

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

### **Decision notice**

**Date:** 10 October 2019

**Public Authority: Northern Ireland Co-Operation Overseas**

**Address: Landmark House  
5 Cromac Place  
Belfast  
BT7 2JD**

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

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1. The complainant has requested information from Northern Ireland Co-Operation Overseas ('NI-CO') relating to training materials for a certain project. NI-CO refused the request, citing the exemptions set out in sections 27(1) and 43(2) of the FOIA as a basis for non-disclosure.
2. The Commissioner's decision is that NI-CO has correctly applied section 43(2) of the FOIA to the complainant's request and so she did not go on to consider its application of section 27(1) of the FOIA. The Commissioner therefore requires no steps to be taken.

#### **Request and response**

3. The complainant made a request to NICO on 3 January 2019 for information in the following terms:-

"I would like to make another request under the terms of the FOI Act from December 2016 to the most recent date available:

Training materials created by NI-CO staff for the MyPol project and the Myanmar police force.

Materials should include PowerPoint presentations, PDF documents.

If you have any questions about this request, please email me to let me know within 20 working days.

If you are unable to release certain records because the requested information is caught by one or more exceptions, please provide a register of all information in the scope of the request, including that which is being withheld. Please provide the date and description of each record and indicate which exception is cited to withhold it from disclosure.”

4. NI-CO provided a response to the complainant on 31 January 2019, stating that it was refusing to disclose the requested information and citing sections 27(1)(a) and (c) and 43(2) of the FOIA as a basis for non-disclosure. The complainant was not satisfied with this and requested an internal review on 7 February 2019, the result of which was provided on 7 March 2019. The reviewer upheld the original decision.

### **Scope of the case**

5. The complainant contacted the Commissioner on 19 March 2019 to complain about the way his request for information had been handled.
6. The Commissioner has considered NI-CO’s handling of the complainant’s request, in particular its application of the above exemptions.

### **Reasons for decision**

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#### **Section 43(2) – prejudice to commercial interests**

7. NI-CO applied section 43(2) to the withheld information. Section 43(2) of the FOIA states that information is exempt if its disclosure would or would be likely to prejudice the commercial interests of any person, including the public authority holding it. This is a qualified exemption and is, therefore, subject to the public interest test.
8. In order for section 43(2) to be engaged the Commissioner considers that three criteria must be met:
  - Firstly, the actual harm that the public authority alleges would or would be likely to occur if the withheld information was disclosed has to relate to commercial interests.
  - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential

disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Any prejudice that results must also be real, actual or of substance.

- Thirdly, there is a need to establish whether the level of likelihood of prejudice being relied upon by the public authority is met, whether disclosure would or would be likely to result in prejudice or there is a real and significant risk of the prejudice occurring.

### **Relevant applicable interests**

9. The Commissioner states in her Section 43 – Commercial Interests Guidance:

*"A commercial interest relates to a person's ability to participate competitively in a commercial activity. The underlying aim may be to make a profit however it could also be to cover costs or to simply remain solvent."*

10. NI-CO stated that it operates in a commercial environment and submits tenders to funding agencies for the provision of its services on a competitive basis. These services include delivering technical assistance programmes as a UK representative on behalf of International Funding Agencies. The release of commercial information would likely be damaging to the organisation as it would potentially provide competitors commercially sensitive information.
11. The Commissioner considers that these constitute commercial activities within the definition of her guidance. The Commissioner agrees that the actual harm likely to be caused by disclosure would be to NI-CO's commercial interests. She is therefore satisfied that the first criterion is met.
12. Having determined that the information is commercial in nature and that any harm caused by disclosure would be to NI-CO's commercial interests, the Commissioner has gone on to consider whether there is a causal link between disclosure of the withheld information and the prejudice which disclosure would or would be likely to cause, also the relevant party or parties that would be affected.

### **The causal link between disclosure and prejudice**

13. NI-CO states that the information withheld under this exemption consists of training materials in relation to a particular project (MyPol) and the Myanmar police force. The training materials provided by NI-CO are bespoke, prepared in conjunction with NI-CO's partners. By

releasing this information, NI-Co considers there is the potential for the information to be copied and used by its competitors. This would give them an unfair advantage as they would acquire knowledge of NI-CO's training methods and techniques, which they could use to bid against NI-CO in future tender exercises.

14. NI-CO informed the Commissioner that it works in partnership delivering this project, and it considers that disclosure of the requested information would constitute a breach of trust, which would cause significant commercial and reputational damage to NI-CO, both with its immediate project partner and with other organisations delivering technical assistance programmes. NI-CO states that there is a risk that potential partners are likely to be unwilling to form future consortium alliances and share confidential information with NI-CO as the risk of NI-CO having to publish such documents would be too high and too damaging.
15. The Commissioner also accepts that there is a causal relationship between the potential disclosure of the requested information and the prejudice that this exemption is designed to protect, therefore the second criterion is met.

### **Nature and likelihood of prejudice**

16. NI-CO considers that disclosure of the requested information would be likely to be damaging to the organisation as it would potentially provide competitors with commercially sensitive information such as operational data and costings, work obligations and details of parties to the contract.
17. NI-CO has stated that, although it has rights over the training materials used in its projects, if it was to release these documents publicly, experts would be unlikely to work for NI-CO if it meant their training materials would be made public. As experts are generally employed on short-term contracts to deliver specific inputs it is likely that they would refuse work offered by NI-CO. If this were to happen NI-CO would be unable to deliver its projects.
18. The environment in which NI-CO operates is small, competitive in nature, and has a limited pool of experts that can be drawn upon to deliver such work. Any breach of trust therefore would be likely to have immediate and long-term repercussions. The failure by NI-CO to protect commercially sensitive information would limit its ability to competitively tender for and deliver technical assistance programmes as a UK representative on behalf of International Funding Agencies, which would mean it was unable to carry out its core business purpose.

19. The Commissioner accepts that disclosure of the requested information in this case would be likely to prejudice the commercial interests of NI-CO. Therefore, the Commissioner accepts that the exemption as set out in section 43(2) of the FOIA is engaged.
20. Although the Commissioner accepts that the exemption is engaged, it is necessary for her to go on to consider whether the public interest favours maintaining the exemption or disclosing the requested information.

### **Public interest test**

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

21. NI-CO states that it understands that disclosure of the information would meet the public interest in transparency and accountability by increasing both public awareness of the work that NI-CO undertakes, and transparency in the activities that will be undertaken by it to achieve the projects aims and objectives. There is a general public interest in transparency and accountability of public authorities, so that the public can be informed of and understand their decision-making processes, and the Commissioner affords significant weight to this public interest factor in favour of disclosure.
22. NI-CO also recognises that disclosure of the requested information would:-
  - provide transparency on how this project would fit into the wider programme of reform being undertaken by the Myanmar Government as supported by the EU.
  - highlight the strong commitment supporting positive reform programmes
  - reassure critics that NI-CO is working towards a more service oriented police service including gender sensitive service delivery by promoting community policing in full respect of human rights.

The Commissioner recognises that these are all strong public interest factors in favour of disclosure of the requested information.

23. The complainant also believes that NI-CO, in applying the above exemptions, has failed to consider the extraordinary political situation in Myanmar, which he states increases the public interest in knowing how UK representatives conduct themselves in dealings with the country. He states that disclosing training materials created by NI-CO staff for the MyPol project would ease the public's concerns about NI-

CO's and, by extension, the UK's involvement in human rights abuses committed by the Myanmar Police Force.

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

24. NI-CO argues that disclosure of information relating to the commercial details of NI-CO projects in Myanmar and activities of the company, would cause financial harm to the organisation, preventing it from carrying out such projects in the future.
25. It further argues that disclosure of information relating to its commercial activities, would provide an unfair advantage to NI-CO's competitors and result in commercial detriment to it. NI-CO is not funded by the UK government and has to generate its own income through tendering for projects in a commercial environment. The loss of contracts would have a significant financial impact on NI-CO and could lead to the eventual inability to generate funding, which would likely result in NI-CO becoming unviable.
26. NI-CO also argues that disclosure of partner information would be likely damage the commercial interests of those partners and would erode confidence in NI-CO's ability to keep information confidential and lead to other organisations either not considering NI-CO as a partner in consortia led by them, or joining consortia led by NI-CO.

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

27. The Commissioner recognises that there is a strong and legitimate public interest in the openness and transparency of public authorities with regard to their decision-making processes. In particular, there will be a public interest in knowing more about commercial tenders and projects involving public funds, to ensure that the public is getting the best value for money. However, since NI-CO does not rely on public funds and instead generates its own income, the Commissioner does not consider that this factor carries as much weight in this instance.
28. The Commissioner is also aware that it is necessary for public authorities like NI-CO, who negotiate with third parties on a regular basis, to be able to keep such information confidential so as not to cause a breakdown in trust, resulting in prejudice to its ability to provide services and carry out projects which can serve to strengthen Northern Ireland's relationship with other countries.

29. NI-CO has addressed the complainant's point about the public interest resulting from the current political situation in Myanmar. It refutes the assertion that it has not taken this into account and states that NI-CO, together with a number of other partners, forms part of a £30m project contributing to a more preventive, balanced and professional approach by law enforcement agencies based on international best practices and respect for human rights to the Myanmar Police Force (MPF). The specific objective is contributing to an effective, efficient accountable police service trusted by different communities, applying international best practices and respect for human rights and fundamental freedoms. NI-CO complies with UK government guidance on human rights and the reporting of human rights abuses and works closely with FCO, EU and other donors in this regard.
  
30. On balance and in particular because NI-CO's work in Myanmar is regularly reviewed by the European Commission based in Myanmar, which results in reports and press releases which can be read on NI-CO's website, the Commissioner considers that the public interest in disclosure of the requested information is outweighed by the public interest in maintaining the section 43(2) exemption. Therefore, NI-CO correctly applied section 43(2) to the requested information.

## Right of appeal

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31. 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: 0300 1234504  
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)

32. 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.
33. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed .....**

**Deirdre Collins**

**Senior Case Officer**

**Information Commissioner's Office**

**Wycliffe House**

**Water Lane**

**Wilmslow**

**Cheshire**

**SK9 5AF**