

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 21 March 2011

Public Authority: The Department for International Development
Address: Abercrombie House
Eaglesham Road
East Kilbride
Glasgow
G75 8EA

Summary

The complainant requested information relating to the Department for International Development's (DFID) support and contribution to two International Finance Corporation Development Facilities. DFID withheld the information under section 27 of the Act (international relations). The Commissioner finds that the section 27 exemption has been correctly applied and the information should not be disclosed. However, the Commissioner identified a series of procedural shortcomings on the part of the public authority. He 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.

Background

2. The Department for International Development (DFID) is the part of the UK government that manages Britain's aid to developing countries and works to alleviate extreme poverty. DFID works with governments of developing countries as well as charities, businesses and international bodies, including the World Bank, UN agencies and the European Commission.

3. An international financial institution established in 1956, the International Finance Corporation (IFC) is a member of the World Bank Group. It is one of the world's largest international sources of financing for private sector investment in developing countries with a mandate to reduce poverty and improve people's lives. It finances and provides advice for private sector ventures and projects in developing countries in partnership with private investors. Through its advisory work, it helps governments create conditions that stimulate the flow of both domestic and foreign private savings and investment.

The Request

4. The complainant wrote to DFID on 16 October 2007 with the following request for information:

"Finally, whereas I am able to obtain via the DFID website full details of the Project Memorandum: A Proposed DFID Contribution to the IFC Project for a South Asia Enterprise Development Facility signed April 16 2002, I am unable to obtain similar Project Memoranda relevant to DFID's support and contribution to two other IFC Project Development Facilities launched in 2002:

- *Mekong Project Development Facility II (MPDF); and*
- *China Project Development Facility (CPDF).*

I would appreciate if you would kindly provide the web addresses relevant to these two documents or alternatively provide hard copies of both".

5. DFID responded on 16 November 2007. In this correspondence, the author told the complainant:

"I enclose the document for the China project. I am trying to track down a copy of the document for the Vietnam project and will get back to you about that".

6. The complainant wrote to DFID on 14 December 2007 expressing dissatisfaction with its correspondence of 16 November 2007. With respect to the document it had provided to her, she said:

"It is clearly not what I requested".

7. She asked for the actual requested information to be made available *"without further delay".*

8. On 1 February 2008, DFID wrote to the complainant explaining that:

"officials are still looking into whether it will be possible to provide you with the two Programme Agreements that you have requested".

9. On 15 February 2008, DFID wrote to the complainant, advising her that *"it is not possible to send you copies of the project documents you have requested"*. Although a brief explanation was given as to why the information was not being provided, no reference was made either to the Act, or to any exemptions.
10. Following the Commissioner's intervention, DFID wrote to the complainant on 26 June 2008. In this correspondence, DFID acknowledged that her original request was not treated formally as a freedom of information request as it should have been. It confirmed that, having been appraised of her complaint, it had now conducted its internal review.
11. DFID confirmed that it holds *"copies of documents for the MPDF II and CPDF projects both of which are described as Project Memoranda"*. DFID went on to explain to the complainant that they are not directly comparable to the Project Memorandum which she referred to in her correspondence. The Commissioner notes that DFID explained to the complainant that this is due to the fact that the information it holds, that falls within the scope of the request, was drawn up by the IFC rather than by DFID.
12. Having established the nature of the information it held that fell within the scope of the request, DFID refused to disclose it, citing the exemptions in section 27(1)(a), (b), (c) and (d) of the Act (international relations).

The Investigation

Scope of the case

13. Although the Commissioner contacted the complainant on 28 July 2008 about the outcome of the internal review, it appears that she did not receive this correspondence. It was not until 2 September 2010, when she contacted him about a different matter, that it was clear that the complainant wished to complain about the way her request for information of 16 October 2007 had been handled.
14. The Commissioner notes that during the long history of this case, the requested information has been described in various ways. For clarity, this Decision Notice will refer to the information at issue as "Project Memoranda".

15. As noted above, DFID advised the complainant that, although not directly comparable to the Project Memorandum she referred them to, it holds information within the scope of the request, namely two documents drawn up by the IFC.
16. The complainant has argued that DFID's *Blue Book* (DFID's rules for internal procedures) requires that all projects and programmes involving trust fund contributions over £1 million, whether managed by the WBG or another partner agency, must be supported by a standard DFID Project Memorandum. Therefore, in her view:

"even if the WBG also draws up a Project Memorandum for signature by DFID and other relevant donors, as implied in DFID's refusal notice, DFID would still be required to complete a detailed Project Memorandum".

17. For the avoidance of doubt, the Commissioner asked DFID for clarification on this point. Having considered its response, he is satisfied that the withheld information, Project Memoranda authored by the IFC, is the information held by DFID which falls within the scope of the request.

Chronology

18. The Commissioner wrote to DFID on 11 October 2010 asking whether, given the passage of time, the withheld information could now be disclosed. If this was not the case, the Commissioner asked DFID for further explanation of its reasons for citing section 27 in relation to the request, including its reasons for concluding that the public interest in maintaining the exemption outweighed the public interest in disclosure of the information requested.
19. DFID responded on 9 November 2010. In this correspondence, DFID confirmed that it was continuing to withhold the information. With respect to the exemptions it considered relevant, it additionally cited section 27(2) of the Act. It apologised for not making it clear to the complainant when corresponding with her that, as well as applying section 27(1)(a),(b),(c) and (d) to the requested information, it was also applying section 27(2) to all of it.

Analysis

Exemptions

Section 27 International Relations

Section 27(1)

20. Information is exempt under section 27(1) if its disclosure would or would be likely to prejudice:

“...

(a) relations between the United Kingdom and any other State;

(b) relations between the United Kingdom and any international organisation or international court;

(c) the interests of the United Kingdom abroad; or

(d) the promotion or protection by the United Kingdom of its interests abroad.”

21. Therefore, to engage the section 27(1) exemption, it is necessary for DFID to demonstrate that disclosure of the information would, or would be likely to, cause some relevant prejudice.

22. In the Commissioner's view, information likely to prejudice the interests of the UK abroad will include information held by a public authority, which if disclosed, would harm UK interests in relation to an international arrangement, or in its dealings with another state or non-UK organisation. He considers the interests of the UK abroad and the international relations of the UK would cover a wide range of issues relating to, for example:

- communications between public authorities in the UK and other states, international organisations or organs of other states;
- the exchange of political views between states;
- UK policy and strategic positioning in relation to other states or to international organisations;
- diplomatic matters between states;
- international trade partnerships; and
- international funding matters.

23. In this case, during the course of his investigation, whilst confirming that it cited all four subsections in correspondence with the complainant, DFID told the Commissioner that it considered section 27(1)(b) is the main exemption in this case:

"as it relates specifically to our relations with the IFC and the World Bank Group."

Applicable interests

24. In order for section 27(1)(b) to be engaged, DFID must show that the disclosure would, or would be likely to, prejudice the stated interest. Accordingly, the Commissioner has first considered as relevant those arguments about whether or not disclosure of the withheld information could be prejudicial to relations between the United Kingdom and any international organisation or international court. In this case, the Commissioner understands the primary international organisation concerned to be the International Finance Corporation (IFC).
25. With respect to the meaning of the phrase "international organisation", Section 27(5) provides that this means:
- "any international organisation whose members include any two or more States, or any organ of such an organisation".*
26. According to its website, the IFC has 182 member countries, including the United Kingdom. The Commissioner understands that these member countries provide its authorized share capital of \$2.4 billion, collectively determine its policies and approve investments.
27. The IFC website describes its corporate powers as being vested in a Board of Governors, to which member countries appoint representatives, generally the minister of finance or equivalent.
28. Having considered the functions and composition of the IFC, the Commissioner is satisfied that it constitutes an international organisation for the purposes of the Act.

Nature of the prejudice

29. The Information Tribunal in *Hogan* (EA/2005/0026 and EA/2005/0030) commented:

"An evidential burden rests with the decision maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice and the prejudice is, as Lord Falconer of Thoroton has stated 'real, actual or of substance' (Hansard HL (VOL. 162, April 20, 2000, col. 827))."

30. When making his assessment regarding the prejudice test, the Commissioner must consider not only whether the prejudice identified can be said to have a real, detrimental or prejudicial effect but also whether or not the nature of the prejudice can be adequately linked back to the disclosure of the information in question.
31. In this case the Commissioner has seen evidence that DFID has consulted with the IFC in relation to the potential release of the withheld information.
32. DFID has argued that the information at issue was provided to it in confidence by the IFC and on the clear expectation that it would not be shared without the IFC's express permission. Accordingly, DFID has argued that disclosure would damage the relationship between the UK Government and the IFC "*and indeed the World Bank Group as a whole.*"
33. In this respect, having twice consulted with the IFC, and been refused permission to disclose on both occasions because it was not the IFC's policy to make such documents public, DFID told the complainant that:

"DFID would therefore be unable to release the documents without offending a major development partner".
34. DFID confirmed to the Commissioner that it went back to the IFC during the course of his investigation to ask it to reconsider its decision about disclosure given the passage of time.
35. With respect to the IFC's further refusal, received during the course of the Commissioner's investigation, DFID told the Commissioner:

"Their response confirms that the documents are still considered restricted under their Disclosure Policy....They have therefore declined to provide permission to release these documents, although they did point out that some information about the projects was available on their website".
36. DFID also maintains that the documents at issue:

"were not intended for public consumption. They were provided to DFID by the IFC in trust and confidence and on the understanding that they will not be released without IFC permission. Disclosure, even with redactions, would still cause serious harm and offence."

Likelihood of prejudice

37. With respect to the likelihood of prejudice, DFID told the complainant:

"for DFID and the United Kingdom Government to influence international development policy, promote international development and promote and protect UK interests, there must be good working relationships with these other governments and institutions based on confidence and trust. Disclosing information provided by or about them, especially when it is contrary to their policy of non disclosure, would be likely to damage these relationships and limit the UK's ability to work effectively with partner governments and organisations".

38. Where the issue is that disclosure is only likely to give rise to the relevant prejudice then, in accordance with the Tribunal's decision in the case of *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005), *"the chance of prejudice being suffered should be more than a hypothetical or remote possibility; there must have been a real and significant risk."*
39. The Commissioner must consider whether disclosure of the Project Memoranda would harm the UK's dealings with another state or non-UK organisation.
40. DFID has argued:

"DFID works very closely with the IFC and the World Bank Group...It is therefore essential that DFID maintains a good working relationship with these organisations based on honesty, confidence and trust."

41. Having considered the arguments against the lower threshold of prejudice, the Commissioner is persuaded that disclosure in this case would be likely to make relations more difficult. He therefore finds the exemption in section 27(1)(b) engaged in this case.

The public interest test

42. Having established that the section 27(1) exemption is engaged, the Commissioner must go on to consider the public interest test as set out in section 2(2)(b) of the Act. This favours disclosure unless, *"in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure of the information"*.
43. During the course of his investigation, the complainant brought to the Commissioner's attention the fact that she has recently completed a review of a legal monograph about which she told the Commissioner:

"[the author] makes reference to numerous World Bank (IBRD) Trust Fund Agreements entered into with DFID and other donors,

which he notes are 'on file with the author'. In order to have copies of these documents, it is assumed they were either given to him with the consent of either, or both, the World Bank, DFID and the other donors concerned. This is inconsistent with the positions taken by both the World Bank and DFID in respect of my information requests".

44. It is not within the Commissioner's remit to speculate as to the terms under which any information may or may not have been made available to this author. Rather, he must consider whether or not it is in the public interest for the information in this case to be released to the general public.

Public interest arguments in favour of disclosing the requested information

45. DFID accepts there is a clear public interest in disclosure as it would:

"provide greater transparency and accountability for the way in which DFID engages with international organisations such as the World Bank Group and foreign governments in seeking to reduce poverty. It would enable increased public scrutiny of our and our partners' activities into which significant amounts of public funds are channelled".

46. It told the complainant that disclosure:

"could contribute to better understanding of how DFID works at a country level and how we aim to engage with other governments and international institutions".

47. The Commissioner is also mindful of the fact that there is a presumption running through the Act that openness is, in itself, to be regarded as something which is in the public interest.

Public interest arguments in favour of maintaining the exemption

48. Arguing against disclosure, DFID told the complainant that:

"disclosing sensitive information about or provided by other institutions or governments would be likely to damage those relationships to the extent that they would be less likely to share information with the UK government in future."

49. The Commissioner accepts that this argument has merit. However, having had the opportunity to consider the withheld information, he gives limited weight to the argument in this case.

50. DFID also argued that disclosure would seriously damage the relationship between DFID and the IFC, undermining:

"the very strong public interest in ensuring that the UK Government is able to promote international development and protect UK interests abroad".

51. With respect to working relationships with governments and institutions based on trust, DFID argued that:

"Disclosing information provided by or about them, especially when it is contrary to their policy of non disclosure, would be likely to damage these relationships and limit the UK's ability to work effectively with partner governments and organisations, which is contrary to the public interest and the UK's ability to respond to international development needs".

52. Adding further to this argument, DFID advised that:

"the UK government would not tolerate any other shareholder country releasing papers in contravention of the IFC or World Bank Group's policy and practice."

Balance of the public interest arguments

53. When considering the opposing public interest factors in a case, the Commissioner's view is that, generally speaking, the public interest is served where access to the information would:

- further the understanding of, and participation in the debate of issues of the day;
- facilitate the accountability and transparency of public authorities for decisions taken by them;
- facilitate accountability and transparency in the spending of public money;
- allow individuals to understand decisions made by public authorities affecting their lives and, in some cases, assist individuals in challenging those decisions; and
- bring to light information affecting public safety.

54. In this case, the Commissioner acknowledges that disclosure would contribute to the understanding of government involvement in international development as well as to accountability and transparency in the spending of public money.

55. In this respect, he notes that both the IFC and DFID report on their activities which, in his view, contribute to informing public debate and promoting understanding of international affairs. Specifically in this case he is aware that information about the development projects at issue in this case is available in the public domain. The Commissioner considers this reduces the weight of the public interest argument for disclosure in this case.
56. The Commissioner appreciates the importance generally of maintaining good relations with other international organisations, particularly in relation to international development issues.
57. The Commissioner is of the view that causing offence to organisations and partner institutions involved in international development would be likely to make those relationships more difficult in the future. He considers this to be a particularly strong public interest argument for maintaining the exemption.
58. Having balanced the opposing factors in this case, the Commissioner considers the public interest in maintaining the exemption at section 27(1)(b) outweighs the public interest in disclosure. The Commissioner therefore finds that DFID acted correctly in withholding information in reliance on this exemption.
59. As the Commissioner finds that DFID was correct to withhold information under section 27(1)(b) he has not gone on to consider its citing of the other subsections of section 27(1) or its citing of section 27(2).

Procedural Requirements

Section 10 Time for compliance

60. 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."

61. The Commissioner finds DFID in breach of section 10(1) in that it failed to confirm that it holds the requested information within the statutory time limit.

Section 17 Refusal of request

62. DFID did not comply with its obligations under the Act when it responded to the complainant on 16 November 2007. In its response DFID failed to state that it was relying on an exemption, failed to specify

which exemption applied to each element of the requested information, and why it did so. It subsequently acknowledged on 26 June 2008 that it had not dealt with the matter as a formal freedom of information request. The Commissioner has therefore concluded that DFID did not issue a valid refusal notice within the statutory time limit, in breach of section 17(1).

63. Furthermore, DFID failed to comply with section 17(7) by not informing the complainant of her right to seek a review of the decision and to refer the matter to the Information Commissioner.

The Decision

64. 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:

- it applied section 27(1)(b) correctly.

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

- it breached section 10(1) by failing to inform the complainant whether it held the requested information within 20 working days of the request;
- it breached section 17(1) by failing to issue a valid refusal notice within the statutory time limit;
- it breached section 17(7) by failing to provide details of its complaints handling process and particulars of the right of the complainant conferred by section 50 of the Act.

Steps Required

66. The Commissioner requires no steps to be taken.

Other matters

67. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern.

68. The Commissioner considers DFID failed to handle the complainant's request for information correctly from the beginning. DFID acknowledges that the complainant's request for information was not handled in accordance with the requirements of the Act. It told her:

"Your original request was not treated formally as a Freedom of Information request, as it should have been, and DFID acted incorrectly in this respect."

69. Paragraph 15 of the introduction to the section 45 code of practice (the "Code") states:

"All communications in writing to a public authority, including those transmitted by electronic means, may contain or amount to requests for information within the meaning of the Act, and so must be dealt with in accordance with the provisions of the Act. While in many cases such requests will be dealt with in the course of normal business, it is essential that public authorities dealing with correspondence, or which otherwise may be required to provide information, have in place procedures for taking decisions at appropriate levels, and ensure that sufficient staff are familiar with the requirements of the Act and the Codes of Practice issued under its provisions. Staff dealing with correspondence should also take account of any relevant guidance on good practice issued by the Commissioner. Authorities should ensure that proper training is provided in this regard."

70. Whilst the introduction does not form part of the Code itself, the Commissioner echoes its recommendations and expects that, in future, the public authority will ensure that requests for information are recognised and processed accordingly.

Right of Appeal

71. 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

72. 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.

73. 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 21st day of March 2011

Signed

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

Legal Annex

Section 27(1) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (a) relations between the United Kingdom and any other State,
- (b) relations between the United Kingdom and any international organisation or international court,
- (c) the interests of the United Kingdom abroad, or
- (d) the promotion or protection by the United Kingdom of its interests abroad.”

Section 27(2) provides that –

“Information is also exempt information if it is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.”