

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 December 2022

Public Authority: Northern Ireland Office
Address: 1 Horse Guards Road
London
SW1A 2HQ

Decision (including any steps ordered)

1. The complainant has requested from the Northern Ireland Office ('NIO') emails found within the archived email inbox of the former Secretary of State, Owen Paterson, which contain references to Radox Laboratories Ltd or Lynn's Country Foods. The NIO initially refused to respond, citing the cost limit exemption under section 12 of FOIA. After the Commissioner's intervention, NIO issued a fresh response and disclosed information but withheld some information citing sections 36(2)(b)(i), 36(2)(c) (prejudice to effective conduct of public affairs) and 40(2) (personal data) of FOIA.
2. The Commissioner's decision is that NIO was entitled to rely on sections 36(2)(b)(i), 36(2)(c) and 40(2) to withhold this information.
3. The Commissioner requires no steps to be taken as a result of this decision.

Request and response

4. On 7 February 2022, the complainant made the following request for information to NIO:

"My FOI request relates to the period that Owen Paterson was Secretary of State for Northern Ireland.

I wish to see emails found within the archived email inbox of the former Secretary of State which contain references to Radox Laboratories Ltd or Lynn's Country Foods.

I am happy at this stage for the search to be carried out by a keyword search using the key words "Radox", "Lynn's Country Foods" and "Lynn's."

5. On 7 March 2022, NIO refused the request, citing section 12 of FOIA. This position was maintained at internal review on 13 April 2022.
6. During the course of the Commissioner's investigation, NIO revised its position and issued a fresh response to the complainant on 27 October 2022, saying it could disclose some information but was relying on sections 36(2)(b)(i), 36(2)(c) and 40(2) of FOIA to withhold information saying:

"...we have identified 26 pieces of correspondence which contain references to Radox Laboratories Ltd...We did not identify any correspondence which contained reference to Lynn's Country Foods. In this instance the exemption(s) has been applied to ... correspondence concerning overseas business engagement. The Northern Ireland Office have consulted our qualified person, the Minister of State for Northern Ireland, Mr Steve Baker, who has confirmed that in his reasonable opinion the requested information engages the exemption.... The requested information includes internal discussions on how best to support Northern Irish businesses wishing to trade and invest overseas."

Reasons for decision

Section 36 – Prejudice to the effective conduct of public affairs

7. Section 36 of FOIA states that information is exempt where, in the reasonable opinion of a qualified person, disclosure would, or would be likely to, prejudice the effective conduct of public affairs.

8. NIO has applied section 36(2)(b)(i) to correspondence detailing discussions in 2012 between senior officials and special advisers within NIO and the Foreign and Commonwealth Office (FCO^[1]) in relation to any advice or assistance which they could provide to Radox Laboratories in support of the company's efforts to expand into a specified country's market. Sections 36(2)(b)(i) and 36(2)(c) were also applied to a ministerial submission in 2012 concerning support received whilst on a trade visit to the specified country.
9. Arguments under these sections are usually based on the concept of a 'chilling effect.' The chilling effect argument is that disclosure of discussions would inhibit free and frank discussions in the future, and that the loss of frankness and candour would damage the quality of advice and deliberation and lead to poorer decision making. As the Commissioner's well established guidance on section 36 makes clear, civil servants and other public officials are expected to be impartial and robust when giving advice, and not easily deterred from expressing their views by the possibility of future disclosure. It is also possible that the threat of future disclosure could actually lead to better quality advice. Nonetheless, chilling effect arguments cannot be dismissed out of hand.
10. The Commissioner's guidance on section 36¹ states that information may be exempt under sections 36(2)(b)(i) if its disclosure would, or would be likely to, inhibit the ability of public authority staff, and others, to express themselves openly, honestly and completely, or to explore extreme options, when providing advice or giving their views as part of the process of deliberation. In this case, NIO argue that disclosing such information would lead to officials being more guarded with their opinions, moderating the language they used and thereby diluting the cut and thrust of their discussions. An environment in which officials cannot freely express themselves would diminish their capacity to provide robust advice and would be to the detriment of the decision

^[1] Now known as the Foreign, Commonwealth & Development Office (FCDO)

¹ <https://ico.org.uk/media/for-organisations/documents/2260075/prejudice-to-the-effective-conduct-of-public-affairs-section-36-v31.pdf>

making process. A previous ICO Decision Notice accepted this rationale (FS50365422² paragraph 26).

11. The Commissioner's guidance on section 36 states that information may be exempt under sections 36(2)(c) if its disclosure would prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs. NIO state that the ministerial submission in 2012 concerns a relatively minor decision on how to respond to a piece of correspondence. However, NIO argue that it has not previously disclosed ministerial submissions as a result of an FOI request. NIO also argue that premature publication of this submission would set a precedent where standard material would be considered disclosable earlier than is currently the case³. The Commissioner agrees that such disclosure would be liable to create an atmosphere in which junior officials were augmenting their submissions on minor decisions to make them more palatable for a public audience, and that this may result in the overall detriment of the decision-making process. The Information Tribunal have acknowledged the risk premature disclosure of ministerial submissions presents as noted in their ruling on the First-Tier Tribunal case EA/2014/0079⁴.
12. The exemptions at section 36 can only be engaged on the basis of the reasonable opinion of a qualified person. The Commissioner is satisfied that NIO's Minister of State for Northern Ireland is authorised as the qualified person under section 36(5) of FOIA and that he gave the opinion that the exemption was engaged. It is not the role of the Commissioner to substitute his own opinion for that of the Qualified Person. A "reasonable" opinion need not be the most reasonable opinion available. It need only be within the spectrum of opinions that a reasonable person might hold and must not be irrational or absurd.

² https://ico.org.uk/media/action-weve-taken/decision-notice/2011/678946/fs_50365422.pdf

³ An expectation of transparency for standard material remains, however it is deemed less pressing and will generally be met when such material is made available to the public 20 years after its creation in accordance with the Public Records Act.

⁴ Para 59:
<https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1474/020%20280115%20Decision%20EA-2014-0079.pdf>

13. The Commissioner accepts that the qualified person's opinion was a reasonable one based on the risk of a chilling effect. There was a need for officials/ministers/participants to develop policy relating to how best to support trade and investment and to fully express themselves in a free and frank manner in order to reach decisions away from external interference and distraction. He is satisfied that the qualified person's opinion is reasonable. He is therefore satisfied that the exemption in sections 36(2)(b)(i), and 36(2)(c) were engaged correctly.
14. When considering whether the public interest favours maintaining the exemption or disclosing the requested information, the Commissioner has taken account of the age of the requested information (just under 10 years old at the time of the request). However, it is noted that it was created well before November 2021 when the former Secretary of State resigned following an investigation by the Commissioner for Parliamentary Standards⁵ which found that he had seriously breached the lobbying rules for MPs whilst acting as a paid consultant from 2015 onwards for Radox Laboratories.
15. Furthermore at this level of government some decisions need to be taken at pace and consequently communications are more likely to be concise and candid. If contributors were concerned that these discussions might be made public, the resultant loss of frankness and candour in the course of discussions and deliberations would be likely to damage the quality of advice to decision makers, and thus inhibit NIO's ability to make informed decisions. The force of the chilling effect is especially acute in circumstances where the relevant information necessarily relates to the conduct of very senior figures in Government. Any diminution of the quality of the exchange of views and/or the provision of advice, through concerns that candid views would be publicly disclosed, would lead to a less informed picture with significant repercussions.
16. The Commissioner accepts that disclosure would inform public debate by providing the public with a more detailed account of the relationship between Radox and the former Secretary of State whilst he was in government and before he was a paid consultant for Radox. However, having had sight of the withheld information, the Commissioner considers that its disclosure would be unlikely to provide the valuable transparency and accountability sought, in respect of the serious

⁵ <https://committees.parliament.uk/committee/290/committee-on-standards/news/158246/committee-on-standards-publish-report-on-the-conduct-of-rt-hon-owen-paterson-mp/>

allegations made against Mr Paterson in respect of the events leading to his resignation.

17. The Commissioner considers the public interest in good decision-making by NIO to be a compelling argument in favour of maintaining the exemption in this case. He has reached this view by a narrow margin given that disclosure at the time of the request would have contributed to the public interest in knowing more about the relationship between Radox and the former Secretary of State. However he also notes that much of the public interest in disclosure had already been satisfied by the information that was already in the public domain before the date of the request. While he acknowledges that the public interest in openness and transparency would be served if the information was disclosed, on balance, he finds the public interest in protecting NIO's access to unfiltered and frank advice to be the stronger argument.
18. Consequently, he is satisfied that, in this case, the public interest favours maintaining the exemption. It follows that his decision is that NIO was entitled to rely on sections 36(2)(b)(i) and 36(2)(c) of FOIA to withhold some information falling within the scope of the request.

Section 40(2) – personal data

19. The following analysis sets out why the Commissioner has concluded that the public authority was entitled to rely on section 40(2) of FOIA in respect of the information disclosed to the complainant that was redacted. not withheld.
20. The Commissioner notes that NIO has redacted the following information:
 - a. Names and contact details of junior officials within NIO and FCO as they fall below the grade of senior civil servant and therefore do not hold a level of seniority which would typically warrant disclosure of their names and contact details.
 - b. Names and contact details of members of the public who were employed by [four named companies] and Radox Laboratories. This information was generated whilst these individuals were acting in their professional capacity as employees of the aforementioned companies.
21. The complainant has indicated that they are not challenging the need to protect details of junior employees.
22. As regards para 20b above, the individuals concerned provided their personal information on the understanding that it would be used to facilitate a ministerial visit to Antrim or to manage correspondence

between the NIO and Randox Laboratories. However, it is noted that for senior employees NIO have withheld contact details only, as the senior employees have already been publicly affiliated with the companies in question and due to their seniority NIO consider it a reasonable expectation that they would represent their organisations when interacting with a government department. By contrast, the junior individuals would not have been aware that the information would be subject to long-term retention by the NIO or that it might be released into the public domain as a result of a successful freedom of information request over 10 years after they provided that information. Given this expectation, disclosure would be a breach of data protection principles and therefore disclosure of such information is exempt under section 40(2) of FOIA.

Right of appeal

23. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

24. 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.
25. 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

Jonathan Slee
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