

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 August 2012

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

Decision (including any steps ordered)

1. The complainant has requested copies of documents held by CDC Group plc (CDC) in relation to a report about a named company investing in Nigeria.
2. The Commissioner's decision is that CDC has correctly applied the exemption where the cost of compliance exceeds the appropriate cost limit as set out in section 12(1) FOIA and the accompanying regulations. However, CDC then unreasonably refused to provide advice and assistance as required by section 16(1) FOIA.
3. The Commissioner requires CDC to take reasonable steps to advise and assist the complainant with a view to refining his information request.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. CDC is a company which 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 is distinct from DFID and is managed quite

independently of it, working within a set of defined investment targets and an ethical investment code agreed with DFID.

6. The complainant told the Information Commissioner that he had provided information to CDC alleging irregularities in the affairs of the named company. He said that he had done this at great personal risk to himself and his family. He referred to what he said were well-documented dangers experienced by those fighting high-level corruption in Nigeria and provided the Information Commissioner with credible supporting evidence about some of those dangers.
7. On 31 August 2011, the complainant wrote to CDC and requested information in the following terms:

“Copies of the following documents in relation to the Report on [a named company] investing in Nigeria (the report)

 - *All notes and/ or minutes of meetings held by the CDC directors and staff that handled the report*
 - *All reports, including handwritten notes, of the investigations undertaken by CDC*
 - *All correspondence with the named company, DFID and [five other named international organisations].”*
8. CDC responded on 20 October 2011. It stated that information within the scope of the information request was held but that it was exempt from disclosure and that the exemptions contained in sections 27, 31, 36, 40, and 43(2) FOIA applied. CDC said it had not been able to carry out the relevant public interest test yet. Eventually, on 16 November 2011, CDC sent its full response.
9. On 22 November 2011 the complainant told CDC that he found it implausible that all of the information requested was exempt from disclosure and asked for a review of CDC's decision. Following an internal review CDC wrote to the complainant on 10 January 2012. It stated that the section 27, 31, 36, 40 and 43(2) exemptions of FOIA had been correctly applied, as had the relevant public interest tests.
10. In addition, CDC then added the section 42 FOIA exemption and said that the public interest in maintaining that exemption outweighed the public interest in disclosing the information.
11. Also on 22 November 2011 CDC apologised for the delays that had taken place which, CDC said, had arisen from its comprehensive investigation of the matter. Additionally, following internal review, CDC relied upon the exemption where the cost of compliance exceeds the appropriate limit which is set out in section 12(1) FOIA and the accompanying Freedom of Information and Data Protection (Appropriate

Limit and Fees) Regulations 2004 (SI 2004 No. 3244) (the regulations). CDC said that the aggregated likely costs of determining whether CDC held the information, locating it and extracting the information would significantly exceed the prescribed amount and that it was not therefore obliged to comply with the request.

Scope of the case

12. On 3 February 2012 the complainant contacted the Information Commissioner to complain about the way his request for information had been handled. He complained that no information at all had been provided and said that he found it implausible that all of the information held by CDC was exempt. He provided comment on some of the FOIA exemptions cited by CDC. He referred to a parallel request he had made to DFID and which had led to DFID disclosing some information and to the Information Commissioner issuing a decision on 26 April 2011, reference FS50307624.
13. The complainant also complained about the length of time taken by CDC to determine his information request.
14. The Information Commissioner considered the application of the appropriate costs limit exemption at section 12(1) FOIA. He established that CDC did not seek to rely on the vexatious requests exemption at section 14(1) FOIA and considered the extent to which CDC had offered advice and assistance as required by section 16(1) FOIA.

Reasons for decision

Cost of compliance exceeds appropriate limit – section 12 FOIA

15. Section 12(1) of FOIA states that:

“Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.”

16. Section 12(1) allows a public authority to refuse to comply with a request for information if the authority estimates that the cost of compliance would exceed the ‘appropriate limit’, as defined by FOIA and the regulations.
17. The appropriate limit for central government departments is £600 and for all other public authorities, including CDC, it is £450 or 18 hours of one member of staff’s time at a flat rate of £25 per hour.

18. The regulations allow a public authority to count the following activities in calculating whether or not it has complied with the appropriate limit:
- determining whether the information is held;
 - locating the information, or a document which may contain the information;
 - retrieving the information, or a document which may contain the information; and
 - extracting the information from a document containing it.
19. Section 12 explicitly states that public authorities are only required to estimate the cost of compliance with a request, not give a precise calculation. Therefore, it is the Information Commissioner's task in this situation to decide whether or not the estimate provided by CDC is reasonable in the circumstances.
20. CDC provided the Information Commissioner with its estimates of the time needed to locate, retrieve and extract the information held in respect of each of the three parts of the information request. CDC identified the steps it needed to take to be: verify the identity and number of staff who handled the report; search relevant emails, the number of which, CDC said, could exceed 10,000; search electronic records and make a targeted manual search of relevant folders; locate and search physical documents, notebooks and storage; and search relevant board minutes. CDC added that the costs should be aggregated in accordance with regulation 5 of the regulations.
21. The Information Commissioner's staff summarised the estimates that CDC provided in the table annexed to this decision notice. The CDC estimates showed that not less than 83 hours would be required and that, in its view, the time needed could be considerably more than that. The Information Commissioner has decided that the time needed would exceed the 18 hours provided for in the regulations and that CDC was therefore justified in not complying with the information requested.

Advice and assistance - section 16 FOIA

22. Section 16 FOIA states as follows:

"(1) It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.

(2) Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under

section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case."

23. Thus section 16(1) FOIA places a duty on public authorities to provide advice and assistance to applicants who have made or are planning to make requests for information. Where a request engages the costs limit, the process of providing advice and assistance usually involves the public authority in opening a dialogue with the applicant to try to find ways to refine the request in order to bring it under the appropriate costs limit.
24. Paragraph 14 of the section 45 FOIA Code of Practice (the code) says that where a public authority is not obliged to comply with a request, because it would exceed the appropriate limit to do so, then it:

"...should consider providing an indication of what, if any, information could be provided within the cost ceiling. The authority should also consider advising the applicant that by reforming or re-focussing their request, information may be able to be supplied for a lower, or no, fee."
25. Where a public authority has satisfied the requirements of the section 45 code, it will be deemed to have complied with section 16. However, this should not be taken to mean that a public authority should not go beyond the provisions of the code, as the Information Commissioner considers that public authorities should try to be as helpful and flexible as possible.
26. In cases where it is reasonable to provide advice and assistance in the particular circumstances of the case, the minimum a public authority should do in order to satisfy section 16 is to:
 - **either** indicate if it is not able to provide any information at all within the appropriate limit; **or**
 - provide an indication of what information could be provided within the appropriate limit; and
 - provide advice and assistance to enable the requestor to make a refined request.
27. CDC said, without providing supporting evidence, that the complainant had made other requests under a pseudonym. CDC did not pursue the point or explain its relevance in the context of providing the complainant with reasonable advice and assistance following his 31 August 2011 information request.
28. CDC told the Information Commissioner that narrowing the search terms would not be of assistance to the complainant because CDC considered

that, in any event, the information which it had so far identified was exempt from disclosure under FOIA. The Information Commissioner decided that CDC's view that the information requested would, if found, prove to be exempt prejudged the issue and did not absolve CDC from its duty to provide reasonable advice and assistance or to narrow the search. The Information Commissioner decided that if CDC identified relevant information within the scope of a narrower search, it would still be possible, at a later stage, for CDC itself, the Information Commissioner or the courts to overturn CDC's prejudicial view. He therefore decided that because the information appeared to CDC to be exempt did not absolve it from its duty to provide reasonable advice and assistance or to comply with section 1(1)(a) FOIA.

29. During his investigation, the Information Commissioner invited CDC to address the matter informally by providing section 16 advice and assistance so far as it would be reasonable to expect CDC to do so. For example, it might share with the complainant its estimates of costs, which appeared to open the possibility of some limited searches being made within the appropriate costs limit. However, CDC declined to do so.
30. CDC told the Information Commissioner that it was not reasonable for it to provide advice and assistance for several reasons. CDC said that the complainant had previously made allegations in connection with two of CDC's fund managers and CDC and DFID had investigated the allegations in detail. The information request to CDC had, it said, been triggered by the complainant's own 'unsubstantiated' allegations. CDC said that the complainant had embarked on a 'fishing expedition' and had used a scatter gun approach; it was not reasonable to expect CDC to suggest a refinement to his request when it was not clear what he was hoping to find.
31. CDC described the complainant's actions as aggressive, saying that the pattern, scope and nature of its correspondence with him, when taken in context, constituted aggressive behaviour. CDC said that it was now entering its fourth year of dealing with this line of questioning and CDC had already dedicated a disproportionate amount of time to answering the complainant's aggressive questioning.
32. CDC said that a full and detailed response to the substance of the allegations made by the complainant and others had been provided in a CDC report of November 2010. This document had been structured as a response to representations about these matters from a group of seven non-governmental organisations (NGOs) which had been working with the complainant and had submitted a memorandum dated 29 June 2010 to the Secretary of State for DFID. CDC said that the November 2010 response to that memorandum had been shared with the seven NGOs

which had authored the memorandum and the complainant was aware of its contents. The Information Commissioner saw independent evidence that the complainant was so aware. He also decided that the concerns raised by the complainant had been shared and raised by others.

33. The Information Commissioner recognised that CDC had expended significant time and resources in relation to addressing issues raised by the complainant and others previously but saw no evidence that this had extended to addressing the information request of 31 August 2011 and so had not satisfied CDC's duty to provide advice and assistance in relation to that information request.
34. The Information Commissioner also found that the refusal by CDC to offer the complainant advice and assistance did not sit comfortably with its chairman's letter of apology and expression of regret, which he made on 19 January 2012 and which is referred to in '*Other matters*' below. Nor was the refusal consistent with CDC's expressed wish to hear further from the complainant regarding any evidence he held of alleged misconduct by the named company.

Vexatious requests –section 14(1) FOIA

35. Section 14(1) of FOIA states that:

"Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious."

36. CDC said that the duty to provide advice and assistance in section 16(1) FOIA did not arise where a request was vexatious. However, CDC made clear to the Information Commissioner that it did not seek to rely on the vexatious request exemption at section 14(1) of FOIA.
37. CDC nevertheless argued that the same factors that arose where a request was vexatious made it reasonable for CDC not to advise and assist the complainant. CDC maintained that some of those factors were present within this matter – a line of reasoning that the Information Commissioner did not find to have been justified. The Information Commissioner saw no evidence in his investigation that the request was vexatious within the meaning of section 14(1) FOIA – as CDC itself had decided. The Information Commissioner decided that CDC had not advanced evidence of behaviours that were so extreme as to give it reasonable grounds for refusing to advise and assist the complainant.

Substantive procedural matters

38. The information request was made on 31 August 2011 and the initial response was not made until 20 October 2011 with a full reasoned

response made on 16 November 2011. In addition, the refusal notice did not specify section 12(1) FOIA which CDC relied upon subsequently. This delay exceeded the statutory time period of 20 working days and therefore breached sections 10(1), 17(1) and 17(5) of FOIA.

Other matters

39. On 19 January 2012 CDC's chairman wrote to the complainant to express his great regret at the very serious and entirely unwarranted harassment received by the complainant and his family as a result of CDC having inadvertently and wrongly disclosed the complainant's sensitive personal data to the named company. He said that CDC had acted in good faith and had offered a full apology and explanation of how the breach had occurred. The chairman concluded by saying that, to the extent that the complainant had evidence indicating misconduct in connection with relevant investments by the named company, he would welcome receiving the evidence and gave his assurance that CDC would respond appropriately.
40. DFID had also been party to the inappropriate disclosure of the complainant's sensitive personal data and DFID's Secretary of State had also offered a parallel and unconditional apology in respect of DFID's role in the matter.

Right of appeal

41. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

42. 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.
43. 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

**Jon Manners
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

ICO summary of the CDC estimates of time likely to be needed to comply with the request:

Search hours estimated:	Request 1	Request 2	Request 3
Verify identity and number of staff	10		
Review staff emails	14	[14]	[14]
Electronic storage	5	[5]	[5]
Physical docs and storage	26	[26]	
Board minutes	20	[20]	
Hard copy correspondence files			8
Total	75	[65]	8 + [19]

[] indicates activities where there may potentially be a risk of double counting at least some of the time likely already to have been taken in earlier searches.