is now of six years' vintage following the application for information by the complainant.

[13] However, we are not determining this application for leave to appeal on the basis that it is academic given the industry of the various arguments addressed to us. Rather, having considered the substantive arguments made in support of the application and applying the appellate test, we are quite clear that we should not grant leave to appeal based on a point of law or procedure arising or there is a compelling reason that requires us to intervene.

[14] We reach this conclusion having undertaken an interpretation of section 51 of FOIA as a whole, considering the natural meaning of the words that we find in the section and in the context of FOIA in its entirety. Mindful of the context of FOIA, the

scope of the Commissioner's functions under section 50 require him to carefully consider the terms of a public authority's refusal to comply with Part 1 of FOIA. To undertake that task when the refusal to provide information is on the basis of legal professional privilege, as a matter of common sense, must require the Commissioner in an appropriate case to see the underlying material. Mr Dunford has effectively accepted that argument. We also find no valid reason raised in this case why there should be some further exception applied to allowing the Commissioner to see the material.

[15] A further point in support of our conclusion is very simple. Legal professional privilege is obviously an important constitutional right, but it is clearly a qualified exemption under the FOIA regime. Also, section 51 read as a whole, is clear. Parliament has chosen a certain structure in section 51. The terms of section 51(1)(a) are unambiguous. The use of the word 'or' which is found after section 51(1)(a) means that the UTT was correct to dismiss the argument that the notice must satisfy the reasonable requirement which is found in one part of section 51(1)(b). The terms of section 51(2) support the distinction which is clearly found in the statute.

[16] It is clear to us if you read section 51 as a whole, that an evaluation is required on the part of the Information Commissioner because the Information Commissioner must undertake an exercise to decide whether to issue a notice. Thus, the first ground of appeal is unconvincing and so we refuse leave.

[17] We also refuse leave on the second ground. The legislation has provided for a legal professional privilege exemption in section 51 by virtue of section 51(5). In our view the UTT was correct to hold that the decision in *Scottish Legal Complaints Commission v Murray* [2022] CSIH 46, was not applicable and the necessary implication argument does not work in favour of Mr Dunford's client given the overall structure of FOIA.

[18] Boiling all of this down, there is a relatively simple trajectory in play. The notice requested a category of information under FOIA. That was to allow the Commissioner to undertake his duties and obtain information by way of a notice. Thereafter, he must undertake an independent assessment as to whether the qualified exemption in section 42 of FOIA is appropriately claimed by the PSNI. This all means that the decision of the Commissioner which has been effectively upheld by two specialist tribunals is not a decision which we consider requires us to grant leave to appeal to consider any issues of law or for any other compelling reasons.

[19] Finally, we reflect that to decide otherwise than as we have would be to defeat the purpose of the Commissioner and the enforcement of rights which Parliament has set out in FOIA. Our decision means that, subject to anything counsel want to say, the decision of the Commissioner stands which requires compliance within 30 days from today.

Conclusion

[20] The application is refused. We make an order for costs against the applicant in the circumstances given the unsuccessful application.