

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 July 2019

Public Authority: CDC Group PLC
Address: 123 Victoria Street
London
SW1E 6DE

Decision (including any steps ordered)

1. The complainant requested information from CDC Group PLC ("CDC") about companies in Myanmar, Burma that had received money from its investments. CDC provided some of this information but refused to provide a list of contractors it held who were carrying out work for Irrawaddy Green Tower Project ("IGT") a recipient of its investment, citing section 43(2) – commercial interests.
2. The Commissioner's decision is that, although section 43(2) is engaged in respect of the withheld information, the public interest in favour of releasing it outweighs that in maintaining the exemption.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the list of contractors working for IGT that was withheld under section 43(2).
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. On 5 November 2018 the complainant made the following request for information under the FOIA:

"I'm writing to request information under the terms of the FOI act.

1. Details of all companies that have received money for the following CDC investments in Myanmar - the timeframe is from the start date of the investment.

2. Details of all end recipients for the following CDC investments in Myanmar - the timeframe is from the start date of the investment.

3. Details of all companies contracted to carry out work for the following CDC investments in Myanmar - the timeframe is from the start date of the investment.

Advans Myanmar

Alliance for Microfinance in Myanmar Limited

Frontiir Co. Ltd

Irrawaddy Green Tower Project

Myanmar (CMI)"

6. CDC responded on 3 December 2018 confirming that it held information in relation to the request and stating that it needed an extension to consider the public interest, though it did not state what exemption it was applying.
7. On 18 December 2018 CDC denied holding some of the requested information (some of the information requested at part two and part three in relation to four of the five companies listed) but confirmed that the remainder was held. CDC provided some of the requested information (part one and some information in relation to part two of the request). CDC refused to provide what it held in relation to part three of the request - the companies contracted to carry out work for IGT citing the following FOIA exemption - section 43(2).
8. On the same date the complainant requested an internal review. CDC provided an internal review on 18 January 2019 in which it maintained its original position.

Scope of the case

9. The complainant contacted the Commissioner on 21 January 2019 to complain about the way his request for information had been handled. He argued that he required disclosure in order to discover whether Burmese military owned or controlled companies had been contracted to

carry out work on the IGT project. His view is that where UK aid money was being invested in Burma the public interest favours disclosure.

10. The Commissioner considers the scope of this case to be whether CDC was correct to apply section 43(2) to the requested information.

Background

11. CDC's website explains that it was originally the Colonial Development Corporation and was established by the Overseas Resources Development Act of 1948. Its mission was "do good without losing money". It was the world's first development financial institution and has supported companies that help poor countries since 1948. It is a private limited company owned by the Department for International Development (DfID). Since 2004 CDC has been able to operate mainly as a fund investor.
12. The withheld information concerns the names of the companies contracted to carry out work for the IGT Project which is the largest independent tower company (telecoms) in Myanmar and is one of the end recipients of CDC's investments.

Reasons for decision

13. Section 43(2) of the FOIA states 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.
14. The Commissioner has defined the meaning of the term "commercial interests" in her guidance on the application of section 43 as follows:

"...a commercial interest relates to a person's ability to participate competitively in a commercial activity"¹

Most commercial activity relates to the purchase and sale of goods but it also extends to other fields such as services.

¹ <https://ico.org.uk/media/for-organisations/documents/1178/commercial-interests-section-43-foia-guidance.pdf>

15. The exemption is subject to the public interest test which means that, even if the Commissioner considers the exemption to be engaged, she needs to assess whether it is in the public interest to release the information.
16. In order for section 43(2) to be engaged the Commissioner considers that three criteria must be met:
 - Firstly, the actual harm that the public authority alleges would or would be likely to occur if the withheld information was disclosed has to relate to commercial interests.
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Any prejudice that results must also be real, actual or of substance.
 - Thirdly, there is a need to establish whether the level of likelihood of prejudice being relied upon by the public authority is met, whether disclosure would or would be likely to result in prejudice or there is a real and significant risk of the prejudice occurring.
17. CDC's view is that the disclosure of this information would be likely to be prejudicial to its commercial interests and also those of its investee company, IGT.
18. The Commissioner agrees that the actual harm is to CDC's commercial interests as it relates to one of its investments and also to IGT as the recipient. She is satisfied that the first criterion is met.
19. CDC believes that there is a causal link between any release of information about portfolio companies that may be commercially sensitive. To the extent that these companies are unlikely to want this information to be published, disclosure is likely to put CDC at a commercial disadvantage.
20. CDC also argues that any release would be likely to harm IGT's commercial interests and that it would therefore be unfair to do so. In order to underpin this argument CDC provided emails between itself and IGT regarding the request. The email from IGT explains the history of its development and how it has built up its expertise as has its contractors. It describes how there are now 10 telecoms tower companies operating in Myanmar and that the competition for business is strong. Release of the information might damage the relationship IGT has with its contractors and suppliers. Additionally, publicising IGT's list of business

partners would enable its competitors to draw on and commoditize the experience and techniques that it relies on to maintain its leading position.

21. CDC explained that it invested in Africa and South Asia through debt, equity and intermediated equity investments as a means to achieve its mission of supporting businesses in those regions to create jobs and make a difference in the world's poorest places. This is done through investing directly and indirectly in private sector businesses in countries where CDC can have the greatest impact and where the private sector is weak and jobs scarce. It argues that a requirement to disclose information would be likely to be prejudicial to an investee company and would be likely to limit the number of private sector firms seeking investments from CDC and consequently restrict CDC's mission. It could also potentially prevent its own funding from achieving maximum value.
22. The Commissioner also accepts that there is a causal relationship between the potential disclosure of the requested information and the prejudice that this exemption is designed to protect with regard to both CDC and IGT. Therefore the second criterion is met.
23. Finally, the Commissioner needs to establish whether the level of likelihood of prejudice that is being relied upon by CDC is met.
24. To meet the lower threshold of "would be likely to" result in prejudice, the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; there must be a real and significant risk.
25. From its correspondence with the Commissioner, CDC is claiming this lower threshold. CDC considers that the disclosure of this information "would be likely to prejudice" both IGT's commercial interests and its own. Investee companies might limit the information available to CDC which could impact on its ability to properly oversee its investments. The position of IGT is potentially more commercially sensitive if it impacted on its competitiveness in the Myanmar market which is significantly smaller than many other markets.
26. The Commissioner is not entirely convinced by CDC's arguments about prejudice to its own commercial interests, particularly in respect of private sector firms seeking investment. She believes that those seeking investment will still do so because obtaining foreign investment is challenging. However, on balance, she accepts that the exemption is engaged at the lower bar of prejudice because there is a possibility that potential investees will provide less information which could impact on CDC's ability to oversee its investments and result in detriment. The Commissioner agrees that there would be likely to be some commercial prejudice to IGT if contractors knew that information about them might

be subject to disclosure. However, this is not a compelling argument in a situation where the contractors are operating in a weak economy where jobs are scarce. Nonetheless, she considers that the third criterion has been met and the exemption is engaged.

27. Although the Commissioner accepts that the exemption is engaged, it is necessary for her to go on to consider whether the public interest favours maintaining the exemption or disclosing the requested information.

Public interest arguments in favour of maintaining the exemption

28. CDC contends that other countries in their freedom of information legislation have deliberately exempted Development Finance Institutions ("DFIs") from having to disclose information. This suggests to CDC that there is widespread recognition that it is generally not in the public interest for them to be required to publish information about portfolio companies because such information is likely to be commercially sensitive.
29. CDC further argues that other DFIs who are not subject to FOIA have also invested in IGT and that disclosure would put CDC at a potential commercial disadvantage which is not in the public interest.
30. Additionally investee companies might limit the information they make available to CDC which would impact on its ability to properly oversee its investments. It believes that there is a strong public interest in ensuring that CDC performs and maximises its investments as effectively as possible.

Public interest arguments in favour of disclosure

31. CDC accepts that there should be some disclosure about its investments. Investments are made with public funds and how those funds are utilised is of interest to UK tax payers.
32. The complainant contends that there is a strong public interest in disclosing information about companies that have been contracted to carry out work for IGT in Burma. His view is that the public interest outweighs the commercial interests of both CDC and those who are contracted to carry out work for IGT. He argues that there should be accountability for the spending of public money and that this requires openness and transparency.

33. The complainant underpins his argument by referring to the report published by the International Development Committee ("IDC") recommending an overhaul of UK aid to Burma.² He includes a quotation from Stephen Twigg MP (Chair of the Committee):

"British taxpayers must be assured that their money is not being used to subsidise a government accused of crimes against humanity..."

The complainant also quoted from the response to the IDC report by the then International Development Secretary, Penny Mordaunt who he quotes as saying,

"DFID does not provide financial aid to the Burmese Government or funding to the military."

34. The complainant states that CDC uses UK aid money to invest in companies in the developing world. It gave a loan to IGT in 2015, which was subsequently increased in early 2017. The Commissioner notes that CDC have stated that the investments were made in 2015 and 2016. In July 2017, the complainant says MyTel, joint venture of the Burmese and Vietnamese military, signed a master lease agreement with IGT.
35. The complainant also supported his argument by quoting from the Burma Campaign UK's submission to the IDC where MPs were told the following:

"Burma Campaign UK has found an example of why there needs to be policies ensuring no UK aid ends up directly or indirectly benefiting the military. Irrawaddy Green Towers in Burma was created from development aid loans from European countries, including CDC group, under the control of DFID. It is working for MYTEL, the new mobile phone company set up by the Burmese military in conjunction with the Vietnamese military, so it could be deemed that UK aid is helping the Burmese military make money." (at paragraph 65)

The complainant acknowledges CDC's insistence that it is not accurate to reach this conclusion because *"since the entry of MyTel, Irrawaddy Green Towers provides the services at market rates"*.

36. The complainant says that, in light of these comments he requested information on which companies have been contracted to carry out work for the IGT project, since CDC made its investments. He has done this for the primary reason of discovering whether Burmese military owned

² <https://publications.parliament.uk/pa/cm201719/cmselect/cmintdev/1054/105402.htm>

or controlled companies have been contracted to carry out work on the IGT project.

37. He concludes his arguments that it is in the public interest for the withheld information to be disclosed by stating that the UN Human Rights Council accused the Burmese military of committing genocide, therefore if Burmese military owned or controlled companies have been contracted by IGT as part of a UK aid supported project, the Burmese military is indirectly benefiting from UK aid. He argued that the British public has a right to know and that this right overrides the commercial interests of CDC and IGT.

Balance of the public interest arguments

38. CDC countered this argument by stating that the complainant was relying on a quotation from *Bangladesh, Burma and the Rohingya crisis: Government response to the Committee's Fourth Report* to the effect that IGT is working for MyTEL. It repeated the complainant's reference to this document, "*it could be deemed that UK aid is helping the Burmese military make money*". In response CDC say that:

- *IGT is transparent about its clients and publishes the fact that MYTEL is a client on its website;*
- *the fact that MYTEL is a client of IGT is not relevant to the FOIA request, which is for the names of "companies contracted to carry out work for [IGT]".*

39. There is clearly public interest in foreign aid investment being provided by the UK to the countries and companies it invests in. However, there has been public disquiet regarding how that money is spent and who are the end recipients of UK tax payers' money. CDC's view is that the involvement of MyTel is already transparent and that it is also irrelevant because the request is solely for a list of contractors contracted to carry out work for IGT.
40. The Commissioner acknowledges that the ramifications attached to foreign aid are complex. What is in the public interest for a country that is the recipient of UK aid is not necessarily what is in the public interest for all the inhabitants of that country or the UK tax payer. In other words, there is an argument that, however beneficial such aid might be to the recipient country or organisation, there is a responsibility that the audit trail for UK public money be as transparent as possible. In this instance the Commissioner's decision is that the list of contractors should be disclosed as the public interest overrides any commercial prejudice to CDC or IGT.

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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

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

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