Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 26 April 2011

Public Authority: **Department for International Development**
Address: **1 Palace Street**
London
SW1E 5HE

Summary

The complainant asked the Department for International Development (DFID) for information about its response to a report which had raised concerns about investments made by DFID and its partner organisation CDC, formerly the Commonwealth Development Corporation, including notes and minutes of meetings, reports by DFID's Counter Fraud Unit and correspondence with CDC. DFID initially refused to provide any information but subsequently disclosed some in redacted form. The Commissioner decided that DFID had correctly withheld information relying on sections 31, 40(2), 41 and 43 of the Act. He also decided that, in not disclosing some information by the close of its internal review, DFID had breached sections 1(1)(b), 10(1) and 17(1) of the Act.

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, formerly the Commonwealth Development Corporation, is a company that is wholly owned by the Department for International Development (DFID). CDC invests in businesses in the poorer developing countries. Since 2004, CDC has concentrated on private equity investment and investing through third party fund managers.

CDC operates independently from DFID working within a set of defined investment targets and an ethical investment code agreed with DFID.

3. The complainant produced a report (the report) in relation to a named private equity investment company (company X) investing in businesses operating in African countries including Nigeria. The report alleged that company X had been linked directly and indirectly to corrupt business practices in some of its business dealings and that some of these had involved international development funds provided by DFID. He said (correctly) that company X was approved by CDC to manage UK government international development funds on its behalf. The complainant said that he had provided the report to DFID on 1 February 2009. He provided the Commissioner with a copy of the report.

The Request

4. On 27 November 2009 the complainant asked DFID for:
copies of the following documents in relation to the Report on [company X] Investments in Nigeria that I submitted to you directly and through [a named organisation] and other third parties.

- *All notes and/ or minutes of meetings held by the DFID staff that handled the report;*
- *All reports, including handwritten notes, of the investigations undertaken by the Counter-Fraud Unit;*
- *All correspondence with CDC in relation to the report.*

5. On 29 December 2009 DFID told the complainant that it was not in a position to respond to the request as it had not yet determined where the balance of the public interest lay in regard to information being withheld and relying on the exemption at section 36 (Prejudice to the effective conduct of public affairs) of the Act.

6. On 13 January 2010 DFID told the complainant that it was still not in a position to respond fully to his request but planned to do so by 27 January. On 27 January DFID sent a further holding reply saying it hoped to respond fully by 10 February

7. On 31 January 2010 the then DFID Minister of State wrote to the complainant's then MP saying that DFID had looked into the matters raised by the complainant and that DFID would be responding to his information request shortly

8. On 2 February 2010 DFID confirmed that relevant information, falling within the scope of the request, was held but said that it was being withheld from the complainant. In refusing the request, DFID no longer relied on the section 36 exemption but instead relied on the exemptions in the Act in sections 31 (Law enforcement), section 40(2) (Personal information), section 41 (Information provided in confidence) and section 43(2) (Commercial interests). In the case of the section 31 and 43 exemptions, DFID said that the balance of the public interest favoured withholding the information.

9. On 8 February 2010 the complainant asked DFID for an internal review of the refusal of his request. He said that he had submitted his report to DFID under a pseudonym and had since raised the matter with DFID, CDC and his then MP. He said that he had no confidence, from DFID's handling of the matter, that the matters raised within his report were being investigated thoroughly and conscientiously. He said it would be appropriate for DFID to keep him informed of progress in the handling of the report and the allegations it contained. He said he found it implausible that all of the information he had requested was exempt from disclosure in its entirety.

10. On 15 February 2010 the complainant wrote to DFID complaining about the time it appeared to be taking DFID to investigate the matters he had raised with them and also saying that DFID had not acknowledged his 8 February request for an internal review. DFID immediately responded and said that it would reply by 12 March.

11. On 26 February 2010 CDC told the complainant that it had examined in depth the very serious allegations that he had made to it against company X.

12. On 10 March 2010 DFID told the complainant that it was not yet able to respond to his request for an internal review but said that it hoped to do so no later than 19 March.

13. On 19 March 2010 DFID responded to the complainant with the outcome of its internal review of his complaint. DFID said that it continued to rely on the exemptions in sections 31, 40, 41 and 43 of the Act.

The Investigation

Scope of the case

14. On 12 April 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider DFID's

refusal to release the information he had requested. He explained that he had raised with CDC and DFID his concerns that CDC was investing large sums of public money in company X and that company X was then engaging in corrupt business activities. After 10 months with no substantive information he said that he had no confidence that DFID was investigating thoroughly and conscientiously the matters he had raised in his report. He said that the information he had requested from DFID would allow independent assessment of the extent to which company X had complied with its obligations and the quality of DFID's oversight of CDC on this matter. He considered that there was a very strong public interest in disclosing the information to him.

15. During the course of the Commissioner's investigation, DFID disclosed some of the information requested to the complainant. This Notice deals solely with the information still withheld from the complainant by DFID.

16. The Commissioner has reviewed in detail all of the information being withheld and has provided a separate detailed confidential annex to this notice to DFID only as it contains information which is itself exempt from disclosure.

17. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.

Chronology

18. On 8 June 2010 the Commissioner began his investigation.

19. On 22 June 2010 the complainant told the Commissioner that he had corresponded with the National Audit Office and that it had responded to a related information request to it with some information being released, some with redactions and with reasons given for information withheld. He contrasted that approach with DFID's decision not to disclose any of the information requested.

20. On 30 June 2010 the Commissioner, at the complainant's request, told DFID about the response the complainant had received from the National Audit Office and said that it had disclosed some relevant information.

21. On 14 July 2010 DFID provided the Commissioner with its response to the complaint. DFID indicated that its own investigation of the allegations made in the report was complete now but that the matter was not closed. DFID provided further explanatory information to the Commissioner.

22. On 5 August 2010 the Commissioner noted that the schedule of information provided by DFID setting out the information still being

withheld by it did not detail which exemption was being applied to which information and asked for a more detailed analysis to be provided.

23. On 9 August 2010 the complainant told the Commissioner that DFID made a consistent practice of using what he described as spurious comments about the FOI request process to withhold substantive information on its findings into the allegations contained in the report, even though DFID had led others to believe that it had looked extensively into the matter and concluded its investigation. The complainant told the Commissioner that DFID's blanket withholding from him of all of the relevant information was excessive, arbitrary and ill-considered. He said it was implausible that all the relevant documents were exempt.

24. On 10 August 2010, and with his permission, the Commissioner passed the gist of the complainant's comments on to DFID for its information and to offer it an opportunity to respond.

25. On 3 September 2010 DFID provided more detailed comments to the Commissioner. DFID said that it had now decided to disclose short extracts from four of the documents being withheld. DFID said that it also now relied on two further exemptions, those at section 27(1) (International relations) and section 35(1) (Formulation of government policy etc) of the Act. DFID told the Commissioner that it was absolutely committed to investigating any allegations of corruption in a fair and open minded way without prejudice to either the person reporting a perceived impropriety or the alleged wrongdoers. DFID said that it was essential that it ensured that investigations were not undermined by inappropriate and premature disclosure of information.

26. On 24 September 2010, in response to his enquiry, DFID told the Commissioner that its own internal investigation had been concluded before the complainant had made his information request on 27 November 2009. DFID reiterated that this was a high profile case and said that it believed strongly that disclosure of the withheld information would undermine continuing investigations by its partners and also prejudice the commercial interests of DFID and others.

27. On 14 December 2010 DFID told the Commissioner that there was nothing in CDC's Articles of Association that addressed the arrangements for sharing information between CDC and DFID or confidentiality. However DFID said that it understood that a breach of confidence by it of information supplied by CDC would be actionable.

28. On 20 December 2010 the Commissioner put a preliminary view of the matter to DFID for its consideration requiring some further disclosures

of information by DFID. On 21 January 2011 DFID told the Commissioner that it accepted his preliminary view.

29. On 24 January 2011 the Commissioner put his preliminary view of the matter to the complainant and invited him to accept it.

30. On 27 January 2011 DFID wrote to the complainant disclosing 13 additional documents with redactions in line with the Commissioner's preliminary view that DFID had accepted.

31. On 3 February 2011 the complainant told the Commissioner, without further explanation, that he was not content with the steps taken by DFID and asked the Commissioner to proceed to a formal decision.

Findings of fact

32. DFID is the sole shareholder in CDC.

33. The Commissioner has seen evidence that relevant investigations were continuing at the time of the information request.

Analysis

Substantive Procedural Matters

34. DFID held information which it refused to disclose at the end of its internal review of the complaint but which it subsequently accepted should have been disclosed and has now been disclosed to the complainant. This was in breach of section 1(1)(b) of the Act.

35. In its initial 20 day response to the information request, DFID withheld information and said that, in so doing, it relied on the section 36 exemption (Prejudice to the effective conduct of public affairs). In its subsequent substantive refusal notice, DFID withheld information relying on the exemptions in sections 31, 40(2), 41 and 43(20 of the Act but no longer relied on the section 36 exemption. Later, during the course of the Commissioner's investigation and after completion of the internal review, DFID also sought to rely on the section 27(1)(a) and (c) (International relations) and section 35(1)(a) (Formulation of government policy etc) exemptions. In so doing DFID was in breach of section 17(1) of the Act.

Exemptions

36. The Commissioner considered the full application by DFID of all of the exemptions under the Act that it relied upon. However his decision depends on only some of the exemptions cited and it is only his reasons

in connection with those that are recorded in this Notice. The section 41 exemption has been applied to information received by DFID from other bodies. The section 31 exemption has been applied to information relating to relevant investigations and the section 43(2) exemption has been applied to information that is exempt for commercial reasons but is not already being withheld under the section 41 exemption. The section 40(2) exemption has been applied in withholding the personal details of junior officials. Where he has decided that information was correctly withheld under an exemption, the Commissioner has not then proceeded to consider the application of other exemptions to that same information.

Section 31 – Law enforcement

37. Section 31(1) of the Act exempts information the disclosure of which would or would be likely to prejudice (a) the prevention or detection of crime, (b) the apprehension or prosecution of offenders or (g) the exercise by a public authority of its functions for any of the purposes specified in section 31(2) of the Act. DFID applied section 31(1)(a), (b) and also section 31(1)(g) for the purposes specified in section 31(2)(a) and (b).

38. As regards section 31(1)(a), if those persons committing a crime or contemplating the commission of a crime were to become aware that their actions were attracting the attention of agencies responsible for preventing and detecting crime, or became aware of the methods used by such agencies to prevent and detect crime, then they would be forewarned and able to take evasive action. There would be detriment to the crime prevention and detection agencies which would seriously hamper their effectiveness and such prejudice would be real, actual and substantial to the agencies and to the public. This prejudice to the interests of the relevant crime prevention and detection agencies would be likely to occur as the intending perpetrators of crime would be alerted to the prevention and detection strategies that would be employed thus enabling the intending criminals to design and take evasive action.

39. As regards section 31(1)(b), which relates to the apprehension or prosecution of offenders, by the same token, those intending criminal acts, and at risk of being apprehended and prosecuted, if provided with the relevant information, would be better equipped to frustrate the actions of the agencies responsible for the apprehension and prosecution of offenders. The interests that would be prejudiced would be those agencies responsible for the apprehension and prosecution of potential offenders. Knowing from the disclosure of relevant information, the strategies that would be employed by the relevant agencies would forewarn and forearm potential offenders and enable them to design their activities in such ways as would reduce the risk to themselves of

detection or of the prosecution agencies being able to assemble information that would allow for any relevant criminal activity by offenders to be proven beyond reasonable doubt.

40. Section 31 is a prejudice based exemption. The interests that would be prejudiced in this matter are those of DFID and the other public authorities with which it has worked in addressing the very serious allegations put to it by the complainant. Disclosure of the relevant information that is now being withheld would alert potential suspects that they had attracted the attention of the authorities and would reduce the trust in DFID of its partner authorities. DFID and its partner public authorities confirmed to the Commissioner that disclosure of the withheld information would seriously undermine their investigations and that they are ongoing. DFID say, and the Commissioner accepts, that premature disclosure of relevant information by DFID would be likely to prejudice the conduct of the investigations and that making public the details of how DFID and its partners go about investigating alleged irregularities would also be likely to undermine this and any comparable future investigations.

Public interest arguments in favour of disclosing the requested information

41. Factors in favour of disclosure include the significant public interest in openness regarding criminal investigations and the administration of justice in order to maintain public confidence in law enforcement. There is too a strong public interest in ensuring the proper conduct by those in positions of trust in public office and upon whose proper conduct the public relies for the protection of their interests. Additionally, there is a strong public interest in ensuring that robust systems are in place to prevent and detect wrong-doing or impropriety, especially in the use of public funds. In this matter the sums of public international development money concerned are substantial, running into millions of pounds, and there is a public interest in transparency so that the public is made aware that some of these sums have been said to have been improperly used by a partner agency of DFID.

Public interest arguments in favour of maintaining the exemption

42. Factors favouring maintaining the exemption are the need to avoid interference with an investigation or operation designed to apprehend alleged offenders or gather relevant evidence. Information of this nature, if disclosed, would put at risk investigations in progress and provide valuable assistance to the intending perpetrators of crime. Because of the impact it would have in the present matter, inappropriate disclosure by DFID would put severely at risk future cooperation from its partners. There is also a very strong public interest in ensuring that

public authorities including DFID and its partners are able to carry out their functions properly including ensuring that their ability to take appropriate action in the event of improper or unlawful conduct is not prejudiced. DFID contends, and the Commissioner accepts, that disclosure of the information being withheld would be likely to prejudice the exercise of their functions by both DFID and its partners.

Balance of the public interest arguments

43. The Commissioner has considered the evidence put to him by the complainant and by DFID and has had regard for the content of the information being withheld. He has seen that there are strong public interest grounds for disclosing much or all of the information withheld. However he has also seen that premature disclosure would put at risk the full and proper conduct of investigations by DFID and its partners and that there would be strong detriment to the public interest if an investigation were to be compromised by premature disclosure of information now. He decided that, certainly while relevant investigations are continuing, and he has seen that they were at the time of the request, the balance of the public interest lies in withholding the relevant information.

Section 41 – Information provided in confidence

44. Section 41 exempts as a class information obtained from any other person if its disclosure would constitute a breach of confidence actionable by that or any other person. This provision confers absolute exemption. A duty of confidence may be created by contract, or may arise from the circumstances. The common law of confidence itself provides that in certain circumstances a duty of confidence does not arise having regard to the public interest. The Commissioner considered the information being withheld by DFID in reliance on the section 41 exemption.

45. During its investigation of matters arising from the report, information was supplied to DFID by CDC and others in strict confidence and on the understanding that it would not be disclosed further by DFID. DFID therefore believes that it owes a duty of confidence to those parties. In investigating evidence of possible wrongdoing DFID said that it relies heavily on the cooperation of its partners, both in supplying information and in lending their expertise to an investigation. CDC in turn relies heavily on the trust of its partners. To betray a promise to maintain confidentiality would put future cooperation seriously at risk. The reputation of CDC and its partners would suffer to the extent of undermining the confidence of its immediate partners in this matter and, more widely. DFID's evidence is clear that the interests of CDC and its other partners in government and beyond both in the UK and overseas

would be prejudiced because their trust, once lost, would be very hard to regain.

46. In order for the exemption to be engaged the Commissioner considers that in this case the appropriate test is that it must be shown that:

    a. the information was provided to the authority by another person, and

    b. that a disclosure of the information would give rise to an actionable breach of confidence - which in turn the Commissioner considers in this case requires that:

    c. the circumstances in which the information was provided gave rise to an obligation of confidence, in that a 'confider' provided information to a 'confidant' in the expectation, whether express or implied, that the information would only be disclosed in accordance with the wishes of the confider;

    d. The information is not in the public domain and has the necessary 'quality of confidence' – it need not be highly sensitive, but it must not be trivial;

    e. disclosure of the information would be unauthorised and to the detriment of the person(s) to whom the duty of confidence is owed;

    f. the action would not fail on grounds which provide a legal defence to a breach of a duty of confidence, for instance that disclosure would be protected by a public interest defence.

47. The Commissioner accepts that the above does not constitute the only test of confidence, however he considers it appropriate to use in this case.

48. The Commissioner does not accept that all information is held in confidence merely because the parties decide together that that will be the case. Accepting this would allow parties to contract their way out of their obligations under the Act. The Commissioner has therefore considered whether the information meets the necessary criteria for a duty of confidence to apply.

Was the information provided to DFID by another person?

49. The Commissioner has considered whether the information was provided to DFID by another person. He has seen that the relevant information

was provided to DFID by CDC and other bodies in written submissions and in the course of confidential meetings which were held to discuss the matter.

50. In the case of CDC which is wholly owned by DFID, the Commissioner decided that as both DFID and CDC are separate legal persons it is possible for one to provide information to the other. The Commissioner is therefore satisfied that, in receiving information from CDC, DFID did receive the information from another person.

Obligation of confidence

51. DFID has confirmed to the Commissioner that the relevant information was provided to it by its relevant partner organisations in strict confidence and on the understanding that it would not be shared with others. DFID has taken advice from the information providers who have refused permission for it to share the information more widely.

52. The Commissioner is therefore satisfied that there was a clear intention for DFID to hold in confidence the information it obtained from partner organisations.

53. The Commissioner must also consider the request 'applicant blind'. He must therefore consider the position as if any person had asked for that information. He has seen that DFID has already refused to share some of the relevant information in confidence with other partners and is satisfied that it would be entirely inappropriate for DFID to disclose the relevant information into the public domain.

54. He is therefore satisfied on the facts of the case that, while there was no explicit contractual requirement for confidence, DFID had obtained the information with the necessary obligation of confidence and that such was, and remains, the clear intention and understanding of all relevant parties.

Quality of confidence

55. In order to decide whether the information has the necessary quality of confidence the Commissioner must consider whether the information is otherwise accessible and whether the information is more than trivial.

56. He has seen that the withheld information relates to serious allegations against some of the partners of DFID and some of their partners. He has also seen that it is not readily accessible to the applicant, nor to members of the public or even necessarily to other partner organisations of DFID. He is therefore satisfied that the information is not trivial and that the information is not in the public domain generally. The Commissioner is therefore satisfied that the information has the

necessary quality of confidence, and that the information is not well known.

Detriment to the confider

57. The Commissioner has considered what detriment would occur to the provider if this information was disclosed.

58. DFID told the Commissioner that if it were to betray a promise to maintain confidentiality then its partners would sustain damage as a result. The partner organisation would suffer reputational damage and would find it more difficult to establish successful and trusting business relationships with others in the future.

59. The Commissioner is therefore satisfied that there would be detriment to the confiders of the information.

Would an unauthorised disclosure be actionable?

60. The Commissioner must also consider whether DFID's partners could take action in order to prevent that information from being disclosed if they chose to do so.

61. The Commissioner considered the relationship between DFID and CDC which is wholly owned by DFID but is, and is managed as, a separate entity. The Commissioner considered whether a breach of confidence by DFID in respect of information from CDC would be actionable. He regards the likelihood of a party actually bringing a claim as irrelevant as long as any claim that a party did make would be likely to succeed. To establish an 'actionable' breach of confidence, a public authority must establish that an action for breach of confidence would, on the balance of probabilities, succeed, i.e. considering whether or not all three limbs of the test of confidence can be established and whether or not the public authority has a public interest defence to the claim. This does not mean that it has to be established that someone would be likely to bring a claim for breach of confidence but rather that if they did, they would be likely to succeed. In this case CDC is a separate legal entity from DFID and the Commissioner has not seen, in CDC's Articles of Association or elsewhere in the terms of engagement between the two bodies, any reason why it should not be able to share information with DFID under an obligation of confidence.

62. The Commissioner has established, as set out above, that all of the necessary criteria for a duty of confidence to arise are in place in respect of CDC having been satisfied that DFID's other partners could also take action in principle. However there may be a defence to a disclosure of confidential information which prevents action being taken against the

discloser. The Commissioner has therefore gone on to consider whether there would be a defence to unauthorised disclosure of this information.

The public interest defence

63. The Commissioner has considered whether an action for a breach of confidence would fail because the disclosure of the information would be protected by a public interest defence.

64. In Derry v ICO (EA/2006/0014) the Information Tribunal clarified that the test to be applied in deciding whether the public interest provides a defence to a breach of a duty of confidence is that the duty should be maintained unless the public interest in disclosing the information outweighs the public interest in protecting confidences.

Public interest in disclosing the information

65. In this matter, the central public interest in the information being disclosed lies in the increase in transparency such a disclosure would bring with assurance that significant sums of public money intended as part of DFID's aid programme were being applied appropriately and that any inappropriate actions would be rigorously investigated and help to deter possible misuse of funds. Disclosure would increase the ability of the public to scrutinise the actions of DFID in relation to its own duties and the circumstances of its partners. It would add further detail of the information which DFID had in front of it when it made the decisions it did.

66. Disclosure would also provide some indications of the issues that DFID was considering, its general approach to allegations of wrong doing, and the specific actions DFID and its partners were considering which could provide further comfort to interested members of the public.

The public interest in maintaining confidences

67. The Commissioner notes that the courts have generally taken the view that the grounds for breaching confidentiality must be strong ones, since confidentiality is recognised as an important value in itself. There is a public interest in maintaining trust and preserving the free flow of relevant information to public authorities to enable them to perform their functions. This argument has a particular strength in the case of information provided in connection with the investigation of allegations of wrong doing. The duty of confidence protects the necessary relationship of trust between the confider and the confidant, thereby operating to serve the public interest.

68. In the case of Bluck, the Information Tribunal quoted from the Lords decision of Attorney General v Guardian Newspapers [1990] 1AC109:

'as a general rule, it is in the public interest that confidences should be respected, and the encouragement of such respect may in itself constitute a sufficient ground for recognising and enforcing the obligation of confidence…'.

69. The disclosure of confidential information may undermine the relationship of trust that currently exists between the relevant partner organisations and DFID which would harm their future working relationships and reduce future cooperation all of which would be damaging to the organisations concerned and contrary to the public interest. DFID told the Commissioner that it investigates every allegation of fraud or corruption and would be unable to do so properly in the future if it could not expect the cooperation and input of other key stakeholders and that this would be to their mutual detriment. There would be a loss of trust in and by DFID's many other partners including contractors and non-government organisations, as well as the overseas governments and institutions on whose cooperation DFID also depends. The result would be significant harm to the work of all of the authorities, agencies and organisations concerned, not just of DFID itself which would not be in the public interest.

70. On balance therefore the Commissioner is satisfied that the public interest rests in maintaining confidences in this instance.

Section 43 – Commercial interests

71. Section 43(2) exempts information the disclosure of which would, or would be likely to, prejudice the commercial interests of any person, including those of the public authority holding the information. In this matter, DFID withheld information concerning CDC and its partner organisations and their investments.

72. Disclosing the commercially sensitive information being withheld would be likely to adversely affect the commercial interests of CDC and its partners. CDC confirmed that much of the information provided by it to DFID was commercially sensitive and that its disclosure would be likely to result in the loss of competitiveness for CDC as well as for other organisations mentioned in the documents and weaken their ability to participate successfully in commercial activity. Disclosing prematurely unproven implications of wrong doing would be damaging to the reputations of CDC's commercial partners and of CDC itself. This in turn would lead to revenue losses and difficulty for CDC's partners thereafter obtaining credit and trading supplies from others.

73. CDC had provided information about its own operational processes and those of its commercial partners. The information is sensitive and would

be of value to CDC's competitors and weaken its ability to do business successfully with its partners and in competition with other aid agencies.

74. So far as the commercial interests of CDC and its partners are concerned, only by withholding the relevant information would DFID be likely to be able to ensure that its partners mentioned in the relevant documents were not exposed to premature public discussion about the commercial management of their activities or the commitment of public funds by them for investments leading to international development. Inappropriate disclosure would be likely to weaken the ability of CDC and its commercial partners to successfully participate in commercial activity and this prejudice would be real, actual and of substance. The Commissioner is satisfied from the evidence he has seen that if the information were to be disclosed then prejudice would be likely to occur to the commercial interests of CDC and its relevant partners.

Public interest arguments in favour of disclosing the requested information

75. Factors favouring disclosure include the public interest in ensuring transparency in the use of public funds and ensuring that the commercial activities of DFID and its partners are conducted in an open and honest way. It is strongly in the public interest to facilitate public scrutiny of the activities of public authorities such as DFID and of how it engages with CDC and through it with commercial organisations overseas when disbursing public funds. Disclosure would demonstrate to the public whether DFID, CDC and its partners follow sound business and ethical principles in accordance with their business missions. Disclosure would be likely to enable scrutiny of the activities of DFID's partners ensuring that their commercial activities are conducted in an open and honest way as well as demonstrating DFID's oversight and stewardship of its relationships and investments.

Public interest arguments in favour of maintaining the exemption

76. Public interest factors in favour of maintaining the exemption include the strong public interest in CDC and its partners being able to submit detailed reports to government agencies such as DFID without fear of inappropriate disclosure of information having commercial or competitive value with resultant loss to them of competitiveness and reduction in their ability to successfully participate in commercial activity. There is a strong public interest in protecting the interests of those whose sensitive commercial information is shared directly or indirectly with DFID. The fact that a CDC partner organisation has been mentioned in connection with a fraud investigation does not necessarily mean that organisation has been involved in any wrong-doing but premature public mention of its name in that context could be taken to

imply guilt and would unfairly damage its reputation and, in turn, the esteem and confidence that its customers, donors, suppliers or investors may have in it. This could have a significant impact on its revenues or threaten its ability to obtain supplies or to secure finance for other initiatives thereby weakening its ability to compete for business and grow and develop. Inappropriate disclosure of others' sensitive commercial information would damage both CDC's business reputation, and the confidence that suppliers and partners have in it. This would make DFID less effective as a development agency and CDC less attractive as a business partner and lead CDC to incur greater expense, and prejudice its commercial interests, undermining significant international development and DFID's ability to fulfil its role efficiently and effectively while achieving value for money in the use of public funds.

Balance of the public interest arguments

77. For the information he decided should be withheld, the Commissioner has considered the evidence he received from the complainant and DFID and has taken account of the contents of the relevant information. He has seen that the substantive issues remain fresh and that there is a real possibility of long term harm to the relationships that the authority has with all of its suppliers; accordingly he decided that the balance of the public interest lay in non-disclosure. This reflected the likely damage to the public interest from disclosure due to the commercial sensitivity of the information content.

Section 40 –Personal information

78. Section 40(2) provides an exemption to the duty to disclose information where the information requested constitutes the personal data of a third party, (subject to the provisions of the Data Protection Act 1998). Section 40 is an absolute exemption and therefore, there is no need to apply the public interest test under section 2 of the Act. Section 1(1) of the 1998 Act defines personal data as 'data which relate to a living individual who can be identified from those data, or from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and indication of the intentions of the data controller or any other person in respect of the individual…'. When considering disclosure or non-disclosure of third-party personal information, an authority is required to consider the data protection principles as set out in Schedule 1 of the Data Protection Act 1998 (DPA). The first data protection principle requires that personal data shall be processed fairly and lawfully. In considering whether a disclosure would be fair under the first principle of the 1998 Act, the Commissioner balances the consequences of disclosure and the

reasonable expectations of the data subject with the general principles of accountability and transparency.

79. The Commissioner believes that it would be reasonable for a junior official who is not a spokesperson for an organisation to have an expectation of privacy and to not normally be named.

80. In this matter, he withheld information containing personal details of several relatively junior members of staff of DFID and of some of its partners, the disclosure of which would breach their reasonable expectations of privacy in carrying out their public duties and therefore their rights to the protection of their personal information. Additionally the documents contain names of persons whose names have been mentioned in connection with the investigations into alleged wrongdoing that have been taking place. This constitutes sensitive personal information which carries with it higher expectations of privacy especially where those allegations have not been proven. The disclosure of such allegations would breach the rights of those individuals to privacy and, in some cases, expose individuals to suspicions that have not been substantiated. Accordingly the Commissioner decided that this personal information had been correctly withheld by DFID.

The Decision

81. The Commissioner's decision is that DFID dealt with the following elements of the request in accordance with the requirements of the Act:

- The information listed for withholding in his decision schedule was correctly withheld by DFID relying on sections 31, 40(2), 41 and 43.

82. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- Some of the information initially withheld was later disclosed so that there were breaches of sections 1(1)(b) and 10(1) of the Act.

- DFID failed to advise the complainant within 20 working days of exemptions that it later relied upon, this was in breach of section 17(1).

Steps Required

83. The Commissioner requires no further steps to be taken.

Right of Appeal

84. 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

85. 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.

86. 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 26th day of April 2011

Signed ……

Lisa Adshead
Group Manager

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

Legal Annex

General Right of Access

Section 1(1) provides that -

"Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."

Section 2(3) provides that –

"For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption –

(a) section 21

(b) section 23

(c) section 32

(d) section 34

(e) section 36 so far as relating to information held by the House of Commons or the House of Lords

(f) in section 40 –

(i) subsection (1), and

(ii) subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section,

(iii) section 41, and

(iv) section 44"

Time for Compliance

Section 10(1) provides that –

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

Refusal of Request

Section 17(1) provides that -

"A public authority which … is to any extent relying:

- on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request, or

- on a claim that information is exempt information

must, within the time for complying with section 1(1), give the applicant a notice which –

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies."

Law enforcement.

Section 31(1) provides that –

"Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

(a) the prevention or detection of crime,

(b) the apprehension or prosecution of offenders,

(c) the administration of justice,

….

(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),

(h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or

Section 31(2) provides that –

"The purposes referred to in subsection (1)(g) to (i) are-

(a) the purpose of ascertaining whether any person has failed to comply with the law,

(b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,

……

Personal information.

Section 40(1) provides that –

"Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject."

Section 40(2) provides that –

"Any information to which a request for information relates is also exempt information if-

(a) it constitutes personal data which do not fall within subsection (1), and

(b) either the first or the second condition below is satisfied."

Section 40(3) provides that –

"The first condition is-

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of

the information to a member of the public otherwise than under this Act would contravene-

(i) any of the data protection principles, or

(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and

(b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded."

Information provided in confidence.

Section 41(1) provides that –

"Information is exempt information if-

(a) it was obtained by the public authority from any other person (including another public authority), and

(b) 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 41(2) provides that –

"The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence."

Commercial interests.

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)."