

Freedom of Information Act 2000 (FOIA)

Decision Notice

Date: 22 March 2018

Public Authority: Northern Ireland Co-Operation Overseas
Address: nicohq@nico.org.uk

Decision (including any steps ordered)

1. The complainant has requested information on projects undertaken in Bahrain by Northern Ireland Co-Operation Overseas (NI-CO). NI-CO initially provided some information and cited the exemptions at sections 27(1)(a), 27(1)(c) and 43(2) of the FOIA in respect of the remainder. During the course of the Commissioner's investigation it transpired that NI-CO did not in fact hold the requested information within the meaning of section 3(2) of the FOIA. The information was in fact held on behalf of the Foreign and Commonwealth Office (FCO).
2. The Commissioner's decision is that NI-CO holds the requested information on behalf of the FCO, and therefore does not hold it in its own right. Accordingly NI-CO cannot be required to take remedial steps.

Request and response

3. NI-CO is a not for profit, public body owned by Invest Northern Ireland. As a publicly-owned company it is a public authority within the meaning of section 3(1)(b) of the FOIA.
4. According to its website NI-CO provides training, institutional capacity building and consultancy across a range of sectors.¹ This typically involves sending a team of "experts" to carry out work in the country in question to deliver the project.

¹ <http://www.nico.org.uk/>

5. On 20 June 2016 the complainant requested the following information from NI-CO:

"I write regarding the following NI-CO projects with Bahrain:

- (a) Neighbourhood/community policing (since 2014)*
- (b) Prisons (since 2015)*
- (c) C&C support (since 2016)*

In respect of each project, please provide information about:

- i) the number of NI-CO staff who have visited Bahrain, who they are, when they visited and what they did in Bahrain.*
- ii) the number of Bahraini officials who have visited the UK, who they are, when they visited and what they did in the UK.*
- iii) the number of IPAB and OSJA forms that were completed in respect of the above, if they were approved and by whom.*

In respect of project 'c' only (C&C support), please provide a project summary.

I am aware that NI-CO personnel have worked with Bahraini officials from Jau, Hidd, Isa Town and Dry Dock custodial facilities and I expect your disclosure to include these liaisons".

6. NI-CO responded to the complainant on 18 July 2016. It provided some information, stated that it did not hold other information, and withheld information on the basis of the exemptions at section 27(1)(a), section 27(1)(c) and section 43(2) of the FOIA.
7. The complainant requested an internal review on 4 August 2016 and NI-CO responded on 6 September 2016. At this stage it provided some further explanatory information, but withheld its reliance on the exemptions previously cited.

Scope of the case

8. The complainant contacted the Commissioner on 4 October 2016 to complain about the way his request for information had been handled.
9. The Commissioner initially considered the scope of her investigation to include whether or not NI-CO was entitled to rely on the exemptions claimed. However it subsequently appeared to the Commissioner that NI-CO may not in fact hold the requested information within the meaning of the FOIA. Therefore the Commissioner first considered whether or not NI-CO holds the requested information by virtue of section 3(2) of the FOIA.

Reasons for decision

10. Section 1(1)(a) of the FOIA requires a public authority to inform the complainant in writing whether or not it holds recorded information that is relevant to the request. Section 1(1)(b) requires that if the requested information is held by the public authority it must be disclosed to the complainant unless a valid refusal notice has been issued.
11. Section 3(2) of the FOIA sets out the following:

"3(2) For the purposes of this Act, information is held by a public authority if-

 - (a) it is held by the authority, otherwise than on behalf of another person or*
 - (b) it is held by another person on behalf of the authority."*
12. The Commissioner noted from the correspondence that NI-CO's response to the request in this case had been comprised of narrative and explanatory information, rather than copies of documents. The Commissioner asked NI-CO to clarify what recorded information it held that was relevant to the request.
13. NI-CO provided the Commissioner with the information that it physically held. This largely comprised information created before the project work commenced. However the Commissioner was concerned that NI-CO did not appear to hold records of the work actually undertaken as part of the project.
14. NI-CO advised that information relating to the work of each project would be held by the experts who carried out that work. The Commissioner explained that if the experts were working on behalf of NI-CO then information that they held would in effect be held on behalf of NI-CO. Having noted that the Bahrain project was initiated and funded by the FCO, the Commissioner further considered it appropriate to explore whether the public authority responsible for handling the request was NI-CO or the FCO.

15. In cases such as this the Commissioner will have regard to her published guidance². This states that factors that would indicate that the information is held on behalf of another person include:
- the authority has no access to, use for, or interest in the information;
 - access to the information is controlled by the other person;
 - the authority does not provide any direct assistance at its own discretion in creating, recording, filing or removing the information; or
 - the authority is merely providing storage facilities, whether physical or electronic.
16. Consequently the Commissioner asked NI-CO to clarify the relationship between the FCO and NI-CO. NI-CO explained that the FCO had initiated the project, and had awarded funding to NI-CO following a competitive process.
17. In the circumstances of this case the disputed information is information directly relating to the project, ie records of the work carried out by the experts. Information relating to the project proposal has already been provided to the complainant so is not in dispute.
18. NI-CO provided the Commissioner with copies of contracts between NI-CO and the FCO, and between NI-CO and the Project Director. None of the documents explicitly addressed who would "hold" information relating to the contract for the purposes of the FOIA. There did not appear to be any consideration as to who actually "holds" the information (within the meaning of the FOIA) in the event of a request for that information.
19. The Commissioner further noted that the contract provided that the FCO could require access to records held by NI-CO that indicated how grant funding has been used. NI-CO confirmed that it did not use the information for its own purposes, other than undertaking the project for the FCO. As set out above, information held by NI-CO in respect of its

² <https://ico.org.uk/media/for-organisations/documents/1148/information-held-by-a-public-authority-for-purposes-of-foia.pdf>
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bid for the project has already been disclosed. The Commissioner considers that this information can be distinguished from information created during the project, which relates only to that project and would not be used by anyone other than the experts, save if the FCO requested sight of it.

20. The Commissioner also inspected correspondence between the FCO and NI-CO. She noted that that NI-CO had contacted the British Embassy in Bahrain, who stated that the information was the property of the British Embassy.
21. The Commissioner notes that the FCO received a very similar request for information on the Bahraini project.³ The FCO did not seek to transfer the request to NI-CO but issued a response under the FOIA. This suggests that the FCO accepted that it held the requested information within the meaning of section 3(2) of the FOIA.
22. The Commissioner also notes that NI-CO had consulted the FCO in October 2017. In this correspondence NI-CO acknowledged that the project documentation was held on behalf of the FCO. The FCO indicated that the information was the "property of the British Embassy Bahrain" and expressed strong concerns about disclosure of the requested information. However the FCO did not explicitly recognise that the information request should be handled by the FCO rather than NI-CO.
23. In light of the above the Commissioner asked NI-CO whether it now considered that it held the disputed information on behalf of the FCO. NI-CO confirmed that this was the case. NI-CO contacted the FCO again, this time to request its view on which authority held the information for the purposes of the FOIA. The FCO reiterated its stance that the information was the property of the British Embassy in Bahrain, and stated that in its view the FCO "held" the information for the purposes of the FOIA.
24. Having considered the information and documentation provided by NI-CO in this particular case the Commissioner is satisfied that NI-CO does not hold the disputed information in its own right as a public authority. The Commissioner accepts that, to the extent that the disputed information exists, it was created by the experts solely to deliver the project on behalf of another public authority.

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/559215/FOI_0603-16_Letter_.pdf

25. The Commissioner concludes that NI-CO was not obliged to respond to the complainant's request under the FOIA. It ought to have advised the complainant that it did not "hold" the requested information within the meaning of section 3(2) of the FOIA. NI-CO would however have been required to comply with the duty to provide advice and assistance under section 16 of the FOIA.

Section 16: advice and assistance

26. Section 16 of the FOIA provides that a public authority is required to provide advice and assistance to any person proposing to make a request for information, or who has made a request. Section 16(2) goes on to say that compliance with the code of practice issued under section 45 of the FOIA will be interpreted as compliance with this duty.
27. The code of practice issued under section 45 of the FOIA provides recommendations as to how public authorities can comply with the requirements of section 16 of the FOIA. The Commissioner considers paragraphs 17 and 18 of the code to be relevant in this case:

"17. If the authority has reason to believe that some or all of the information requested, but which it does not hold, is held by another public authority, the authority should consider what would be the most helpful way of assisting the applicant with his or her request.

In most cases this is likely to involve:

- contacting the applicant and informing him or her that the information requested may be held by another public authority;*
 - suggesting that the applicant re-applies to the authority which the original authority believes may hold the information; and*
 - providing him or her with contact details for that authority."*
28. In the Commissioner's opinion it is important for public authorities to be mindful of the FOIA implications when engaging third parties to carry out work on their behalf. The Commissioner has produced guidance on outsourcing⁴ which sets out important issues that public authorities need to consider in these circumstances. The Commissioner is of the view that proper consideration of information management issues at an early stage will prevent confusion and minimise delay when dealing with requests for relevant information.

⁴ <https://ico.org.uk/media/for-organisations/documents/1043530/outsourcing-and-freedom-of-information.pdf>

29. The Commissioner acknowledges that NI-CO did not question whether it held the requested information until this issue was raised by the Commissioner. Consequently the matter of compliance with the code, or section 16, did not arise. However, in this case NI-CO ought to have advised the complainant that it held information solely on behalf of the FCO, and followed the recommendations set out in the code. The Commissioner understands that NI-CO has received relatively few requests for information since access rights came into force in 2005. Nevertheless she expects that NI-CO will take adequate steps to ensure that future requests for information are handled according to the requirements of the FOIA.

Right of appeal

30. 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@hmcts.gsi.gov.uk

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

31. 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.
32. 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

**Gerrard Tracey
Principal Adviser
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**