Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 May 2017

Public Authority: Department for International Development
Address: 22 Whitehall
London
SW1A 2EG

Decision (including any steps ordered)

1. The complainant submitted a request to the Department for International Development (DFID) for a copy of a report produced by KPMG in respect of the administration of how a research programme was being conducted by a Sri Lankan based non-governmental organisation, the International Centre for Ethnic Studies (ICES). DFID withheld the information on the basis of the exemptions contained at sections 27(1)(a), (c) and (d) (international relations), 40(2) (personal data), 41(1) (information provided in confidence) and 43(2) (commercial interests) of FOIA. The Commissioner has concluded that the requested information is exempt from disclosure on the basis of the exemption contained at section 41(1) of FOIA.

Background

2. The information which is the focus of this request concerns a research programme which DFID is jointly funding with the Canadian government's International Development Research Centre (IDRC), and the Hewlett Foundation, called Growth and Economic Opportunities for Women (GrOW). IDRC manage the programme on behalf of the donors and it is responsible for allocating and monitoring funding to grant recipients. IDRC awarded the Sri Lankan based non-governmental organisation, the International Centre for Ethnic Studies (ICES) a grant to undertake research in respect of the GrOW project.

3. The complainant was contracted by ICES to work on this project but became concerned about ICES' management of the project and therefore raised his concerns with IDRC. IDRC instigated an internal

review which revealed no financial management weakness or wrongdoing. To ensure full compliance with their financial management framework, IDRC also engaged an independent third party (KPMG) to conduct a forensic audit of ICES' processes and transactions to verify the validity of their financial reporting to IDRC as well as compliance with IDRC's grant agreement.

4. Upon completion of the KPMG report, the IDRC wrote to the complainant explaining the steps they had taken and confirming that, based on the findings of the investigation they concluded that ICES's financial practices and processes were sound and that there was no evidence of wrongdoing. The IDRC also confirmed to the complainant that it was also satisfied with ICES's financial and technical reporting and progress on ongoing IDRC funded projects.

Request and response

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5. The complainant submitted the following request to DFID on 8 August 2016 relating to the forensic audit undertaken by KPMG referred to above:

   'I do hereby kindly request the DFID to send me the Terms of Reference (ToR) for the forensic audit as well as the full forensic audit report by the KMPG without any further delay'.

6. DFID contacted the complainant on 23 September 2016 and explained that it held information falling within the scope of his request and considered this information to be exempt from disclosure on the basis of section 43(2) (commercial interests) of FOIA. However, DFID explained that it needed additional time to consider the balance of the public interest test.

7. DFID issued the complainant with a similar letter on 7 October 2016.

8. DFID provided the complainant with a substantive response to his request on 21 October 2016. DFID explained that it had concluded that the requested information was exempt from disclosure on the basis of sections 27(1)(a), (c) and (d) (international relations), 40(2) (personal data), 41(1) (information provided in confidence) and 43(2) of FOIA.

9. The complainant contacted DFID on 23 October 2016 in order to ask for an internal review of this decision.

10. DFID informed him of the outcome of the internal review on 8 December 2016. The review upheld the application of the various exemptions cited in the refusal notice. The review also explained that DFID held a copy of the forensic report but not a copy of the full terms of reference.

Scope of the case

11. The complainant contacted the Commissioner on 13 January 2017 in order to complain about DFID's decision to withhold the information falling within the scope of his request, namely a copy of the report prepared by KPMG. (As indicated in the preceding paragraph, although the complainant also requested a copy of the terms of reference, DFID does not hold a copy of these).

Reasons for decision

Section 41 – information provided in confidence

12. Section 41 of FOIA states that:

    '(1) Information is exempt information if—

    (a) it was obtained by the public authority from any other person (including another public authority), and

    (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.'

13. Therefore, for this exemption to be engaged two criteria have to be met; the public authority has to have obtained the information from a third party and the disclosure of that information has to constitute an actionable breach of confidence.

14. With regard to whether disclosure would constitute an actionable breach of confidence the Commissioner follows the test of confidence set out in Coco v A N Clark (Engineering) Ltd [1968] FSR 415. This judgment suggested that the following three limbed test should be considered in order to determine if information was confidential:

    - Whether the information had the necessary quality of confidence;
    - Whether the information was imparted in circumstances importing an obligation of confidence; and
    - Whether an unauthorised use of the information would result in detriment to the confider.

15. However, further case law has argued that where the information is of a personal nature it is not necessary to establish whether the confider will suffer a detriment as a result of disclosure.

Was the information obtained from a third party?

16. DFID explained that IDRC provided it with a copy of the withheld information with the permission of KPMG but with explicit provision that it must not be disclosed further without KPMG's prior written consent.

17. The Commissioner notes that IDRC manages the GrOW project on behalf of various donors, including DFID. However, for the purposes of FOIA, in the Commissioner's view this does not mean that IDRC held the withheld information on DFID's behalf.[1] As a result the Commissioner is satisfied that the withheld could not be said to have been held by DFID prior to it being physically passed to it by IDRC. The Commissioner is therefore satisfied that DFID has obtained the withheld information from a third party, namely IDRC, who in turn obtained the withheld information from KPMG.

Does the withheld information have the necessary quality of confidence?

18. Information will have the necessary quality of confidence if it is not otherwise accessible and if it is more than trivial; information which is of importance to the confider should not be considered trivial.

19. DFID argued that the withheld information was clearly not trivial, rather it obviously contained sensitive information. In order to support this view DFID emphasised that the report concerned a number of allegations about the ability of ICES to manage project funding appropriately and allegations concerning the unprofessional and unethical conduct of ICES and IDRC staff. DFID noted that the report also set out KPMG's findings in detail as well as its investigation methodology. DFID argued that the report was clearly regarded as important by KPMG, as well as by IDRC and DFID, who take all matters relating to programmes, financial systems and controls very seriously.

20. On the basis of these submissions the Commissioner is satisfied that the withheld information has the quality of confidence.

Was the withheld information communicated in circumstances importing an obligation of confidence?

21. An obligation of confidence can be expressed explicitly or implicitly. Whether there is an implied obligation of confidence will depend upon the nature of the information itself, and/or the relationship between the parties.

[1] Section 3(2)(b) of FOIA states that information is held by a public authority if it is held by another person on behalf of that authority.

22. DFID provided the Commissioner with copies of letters it had received from both KPMG and IDRC in which both parties clearly explain that the withheld information was provided to DFID under an express obligation of confidence, an obligation which DFID accepted.

23. In light of this correspondence, and indeed given the nature of the withheld information, the Commissioner is satisfied that DFID received this information in circumstances where it was obliged to keep it confidential.

Would disclosure be detrimental to the confider?

24. DFID argued that disclosure of the withheld information would cause specific detriment to the confider, IDRC, as well as to KPMG who had provided IDRC with the report.

25. In respect of KPMG, DFID explained that the report provides an independent assessment of the allegations in question, the controls in place at ICES and testing of items of grant funded expenditure. DFID explained that the scope was specifically designed by KPMG for IDRC and follows a specific methodology and structure which reflects their approach to this type of investigation. DFID explained that given the commercial environment in which KPMG works, this information is sensitive and not intended for public consumption. DFID also argued that disclosure of this report could set an unsatisfactory and undesired precedent which could mean KPMG, and indeed other professional service providers, do not engage in such work in the future. DFID explained that provision of such work provides an important line of business for KPMG and not being able to undertake this could cause real commercial loss to them.

26. Furthermore, DFID argued that IDRC could suffer commercial loss by not being able to access professional services provided by those organisations or access them only in a restricted capacity. DFID suggested that this could also undermine IDRC's ability to engage effectively with key stakeholders, including DFID, as they would lose the opportunity of sharing confidential and independent expert analysis which would in turn affect the relationship between IDRC and DFID.

27. In respect of any potential detriment to KPMG, the Commissioner accepts that disclosure of the withheld information could provide other professional services companies with an insight advantage into KPMG's methodology and approach to such investigations and reports and thus potentially provide them with a commercial advantage. On the basis of this reason the Commissioner accepts that disclosure of the withheld information could be detrimental to KPMG. However, the Commissioner is not persuaded that if the withheld information was disclosed this would dissuade KPMG in offering such services in the future. As DFID

itself notes, such work provides an important line of business for KPMG and it therefore has an commercial incentive to continue to offer such services to organisations which are subject to FOI legislation or indeed may, during the course of their business, share KPMG's reports with organisations that themselves are subject to FOIA. Therefore, the Commissioner considers it too speculative to argue that disclosure of the withheld information would prove detrimental to KPMG for the second reason advanced by DFID.

28. It follows that the Commissioner is not persuaded that disclosure of the report would be detrimental to IDRC on the basis that it would not be able to access the professional services offered by firms such as KMPG. This is because, for the reasons discussed above, the Commissioner considers it unlikely that such firms would refuse to offer their services to IDRC as a result of the withheld information being disclosed under FOIA. However, the Commissioner does accept that if IDRC disclosed the withheld information it could impact on its ability to engage effectively with stakeholders as such stakeholders could be reluctant to share confidential informational with IDRC if they had concerns that such information would be shared by more broadly.

29. The Commissioner is therefore satisfied that if the withheld information was disclosed this would prove to be detrimental to both IDRC and KPMG.

Public interest defence

30. However, although section 41 is an absolute exemption, the law of confidence contains its own built in public interest test with one defence to an action being that disclosure is in the public interest.

31. DFID acknowledged that there is a public interest in allowing the activities of public authorities to be scrutinised and in particular how the UK government engages with international partners through which UK taxpayers' money is channelled. However, in the circumstances of this request, DFID argued that as there is no evidence to support the allegations made by the complainant, disclosing the detailed report would not reveal any evidence of misconduct or wrongdoing by either ICES or IDRC which might serve the public interest in disclosure.

32. On the contrary, DFID argued that disclosure would work against the very strong public interest in maintaining and protecting the principles of confidentiality and would undermine the pivotal relationship of trust that must exist between confider and confidant. DFID emphasised that it was very much in the public interest that information provided to it by third parties continues to be available so that that it could carry out its functions. Any reduction in the willingness of other partners to share information with DFID would, in turn, lead to a reduced ability by DFID

and the wider UK government to carry out its international development objectives which require the support and engagement of external partners. This, DFID argued, would be very much against the public interest.

33. In the specific circumstances of this case, DFID argued that both IDRC and KPMG have been very open with it by sharing a confidential report and with IDRC immediately bringing the allegations to DFID's attention. DFID argued that disclosing sensitive information obtained in such circumstances would prejudice DFID's relations with IDRC and harm its ability to work together on international development programmes. DFID also suggested that it would be unlikely that IDRC or KPMG would be as willing to share information about any future possible investigations if the information in this case was disclosed into the public domain against their express wishes.

34. Furthermore, DFID also argued that in addition to causing detriment to its interests and those of IDRC and KMPG, it would also have a negative impact on ICES. This was on the basis that ICES operates in a competitive market and competes against other international NGOs in bidding for contracts to deliver research services. DFID argued that ICES' ability to bid for contracts could be undermined if information about their approach to such work was made public. DFID argued that it was against the public interest for ICES' interests to be harmed in this way.

35. In his submissions to the Commissioner, the complainant explained that as part of its audit of ICES, KPMG interviewed him in March 2016 and as part of this process explained that its report to IDRC was due by the end of April 2016. However, the complainant explained that the day after he was interviewed a press statement issued by ICES was published in the local press claiming that IDRC had expressed satisfaction with ICES' performance on this project. The complainant argued that the fact that ICES made this claim prior to KPMG concluding its report and submitting it to IDRC raises serious concerns about the impartiality and integrity of the forensic audit. He therefore argued that there was a compelling public interest in the disclosure of the withheld information in order that UK taxpayers could understand the truth of the forensic audit process.

36. The Commissioner agrees that there is a public interest in allowing the public to understand how UK taxpayers' money has been used in projects overseas, and in particular reassuring the public that this money has been spent appropriately. The Commissioner also recognises that the complainant has serious and genuine concerns about ICES' management of the GrOW project and the manner in which the investigation into his allegations was conducted. However, in considering the balance of the public interest, she considers it vital to remember that KPMG's report did not find any evidence of misconduct or

wrongdoing by either ICES or IDRC. Furthermore, the Commissioner is not persuaded that the press articles referred to by the complainant necessarily indicate that KPMG's audit process was flawed. Although it is the case that ICES issued a press statement claiming that IDRC was happy with its performance, subsequent to the complainant's allegations but prior to the completion of KPMG's completion of the audit, such a statement is somewhat generic. In the Commissioner's opinion it is not possible to objectively interpret ICES' statement, as reported in the press notices, as a direct indication that IDRC had rejected the complainant's specific allegations. Furthermore, the Commissioner would emphasise that having examined KPMG's report, in her view there is no evidence whatsoever in this report that would lead her to question the impartiality or integrity of the audit process.

37. In contrast, the Commissioner accepts that if DFID disclosed information under FOIA which was explicitly provided to it in confidence then there is clearly a realistic prospect of harm occurring to DFID's relationship with the confider, in this case IDRC. Furthermore, the Commissioner is also persuaded, as DFID has argued, that the disclosure of the information would be likely to make other stakeholders and partners more reluctant to share sensitive information with DFID. In her view it is very firmly in the public interest for DFID to be able to continue to receive information from its partners in order to facilitate the effective use of taxpayers' money to overseas development projects.

38. The Commissioner is also persuaded that the report includes sufficient details about ICES' approach to this project that it is plausible to argue that the disclosure of the report would be likely to undermine ICES' ability to compete on a level playing field with other NGOs when competing for contracts for future research services.

39. Taking into account the cumulative detriment that would be caused to DFID, IDRC, KPMG and ICES if this information was disclosed, the Commissioner has therefore concluded that the public interest in disclosing the information does not outweigh the public interest in maintaining the confidence. The withheld information is therefore exempt from disclosure on the basis of section 41(1) of FOIA.

40. In light of her findings in relation to section 41(1), the Commissioner has not considered the other exemptions cited by DFID.

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 ……………………………………………

Jonathan Slee
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