

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 28 June 2010

Public Authority: CDC Group plc
Address: Cardinal Place
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80 Victoria Street
London
SW1E 5JL

Summary

The complainant wrote to the public authority (CDC) to request information regarding details of its development impact assessments, reports and targets, and subsequently also requested copies of reports from its fund managers. CDC responded to the request and disclosed the development impact targets but explained that the rest of the information requested was exempt from disclosure under section 43(2) and section 41(1)(b) of the Act. The Commissioner has found that CDC correctly withheld all the information under section 43(2) of the Act and requires no steps to be taken by CDC.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

Background

2. CDC Group Plc (CDC), formerly the Commonwealth Development Corporation, is a public limited company wholly owned by the Department for International Development (DfID). It is one of the strategies that DfID uses to help combat poverty, and invests in

private equity funds focused on emerging markets in Asia, Africa and Latin America. Its mission is *'To generate wealth, broadly shared, in emerging markets, particularly in poorer countries, by providing capital for investment in sustainable and responsibly managed private sector businesses'*. According to DfID, while CDC's shares remain owned by the Government, the company operates independently and commercially, working within a set of defined investment targets and an ethical investment code agreed with DfID'. In submissions to the Commissioner, CDC advised that it deploys its capital through 66 different fund managers, investing in approximately 700 different companies in developing countries by means of 137 funds. CDC has no direct contractual relationship with the underlying portfolio companies.

3. CDC improved upon its monitoring and evaluation system and practices in Autumn 2008 as a result of an extensive bench-marking exercise against the practices of other development finance institutions (DFIs), including the European DFIs (EDFIs), the International Finance Corporation (IFC), the European Bank for Reconstruction and Development (EBRD) and others. CDC have explained that the IFC's Development Outcome Tracking System (DOTS) was used as the most relevant and best comparison for CDC to improve upon its monitoring and evaluation systems and practices. The resulting improved monitoring and evaluation system, including updated indicators and templates, was used to complete 12 evaluation reports before the close of 2008. These reports covered seven different investee funds involving companies located in CDC's core investment markets of sub-Saharan Africa and Asia.
4. CDC have confirmed that the above changes came about via their recruiting of a monitoring and evaluation specialist and through extensive working with DfID. This process culminated in the monitoring and evaluation system and processes which are currently in place at CDC. According to CDC, in comparison to other EDFIs, it is now considered to be 'a thought and practice leader on monitoring and evaluation matters'. By way of an example, CDC have informed the Commissioner that Swedfund, the Swedish DFI, has recently opted to use CDC's evaluation framework to analyse its own fund investments.

The Request

5. The complainant wrote to CDC on 19 August 2008 and requested the following information: 'Copies of development impact assessments and reports, including those produced by the Best Practice and Development Committee, going as far back as they are readily

available. Reviews of CDC's funds' development impact, which may be by reference to individual funds within CDC's portfolio. Details of the 'development impact' targets used for CDC's incentive plan, showing threshold, target and score achieved.'

6. The complainant wrote to CDC on 22 August 2008 with the further information request: 'Copies of reports received by CDC from its fund managers, of the sort referred to on page 30 of the CDC/Actis umbrella agreement date 7 July 2004, of which a redacted version has been released under Fol.'
7. CDC responded to both requests on 15 September 2008. Although CDC provided the complainant with the threshold, target and score information requested, they advised him that the rest of the information requested was being withheld on the basis of section 43(2) and section 41(1)(b) of the Act. CDC advised the complainant that the information was commercially sensitive and that disclosure '*could damage CDC's interests over the short term and over the long term*' and '*could damage CDC's ongoing and long-standing business relationships, and CDC's future negotiations with funds and fund managers*'. With regard to the public interest test required in the consideration of section 43(2), CDC advised that the public interest in maintaining the exemption outweighed the public interest in disclosure. The complainant was told that '*The damage to CDC's business relationships and potential future relationships would make it harder for CDC to perform its public function and thus carry out its duties as a public body*'.
8. The complainant requested internal reviews of both his requests on 17 September 2008 and CDC provided him with its internal review decision on 13 October 2008. CDC provided the complainant with further details relating to the threshold, target and score information, but confirmed the application of the stated exemptions to the withheld information. CDC's General Counsel explained that: 'While I accept that there is a general public interest in disclosing information relating to the ways in which investment by CDC affects development, I consider that the detriment to CDC's relationships and to its ability to carry out business in the future is such that the public interest in maintaining the exemption, outweighs the public interest in disclosing the information. There is also a strong public interest in ensuring that CDC continues to receive the information it needs in order to make judgements on development impact. There is a risk that fund managers or portfolio companies will be unwilling to provide relevant information to CDC if they believe that this information will be disclosed publicly. This will lessen CDC's ability to have a meaningful impact on development, which would not be in the public interest'.

The Investigation

Scope of the case

9. On 19 October 2008 the complainant contacted the Commissioner to complain about the way his requests for information had been handled. With regard to the assessment made of the public interest in relation to section 43(2), the complainant noted that: 'I believe CDC is likely to have judged this incorrectly, given the overwhelming public interest in assessments of the development impact of its activities and its fund managers' compliance with its 'business principles'. I also think it is relevant that last month CDC launched a PR campaign on promoting its development impact, which will inevitably put one side of the story and which the public would be justified in seeing the evidence. Of course, I haven't seen the reports themselves so can't argue the case in more detail, but it seems very unlikely there are strong enough commercial considerations to override this'.
10. As CDC responded to the complainant's two requests in the same correspondence, and relied on the same exemptions in relation to both requests, the Commissioner has considered both requests in the one decision notice.

Chronology

11. The Commissioner wrote to the CDC with details of the complaint on 28 September 2009. The delay in investigation was due to the large number of cases that the Commissioner was dealing with at the time. CDC were asked to provide copies of the information withheld from the complainant and further information in relation to its use of section 43(2) and section 41(1)(b).
12. On 14 December 2009, CDC provided the Commissioner with detailed submissions regarding the exemptions cited. In addition to sections 43(2) and 41(1)(b), CDC also placed reliance on section 43(1) and section 36(2). CDC subsequently provided the Commissioner with copies of the information falling within the scope of the complainant's request; the development impact assessments and reports (referred to as 'Evaluation Reports') and fund manager reports (referred to as ESG (environmental, social and governance) Reports).
13. Due to the volume of the reports held by CDC (100+) and their decentralised location, it was not practical for the Commissioner to be provided with copies of all the information falling within the scope of the complainant's request. Therefore, CDC provided the Commissioner

with a sample of the Evaluation and ESG reports, which are representative of the type of information contained in the reports as a whole. The Commissioner has no reason to believe that the reports which he has seen, differ in any significant respect to the remaining information held by CDC.

14. CDC advised the Commissioner that they do not require their fund managers to produce ESG reports in a prescribed form, and some such reports combine ESG and financial reporting in one document (a copy of one such combined report was provided to the Commissioner). CDC also advised the Commissioner that since the date of the complainant's request, their more recently compiled reports are considerably more detailed than those falling within the scope of the request. Whilst these recent reports do not come within the scope of the complainant's request, or the Commissioner's current investigation, copies have been provided to the Commissioner by CDC, to demonstrate how their reporting practices have changed.
15. Following discussions with the Commissioner, the complainant provided further written representations on 5 and 15 March 2010.

Findings of Fact

16. The Commissioner is aware that CDC's monitoring and reporting systems and the effectiveness of those systems in evidencing whether CDC is achieving its mission (i.e. whether the profits generated by its investment activity are actually achieving poverty reduction in the countries concerned), have attracted considerable comment and scrutiny in certain quarters in recent years. These have included the Public Accounts Committee¹, the International Development Committee² and the National Audit Office³, amongst others. However, in light of the decision of the High court in *Office of Government Commerce v The Information Commissioner & the Attorney General* (2008) EWHC 737 (Admin), the Commissioner has not referred to the findings of these committees in detail, so as to avoid infringing parliamentary privilege.

¹ Public Accounts Committee Eighteenth Report: 'Investing for Development: Department for International Development: Oversight of CDC Group plc (April 2009)

² International Development Committee (2009-2010 Session) Fourth Report: DfID's Performance in 2008-9

³ National Audit Office: 'Investing for Development: the Department for International Development's Oversight of CDC Group plc' (December 2008)

Analysis

17. A full text of the relevant statutes referred to in this section is included as an annex to this decision notice.
18. Due to the commercially sensitive nature of the reports provided by CDC, the Commissioner is not, within this Notice, able to comment in detail about the information which they contain. However, the Commissioner can confirm as follows. Each Fund Evaluation Report consists of six to eight pages of analysis of a particular investment fund and its evaluation by CDC. The evaluations are explanatory and descriptive in nature, rather than being purely financial data. The main thrust of the reports is to set out CDC's investment rationale and strategic objectives. Details are provided as to investment outcomes (either satisfactory or otherwise) and lessons learned for future investment operations. The reports contain frank and candid judgements about the performance of both investment funds and the respective fund managers. Details as to CDC's 'investment rationale' and 'effectiveness', for example, would quite clearly be of interest and value to competitors within the private equity market, and the nature of the marketplace involved
19. Although shorter in content, being between two to four pages, the ESG Reports are similar in format and purpose to the Fund Evaluation Reports in that each report concerns a specific investment company. The reports focus on environmental, social and health and safety assessments, and include details as to lessons learned for the following year. They also contain commercially sensitive and confidential information, such as the salaries and benefits paid to the particular company's employees, and its recruitment and training strategies.

Section 43(2) – Prejudice to Commercial Interests

20. In its representations to the Commissioner, CDC has argued that the section 43(2) exemption applies to all the information withheld from the complainant. As section 43(2) is a prejudice based exemption, it is first necessary to identify the interests which the exemption has been designed to protect. Section 43(2) provides that: 'Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)'.
21. It follows from the above wording that the information must be of a nature such as its disclosure would, or would be likely to, prejudice the commercial interests of any person or persons, including the public

authority. The Commissioner is satisfied that the withheld information is of a commercial nature and relates to the commercial interests of CDC, its fund managers and the portfolio companies in which CDC invests.

22. The Commissioner has been guided on the interpretation of the phrase *'would, or would be likely to'* by a number of Information Tribunal decisions. In *John Connor Press Associates Limited v The Information Commissioner (EA/2005/0005)*, the Tribunal confirmed that in the case of *'would be likely to'*, then the chance of prejudice being suffered should be more than a hypothetical possibility, and *'there must have been a real and significant risk'* (paragraph 15). This interpretation followed Mr Justice Munby's judgement in *R v Secretary of State for the Home Office (2003)* that *'likely connotes a degree of probability that there is a very significant and weighty chance of prejudice to the identified public interests. The degree of risk must be such that there 'may very well' be prejudice to those interests, even if the risk falls short of being more probable than not'*. In cases where the more definite *'would'* prejudice is asserted by the public authority then *Hogan v Oxford City Council & The Information Commissioner (EA/2005/0026 & 0030)* is authority for this *'placing a much stronger evidential burden on the public authority to discharge'*. The Commissioner notes that in this case, CDC have argued the prejudice test in the alternative, and thus the lesser evidential burden applies.
23. In their submissions to the Commissioner, CDC have advanced a number of arguments as to how disclosure of the information requested would, or would be likely to, prejudice the commercial interests of CDC, its fund managers and the portfolio companies through which they invest. As similar considerations apply to the Evaluation Reports and the ESG Reports, the following concerns have applicability to both.

Prejudice to position of fund managers in attracting new investors:

24. CDC advise that they have held extensive conversations with fund managers about the disclosure of information relating to the performance of funds and the evaluation of the performance of underlying portfolio companies, and they are adamant that such information is commercially sensitive and should not be disclosed. The fund managers *'are as concerned about the general, prejudicial impression that such disclosure would make on the private equity investment community, as about the particular 'damage' that would occur as a result of the disclosure of particular information'*. In relaying such concerns to the Commissioner, CDC have submitted that *'In this particular case, the prejudicial effects of disclosure of fund-related*

information can only be understood in the context of the private equity investment community in which CDC operates, and, more pertinently, the value which the private equity investment community places on the protection of fund-related information'.

25. By way of providing that necessary context, CDC have explained as follows: 'Institutional investors commit large sums of money to private equity funds to be invested at the discretion of fund managers and, in order to do so, must have confidence that their fund managers will take all appropriate steps to protect the fund, and to ensure its growth. In order to achieve this, investors (including CDC) are subject to contractual obligations of confidentiality. If investors in a fund believe that information about the fund (or judgements about the fund or the manager of the fund based on such information) will be made public because a public authority which has also invested in the fund has been forced to disclose fund-related information as a result of freedom of information legislation, then these investors – who have a range of funds to choose from – will be more likely to choose a different fund, one in which CDC has not invested, and one which is, as a direct result, better able to protect its information from disclosure. This will have a prejudicial effect on any fund manager seeking to attract investors to a fund in which CDC is an investor, and not just on the fund managers directly responsible for the funds which are the subject of the Evaluation Reports'.
26. CDC have submitted that such commercial prejudice is not limited to the managers of the funds which are the subjects of the assessments, and that disclosure would have the wider 'chilling' effect on investors as described above. The 'chilling effect' was described in *Scotland Office v The Information Commissioner (EA/2007/0070)*, as, '*The risk to candour and boldness in the giving of advice which the threat of future disclosure would cause*'. Therefore, it is the contention of CDC that disclosure of the information requested would adversely inhibit and constrain the interest and investment potential of investors across the private equity investment community as a whole.
27. With reference to the Evaluation Reports, CDC have explained that these were intended for internal use only, and make frank judgements on the performance of fund managers and funds, some of which are negative and identify failures or weaknesses: 'In a market which is both highly competitive and extremely sensitive to adverse publicity, disclosure of these negative evaluations would, or would be likely to, prejudice the fund managers' ability to attract new investors (even where the fund managers have since rectified any failings). If CDC were to disclose reports which showed only positive judgements, it might be argued that this would not be commercially prejudicial.

However, if it were to become known that CDC only disclosed good ratings, then, when CDC refused to disclose information about a particular fund or fund manager, or a rating against a particular criterion, it would be obvious that the evaluation of that fund, or an assessment against a particular criterion, was negative'.

Prejudice to commercial interests of CDC:

28. CDC has explained that when an investor makes an investment in a particular fund, it enters into certain obligations, one of which being an obligation of confidentiality in relation to fund-related information. It is argued by CDC that were they to disclose fund-related information, in contravention of the relevant confidentiality clauses, then they would be liable for an action for breach of contract by the respective fund manager, or by one or more of the other fund investors. In addition, the likely consequence of such disclosure(s) would be that CDC's negotiating position when looking for new fund managers or when asking for information from fund managers would be prejudiced, preventing CDC from investing in certain funds. With regard to the wider 'chilling effect' implications, CDC have stated that disclosure of any of the information in the Reports *'would convey the message to all investors and fund managers that CDC does not value the confidence of fund-related information and/or is not able to give adequate protection for such information'*.
29. In support of their contention that disclosure of the reports would be likely to prejudice their commercial interests and those of their fund managers, CDC drew the Commissioner's attention to a number of cases whereby private equity fund managers had prevented or ejected, public bodies from their funds because of concerns that such funds would otherwise be placed in the public domain. In one such case, Sequoia Capital, a leading US fund manager, ejected the Universities of California and Michigan from its funds, and in another case, Charles River, another US fund manager, denied fund access to all investors who may have been subject to freedom of information laws in the United States. Given that the UK is the largest market for private equity outside the United States, the Commissioner accepts CDC's submission that: *'While CDC recognises that access to information laws in US states do not provide an exact analogy to UK's FOIA, we believe that the fact that a number of US states decided to change their access to information regimes because of private equity concerns, is strong evidence of the gravity of these concerns in the UK private equity market'*.
30. In some circumstances the limited number of available investors in a specialist area may overcome some funds' concerns about disclosure of

this type of investment, but there is enough competition internationally (with evidence to show that disclosure is not likely) to convince the Commissioner that the risk of a negative reaction, such as ejection, is likely.

31. Furthermore, evidence submitted by CDC shows that concerns about private equity development impact/fund disclosure under freedom of information legislation are by no means confined to the UK and US. CDC enquiries have confirmed that the following European national development finance institutions (the member states' equivalent to CDC) are either wholly, or partially, exempt from freedom of information laws –

Swedfund (Sweden)

Finnfund (Finland)

Norfund (Norway)

Proparco (France)

The Nederlandse Financierings-Maatschappij voor Ontwikkelingslanden (The Netherlands)

32. This being the case, the Commissioner acknowledges and accepts CDC's contention that the fact that all of the above development finance institutions are exempt from, or have some form of protection against, being forced to disclose information, *'is clear evidence of the almost universal recognition that such protection is necessary and desirable in such circumstances'*. CDC have also made the important point that this *'also increases the likelihood of commercial prejudice to CDC, in that the fact that these development finance institutions are better able to protect confidential information, makes them more desirable as investors, and gives them a competitive edge over CDC, particularly if CDC were to be forced to disclose the information requested'*. The Commissioner considers this to be a particularly compelling argument in support of CDC's case.

33. As the UK is a member of the International Finance Corporation (IFC), which was established in 1956 with the mission of promoting sustainable private sector investment in developing countries, helping to reduce poverty and improve people's lives, CDC has highlighted paragraph 9(a) of the IFC's 'Policy on Disclosure of Information, which states as follows: 'Consistent with the practice of commercial banks and of most public sector financial institutions (for their private sector investments), IFC does not disclose to the public, financial, business, proprietary or other non-public information provided to IFC by its clients or other third parties. To do so would be contrary to the legitimate expectations of its clients who need to be able to disclose to IFC detailed information without fear of compromising the

confidentiality of their projects or other proprietary information in a highly competitive marketplace’.

34. In its submissions to the Commissioner, CDC has explained the commercial importance of the withheld Evaluation Reports and the future implications for such reports, were they found to be subject to public disclosure: ‘The Evaluation Reports contain a mixture of positive and negative evaluations; it is only as a result of identifying the weaknesses and failings of each fund, measured by reference to specific criteria, that CDC is able to learn from these failings and to formulate more successful and effective strategies. The lessons learned by CDC are distilled in the Evaluation Reports, either in a separate stand-alone section or in paragraphs through the document and relate to elements of strategic policy such as dealing with potential conflicts of interest, risk spread and manager incentivisation. CDC considers these Evaluation Reports to be an invaluable tool. If it were not possible to protect them from disclosure, CDC would have to change the content of the Evaluation Reports, to restrict the information they contained, and to make less frank assessments. This would hamper our ability to learn from our experiences (both positive and negative) and to formulate effective investment strategies’.
35. On the basis of the evidence and argument above, the Commissioner accepts that if CDC were to disclose the contents of the reports requested by the complainant, then it is likely that its current ability and freedom to invest in a number of investments funds would be negatively impacted and thus its commercial interests harmed.

Prejudice to commercial interests of underlying portfolio companies:

36. In advocating on behalf of the relevant underlying portfolio companies, CDC have confirmed that they have not contacted the companies directly, as such contact would be inappropriate in the absence of a direct contractual relationship. However, guidance issued by the Commissioner⁴ (and cited by the public authority) makes clear that, *‘If it is not possible to discuss the issue with the third party, it will be acceptable for the public authority to put forward arguments based on its prior knowledge of the third party’s concerns’*. Furthermore, CDC confirmed that the respective fund managers (with whom CDC does have a direct relationship) had engaged in numerous conversations with the underlying portfolio companies about the confidentiality of information supplied. Consequently, the Commissioner is satisfied that CDC are sufficiently informed to give evidence on this point.

⁴ ICO Guidance: ‘Commercial Detriment of Third Parties’ (October 2008)

37. Counsel for CDC submitted that: 'It is reasonable, in my view, to conclude that direct criticism of a particular underlying company in the Evaluation Reports, concerns expressed about the company's likely prospects for success in the particular market in which it operates, indications as to whether funding may be ongoing or not, and disclosure of commercially sensitive information which is not otherwise publicly available, would, or would be likely to, deter other investors who may wish to invest directly in the company, and/or lead to negative publicity about the company, with resulting damage to its reputation and commercial success'.
38. The Commissioner agrees that the scenario envisaged above, would be highly likely to have the adverse effect described, and is therefore satisfied that the commercial interests of the underlying portfolio companies, would almost certainly be prejudiced by disclosure of the information requested by the complainant. The Commissioner's conclusion with regard to each of the three aspects of prejudice detailed above, is based upon his own assessment of the content of the withheld information itself, coupled with the submissions made by CDC.
39. It is important to note that the Commissioner has previously considered the application of section 43 in a number of cases concerning private equity investments. For the purposes of this Decision Notice, an important distinction needs to be drawn between the cases concerned. In FS50065853 and FS50083667, both of which involved private equity investments by local government public authorities, the Commissioner found that section 43 was not engaged. By contrast, in FS50094891, which also involved CDC, the Commissioner found that the section 43 exemption was correctly applied to withhold the information concerned.
40. The apparent divergence in decision making in the above cases can be explained by reference to the specific information which was being requested in each case. In the local government cases, the information concerned a list of the private equity funds in which the public authority had an investment, with details as to cumulative contributions and distributions, as well as the value of the fund concerned. The Commissioner found that the public authority's argument that disclosure of this information could lead to the public authority being excluded from some investment funds, was 'greatly weakened' by the fact that other public authorities in the United Kingdom and other jurisdictions, routinely made such information publicly available. Conversely, the information requested in the previous CDC case (FS50094891), was a contract which CDC had with one of its fund managers. Evidence seen by the Commissioner showed that disclosure of fund governing documents and information in other

jurisdictions was neither usual and often discouraged, with some private equity funds refusing to accept future investment from a public authority where such disclosure was a possibility (see paragraph 29 above).

41. The Commissioner was satisfied (para 56) that 'a connection can be made between public sector bodies disclosing information about private equity investments, including details of fund governing documents, and decisions of private equity funds to refuse to accept their future investments. Therefore, the Commissioner accepts that if CDC were to disclose sensitive information concerned in the contract, then it is likely that its ability to invest in a number of investment funds would be negatively impacted and thus its commercial interests harmed'.
42. By extension, the rationale provided by the Commissioner in the above case, applies even more strongly in the present case. The information requested by the complainant (the reports) is investment fund specific and contains sensitive and candid information about fund performance and strategy. The Commissioner is satisfied that were CDC to disclose such information, then it is highly likely that their commercial interests (and those of the fund managers and underlying portfolio companies), would be prejudiced. By disclosing such information against the prevailing conventions and agreements of the private equity investment community, it is likely that fund managers would either give preference to private sector investors, or would refrain from providing CDC with all available and pertinent information about an investment(s).
43. More importantly, disclosure would be likely to negatively impact upon CDC's ability to invest in the private equity market and generate the maximum returns possible on such investments. Competing investors would be able to take advantage of the commercial information contained in the reports, and would be able to devise and implement strategies to maximise their own investment returns at CDC's expense. Disclosure of such sensitive commercial information as investment fund outcome (with candid and potentially critical commentary of the fund managers concerned), would be likely to dissuade fund managers and portfolio companies from entering into agreements and contracts with CDC. This would have the result of reducing the number of investment funds open to CDC, correspondingly reducing the scope for investment opportunity and return. Effective advertising of fund manager underperformance or failure, would be likely to have a prejudicial effect on the commercial interests of the individual(s) concerned and the underlying portfolio company concerned.

44. There is a further factor in the present case which differentiates this decision (and other CDC cases), from the decisions reached by the Commissioner in the local government private equity cases. Those cases involved private equity investments by local authority pension funds. In para 24 of FS50065853, the Commissioner noted that the benefits payable to pension scheme members 'are not dependent upon investment performance and so the failure or success of investments entered into by the fund does not directly affect the pension rights of individuals who are members of the scheme'. However, the present case concerns a different type of private equity investment; an emerging markets investment. CDC's mission is to generate wealth in emerging markets, particularly in poorer countries, by providing capital for investment in sustainable and responsibly managed private sector businesses. By doing so, CDC acts in the vanguard of such markets, providing a lead for other investors to follow.
45. Whereas the benefits payable to members of a pension scheme may not be dependent upon investment performance, the success or otherwise of an investment in the emerging market sector (such as those made by CDC), could ultimately have a considerable effect on those poorer countries in which CDC is attempting to generate wealth. That is to say, any prejudice caused to CDC's commercial interests or those of its fund managers and underlying portfolio companies, could result in less profit being made on investments and therefore less wealth being received by private sector businesses in those countries most in need of wealth generation and poverty alleviation. The Commissioner recognises that emerging markets investments are potentially more vulnerable to negative commercial effects than other private equity investments (such as those with which the local government cases were concerned). This distinction leads into the public interest test, which the Commissioner will now examine.

Public Interest

46. Section 43 is a qualified exemption and therefore subject to the public interest test under section 2(2)(b) of the Act. This states that information is exempt information where the public interest, in all the circumstances, in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the requested information

47. The Commissioner recognises that there is a strong inherent public interest in public authorities being open and transparent about commercial arrangements they have entered into with private sector

companies. There is a strong corresponding public interest in the public being assured that monies invested by CDC are being invested appropriately and as effectively as possible, in keeping with CDC's role and function of generating wealth in poorer countries, and having a development impact in terms of reducing levels of poverty.

48. These public interest factors were recognised in the CDC's submissions to the Commissioner, in which it was stated that, *'CDC also recognises that there is a strong public interest in the public being reassured that money invested by CDC is being used to support CDC's functions, and in allowing public scrutiny of the checks and balances which CDC uses in order to ensure value for money'*.
49. The complainant has contended that: *'At the moment, there is no independent audit of CDC's development impact. We know that the information it publishes is highly selective. The public has no way of assessing the development impact, as the public accounts committee recently noted. In the absence of any audit, the raw information should come out'*.
50. The Commissioner agrees that there is not necessarily a correlation between increasing profits and a reduction in poverty in those countries which CDC invests. Such a simplistic cause and effect argument would make no allowance or provision for the individual circumstances and unique challenges which each impoverished country would present. It would not be difficult to envisage monies invested being squandered or diverted from those that they were intended to help (i.e. the poorest), by the influence or interference of a corrupt government or company with less altruistic motives than those which form the mainstay of CDC's function and aims. As the Commissioner noted in FS50094891, some of CDC's investments have been made in countries with a history of human rights abuses or conflict (e.g. Nigeria, China and Rwanda). Given the potentially controversial nature of some of CDC's investments, the need for effective assessment and assurance of positive development impact is even more essential.
51. The Commissioner considers that there would be a strong public interest in having evidence-based assurances that CDC's practice of financially incentivising staff to increase financial performance has not harmed the securing of CDC's non-financial development objectives. For example, there would always be a danger that an unscrupulous and unchecked employer could cut corners or abdicate the duty of care owed to both employees and the environment as a whole if rewards were to be determined by financial profitability alone. A considerable amount of CDC's resources are invested in Sub-Saharan Africa, home to a larger proportion of poor people than any other region of the

world, and one hardly unfamiliar with employee exploitation and high mortality. CDC have made huge financial gain by investing in some of the poorest and most vulnerable areas of the world, the benefits of which it is hoped can be passed on to other countries in need. However, there is a strong corresponding public interest in the (UK) public being assured that such profits have not been made at the expense of the very people whom CDC was created to help.

52. The Commissioner has been provided with a copy of CDC's *'Growth for Development'* annual report⁵, which has also been seen by the complainant. In his representations to the Commissioner, the complainant dismissed this report as 'pure PR'. As it is CDC that selects the case studies which it chooses to highlight in its annual report, the concern would be that only those ventures showing CDC in the most positive and effective light, would be included within the published and publicly available document (next due for publication in June 2010).
53. Certainly, the Commissioner notes that although an entire chapter of the 2008 Report is given over to CDC's success stories ('Chapter Five: Development Highlights in 2008'), there is no corresponding chapter detailing those investments which have proven less successful. One page of the 96 page Report is given over to 'Serious Incidents involving CDC's portfolio companies during 2008', but there is a paucity of information and detail concerning these incidents. For example, it is recorded that all of the 17 work-related fatalities reported to CDC in 2008 arose from Nmeme, a power distribution company in Uganda. There is no information provided as to how these deaths occurred, only a statement that *'CDC's fund manager, Actis, is urgently taking steps to address this serious matter'*. Had such a number of deaths been associated with a UK based company attracting investment from CDC (or other development finance institution), then it is unlikely that so little information would be published about it.
54. The report records that *'Three incidents of fraud or suspected fraud were uncovered during 2008 in companies where CDC's capital is invested'* but there is no information provided as to the sums of money involved or how these incidents were 'uncovered' (i.e. by action taken by CDC or through the action or intervention of a third party).
55. In addition, the limited scope and effectiveness of the annual report, as a means for the public to obtain information as to the *totality* of CDC's investment activities, is made clear in the report itself which states that: 'The 12 evaluations completed by CDC in 2008 represent more than one sixth of the total number of CDC's current portfolio

⁵ 'Growth for Development' (CDC) 2008

- companies. In total, the funds evaluated represent about one tenth of CDC's total portfolio value.'
56. The Commissioner would question whether published information concerning just over one sixth of CDC's portfolio companies, provides a reliable, comprehensive and clear picture as to the extent of CDC's investments, and their impact on development and poverty reduction.
 57. However in highlighting the shortcomings and limitations of CDC's '*Growth for Development*' report, the Commissioner acknowledges that much has improved in the last few years with regard to CDC's commitment and efforts to improve its reporting of information concerning its investments activities, both to the public and to DfID. The Commissioner notes that seven of the 20 evaluations planned for 2009 had been earmarked for outsourcing to external consultants for external scrutiny. However, the Commissioner must focus on the public interest in disclosure at the time of request. At time of the request there were shortcomings in the information CDC were making available for the public to hold it to account, though some changes were underway at the time the request was made.
 58. In its recognition of the public interest in its work, Counsel for CDC made the following submission to the Commissioner: 'I would ask the ICO to take into account the considerable amount of information CDC already makes public, in the form of its annual review and audited report and accounts and other detailed reports, and the way in which CDC is held accountable by the Department for International Development, and by the National Audit Office. Our annual review and audited report and accounts are available on our website and a link to a recent National Audit Office report will be included on our revised website. These provide efficient and objective ways in which the public can be reassured, and our use of public money can be scrutinised, without detriment to our commercial interests, the commercial interests of those we engage with, and to our development mandate'.
 59. There is some merit in arguments that accountability had become less rigorous since CDC's restructure and it would be difficult for any organisation to be held appropriately accountable for its decisions and actions, where there is an absence of information (accessible to the public and reported to DfID) about the whole of its activities and not just a selected sample. As noted above, when examined in the context of CDC's full investments activity, the Commissioner would not agree with the proposition that '*a considerable amount of information*' about CDC's activities was available to the public.

60. The Commissioner notes that there was far more information available concerning CDC's financial performance, than there was regarding its development impact, although the Commissioner acknowledges that CDC has been working to redress this imbalance.
61. In submissions to the Commissioner, the complainant has suggested and contended the following: 'If CDC were forced to reveal its development impact reports, they could be scrutinised and there would be tremendous pressure to improve standards. Some investors may be deterred from co-investing with CDC but many would not, given CDC's reputation and size (which is exactly what it trades on). The effect would be a raising of standards across the private equity sector in developing countries – which evidence suggests desperately needs it. In politically and economically challenging environments, transparency is more important than anywhere'. The Commissioner considers that there is much merit in this argument, having previously noted that CDC has the potential to be an influential outlier in the emerging markets sector. Such an argument and logic, is however predicated on the assumption that standards are in need of improvement to such a marked degree.

Public interest arguments in favour of maintaining the exemption

62. The public interest factors in favour of withholding the information requested should be seen in the context of, and in connection with, the prejudice based arguments which CDC has made to the Commissioner (see above).
63. The Commissioner recognises that information as to CDC's 'investment rationale' and 'effectiveness', to take two examples, would attract a strong public interest in disclosure, in terms of providing the accountability and transparency referred to previously. In addition, not all parts of the information contained within the reports, carry the same weight when it comes to assessing the public interest factors in favour of maintaining the exemption (for example, information detailing environmental impact carrying less weight in this respect than information more explicit about investment profitability and outcome). However, considered as a whole, the reports are clearly frank and there was a reasonable expectation of confidentiality, and the Commissioner accepts that they were not designed or intended for disclosure beyond the parties concerned.
64. With specific reference to the public interest, CDC has advanced the following arguments. 'CDC chooses to invest with fund managers because of their track record and their commitment to invest in regions and sectors which align with CDC's development mandate. Another

- key priority for CDC in selecting fund managers is their commitment to best practice in relation to environmental, social and governance (ESG) issues, and their alignment in this respect with CDC's investment policy and Investment Code. These fund managers, and the funds in which CDC invests, are all focused on emerging markets, often in areas and in sectors where few other investors are prepared to invest. Any commercial prejudice to these fund managers and the funds they operate is therefore in itself contrary to the public interest since this would, as a consequence, lead to commercial prejudice to the very companies CDC is mandated to assist, companies often in the very poorest areas of the world, and to a diminution of the investment available for development projects'.
65. Having accepted that the disclosure of the Evaluation and ESG Reports would be likely to prejudice the commercial interests of not just CDC, but the fund managers and underlying portfolio companies through which it invests, the Commissioner agrees with the logic and rationale of the above contention.
 66. A second line of argument put forward by CDC is that: 'It would not be in the public interest if portfolio companies are unwilling to provide information to fund managers, and/or fund managers were unwilling to provide information to CDC because of a fear that such information would be made public. Neither would it be in the public interest if CDC were to be excluded from some funds as a result. CDC's involvement in funds puts a spotlight on vital issues such as health and safety, good working practices, environmental and social standards and good corporate governance. If funds were to become segregated' (i.e. if private sector investors were to choose not to invest in funds in which CDC was investing), then there would be less ongoing investment in, and attention to, these priority issues'.
 67. The importance of the likely detrimental impact on CDC's investment opportunities and access, were the information to be disclosed, has been stressed by CDC in its submissions to the Commissioner. It has been asserted that *'If CDC were to disclose fund-related information publicly, fund managers who have a choice as to whether to accept CDC as an investor, will prefer to accept commitments from private sector investors, or may take steps to limit the amount of information available to CDC. Neither of these outcomes would be in the public interest'*. The Commissioner concurs with this view.
 68. The restrictive ('chilling') effect that disclosure of the Evaluation Reports would be likely to have on CDC's report making mechanisms was also brought to the Commissioner's attention: 'It would not be in the public interest if CDC had to retreat from the frankness with which

we currently are able to formulate the Evaluation Reports. The Evaluation Reports are tools that enable us to ascertain and measure the performance of individual funds and their underlying portfolio companies, and to formulate strategic policy decisions on that basis. CDC would not be able to produce these reports with the same degree of honesty and frankness if it were likely that the reports would be published. This would deprive CDC of an important resource in formulating successful and effective investment strategies: this would be contrary to the public interest, in that being able to formulate effective investment strategies is the very bedrock of CDC's development mandate'.

69. Given the importance of as much important information as possible being contained and communicated through CDC's report making chain, in order to assess the productivity and adherence to the ESG principles of the investee companies, the Commissioner considers that such a facility should not be unduly constrained, and accepts that there is a public interest in preserving the current confidential process within which such reporting takes place.
70. The central argument put forward by CDC, and one to which the Commissioner attaches considerable weight, was expressed as follows: 'As a private equity fund-of-funds, CDC depends entirely on its relationship with its fund managers, without whom we would be unable to carry out our investment function. An issue therefore, which strikes at the heart of our relationship with fund managers, would directly jeopardise our investment function and role. Any potential breach of long-negotiated contractual arrangements, and of trust, would put at risk the effective commitment of our capital to the private actors in some of the poorest countries in the world'.

Balance of the public interest arguments

71. In submissions to the Commissioner, the complainant has asserted that: 'The whole point of CDC is development. This is where balancing the public interest should begin and end', and 'The key public interest consideration is the development impact – the D in CDC. It's not CCC.'
72. The Commissioner would agree that the development mandate and function of CDC cannot be understated, and carries weighty public interest considerations, many of which have been robustly articulated by the complainant himself. However, the Commissioner considers that it would be both unrealistic and illogical for the development aspect of CDC to be looked at in isolation from, or in predominance to, the commercial engine by which CDC generates the funds which it invests in the poorer countries concerned.

73. In its current incarnation, CDC operates through the private equity fund market. Whilst the Commissioner fully recognises that the private equity sphere is some way short of being synonymous with transparency and external scrutiny, he does not consider that it is the Commissioner's function or place to question how the UK Government has chosen to fund CDC and delegate its operations. Suffice it to say, the restructure of CDC has proven controversial in some quarters and has been the subject of legitimate public debate.
74. Private equity being a reality as to how CDC generates and maximises its assets, the Commissioner considers that any action or disclosure that would create a real risk to the value of those investments, or the likelihood of future investments, would directly negatively impact upon CDC's ability and influence to carry out and fulfil its development mandate objective. This could create hardship in those countries which CDC is tasked in assisting. Such a result would most definitely not be in the public interest.
75. However, the Commissioner considers that the difficult and delicate balance between a commitment to openness and transparency on the one hand, and the need to understand and respect commercial confidentiality on the other is not as well calibrated at present as it could (*or should*) be. Evidence suggests that there was a shortfall at the time of request in the available evidence that CDC's increasing profitability has resulted in increasing '*pro-poor outcomes*'. Such outcomes are not necessarily the natural corollary of financial success, without appropriate allocation, investment and supervision. CDC's '*Growth for Development*' annual report marks a significant step forward in terms of increasing public access to its investment activities but it only provides a small part of the picture at present, and a picture which is very reliant on CDC's '*development highlights*'.
76. The Commissioner does not share CDC's view that it made '*a considerable amount*' of information public, given that its annual report focused on only a small percentage of its total investment activity. Nor is the Commissioner persuaded that CDC was subject to a comprehensive system of accountability, given the amount of assets at its disposal, and its influence upon poorer countries whose citizens do not enjoy the same level as protection as those in the UK. Robust and rigorous accountability cannot be achieved with a shortfall of information.
77. However, notwithstanding the above caveats, the Commissioner is satisfied that CDC has provided a robust and logical rationale, when applied to the evidence of the withheld information, to show that were

- the requested Evaluation and ESG Reports to be disclosed to the world at large, then this would be highly likely to cause serious commercial prejudice to CDC and the fund managers and underlying portfolio companies with whom it conducts its business. The Commissioner agrees that this prejudice would most likely not be confined to the reports which form the subject of the current information request but that disclosure would have a contagious effect upon CDC's commercial reputation and investments as a whole. Such a very serious and foreseeable consequence, would not be in the public interest.
78. The importance which the Commissioner places upon this overriding public interest was highlighted in FS50094891, as referenced previously. At paragraph 85 of that decision, the Commissioner agreed that, *'It would not be in the public interest to limit the number of fund managers that CDC would be able to enter into contracts with, nor would it be in the public interest for CDC to be provided with restricted levels of information about investments it has made'*. Similarly, at paragraph 92, the Commissioner expressed his belief that, *'Ultimately, the more successful CDC's investments are, the higher the level of funds that can be re- invested back into the economies of developing countries, something which the Commissioner considers to clearly be in the public interest'*.
79. In terms of the balance of the public interest, the Commissioner considers that the strong (but not overriding) public interest in disclosure of the withheld information, would have been significantly lessened, if the necessary systems were put in place to ensure that CDC's funds are being re-invested where they are most needed and where they can do the most good within CDC's development mandate. In this respect, the Commissioner notes the increased importance and emphasis placed upon regular reporting and oversight by *'CDC Investment Policy 2009 - 2013'*⁶, which should go some way towards addressing previous failings of monitoring and evaluation. However, although some changes were underway by the time of the request, they were not in effect.
80. In conclusion therefore, and for the avoidance of doubt, the Commissioner agrees that there are inherently strong public interest factors (transparency and accountability) which support disclosure of the information in this case. These factors are further strengthened by the fact that being wholly owned by DfID, CDC, unlike some of its private equity competitors, is ultimately responsible for investing public monies and has a responsibility to ensure that such monies are efficiently and effectively invested. However, there are also very

⁶ CDC Investment Policy 2009-2013

strong arguments in favour of maintaining the section 43(2) exemption. Central amongst these is the importance placed upon confidentiality (both explicitly and implicitly) amongst investors operating within the private equity investment community. CDC has provided compelling evidence and contention to show that if the information within the Evaluation and ESG reports were to be disclosed to the world at large, then this would almost inevitably cause serious prejudice to not only CDC's commercial interests, but to the commercial interests of the fund managers and underlying portfolio companies as well. If CDC's ability to generate profit from its private equity investments, were to be hampered or prejudiced to the extent envisaged, then this would have the effect of seriously reducing the amount of capital able to be invested in developing countries. Such an outcome would manifestly not be in the public interest, and the Commissioner considers that this outweighs the public interest arguments advocating disclosure of the information.

81. In reaching his decision, which has been based upon a balancing exercise of the competing public interest arguments, the Commissioner has given significant weight to the public interest in disclosure, acknowledging the importance of disclosing the withheld information, the shortcomings of the information provided by CDC at the time of the request and some of the changes which were underway by the time of the request. The public interest decision is closely balanced but the Commissioner finds, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure.
82. With respect to both types of reports, CDC have advised the Commissioner that they do not believe that it is possible to redact the reports in such a way as to produce meaningful documents which convey useful information. The Commissioner concurs with this view.

Sections 36(2), 41(1)(b) and 43(1)

83. In its submissions to the Commissioner, CDC has contended that Section 43(2) applies to *all* the information (Evaluation and ESG Reports). As the Commissioner has concluded that all of the information is exempt on the basis of Section 43(2), he has not considered whether the information is also exempt on the basis of the other exemptions relied upon by the public authority.

The Decision

84. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

Steps Required

85. The Commissioner requires no steps to be taken.

Right of Appeal

86. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

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.

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

Dated the 28th day of June 2010

Signed

**Steve Wood
Head of Policy Delivery**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Section 36(2) provides that:

'Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act –

(b) would, or would be likely to, inhibit –

- (i) the free and frank provision of advice, or
- (ii) the free and frank exchange of views for the purposes of deliberation, or

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs'.

Section 41(1)(b) provides that:

'Information is exempt information if the disclosure of the information to the public (otherwise than under this Act), by the public authority holding it, would constitute a breach of confidence actionable by that or any other person'.

Section 43(1) provides that:

'Information is exempt information if it constitutes a trade secret'.

Section 43(2) provides that:

'Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).'