

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 April 2017

Public Authority: CDC Group plc
Address: 123 Victoria Street
London
SW1E 6DE

Decision (including any steps ordered)

1. The complainant submitted a request to CDC Group seeking various details about its private equity investments. CDC provided the complainant with the information relating to its commitment to each private equity fund. However, it refused to provide him with the remaining information he sought, namely the contributions to each fund from inception to date, distributions received from each fund from inception to date, and the net asset value of each fund. CDC argued that this information was exempt from disclosure on the basis of sections 43(2) (commercial interests) and 41(1) (information provided in confidence). The Commissioner has concluded that the information withheld by CDC is exempt from disclosure on the basis of section 43(2).

Request and response

2. The complainant submitted the following request to CDC on 11 November 2016:

'I hereby submit the following FOIA request in relation to your investments in private equity, real estate, infrastructure, special opportunities fund, namely: (1) Name of Fund, (2) Commitment, (3) Contributions from inception to Reference Date, (4) Distributions from Inception to Reference Date, (5) NAV as at reference date and (6) Reference Date Quarter.'

3. CDC responded on 17 November 2016 and explained that it assumed that the request was directed at information pertaining to investee private equity funds. CDC also noted that this request was very similar in nature to a previous request the complainant had submitted in 2010. CDC explained that it considered the information sought by this latest request to be exempt from disclosure under FOIA for the reasons as set out in its letter to him of 28 September 2010, namely sections 41(1) (information provided in confidence) and 43(2) (commercial interests) of FOIA. CDC provided the complainant with a copy of its letter dated 28 September.
4. The complainant contacted CDC on 18 November 2016 and asked it to conduct an internal review.
5. CDC informed him of the outcome of the internal review on 16 December 2016. The review explained that the information sought by points (1) and (2) of the request were published in CDC's annual accounts and updated quarterly online. CDC provided the complainant with the figures as at 30 June 2016. With regard to the remaining information, the review concluded that this information was exempt from disclosure on the basis of sections 41(1) and 43(2) of FOIA.

Scope of the case

6. The complainant contacted the Commissioner on 22 December 2016 in order to complain about CDC's decision to withhold the information falling within the scope of his request.

Reasons for decision

Section 43(2) – commercial interests

7. CDC argued that the withheld information was exempt from disclosure on the basis of section 43(2) of FOIA. This section states that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any party.

CDC's position

8. CDC argued that disclosure of the withheld information would be likely to prejudice the commercial interests of (i) CDC, (ii) the private equity funds in which CDC invests, (iii) the managers of those private equity funds, and (iv) other investors in those funds.
9. In order to support this position CDC provided the Commissioner with detailed submissions which she has summarised below.

10. CDC argued that disclosure of the withheld information would be likely to prejudice its own commercial interests for a number of reasons: it would be in breach of the confidentiality provisions in the legal agreements entered into with its investee funds and the managers of those funds; it may be prevented by those managers from investing in future funds, or only given limited information about the funds in which it has invested; and it could also be liable for breach of contract. In support of these points, CDC referred the Commissioner to an earlier decision notice which summarised submissions which it had made in respect of that earlier complaint.¹
11. CDC also explained that the net asset value (NAV) of a fund, the information sought by point (5) of the request, can be calculated in different ways. It explained that the NAV figure alone provides no indication of the method of calculation used and therefore comparisons between funds based on their NAVs will not necessarily be straightforward and conclusions could be drawn about CDC's portfolio of private equity fund investments which are unwarranted.
12. With regard the interests of the investee private equity funds and the managers of those funds, CDC explained that it had consulted five of the managers of the funds in question. The Commissioner was provided with copies of this correspondence. In summary, the managers made the following points:

Fund manager A

- If a third party became aware of the beginning and end of a fund's investment period, and how much capital had been invested, it could exert commercial pressure on the fund manager. For example, if an investment period was nearing its end and contributions from investors to date were relatively low compared with the level of their commitments to the fund, the third party might conclude that the fund manager was under pressure to make an investment and the third party could drive a harder bargain than would otherwise have been the case;
- If a third party had information relating to distributions made by a fund to investors, and was aware that it was due to terminate relatively soon, it could purchase assets from the fund at a discount, perceiving that the fund manager had been slow to

¹ The decision notice in question is [FS50094891](#) and CDC drew the Commissioner's attention to the evidence summarised at paragraphs 45 to 52.

make prior distributions and was under pressure from investors to realise assets and distribute divestment proceeds;

- The reputation and business of fund managers could be damaged if it became known that a fund manager allowed the disclosure of confidential information notwithstanding the confidentiality provisions contained in its fund agreements. As a result, other investors may decide not to invest in a future fund on the basis of the risk of confidential information being disclosed, whether this is actual or perceived.

Fund manager B

- Disclosure of the withheld information would cause detriment to the fund manager because it provides a measure of financial performance of the fund which is given in isolation and out of context. This could potentially distort the market if recipients reached the wrong conclusion about the financial performance of the funds.
- Further, disclosure of the withheld information would deprive the fund manager of the ability to ensure recipients of the information have all of the necessary information and context to properly and accurately evaluate the fund's financial performance.

Fund manager C

- Details of the contributions made to and distributions received from the fund are critical performance data points. Disclosure without an understanding of the underlying thesis and investment strategy of the reported fund could lead to an incorrect understanding of the fund's performance.
- The private equity industry is highly competitive and performance data points are closely guarded information.

Fund manager D

- The information is commercially sensitive and not public. If disclosed to competitor fund managers it would provide them with a competitive advantage.

Fund manager E

- The withheld information is based on fair value at a given point in time, and may not fully reflect the exact actual future performance or potential of the fund. Disclosure may result in adverse publicity about the fund and may have an effect on future fund raising to the detriment of the fund manager.

13. In relation to the interests of other investors in the funds, CDC explained that their views had also been sought and they provided the following comments:

- Certain investors seek to realise their interest in a fund, prior to its termination, by selling their interest on the secondary market. If a potential purchaser on that market was to become aware of the NAV calculated by another investor, this could have an impact on that purchaser's transaction with the partner seeking to realise their interest, and the transaction may not then proceed, or might only proceed after a substantial renegotiation of the price.
- Information relating to the performance of a fund must be viewed in context and such information viewed out of context can be misleading. A number of investors have their own stakeholders and have a material interest in ensuring that information relating to their investment in a particular fund is managed professionally and appropriately. If isolated information relating to the fund was disclosed outside of their control and the information passed to one or more of their stakeholders, this could have a negative impact on that investor's reputation, which in turn could have a negative impact on the fund manager's funds.
- Disclosure of the withheld information would have detrimental effects on other investors in the fund. Identification of the contributions made and distributions received by CDC as an investor is market sensitive confidential information also applicable to other investors in the fund. This may affect investors' willingness to invest in other funds.

14. Finally, CDC rejected the complainant's comparison between the disclosure of withheld information and the information disclosed by local authority pension funds about their private equity investments. (Further

details of the complainant's position on this are below). CDC argued that such pension funds had different interests and objectives to CDC. CDC emphasised that its investments focused on Africa and South Asia and the private equity fund markets in these areas are significantly smaller than similar markets in developed economies, and the secondary trading of private equity interests is extremely limited for such funds. Consequently, CDC argued that the information sought by points (3) to (5) of the request is significantly more commercially sensitive than disclosure of similar information in other private equity funds markets.

The complainant's position

15. The complainant questioned whether disclosure of the withheld information would actually result in prejudice to the commercial interests to the various parties in the manner envisaged by CDC. In order to support his position the complainant drew a comparison between the information he had requested from CDC and the information which was the focus of previous decision notices issued by the Commissioner which considered the disclosure of private equity data about local authority pension funds.² The complainant emphasised that the information that CDC was seeking to withhold was the same information which these previous decision notices had ordered the disclosure of and moreover was also routinely disclosed by many local authorities. The complainant explained that he did not accept CDC's position that there was a distinction between itself and that of a public pension fund given that CDC was ultimately investing public money with at least one objective being to generate a financial return.

The Commissioner's position

16. In order for a prejudice based exemption, such as section 43(2) to be engaged the Commissioner believes that three criteria must be met:
 - Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
 - 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. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and

² [FS50083667](#), [FS50086121](#) and [FS50627178](#)

- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie, disclosure ‘would be likely’ to result in prejudice or disclosure ‘would’ result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner’s view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.
17. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice described by CDC to the various parties identified at (i) to (iv) (see paragraph 8) clearly relates to the interests which the exemption contained at section 43(2) is designed to protect.
 18. With regard to the second criterion, the Commissioner is satisfied that disclosure of the information withheld on the basis of this exemption has the potential to harm both CDC’s commercial interests and those of the private equity funds in which CDC invests, the managers of those private equity funds, as well as other investors in those funds. The Commissioner has reached this conclusion on the basis of the detailed submissions provided to her by CDC, and summarised above, including the arguments advanced by the parties described at (ii) to (iv) above. In her view, these submissions plausibly demonstrate a number of different ways in which prejudice could occur to the parties in question such that there is clearly a causal relationship between disclosure of the withheld information and prejudice occurring to the commercial interests of those parties. Moreover, the Commissioner is satisfied that any such prejudice would clearly be of substance.
 19. With regard to the third criterion, the Commissioner is persuaded that there is a real and significant risk of prejudice occurring if the information is disclosed. She has reached this conclusion in light of the fact that disclosure risks prejudicing the commercial interests of not simply one party but numerous parties, ie CDC itself, but also the funds in which it invests, the managers of those funds and other investors in the funds in question. The Commissioner considers it is important to emphasise that the withheld information relates to over 180 funds. Therefore, it is clear that the number of parties potentially affected by this disclosure is significant. Furthermore, it is clear from the summarised submission above that prejudice could occur to each of the parties for a number of different reasons following disclosure of the withheld information. For example, CDC’s interests could be harmed by the disclosure of the withheld information because it could be liable for a breach of contract, find itself excluded from certain funds or only be given limited information about performance of funds in which it has

invested. In the Commissioner's view the fact that disclosure risks harming a significant number of parties, and the fact that each of the parties could find their commercial interests harmed because of a number of different ways, provides a compelling case for concluding that section 43(2) is engaged.

20. With regard to the decision notices cited by the complainant, the Commissioner is persuaded by the points made by CDC that there is a difference between its private equity investments and those of local authority pension funds (the Commissioner has discussed this further in her consideration of the public interest test below). Furthermore, with regard to whether section 43(2) is engaged, the Commissioner considers it important to note that in decision notice FS50627178 sections 43(2) and 41(1) were not engaged essentially because the public authority in question had failed to make the case that the exemptions were engaged. However, for the reasons set out above, the Commissioner is satisfied that CDC has provided a compelling case as to why disclosure of the withheld information would be likely to prejudice the commercial interests of parties (i) to (iv). Moreover, one of the reasons why the Commissioner concluded that the exemptions were not engaged in decision notice FS50627178 was because so many other local authorities proactively disclosed similar information. However, in the circumstances of this case the Commissioner is not aware that comparable information is disclosed by other development finance institutions.

Public interest test

21. Section 43 is a qualified exemption and therefore the Commissioner must consider the public interest test and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest in the disclosure of the information

22. The complainant argued that there was a clear public interest in the disclosure of the requested information in order that the public could better understand the success of CDC's investment strategy. Furthermore, the complainant emphasised that in the decision notices cited at footnote 1 the Commissioner had accepted that there was a compelling public interest in the disclosure of similar information. In the complainant's opinion the findings of these decision notices provided a clear precedent for the disclosure of the withheld information in this case.

Public interest in maintaining the exemption

23. CDC acknowledged that there is a public interest in the disclosure of some information regarding its investments given that such investments

are made with public funds and consequently their performance will be of interest to UK taxpayers. However, CDC emphasised that it already published information in its Annual Review about its investments. Furthermore, it argued that the information sought by points (1) and (2) had been provided to the complainant and such information detailed all of the private equity funds CDC is invested in, the date of the commitment, the original commitment, the outstanding commitment, the geographical focus, the domicile of the fund and whether other development finance investors have invested alongside CDC.

24. Furthermore, CDC argued that disclosure of the withheld information – which would result in the prejudicial effects described above – would be firmly against the public interest. It emphasised that disclosure could result in fund managers facing pressure from third parties to buy assets at higher prices, or to make more distributions and that such pressures could affect the orderly running of funds which would not be in the public interest. CDC also emphasised that it would not be in the public interest for the number of funds potentially open to invest in to be reduced. CDC argued that its mission is to support the building of business in Africa and South Asia and it needs maximum flexibility of investment in order to enable it to do this. CDC also noted that if as a result of disclosure it was provided with limited information from fund managers this would also be against the public interest as its ability to oversee its investments and ensure that tax funding was achieving maximum value would be impaired.

Balance of the public interest test

25. The Commissioner agrees with the complainant that there is clear interest in the public being able to understand the nature and performance of CDC's investments as part of the government's approach to international development, and more specifically its strategy of harnessing the power of private capital in reducing poverty. Consequently, the Commissioner accepts that the public interest in respect of CDC being transparent in respect of such investments should not be underestimated.
26. However, the Commissioner does not accept that because of her findings in respect of the previous decision notices referred to by the complainant, the public interest should automatically favour disclosure of the withheld information in this case. The Commissioner has already discussed why she considers the circumstances of this case to differ from those cited by the complainant in respect of determining whether disclosure would be prejudicial. In respect of the balance of the public interest the Commissioner believes that there are also further important distinctions. In decision notice FS50083667 the Commissioner noted any shortfall in a local authority's pension fund, as a result of underperforming private equity investments, may have to lead to the

local authority itself having to inject additional funding in order to meet the fund's commitments to its members. Consequently, the Commissioner concluded that there was a strong public interest in the disclosure of the withheld information given that any losses or underperformance of private equity investments would be compensated by further public funding.

27. In respect of CDC's investments, the Commissioner recognises that whilst these are made on behalf of the taxpayer the profitability of these investments has ensured that CDC is self-financing and as a result has not received any new capital from government since 1995. Furthermore, and to a greater extent than any of the decision notices cited by the complainant, the Commissioner is satisfied that disclosure of the withheld information would be likely to result in prejudice to a range of parties, including but not limited to CDC itself. In the Commissioner's view there is a very strong public interest in ensuring that CDC can perform and maximise its investments as efficiently and effectively as possible. Furthermore, the Commissioner also believes that there is an inherent public interest in ensuring fairness of competition and therefore it is firmly against the public interest for the commercial interests of the parties (ii) to (iv) to be harmed simply because of their relationship with CDC.
28. Finally, the Commissioner recognises the level of information already published by CDC about its investments and the information that can be inferred from the information disclosed in response to this request, ie the information sought by points (1) and (2). In the Commissioner's opinion the extent to which disclosure of the remaining information would inform the public about the performance of CDC's investments, beyond the information already disclosed, is arguably limited. In any event, the Commissioner is satisfied the benefits of such a disclosure are outweighed by the stronger public interest in ensuring that the commercial interests of CDC and its partners are not harmed for the reasons discussed above.
29. The Commissioner has therefore concluded that the public interest favours maintaining the exemption contained at section 43(2).
30. In light of this decision the Commissioner has not considered CDC's reliance on section 41(1) of FOIA.

Right of appeal

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@hmcts.gsi.gov.uk

Website: 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

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