

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 March 2013

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

Decision (including any steps ordered)

The complainant has requested information from the CDC Group plc ("CDC") relating to certain investments made by CDC. CDC refused to disclose the requested information, citing sections 41 and 43 of FOIA as a basis for non-disclosure. The Commissioner's decision is that section 41 of FOIA is engaged in relation to the entirety of the withheld information and that it was correctly applied by CDC. The Commissioner requires no steps to be taken.

Background

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.

Request and response

1. On 25 March 2012, the complainant wrote to CDC and requested information in the following terms:
 1. What investment has CDC made in Travant related funds?
 2. What are the relevant key laws and regulations applicable to Travant?
 3. Who are the co-investors in Travant Private Equity Fund 1 (TPEF1)
 4. How is TPEF1 organised?
 5. Did CDC require Travant to adopt and maintain an appropriate anti-corruption compliance programme?
 6. What are the TPEF1 portfolio companies?
 7. Does TPEF1 have any investments in real estate?
 8. Have there been any exits from any investments made by TPEF1?
2. CDC responded on 19 April 2012. It provided the complainant with the information requested in parts 1-2 and 4-8 of his request and refused to disclose the information requested in part 3. It cited the exemptions under sections 41 and 43(2) of FOIA as a basis for non-disclosure.
3. The complainant wrote to CDC on 23 April 2012 seeking clarification of its responses to his questions 1-8. This was sought by way of posing 4 additional questions. CDC treated that letter as a further request for information and responded to the complainant on 16 May 2012. It provided responses to questions 1-2 and 4 of the complainant's additional request, however it stated that, since question 3 was very similar to question 3 of the complainant's original request, the exemptions under sections 41 and 43(2) of FOIA applied to the information requested in part 3 (the withheld information). The text of question 3 of the complainant's further request was:-

"I would be grateful if you could advise whether there are any publicly owned Nigerian financial institutions that are co-investors and if so provide their names. I would also be grateful if you could advise whether any State or national governments are co-investors either directly or indirectly and if so provide their names."

4. On 22 May 2012 the complainant requested an internal review of CDC's decision not to disclose the withheld information to the complainant. The reviewer upheld the original decision, which outcome it communicated to the complainant on 13 June 2012.

Scope of the case

5. The complainant contacted the Commissioner on 9 August 2012 to complain about the way his request for information had been handled.
6. The Commissioner has considered CDC's application of the above exemptions to the withheld information.

Reasons for decision

7. Section 41 of FOIA states that:

(1) 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 that under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

This exemption is absolute and therefore it is not subject to a public interest test.

8. The Commissioner notes that the withheld information was provided to CDC by Travant and was not created by CDC. The Commissioner is satisfied in these circumstances that the information was obtained from another person or authority, therefore the requirement of section 41(1)(a) is satisfied.
9. In considering whether disclosure of information constitutes an actionable breach of confidence the Commissioner will consider the following:
 - Whether the information has the necessary quality of confidence;
 - Whether the information was imparted in circumstances importing an obligation of confidence; and
 - Whether the disclosure would be an unauthorised use of the information and of detriment to the confider.

Does the withheld information have the necessary quality of confidence?

10. The Commissioner finds that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial.
11. At the beginning of his investigation, the Commissioner carried out a search to see whether the information was in the public domain, and found that it was not. He is therefore satisfied that it is not otherwise accessible. He is also satisfied that it is more than trivial.

Does the information have the necessary obligation of confidence?

12. With regard to the circumstances in which the information was imparted, CDC explained that the Shareholders' Agreement of which the withheld information forms part, contains explicit obligations of confidentiality. The information was provided to CDC by Travant, who have informed CDC orally that they expect it to be kept in confidence. The Commissioner agrees that it is clear that the information was provided with a clear expectation on the part of Travant that it would not be disclosed.

Would disclosure be detrimental to any party?

13. With regard to the specific detriment that the unauthorised disclosure of the information would cause, CDC explained that it operates in a sector and in markets where trust and confidentiality are of paramount importance. Disclosure of the withheld information would undermine the relationship of trust and confidence between CDC and Travant and would make it very difficult for them to work together and for CDC to carry out its remit. Furthermore, CDC argued that disclosing the information may undermine the principle of confidentiality in so much as investors may be discouraged from approaching CDC. The Commissioner accepts that disclosure of the withheld information would cause detriment to both CDC and the confider.

Would disclosure of the confidential information be actionable?

14. Although section 41 of the FOIA is an absolute exemption and thus not subject to the public interest test contained at section 2 of FOIA, the common law concept of confidence suggests that a breach of confidence will not be actionable in circumstances where a public authority can rely on a public interest defence. The Commissioner must therefore consider whether the public interest in disclosing the

information overrides the duty of confidence that is owed. 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 maintaining the confidence

15. CDC argues that disclosure of the withheld information would undermine the principle of confidentiality, and that there is a strong public interest in preserving a relationship of trust and confidence which will facilitate the free flowing of information to a public authority. In this case specifically, there is a strong public interest in CDC maintaining and complying with its obligations of confidence, both under contract and common law, to its fund manager and co-investors.
16. CDC also argues that there is a strong public interest in being able to maintain trust by continuing to honour its confidentiality obligations. Disclosure of the withheld information could make it very difficult for CDC to carry out its remit in the sector and markets in which it operates, where trust and confidentiality are of paramount importance.
17. CDC further argues that, even if it were not excluded from participating in funds as a result of disclosing confidential information, there is a real risk that information provided to CDC in its capacity as an investor in other funds could be restricted. The Shareholders' Agreement in this case provides that Travant may keep information confidential from any shareholder in cases where it reasonably believes that there may be an improper disclosure of such information from which the information may not be adequately protected. This is standard wording in such agreements and would be likely to lead to a reduced flow of information to CDC in the event that it is forced to disclose confidential information and as a result is seen not to be able to protect confidential information from disclosure. This would hinder CDC severely from carrying out its remit, which would not be in the public interest.

Public interest in disclosure of the withheld information

18. The Commissioner considers that general arguments in favour of disclosure in such cases are that disclosure would highlight any misconduct, wrongdoing or risks to the public. Disclosure would also promote openness, transparency and freedom of expression.
19. The complainant argues that disclosure of the withheld information would be protected by a public defence of providing assurance to the public that the activities of the parties concerned are being conducted

in the public interest. He believes that there is a compelling public interest in disclosure of the information, in order to enable the public to make an informed decision as to the quality of the investors selected by CDC in this particular case.

Balance of the public interest arguments

20. The Commissioner considers that there is an inherent public interest in openness and transparency in the activities of any organisation. However, he has also taken into account CDC's arguments in favour of maintaining confidence and considers that there is an equally strong public interest in organisations such as CDC being able to maintain a relationship of trust and confidence with its co-investors and generally in its sector, in order to enable it to properly carry out its remit.
21. The Commissioner considers there to be an extremely strong public interest in information being disclosed which would highlight any misconduct, wrongdoing or risks to the public. He has taken into account the complainant's argument that the public needs to be assured that the activities of CDC and its co-investors are being conducted in the public interest.
22. The Commissioner has, however, also considered the arguments advanced by CDC in relation to this. CDC has argued that information relating to co-investors in funds in which CDC has also happened to invest will not serve to highlight any such wrongdoing, misconduct or risks, nor to provide any particular assurance to the public regarding CDC's activities. Having perused the withheld information, the Commissioner accepts this argument.
23. On balance, whilst the Commissioner accepts that there is a strong public interest in openness and transparency, and also in informing the public of any misconduct or risks to it, he considers that the public interest in preserving trust and the principle of confidentiality in this case outweighs that in disclosure of the withheld information. Therefore, he considers that the confidence should be maintained as there would not be an adequate public interest defence to any breach of confidence claim arising from such a disclosure.
24. Since the Commissioner considers that section 41 of FOIA applies to the entirety of the withheld information and that the public interest in maintaining the confidence outweighs that in disclosure of the withheld information, he has not gone on to consider CDC's application of section 43(2) of FOIA to the withheld information.

Right of appeal

25. 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

26. 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.
27. 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

Rachael Cragg
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