

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 29 July 2009

Public Authority: Department for Business, Innovation & Skills
Address: 1 Victoria Street
London
SW1H 0ET

Summary

The complainant wrote to the Department for Business, Enterprise and Regulatory Reform (now the Department for Business, Innovation & Skills) to request information regarding Actis, the private equity fund manager in which the government holds a 40% stake. The public authority disclosed some information requested by the complainant but withheld details of the calculations used to arrive at a valuation for Actis when it was sold to its management after it was “spun out” from the Commonwealth Development Corporation. The public authority claimed this information was exempt under section 43(2) of the Act as disclosure would prejudice the commercial interests of Actis and the Government. The Commissioner has investigated the complaint and has found that the information held by the public authority which relates to the calculations used to arrive at a valuation for Actis is exempt from disclosure under section 43(2) and the public interest in maintaining the exemption outweighs the public interest in disclosure. The Commissioner also found that the public authority breached section 10(1) (time for compliance) and section 17(3)(b) (refusal of a request) of the Act in its handling of the request but requires no steps to be taken.

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.

The Request

2. On 10 April 2007 the complainant wrote to the Department for Business, Enterprise and Regulatory Reform (“the public authority”) to request information regarding the sale of Actis by the Commonwealth Development Corporation (CDC). The request read as follows:

“Please let me have the following information concerning Actis, in which DfID holds a 40% stake –

- The calculations used to arrive at the valuation of the 60% stake sold to the company's management
 - The terms on which Actis provides services for CDC
 - The remuneration of the Actis partners for the latest year for which the information is held
 - Information held, including discussions among Actis, DfID and/or other parts of government, on the employee benefit trust which is a partner in Actis Capital LLP”
3. The public authority responded to the complainant's request on 19 July 2007. In response to part 1 of the request it explained that the calculations were undertaken by KPMG Corporate Finance Consultants who were appointed by the CDC Group plc and were provided on a confidential basis. It said that it was its view, and the view of other relevant parties, that the data contained within the calculations remained commercially sensitive and could damage the commercial interests of the company and the government as a client of the company and are therefore potentially exempt from disclosure under section 43 (commercial interests) of the Act. It said that it has considered the public interest in disclosure against the public interest in non-disclosure and had concluded that the public interest favoured maintaining the exemption.
 4. The public authority did, however, disclose to the complainant a summary of the methodology used by KPMG to reach its valuations. The public authority explained that it decided to do this after it had sought the agreement of all parties.
 5. In respect of part 2 of the request the public authority provided the complainant with a summary explanation of the terms on which Actis provides services to CDC.
 6. For the part 3 of the request the public authority explained that it did not hold information on remuneration of Actis' partners. It said that it was aware of the remuneration paid to the highest paid partner and directed the complainant to note 5 of the “Actis Capital LLP Members' Report and Consolidated financial Statements for the year ending 31 December 2005” where this information could be found.
 7. It confirmed that it had agreed with the complainant in earlier correspondence that he was happy to receive information on part 4 of the request in the form of a summary. The public authority now provided the complainant with a background to, and mechanisms of, the employee benefit trust which is a partner in Actis LLP.
 8. On 24 September 2007 the complainant contacted the public authority to ask that it carry out an internal review of its handling of his request. The complainant said

- that the response given did not answer his request. In particular he said that he thought the actual terms of dealing between Actis and CDC (part 2 of the request) and the calculations of the sale price of 60 per cent (part 1 of the request) should be disclosed.
9. The Shareholder Executive, part of the public authority, presented the complainant with the findings of the internal review on 19 November 2007. Dealing first with its response to part 1 of the request, it said that it still believed that data contained within the calculations is commercially sensitive and disclosure could damage the commercial interests of the company and the government were it to be disclosed and that therefore it was exempt from disclosure under section 43 of the Act. It concluded that the public interest in maintaining the exemption outweighed the public interest in disclosure.
 10. Commenting on its decision to provide a summary of the methodology used to reach a valuation, the public authority said that it trusted that this would provide the complainant with reassurance that standard industry methodology was used.
 11. The public authority said that it also wanted to comment on recent articles regarding the sale of Actis. It said that a recent valuation of Actis by the National Audit Office was not recognised or agreed by the Shareholder Executive or the Department for International Development and it did not understand the basis on which this valuation had been made. It said that a valuation of the business, which it explained does not currently make a profit and is not forecast to make a significant profit, was difficult. However it said that its view was that the value of Actis was significantly lower than the figure arrived at by the National Audit Office.
 12. The public authority had previously provided the complainant with a summary explaining the terms under which Actis provides services to CDC. It now explained that the full terms “are contained within an extensive and extant commercial contract subject to confidentiality clauses”. Rather than withhold all the information under section 43 of the Act, which it said it would have done had the complainant requested the whole contract, it said that it had decided to summarise the terms of the contract in order to provide the complainant with the key points. Explaining its decision to withhold the full terms of the contract, it said that confidentiality clauses are placed in contracts to protect the commercial interests of both parties. Breaking such clauses, it said, jeopardizes the specific commercial interests but also raises wider issues of trust and the ability to enter into commercial agreements where confidentiality is required. The public authority concluded that it was not in the public interest to release the contract in full.
 13. Following telephone calls from the complainant, the public authority wrote to him again on 23 November 2007 to clarify points from its previous letter regarding Actis’ profits. It confirmed that the Actis LLP accounts to 31 December 2006 contained the following item:

Profits for the financial period before Members’ profit share: \$18.2m.
 14. It explained that it was typical in LLP accounts for profits to be stated before salaried and bonus payments and therefore it could not be compared to profits

before tax that would be found in company accounts. It went on to say that if the accounts were to show Actis' profits after the deduction of salaries and bonus payments, the distributable profit would be zero. Therefore it said that if the profits for Actis were shown in a company format one would expect to find that the profit of the business, either retained in the business or paid as a dividend, would be zero. The public authority apologised for any confusion caused by its previous response.

The Investigation

Scope of the case

15. On 23 January 2008 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
16. On 11 November 2008 the Commissioner contacted the complainant to clarify his grounds for complaint. Noting that in its internal review the public authority only reviewed its response to parts 1 and 2 of the request, the Commissioner asked the complainant to confirm for which elements of his request he wished to pursue a complaint.
17. On 16 November 2008 the complainant contacted the Commissioner to say that he was happy to restrict his complaint to cover the public authority's response to parts 1 and 2 of his request.

Chronology

18. The Commissioner contacted the public authority on 17 November 2008 with details of the complaint. The Commissioner asked for copies of the information withheld in response to parts 1 and 2 of the request and asked the public authority to provide responses to the following:
 - An explanation of how disclosure of the information in parts 1 and 2 would, or would be likely to, prejudice the commercial interests of a) Actis and b) the Government.
 - Confirmation as to whether BERR sought the views of Actis when considering whether disclosure would prejudice its commercial interests, and an outline of their response if they did so.
 - Arguments on why the public interest in maintaining the exemption in section 43 outweighs the public interest in disclosure, for both parts 1 and 2 of the request.
19. The Commissioner invited the public authority to make any additional representations in support of its handling of the complainant's request and asked it to respond to him within 20 working days.

20. The public authority responded to the Commissioner on 19 December 2008. It addressed part 1 of the request first and explained that KPMG were appointed by CDC to arrive at a valuation of the new business which was being established to undertake fund management (Actis). It said that the information it held which was relevant to the request was a KPMG report relating to the valuation of the company. It said that as far as it was aware from a search of its records, this was the only information it held which was relevant to this part of the complainant's request. The public authority provided the Commissioner with a copy of this report and provided detailed answers to the 3 questions asked by the Commissioner.
21. Addressing part 2 of the request, it said that the terms under which Actis provides services for CDC are contained within the contract between Actis and CDC for the period 2004-2008. The public authority noted that the Commissioner had now issued a Decision Notice in a separate case where the complainant had requested a copy of this contract. The public authority said that a redacted version of the contract had been released and it understood that the complainant in this case had received a copy as well. It explained that this redacted version sets out, at clause 2, the services Actis is contracted to provide CDC. As such it said that it did not think that any further action was necessary on its part.
22. The Commissioner contacted the public authority again on 29 January 2009. In its previous letter the public authority had explained that disclosure of the information in part 1 of the request would prejudice the commercial interests of Actis because the report would provide competitors with information about the strategic direction and investment strategy of Actis. The Commissioner now asked the public authority to explain which parts of the report contained this kind of information and asked it to clarify why such information would be of use to Actis' competitors and why this would prejudice its commercial interests.
23. The public authority had also suggested that potential investors in Actis or potential partners would be reluctant to deal with that company if they thought that information regarding a potential deal could be disclosed under freedom of information legislation. The Commissioner now asked the public authority if it had any evidence, including from other jurisdictions, where this had happened.
24. Finally, the Commissioner said that on reviewing the report it appeared to him that not all of the information related directly to the calculations used to arrive at a valuation for Actis and so he asked the public authority to clarify which aspects of the report it considered to fall within the scope of the request.
25. The public authority responded to the Commissioner on 12 February 2009 and provided details of which sections within the report *do not* contain information on the strategic direction and investment strategy of Actis. It went on to explain that disclosure of information in the report would place it at a disadvantage as it would provide competitors with an insight into Actis' business whereas they would never be expected to reciprocate by placing such information in the public domain.
26. In response to the Commissioner's second point the public authority explained that it was not aware of any examples from other jurisdictions where similar circumstances may apply. Nevertheless it provided the Commissioner with further

background information on the importance of confidentiality to the private equity industry.

27. As regards which sections of the report the public authority considered to fall within the scope of the request, it now clarified that the report provides a valuation for the whole of the new fund management company rather than the 60 per cent stake sold to management and that therefore the report does not contain the necessary information to answer the specific request. However, it said that because the total value of the business must be calculated before a 60 per cent stake can be determined, many of the principles and approaches documented in the report are relevant. For this reason it deemed it appropriate to respond to the request in the way it did.
28. The Commissioner considered that in order to reach a decision on the public authority's application of section 43 he required further explanation of why disclosure of the requested information would prejudice Actis' commercial interests. Therefore the Commissioner contacted the public authority again on 19 February 2009 and asked it to explain why a potential competitor would be able to use information within the report on Actis' strategic development and investment strategy to gain a commercial advantage.
29. The public authority responded to the Commissioner on 5 March 2009. The public authority now provided the Commissioner with a list of reasons why disclosure of the various types of commercially sensitive information contained within the report would prejudice Actis' commercial interests. In doing so it provided the Commissioner with examples of how Actis' competitors and potential investors could use information within the report to gain a commercial advantage.
30. On 18 March 2009 the Commissioner contacted the complainant to update him on the progress of the investigation and to ask him to confirm that he had received the redacted copy of the Umbrella Agreement including, at clause 2, the terms on which Actis provides services for CDC. The complainant responded on the same day to say that he had received a redacted copy of the Umbrella Agreement but that he did not consider this to satisfy his request. He said that he wanted information on what determines how much Actis gets paid and asked the Commissioner to consider whether this information should be disclosed.
31. On 18 March 2009 the Commissioner wrote to the public authority to ask for its comments on the complainant's suggestion that the information at clause 2 of the Umbrella Agreement did not meet the terms of part 2 of his request. The Commissioner asked the public authority to forward him copies of any additional information it may or may not hold.
32. The public authority responded to the Commissioner on 31 March 2009. The public authority now confirmed that, at the time the request was received, it did not hold any additional information falling within the scope of part 2 of the complainant's request, other than the information contained in the Umbrella Agreement.

Findings of fact

33. CDC was created in 1948 and has developed as the primary operator for the Government's private sector investment programme in developing countries. It has responsibilities for carrying out the Government's investment strategy by making investments in private sector businesses in developing countries and conducting the ongoing management of the resulting investment portfolio. It is wholly owned by the Department for International Development.
34. In 2002 the Government proposed a change to the structure of CDC and suggested that the new structure should be based upon the private equity fund management model, whereby CDC would use independent companies with different expertise to manage the investment of its funds. As a result a new entity, Actis, was 'spun out' from CDC as an independent and privately controlled fund manager in the emerging markets.
35. The contract between Actis and CDC in 2004 is known as the Umbrella Agreement. The Commissioner has previously considered disclosure of this information in a previous case (ref: FS50094891) in which he ordered that a redacted version of the agreement should be released.¹
36. KPMG corporate finance consultants were appointed by CDC to perform calculations and provide an objective opinion on the valuation of the business to be established to undertake fund management (Actis). Firstly, KPMG provided an independent opinion on the valuation on the whole of the new company. The advice was reviewed and accepted by an independent committee of the CDC board. Following this KPMG advised on the appropriate value of the 60 per cent ownership interest in the new company, taking into account the arrangements for the distribution of any profits.
37. The information withheld under part 1 of the request (the report) only represents the work done to arrive at a valuation for the whole (i.e. 100 per cent) of Actis. The public authority has confirmed that it does not hold the additional information undertaken by KPMG to arrive at a valuation of the 60 per cent stake sold to Actis' management. The Commissioner understands that the valuation of management's share was not a matter of simply calculating 60 per cent of the full value of the business and that the specific terms set out at the time of the transaction were also taken into account.
38. The valuation of the 60 per cent stake of Actis, which was sold to the company's management, was £373,000.² The Department for International Development (DfID) hold a 40 per cent stake in Actis.
39. In September 2007 the House of Commons Public Accounts Committee reported that the National Audit Office's valuation of Actis fell within a range of between £182 million and £535 million.³

¹ http://www.ico.gov.uk/upload/documents/decisionnotices/2008/fs_50094891.pdf

² Hansard HC vol 418 col 637W (1 Mar 2004)

³ House of Commons Committee of Public Accounts, *The Shareholder Executive and Public Sector Businesses*, p.7.

40. In February 2009 The National Audit Office acknowledged to the Public Accounts Committee that its previous valuation of Actis was too high and that the valuation arrived at by KPMG was in fact 'reasonable'.⁴

Analysis

41. A full text of the relevant provisions of the Act referred to in this section is contained within the legal annex.

Exemption

Section 43(2) – Commercial interests

Part 1 – The calculations used to arrive at the valuation of the 60% stake sold to the company's management

42. The public authority has refused to disclose the information it holds regarding the calculations used to arrive at a valuation of the 60 per cent stake sold to the management of Actis (part 1 of the complainant's request). The information the public authority holds which is relevant to this request is contained within a report by KPMG who were appointed to undertake a valuation of Actis as a result of it being 'spun out' from CDC. The public authority has explained that the report provides a valuation for the whole of the company and that KPMG carried out additional work to advise on the valuation of the 60 per cent stake sold to management. The public authority has said that it does not hold this additional information and therefore it has explained that, strictly speaking, it does not hold all of the information needed to answer the complainant's specific request. However, given that the valuation of the whole company must be determined before the 60 per cent stake can be calculated the Commissioner is satisfied that the information contained within the report which relates to the calculations used to arrive at a valuation for the whole company falls within the scope of the request.
43. The Commissioner would also add, for the avoidance of any doubt, that he is satisfied that the public authority does not hold the additional work carried out by KPMG. The public authority explained that a search of its records did not produce this additional information. Given that it is the Department for International Development rather than the public authority which has responsibility for CDC, and in the absence of any evidence to the contrary, the Commissioner is satisfied that this information is not held.
44. The public authority has withheld the information it holds under section 43(2) of the Act. Section 43(2) provides that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person including the public authority holding it.

⁴ <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmpublic/94/8121512.htm>

45. The public authority has claimed that disclosure of the data within the KPMG report could prejudice the commercial interests of both Actis and the government, as a client of Actis. It has argued that, to its knowledge, Actis is the only private equity business that could become subject to a request under the Act. The Commissioner would stress that Actis is not a public authority itself. However, clearly Government departments do hold information about its commercial interests whereas this would not be the case for other private equity businesses. In light of this the public authority has argued that disclosure will place Actis at a disadvantage to its competitors for the following reasons, repeated here as direct quotations:
- The report would provide competitors with information about the strategic direction and investment strategy of Actis and CDC.
 - Private equity investors have industry wide-confidentiality expectations. Disclosure of aspects of an entity's underlying business plan would be disproportionately damaging in a private equity context and could present a threat to Actis's credibility with potential investors, not least because it would raise doubts over future releases of commercially sensitive information.
 - There is a range of information contained in the report which relates to joint venture agreements with several entities some of which are private sector companies. The report includes various details of these JV's including management fees, investment limits, governance structures and details in relation to carried interest and hurdle rates. Actis and CDC, as well as third parties, regard this information as commercially sensitive. Furthermore, release of information could discourage other corporate entities from dealing with CDC and Actis due to the perceived risk of future public disclosure of commercial arrangements.
46. The public authority has not said whether it considers that disclosure of the withheld information "would" or "would be likely to" prejudice Actis' commercial interests but has instead said that it believes that disclosure "could prejudice" or "has the potential to prejudice" the commercial interest of Actis and the government. In light of this the Commissioner feels that in assessing the level of prejudice at which the exemption has been engaged it is appropriate to employ the lesser test, that is to say that the exemption will be engaged where disclosure would be likely to prejudice the commercial interests of Actis and/or the Government.
47. The Commissioner is of the view that for the exemption to apply the possibility of prejudice being caused must be real. This follows a decision of the Information Tribunal in *John Connor Press Associates v Information Commissioner* in which it stated that:

*"the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk."*⁵

⁵ John Connor Press Associates v Information Commissioner [EA/2005/005], para. 15.

48. This interpretation follows the Judgement of Mr Justice Munby in the High Court in which the view was expressed that:

“Likely connotes a degree of probability that there is a very significant and weighty chance of prejudice to the identified public interests. The degree of risk must be such that there ‘may very well’ be prejudice to those interests, even if the risk falls short of being more probable than not.”⁶

49. The Commissioner is also mindful of the comments of the Information Tribunal in the case *Derry City Council v Information Commissioner*.⁷ In that case the Tribunal rejected Derry City Council’s argument that disclosure of the requested information would prejudice the commercial interests of a third party, Ryanair, because the Tribunal had not been provided with any direct evidence from Ryanair to support this argument.
50. The Commissioner understands that the decision of the Tribunal could be taken to mean that arguments as to what prejudice could be caused by disclosure can be discounted or given less weight when advanced on a speculative basis by a public authority. However in this case the Commissioner recognises that the public authority has consulted Actis, as well as other important stakeholders such as DfID, CDC and KPMG and they are of the view that the requested information is commercially sensitive.
51. The public authority has explained that the report contains a wide range of detailed financial and strategic information on plans for Actis which includes:
- the structure and composition of its funds and investment portfolio;
 - plans for future investments;
 - joint venture arrangements;
 - projected financial statements including cash flows by fund;
 - projected fund raising plans;
 - forecast investment returns; and
 - planned management fees.
52. The Commissioner would add that the report also contains a detailed analysis of the risks and threats to Actis.
53. The public authority has argued that given Actis’ unique position as a private equity business partly owned by government, disclosure of this kind of detailed financial and strategic information would put it at a commercial disadvantage

⁶ R (on the application of Lord) v Secretary of State for the Home Office [2003] EWHC 2073 Admin

⁷ Derry City Council v Information Commissioner [EA/2006/0014]

because it would provide Actis' competitors with an insight into its business which would never be reciprocated. In essence the public authority's argument is that disclosure would prejudice Actis' commercial interests as it would reveal commercially sensitive information which Actis' competitors would be able to use to their advantage.

54. The public authority has provided the Commissioner with examples of how this information would be used by Actis' competitors to their advantage and how consequently its commercial interests would be likely to be prejudiced. Firstly the public authority has explained that the report includes a forecast of rates of return on investments as well as investment plans by fund/geographic area. The public authority has suggested that if a competitor believes it can achieve a better rate of return it could use this knowledge in its marketing to potential investors. The information would also provide an insight into where Actis is focusing its third party fundraising efforts. A competitor would be able to use this information to modify its own efforts accordingly. The report also includes details of the investment plans for its funds, revealing the relative weighting Actis attaches to each of its funds, as well as the cost base for each of the funds. The Commissioner accepts that competitors would be able to use information of this kind to favourably position their own priorities by emphasising a certain fund, geographical or industrial focus of their business compared to Actis in order to target investors.
55. The Commissioner is satisfied that one likely consequence of disclosing information on the strategic direction and investment strategy of Actis would be to prejudice its ability to attract investment, which is obviously crucial to its success as a private equity fund management business.
56. The public authority has also argued that the report contains details of the management fees charged by Actis for the funds under management as well as the expected rates of return on investments. The public authority has argued that disclosure of this information could also be used as a reference point by potential investors in Actis in order to negotiate more favourable terms on which an investor might make a commitment to a fund. The Commissioner considers that this is a logical argument and is satisfied that this would be likely to prejudice the commercial interests of Actis.
57. The Commissioner wishes to stress that the valuation of the company, as set out in the report, is not based on a single, simple calculation but is instead an analysis of various valuation methodologies based on a detailed financial model provided by CDC. The Commissioner has reviewed the report and is satisfied that none of the information which relates directly to the calculations used to arrive at a valuation of Actis could be disclosed without causing the prejudice he has described in the previous paragraphs. Clearly some limited sections of the report such as the introduction, background and sections detailing KPMG's terms of engagement do not raise these concerns. However, it is the Commissioner's view that such information falls outside of the scope of the request given that it would not provide the complainant with any information related to the calculations used to arrive at a valuation for Actis.

58. The Commissioner is satisfied that disclosure of the financial and strategic information contained within the report would be likely to be used by competitors or potential investors in such a way that it would be likely to prejudice the commercial interests of Actis. Nevertheless, for the sake of completeness the Commissioner has gone on to consider the other arguments advanced by the public authority.
59. The public authority's second and third arguments for engaging the exemption (paragraph 42 above) are similar, namely; third party investors and potential partners would be discouraged from working with Actis by the prospect that information could be released under the Act. The public authority has argued that Actis' unique position as a private equity business, partly owned by Government means it would be placed at a disadvantage to its competitors from which similar information would not be available.
60. The Commissioner believes that this argument can be viewed as a general class based argument, i.e. if any of the information in the report, which falls within the scope of the request, were disclosed then potential investors and partners would be more reluctant to deal with Actis.
61. The public authority has not provided any firm evidence to show that potential investors or other bodies are reluctant to deal with fund managers such as Actis where there is the prospect that information about their business may be disclosed. However, the Commissioner is mindful of the discreet nature of the private equity industry and understands that within the industry there are strong expectations of commercial confidentiality. As such it is difficult to provide specific examples of where investors have declined to invest with a fund manager because of the potential for disclosure under freedom of information legislation. Furthermore, given Actis' somewhat unique position as a private equity fund manager partly owned by government, it is unsurprising that the public authority was unable to provide the Commissioner with examples of similar cases and the failure to do so does not necessarily detract from the strength of the argument.
62. Having said this, the Commissioner is aware of cases in the USA where fund managers have refused to accept investments from investors with freedom of information obligations, such as public sector pension funds, for fear that information about the performance of their funds may be disclosed. Notable examples include that of the California Public Employees Retirement System, (CalPERS), one of the largest pension funds in the USA, where some private equity funds barred future investment from this public entity after it was forced, under freedom of information legislation, to disclose information regarding the performance of funds in which it had invested.⁸ Subsequently four US states (Colorado, Massachusetts, Michigan and Virginia) modified their information laws to exempt from disclosure some information about private equity funds.⁹
63. Clearly such examples are not directly analogous to the circumstances in this case as the public authority's argument is that the prospect of disclosure would

⁸ Source: http://www.nixonpeabody.com/publications_detail3.asp?ID=937

⁹ *ibid*

lead to investors being reluctant to invest their funds with Actis, a fund manager, rather than fund managers being reluctant to accept public sector investments as was the case in the USA. However the Commissioner believes that this does allude to the sensitive and discrete nature of the private equity industry and suggests that disclosure of detailed financial information on Actis would, at the least, be viewed with concern by some within the industry.

64. The Commissioner understands that it is important that private equity fund managers are seen to be performance driven and independent from government in order for them to be able to attract third party investment. Therefore the Commissioner is satisfied that, on balance, disclosure would be likely to harm the perception of Actis in the eyes of potential investors and partners and consequently would be likely to prejudice its commercial interests.
65. Clearly arguments that disclosure would prejudice the ability of Actis to attract third party investment would only prejudice its commercial interests if Actis intends to attract investment from third parties other than CDC. The Commissioner is aware that at the time the complainant made his request Actis was in the process of a major fundraising initiative and a major marker of the success of its de-merger from CDC will be its ability to generate third party investment.
66. The Commissioner is therefore satisfied that the section 43 exemption is engaged in respect of all the information contained within the report which falls within the scope of part 1 of the complainant's request.

Part 2 – The terms on which Actis provides services for CDC

67. When the public authority initially responded to part 2 of the complainant's request it provided a brief half page summary of the terms on which Actis provides services to CDC. At the internal review stage the public authority explained that the full terms were contained within a commercial contract (the Umbrella Agreement) and that it considered it was more appropriate to provide the complainant with a summary of what it believed were the key points rather than withhold all the information under section 43 of the Act. It concluded that the public interest in maintaining this exemption outweighed the public interest in disclosing the document in full.
68. When the Commissioner contacted the public authority with details of the complaint it said that it now considered that part 2 of the request had been satisfied by disclosure of the redacted version of the Umbrella Agreement. The redacted Umbrella Agreement includes at clause 2 a brief outline of the services that Actis is contracted to provide CDC. It does not include details of how Actis is remunerated.
69. The complainant has argued that the information provided at clause 2 of the Umbrella Agreement does not meet part 2 of his request as it does not contain details of what Actis is paid for providing services to CDC. The Commissioner has considered whether such information could be said to fall within the scope of this part of the request. The word 'terms' is defined as the conditions under which

some action may be undertaken or a dispute settled including conditions with regard to payment for goods or services.¹⁰ Therefore the Commissioner considers that an objective reading of the request would suggest that information on what Actis is paid would also fall within the scope of this part of the request.

70. Furthermore the Commissioner has found that this information was held by the public authority at the time the request was received because the Umbrella Agreement includes schedules that detail the level of management fees and carried interest (Actis' employees' share of any profits generated on a fund) that shall be paid to Acts.
71. At the internal review stage the public authority said that section 43 applied to the Umbrella Agreement and therefore the Commissioner has gone on to consider whether or not this exemption would apply to the information within the umbrella Agreement which relates to how Actis is remunerated by CDC. The Commissioner is of the view that disclosure of this information would raise the same concerns as the disclosure of the information in part 1 of the request, as outlined in the previous section. The public authority has already said that disclosure of information regarding management fees would prejudice Actis' commercial interests as it would prejudice their ability to attract third party investment. This is because it would reveal the terms on which it is prepared to manage a fund which would allow its competitors to undercut it in any future negotiations. This argument is equally relevant to this information and therefore the Commissioner has decided that the information within part 2 of the request is also exempt from disclosure under section 43(2) of the Act. The Commissioner would also stress that he has previously considered disclosure of the Umbrella Agreement in a decision notice issued under case ref: FS50094891.

Public Interest Test

72. Section 43 is a qualified exemption and therefore subject to a public interest test under section 2(2)(b) of the Act. Section 2(2)(b) provides that information may only be withheld if an exemption applies and in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
73. The Commissioner recognises that there is a public interest in information regarding the valuation of Actis being disclosed. Disclosure would serve the public interest as it would shed light on how the valuation of Actis was arrived at. It would allow for greater scrutiny of the sale of Actis to its management or else would provide assurance that the valuation process was carried out properly. The Commissioner believes that there is also a general public interest in promoting greater transparency and accountability in a company like Actis in which the government maintains a 40 per cent shareholding. In addition disclosure of the information in part 2 of the request would serve the public interest in transparency and accountability as it would reveal whether CDC, and therefore the Government, was getting value for money from its dealings with Actis and whether the fees paid to Actis were in line with industry norms.

¹⁰ *Shorter Oxford English Dictionary* (Oxford: Oxford University Press, 2002)

74. Given the difference in the KPMG valuation and the initial National Audit Office valuation there has clearly been some concern that part of a government owned investment fund may have been sold to its management “on the cheap”. Any suggestion that the taxpayer has suffered by the company being undervalued would be a significant public interest factor. However, as noted at paragraph 40, it has now become clear that the National Audit Office’s initial valuation was too high and therefore the Commissioner has attributed less weight to this factor. Whilst the Commissioner notes that this fact only emerged during the course of his investigation and therefore after the request was made, he believes that it is only proper to take this into account as it serves to illuminate public interest factors that were present at the time the request was made.
75. On the other hand, the Commissioner also believes that there is a public interest in preventing the kind of prejudice he has outlined above. In essence the public authority’s argument for engaging the exemption is that disclosure would prejudice Actis’ commercial interests because it would make it more difficult for it to attract third party investment as well as making it more difficult for it to deal with other potential partners. Given that the Department for International Development is also a shareholder in Actis any prejudice caused to Actis’ commercial interests would consequently prejudice the commercial interests of the Government. Therefore, whilst there may be concern that the sale of Actis failed to get the best deal for the taxpayer, at the same time the Commissioner believes that the public interest would not be served by disclosing information which would be likely to put taxpayers money at unnecessary risk.
76. Actis was established as the fund management arm of CDC with responsibility for investing funds in companies and projects in developing countries which otherwise may find it difficult to obtain capital. Disclosure of the requested information would be likely to make it more difficult for Actis to attract additional third party investment and consequently the levels of funds it would be able to invest would be reduced. The Commissioner is of the opinion that there is a public interest in helping the economies of developing countries and considers this a further factor in favour of maintaining the exemption.
77. In reaching his decision the Commissioner has also considered the severity and extent of the prejudice that would be caused to Actis and the Government as a result of disclosure. Having reviewed the report the Commissioner is aware that the success of Actis’ will be measured to quite a large extent on its ability to attract third party investment. Therefore the particular prejudice that would be likely to be caused in this case would have a very significant impact on Actis’ success.
78. In this sense the timing of the request is also significant. The Commissioner is mindful of the fact that the spin-off of Actis from CDC was only finalised in 2004 and the complainant made his request in April 2007. Therefore, at the time the request was received Actis was still at an early stage in its development and so any prejudice that would be caused would be likely to have a greater impact on the business. The report also contains projected financial information up to 2008

and so in this sense the information was still current when the complainant made his request.

79. Having considered the arguments for and against the Commissioner has decided that the public interest favours maintaining the exemption. The Commissioner believes that there is a legitimate public interest in knowing that the valuation of Actis was carried out properly and that standard industry methodology was followed. However, the Commissioner is satisfied that this public interest has to a certain extent already been met by the public authority disclosing to the complainant details of the methodologies that were used in this case and with assurances that the valuation was carried out properly. The Commissioner is of the opinion that there is a strong public interest in disclosure of information regarding the sale of Actis and its relationship with CDC and the Commissioner accepts that disclosure of the requested information would shed further light on this issue. However he has decided that the severity of the prejudice that would be caused to the commercial interests of Actis is such that, on balance, the public interest falls in maintaining the exemption outweighs the public interest in disclosure.
80. The Commissioner has decided that in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Procedural matters

81. The complainant made his request to the public authority on 10 April 2007 and the public authority responded on 19 July 2007. By failing to confirm that it held the information in part 1 and 2 of the request within 20 working days the public authority breached section 10(1) of the Act for late compliance with section 1(1)(a).
82. The public authority breached section 17(1) by failing to issue the refusal notice within 20 working days
83. In the refusal notice the public authority explained that the information in part 1 of the request was exempt from disclosure under section 43(2) of the Act. However, it failed to state its reasons for claiming that the public interest in maintaining the exemption outweighs the public interest in disclosure of the information, in breach of section 17(3)(b) of the Act (refusal of request).
84. For part 2 of the request the public authority initially supplied the complainant with what it said was a summary of the terms on which Actis provides services for CDC. However it failed to disclose to the complainant the information in clause 2 of the contract and therefore breached section 1(1)(b) by failing to provide the information to the complainant by the time of the internal review and breached section 10(1) for failing to provide the information within 20 working days.

The Decision

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

- The public authority dealt with the request in accordance with section 1(1)(b) of the Act by correctly withholding the information falling within part 1 of the request under the exemption in section 43(2) of the Act.
- The public authority dealt with the request in accordance with section 1(1)(b) of the Act by correctly withholding the non-disclosable information falling within part 2 of the request under the exemption in section 43(2) of the Act.

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

- The public authority breached section 10(1) of the Act by failing to failing to confirm that it held the information in part 1 and 2 of the request within 20 working days.
- The public authority breached section 17(1) by failing to issue the refusal notice within 20 working days.
- The public authority breached section 17(3)(b) of the Act by failing to state its reasons for claiming that the public interest in maintaining the section 43(2) exemption outweighed the public interest in disclosure.
- The public authority breached section 10(1) of the Act by failing to disclose to the complainant the disclosable information in part 2 of the request within 20 working days.
- The public authority breached section 1(1)(b) of the Act by failing to disclose to the complainant the disclosable information in part 2 of the request by the time of the internal review.

Steps Required

86. The Commissioner requires no steps to be taken.

Right of Appeal

87. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre

PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk

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

Dated the 29th day of July 2009

Signed

**Steve Wood
Assistant Commissioner**

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

Legal Annex

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(2) provides that –

“In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

- (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
- (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”

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.”

Section 17(1) provides that -

“A public authority which, in relation to any request for information, 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.”

Section 17(3) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

- (a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

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).”