

EXPLANATORY MEMORANDUM TO

The Court Files Privileged Access Rules

S.R. 2016 No. 123

1. Introduction

- 1.1. This Explanatory Memorandum has been prepared by the Department of Culture, Arts and Leisure to accompany the Statutory Rule (details above).
- 1.2. The Statutory Rule is made under section 9 of the Public Records Act (Northern Ireland) 1923.

2. Purpose

- 2.1. The Statutory Rule, developed in consultation with the Office of the Attorney General for Northern Ireland, will facilitate privileged access to information contained in court files for applicants meeting the eligibility criteria. The Rules codify a process, developed following engagement with relevant authorities and legal and voluntary sector organisations, piloted since January 2015.

3. Background

- 3.1. The draft Rules deal with information contained in court files “created by or originating from” any court in Northern Ireland. These include inquest files which originate from the Coroner’s Court. (rule 2).
- 3.2. Most of the requests received by PRONI are for conflict-related court files, however, there are also requests for court files which are not related to the Conflict, for example the inquest file of a close relative who died in a fire. In some cases (some suicides) it may not be entirely clear whether the conflict had a direct causal effect.
- 3.3. Regardless of whether the incident was conflict related, the focus of the Department's concern is the person who is seeking the file. As a result the Rules do not distinguish between conflict and non-conflict requests and apply to a request for any court file.
- 3.4. The people the process was designed to benefit are those who were involved in an incident or those who have been seriously adversely affected by the incident, for example people close to those involved, including relatives, partners, in-laws, step relatives and friends.
- 3.5. Draft rule 3 therefore provides for applications to be accepted from - or on behalf of – people who, as a result of an incident recorded in the court file they are requesting, have been bereaved, physically or psychologically injured, or seriously adversely affected in some other way.
- 3.6. Draft Rule 3(1)(b) and (c) provide for a solicitor or an employee of a charity to request a file on behalf of a person. For the protection of the intended recipients of the files and the Department, it is important to ensure that we are accepting applications from solicitors and representative organisations which are operating within a recognised governance regime.
- 3.7. Therefore, by way of draft rule 2 we define “solicitor” as having the same meaning as in article 3 of the Solicitors (NI) Order 1976. The matters the

1976 Order deals with include qualification for practicing and admission of solicitors to the profession, also professional practice, conduct and discipline.

- 3.8. Similarly, draft Rule 2 defines “charity” as having the same meaning as in the Charities Act (NI) 2008. The 2008 Act established the Charity Commission which maintains a register of charities and has powers of regulation, investigation and enforcement. The bodies who have requested court files on behalf of families under the pilot process are registered or in the registration process with the Charities Commission.
- 3.9. Draft rule 4 (1) and (2) deal with the detail of making an application, including the introduction of an application form, which in practice will include the Undertaking. The aim is to assist applicants by making the application process as clear and straight forward as possible, and by minimising the risk of applicants providing incomplete or erroneous information.
- 3.10. Under the process, decisions about the release of information in court files are Ministerial decisions, made in the light of the Data Protection Principles in Schedule 1 of the Data Protection Act 1998 and informed by consultation with the Department of Justice and/or the Northern Ireland Office. This is articulated through draft rules 5, 6 and 7.
- 3.11. Rule 6 requires that the Minister’s decision about the release of a court file is preceded by consultation with the relevant authority, that is, the Department or other authority which transferred the file to PRONI. This rule also provides for residual consultation with the Secretary of State for Northern Ireland.
- 3.12. Draft rule 5 establishes that information in a court file is eligible for release only to the extent that its release complies with the Data Protection Act 1998. In turn, draft Rule 7(2) requires the Department to review information in a court file to ensure that its release would comply with the 1998 Act.
- 3.13. Rule 7(3) provides for the Minister to “withhold the whole or part of any court file” (therefore, to redact information) and to “impose conditions as the Minister sees fit” on its release. These conditions are any specific conditions which the Minister may wish to apply in respect of a particular request. For example, extra care is exercised over the release of certain photographs and reports by requesting additional information to ensure that the recipient understands the graphic nature of the requested material.
- 3.14. Draft rule 7(4) requires the recipient of the court file to attend PRONI and to produce photographic identification to receive the files. However, this may not always be possible and rule 7(5) allows for the Department to make an alternative arrangement where this seems appropriate, for example to assist the recipient.
- 3.15. On occasion there may be some applicants who are unhappy about information being redacted. In these circumstances they may ask the Minister to review the redactions.
- 3.16. Draft rule 10 sets out arrangements for requesting a review, including that the review process will include consultation with the relevant authorities prior to the Minister making a decision on the request. Rule 10(3) proposes that any review must be on grounds that the procedures were not properly followed or that not all of the relevant information was available to the Minister when

making the decision. The proposed time limit for lodging an appeal is one month from the date on which the Department issued notification of the decision.

- 3.17. For the process to operate effectively each person requesting access to a court file is required to sign an Undertaking to the effect that they will keep the information confidential.
- 3.18. Draft rules 8 and 9 deal with the general conditions which apply after the release of information contained in a court file. These conditions are articulated in the draft Undertakings at Schedules 1, 2 and 3. Rule 4(4) to (7) requires each person making an application, or having an application made on their behalf, to provide a signed Undertaking.
- 3.19. Rule 8(1) requires the recipient of a court file to keep it confidential and securely stored; not to copy or reformat it, or allow another to do so; and not to publish the file, or allow another to do so, without the written permission of the Department. Rule 8(2) enables individual recipients to share the file with solicitors to obtain legal advice. Rule 8(3) provides for solicitors to copy a file for purposes of obtaining counsel or expert witness opinion or making a submission to the Attorney General for a new inquest.
- 3.20. Rule 9 provides for an applicant to seek the Minister's permission to publish information in a court file and sets out the relevant procedures. It requires consultation with the relevant authorities before the Minister makes a decision. It also makes clear that the Minister will always grant permission where publication is for court purposes and where ECHR Article 6 (Right to a fair trial) is engaged.
- 3.21. The Undertaking requires that, within 10 years of a file being released, an applicant must either return it to PRONI or apply to retain it for a further period (rule 8(4)).
- 3.22. Under the process there is the option of court action against anyone who either breached an Undertaking or published material in the file. Any solicitor who breached the Undertaking could be at risk of action by the Law Society. The Rules also enable the Minister to recall court files (and any copies) if there is reasonable evidence of a breach of the Undertaking or of a breach of any specific or general condition placed on the release of a file. Draft rule 11 provides for this and places a duty on the applicant to comply.

4. Consultation

- 4.1. Public consultation on the proposed Rules took place during January and February 2016. 14 responses were received from individuals and a range of organisations including a number from the legal and voluntary sectors.
- 4.2. The Department hosted a series of stakeholder engagement events organised in partnership with the Commission for Victims and Survivors and the Law Society. Focused engagement with organisations representing victims and survivors were hosted in Belfast, Londonderry and Portadown. The events provided an opportunity for the Department to present the draft Rules and to answer any questions. Participants were encouraged to submit a written response.

4.3. Key themes emerging from the consultation relate to (i) the materials covered by the draft Rules; (ii) the provisions for making the Rules, under the Public Records Act (NI) 1923; and (iii) relationship of the process to other routes to seek such information, for example the Freedom of Information Act or the Data Protection Act.

5. Equality Impact

5.1. The draft proposals have been subject to an equality screening exercise to determine if there are any negative differential impacts on any of the groups identified at section 75 of the Northern Ireland Act 1998. The exercise concluded that there are no detrimental impacts.

6. Regulatory Impact

6.1. After consideration it was determined that a Regulatory Impact Assessment is not necessary because the proposals result in no, or negligible, costs or savings to business, charities or social economy organisations including enterprises or voluntary bodies.

7. Financial Implications

7.1. There will be minimal additional costs to PRONI or other public authorities consulted in respect of the release of information under the draft Rules. The introduction of the process will run alongside and utilise the same resources as the existing legal processes for managing the release of information. The process is unlikely to generate additional information requests.

8. Section 24 of the Northern Ireland Act 1998

8.1. The draft Rules are in compliance with section 24 of the Northern Ireland Act 1998.

9. EU Implications

9.1. N/A.

10. Parity or Replicatory Measure

10.1. There is no equivalent legislation in Great Britain.

11. Additional Information

11.1. N/A.