

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 May 2023

Public Authority: British International Investment
Address: 123 Victoria Street
London
SW1E 6DE

Decision (including any steps ordered)

1. The complainant has requested a particular document regarding the investment management group Abraaj from British International Investment PLC (BII). BII provided some information but refused to provide all of it, citing sections 36, 40(2) and 43(2) of FOIA.
2. The Commissioner's decision is that, although section 36 of FOIA is engaged, the public interest favours the disclosure of the withheld information. He has also decided that section 43(2) is engaged but that the public interest favours disclosure except for the information specified below. BII also breached sections 1 and 10 of FOIA by responding late and releasing information beyond the time for compliance.
3. The Commissioner requires BII to take the following steps to ensure compliance with the legislation.
 - Disclose the information BII withheld under section 36 of FOIA.
 - Disclose the information BII withheld under section 43(2) of FOIA with the exception of the information withheld under that exemption on p.2 and p.11.

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.

Background

5. BII explained its history and the context within which the request was made, as follows:

“British International Investment plc (BII), previously known as CDC Group plc (CDC), wholly owned by HM Government, is the UK’s development finance institution and impact investor with a mission to help solve the biggest global development challenges by investing patient, flexible capital to support private sector growth and innovation in developing countries...

BII invests in companies directly. It also invests in companies indirectly. It does that by committing capital to investment funds managed by third-party fund managers, who then invest in companies on its and other investors’ behalf. Abraaj Group (Abraaj), a large Dubai-based investment management group, were one such manager.

Abraaj became a major relationship for BII in 2012 when it acquired another fund manager, Aureos Capital. BII had approximately US\$270m financial exposure to investment funds managed by Aureos Capital before Abraaj acquired the company. BII subsequently committed US\$150m to various Abraaj-managed investment funds in 2015 and 2016.

Abraaj is now in liquidation following the well-publicised failure of its fund management business amidst allegations of fraud and misappropriation of funds by senior members of its management team. The failure has resulted in lawsuits and regulatory action in various fora, which continue to this day. A criminal case has been brought against former management team members by the US Department of Justice, and a parallel civil complaint has been filed by the US Securities and Exchange Commission.”

Request and response

6. On 21 November 2022 the complainant wrote to BII and requested information in the following terms:

"As a follow up request, could you please provide a copy of the document entitled:

'1- Abraaj lessons learned- Final'

Ahead of the request, I understand that some very specific financial information may be exempt under section 43.

However, FOIA is an information regime not a documents regime, and any information not exempt must be provided..."

7. BII responded on 17 January 2023 and provided some information within the scope of the request but refused to provide the remainder. BII cited the following exemptions as its basis for doing so – section 36(2)(b)(i), (b)(ii), section 40(2) and section 43(2) of FOIA.
8. The complainant requested an internal review on 9 February 2023.
9. Following an internal review, BII wrote to the complainant on 13 March 2023. BII did not consider section 40(2) as the complainant had not referred to it when asking for a review. BII maintained its original position regarding sections 36(2)(b)(i) and (ii) and section 43(2) of FOIA.

Scope of the case

10. The complainant contacted the Commissioner on 15 March 2023 to complain about the way their request for information had been handled.
11. The Commissioner considers that the scope of his investigation is to consider BII's application of sections 36(2) and section 43(2) of FOIA to the requested information. He has not considered section 40(2) of FOIA as the complainant did not query its use. The Commissioner will also consider any procedural issues.

Reasons for decision

Section 36 – Prejudice to the effective conduct of public affairs

12. Section 36 FOIA provides that,

“Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act -

(2)(b) would, or would be likely to, inhibit -

- i. the free and frank provision of advice, or
- ii. the free and frank exchange of views for the purposes of deliberation, or

(2)(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.”

13. In its response to the Commissioner, BII cited sections 36(2)(b)(i), (ii) and 36(2)(c) in relation to most of the withheld/redacted information that is being considered here. The Commissioner has been provided with the withheld information. He is unable to describe the withheld information in any detail for confidentiality reasons. However, in the internal review BII told the complainant that it was an 11 page document.
14. Section 36 is a unique exemption within FOIA in that it relies on a particular individual (the QP) within the public authority giving an opinion on the likelihood of prejudice occurring. The Commissioner is required to consider the QP’s opinion as well as the reasoning which informed that opinion. Therefore, in order to establish that the exemption has been applied correctly the Commissioner must:
- Establish that an opinion was given;
 - Ascertain who was the qualified person or persons;
 - Ascertain when the opinion was given; and
 - Consider whether the opinion was reasonable.
15. The exemptions at section 36 can only be engaged on the basis of the reasonable opinion of a QP. The QP at BII both now and at the time of the request is Nick O’Donohoe, Chief Executive Officer. The Commissioner is satisfied that he was the appropriate qualified person to give an opinion. The opinion of the QP was sought and subsequently given on 9 January 2023. The QP was provided with arguments for maintaining the exemption and contrary arguments regarding disclosure.

16. The Commissioner next needs to establish whether the qualified person's opinion was reasonable.

Is the qualified person's opinion reasonable?

17. The QP identified and gave their opinion regarding the two limbs of the exemption that they believed were applicable - sections 36(2)(b)(i) and (ii) to the withheld information. This means that the QP's opinion was that release would inhibit the free and frank provision of advice and the free and frank exchange of views. The QP did not check the box on the form to indicate that section 36(2)(c) of FOIA was being cited, though arguments were provided by BII under this heading in its response letter to the Commissioner's investigation.

18. The Commissioner's guidance¹ regarding the definition of "reasonable" is as follows:

"In this context an opinion either is or is not reasonable. In deciding whether an opinion is reasonable the ICO will consider the plain meaning of that word, rather than defining it in terms derived from other areas of law...The most relevant definition of 'reasonable' in the Shorter Oxford English Dictionary is: "in accordance with reason; not irrational or absurd". If the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable."

19. In order to determine whether section 36(2)(b)(i) and (ii) are engaged, the Commissioner must determine whether the QP's opinion was a reasonable one. In doing so the Commissioner has considered the following factors -

- Whether the inhibition relates to the specific subsection that has been cited, in this case sections 36(2)(b)(i) and (ii). If the inhibition is not related to the specific subsection the opinion is unlikely to be reasonable.
- The nature of the information and the timing of the request.
- The qualified person's knowledge of, or involvement in, the issue.

Section 36

20. Firstly, the Commissioner has only considered section 36(2)(b)(i) and (ii). As stated earlier, he has not considered section 36(2)(c) because

¹ [Section 36 \(ico.org.uk\)](https://ico.org.uk)

the QP did not check the box to indicate that they agreed with its application. It can therefore only be considered in relation to the statistical part of the requested information which does not require a QP's view. However, the Commissioner intends to look first at the citing of section 43(2) later in this decision notice in relation to that part of the information.

Section 36(2)(b)(i) and (ii)

21. The term "advice" is not defined in the legislation. However the Commissioner's guidance states that:

"Examples of 'advice' include recommendations made by more junior staff to more senior staff, professional advice tendered by professionally qualified employees, advice received from external sources, or advice supplied to external sources. However, an exchange of data or purely factual information would not in itself constitute the provision of advice or, for that matter, the exchange of views."

22. The Commissioner's guidance states that arguments under section 36(2)(b)(i) and (ii) are usually based on the concept of a 'chilling effect'. The chilling effect argument is that disclosure of discussions would inhibit free and frank discussions in the future, and that the loss of frankness and candour would damage the quality of advice and deliberation and lead to poorer decision-making.

23. The Commissioner's guidance also explains that the chilling effect operates at various levels:

"If the issue in question is still live, arguments about a chilling effect on those ongoing discussions are likely to be most convincing. about the effect on closely related live issues may also be relevant. However, once the decision in question is finalised, chilling effect arguments become more and more speculative as time passes."²

24. BII notes that the legislation does not "dictate precisely how a qualified person's reasonable opinion is obtained or recorded". It also notes that "the critical issue is that the opinion was within the range of likely reasonable opinions based on the relevant factors considered..." BII refers the Commissioner to a recent decision IC-149056-Q7Q8 where it

² Ibid.

is stated:

“the test of reasonableness is not meant to be a high hurdle and if the Commissioner accepts that the opinion is one that a reasonable person could hold, he must find that the exemption is engaged”.

25. BII explains that it is publicly owned company and:

“only invests and operates in the private sector. It interacts with market participants (e.g. investors, fund managers and portfolio companies) who are not subject to freedom of information-type legislation and value the protection of commercially sensitive information and commercial confidentiality highly”.

26. There is an expectation that information provided to BII in confidence remains in confidence. BII underlines that the requested information is in a report marked “Strictly Private and Confidential”. Although employees are aware that FOI means that information can be disclosed, interviews were conducted on the basis that there was a reasonable expectation that they were in confidence and intended to be for “senior BII eyes and decision-making only”. These expectations were -

“in reliance on those reasonable confidentiality expectations and enabled interviewees, without fear of disclosure or criticism, to be open and provide complete and detailed input, advice, and informed views on important points, history, and issues”.

BII’s opinion is that the report’s authors would not have been able to obtain or identify these details without confidentiality. Its view is that these details and insight would not then have been available to the decision-makers.

27. BII explains that it is very important to the company that individuals that deal with it “feel sufficiently safe and supported to be open about what has happened and why”. There is a need to “identify possible or actual causes, faults and risks and consider ways to avoid and/or mitigate them in future”. BII needs “individuals to provide honest, complete, frank advice, views, opinions, guidance and recommendations without fear of being blamed, criticised or scapegoated”. With an “environment of trust” and a “complete view” BII is able to “understand key risk factors and potential solutions better”. Contributors need to be able to trust BII and not “feel they may be punished or suffer as a result of their contributions or be unfairly criticised or blamed for them...” It contends that “the volume and quality of contributions will decline...” should the information be disclosed and that this will impact on BII.

28. BII also explains to the Commissioner that it is "important to consider the markets and economies where BII invests. These markets are often volatile. The unexpected happens with regularity". A safe space is needed -

"in markets where there may be scepticism over how commercially sensitive/confidential information is shared and used and the fear of retaliation, protecting the space to receive and share feedback is critical...

...decision-makers need to receive full and frank advice, opinions, and views from their colleagues."

29. If individuals believe that their contributions will be disclosed they are likely to be "anodyne", lacking detail and this risks "less informed decisions" being made, less rigorous, and of a lower quality. BII invests long-term (some investments are twenty to thirty years old) and they need to be "well-documented" and contain "lessons learned". Disclosure "would likely result in the loss of free and frank sharing of views in relation to future lessons learned papers".
30. Shortcomings and failings could be underplayed and corrective actions not taken for that reason. The redacted information recommends improvements in processes and procedures regarding the assessment of future investments and BII needed to review its "approach and actions over a period of time" in order to do so. Disclosure "would likely have a chilling effect on the way future analysis is undertaken and delivered to decision-makers".
31. The Commissioner is satisfied that the QP's opinion is reasonable in respect of both these limbs of section 36 and is therefore engaged at the lower level of inhibition.

Public interest test

32. The Commissioner has therefore gone on to consider where the public interest lies in this matter.

Public interest factors in favour of maintaining the exemption

33. The complainant quotes from a parliamentary evidence report as follows:

"senior managers at Abraaj were accused of fund misuse and

Abraaj subsequently collapsed, with its CEO facing fraud charges and 291 years of imprisonment in the USA.”³

Their view is that there is a clear public interest in transparency regarding what lessons have been learned from what they describe as £100m's of taxpayers' money being exposed to a major fraud.

34. The complainant states that,

“BII must be held accountable for these losses, and understanding what due diligence mistakes were made, and therefore what lessons have been learned, is a crucial part of that accountability process.

It is therefore concerning that the authority has withheld the majority of the information requested, information which could explain what errors took place and why.”

35. They assert that lessons learned should be shared and not kept within one public authority. Not sharing these lessons “could allow similar frauds to take place” in public authorities or businesses making similar kinds of investments. The complainant argues that these lessons are clearly in the public interest.

36. They go on to weigh the ‘safe space’ argument against “this specific interest in transparency” in this case. The complainant’s view is that staff in public authorities know that they are subject to the FOIA and that their comments may be disclosed but that they “have a duty of candour and honesty”. Junior staff are generally protected by the expectation of privacy which lessens “the actual prejudice in this case”. In any case, they suggest that the record is likely to be an anonymised report where “teams would not be easily identifiable” which also lessens the risk of prejudice and “undermines claims at internal review that disclosure would lead to ‘self-censoring’ among staff”.

37. Finally, the complainant says that in serious failures involving “significant taxpayer losses” learning and accountability must take precedence over the fear of “bland and empty submissions” (internal review) which is a concern that “could apply in all cases where officials make written records”.

³ <https://committees.parliament.uk/writtenevidence/116043/pdf/>

38. BII acknowledges the need for transparency and accountability, particularly when a large amount of tax payer money is involved and "the activities of a publicly owned company can affect many individuals".

Public interest factors in favour of maintaining the exemption

39. It is noted by BII that there was already information in the public domain⁴ before this request was made about its investment focus and policies which, it says are "relevant in relation to the Abraaj matter and the redacted information". Information has already been disclosed that includes -

"the size and timing of BII's investments made, the nature of the investments, when issues began to be identified, initial steps taken to deal with them, the fact that other investors were involved, likewise affected and how the issues developed, including details about the financial exposure of affected investors as a whole and resultant litigation".

BII says that it was "keen to identify how this situation had arisen and developed and how it could do better in future..." A copy⁵ of the relevant board meetings was also published. However, "The extent to which BII can be open about relevant issues is also limited due to the litigation referenced above."

40. Set against disclosure, BII argues that without "openness and high-quality information" the report that emerged "would have looked very different, with a consequential and negative impact on related decision-making".
41. BII states that there is a "strong public interest in any look-back or lessons-learned exercise being effective and of value to the organisation undertaking it". This exercise is "designed to inform corporate boards and executive management and improve corporate systems, processes and procedures". Any "erosion" of this process is likely to be detrimental to the public interest in harming an organisation's "ability to learn from past matters and avoid future missteps".

⁴ [strategy-summary-2022-2026.pdf \(bii.co.uk\)](#) and [Policy report \(bii.co.uk\)](#)

⁵ [Minutes \(bii.co.uk\)](#)

42. There is a public interest in openness and honesty as regards the input from employees and BII partners where the quality of the contributions increase understanding and "enhances the company's ability to make properly informed and high-quality decisions". Disclosing the information is not in the public interest as the maintenance of trust and BII's "ability to offer a safe space" and encourage "whistleblowing" and the flagging up of concerns and maintaining the integrity of the review process.
43. Where disclosure is a possibility it "will inhibit the ability and willingness of those undertaking the exercises to do so in the most open, detailed way". Having to do this in the public eye might stifle the "thought process of those involved, their analysis (and how full and frank it will be)" and prevent "critical thinking (in relation to new options and approaches, rather than the familiar approaches...)".
44. BII contends that "encouraging information flows from employees and others" improves risk management and investment returns that help BII grow in order to benefit "developing countries and markets around the world and address the climate crisis".
45. It believes that the case for non-disclosure is "extremely strong" as engagement is necessary for "potentially contentious topics" that might arise where "robustly evidenced reviews" will ensure that "decision-making was properly informed, effective, and successful".
46. Disclosure risks "having the opposite effect". BII argues that, instead of "shining a light on issues" and making it "publicly accountable", it was more likely to "lead to a reduction in timely updates and relevant information about concerns and issues, limiting its ability" to improve awareness and "spot potential/growing problem areas, benefit from market intelligence and concerns, and take prompt action..." There is likely to be "significant harms and negative consequences as "BII would be almost alone in having to make such public disclosures in a market where confidentiality is critical to managing the impact on investments and their value".

Balance of the public interest

47. BII argues that because it is subject to the FOIA it faces unfairness in comparison with other investment companies that don't have to face the disclosure of its information. However, it is a public authority, it is government owned and the taxpayer is exposed.
48. The Commissioner has decided that the information withheld under section 36(2) of FOIA should be disclosed. Had the request been made regarding a recent report, then the outcome may well have been in favour of non-disclosure but the request was made over three years

after the date on the report. During that time he supposes that the contents of the report will have been digested and acted upon and CDC Group PLC has also been superseded by BII.

Section 43 – commercial interests

49. Section 43(2) of 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.
50. The Commissioner has defined the meaning of the term “commercial interests” in his guidance on the application of section 43 as follows:

“A commercial interest relates to a legal person’s ability to participate competitively in a commercial activity. The underlying aim will usually be to make a profit. However, it could also be to cover costs or to simply remain solvent.”⁶
51. Most commercial activity relates to the purchase and sale of goods but it also extends to other fields such as services.
52. The Commissioner’s guidance says that there are many circumstances in which a public authority might hold information with the potential to prejudice commercial interests.
53. The public authority must demonstrate a clear link between disclosure and the commercial interests of either itself, a third party or both. There must also be a significant risk of the prejudice to commercial interests occurring and the prejudice must be real and of significance for it to be successfully engaged.
54. The exemption is subject to the public interest test. This means that, even if the exemption is engaged, the Commissioner needs to assess whether it is in the public interest to release the information.
55. BII has provided the Commissioner with a breakdown of where it considered section 43(2) to apply.
56. 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.

⁶ [Section 43 - Commercial interests | ICO](#)

57. BII explained that it is a publicly owned investment company that operates in the private sector, transacting "on commercial terms seeking to deliver a development and impact agenda and earn appropriate investment returns for reinvestment in deserving companies in its markets".
58. Disclosure of the withheld information would be likely to prejudice the commercial interests of BII, HM Government and UK taxpayers. If there was to be a harmful commercial impact on BII this -
- "necessarily affects its ability to invest, limits terms available in the market, and ultimately reduce its impact on the local business community and population who would otherwise benefit from such increased investment."
59. BII is relying on some of the same arguments it used for section 36 regarding the harmful impact of disclosure within the "commercial context in which BII operates". It is an investment company that invests in private sector businesses and investment funds on a for-profit basis. Although it seeks to be transparent about its commercial activities the environment it operates in relies heavily on commercial confidentiality. The third parties BII invests with are mostly not subject to the FOIA and they expect BII to behave like other private sector companies when handling commercially confidential information and they "will not expect BII to disclose or publish information obtained from them, about them or relevant to them". If confidentiality is not kept, and they believe that information about them that may be detrimental to their interests will go into the public domain without their consent, then they may well be "more reluctant to provide BII with such information, and/or to contract/partner with BII as a result (especially compared to other investment companies with which they can work). BII contends that the consequences "might include missed investment opportunities, missed market information (including in respect of concerns and risks)..." the detrimental effect is therefore the impact on its ability to invest and obtain appropriate returns for further investment and "deliver its HM government-mandated development mission".
60. It drills down into the likelihood of harm as it would "cast doubt over the robustness of BII's internal assessment and risk management structures, which may cause BII to be perceived as 'risky'..." as a partner. If investment opportunities are lost growth will be limited and this will reduce its ability to reinvest in "deserving companies" and "benefit people in developing countries and address the climate crisis".

61. BII points to a previous decision⁷ where the Commissioner had decided that the CDC Group “was able to withhold from disclosure sensitive financial information around funds and investments in funds”. It is sensitive information that is not publicly available and that a “comparable private market organisation” would not have to disclose. It could provide “critical insight into the BII’s position and approach” and hamper its ability to negotiate.
62. Any commercial detriment to BII would be likely to cause detriment to HM Government and the taxpayer. The Commissioner is satisfied that the withheld information relates to BII’s commercial interests, that a causal link has been provided and that, although the information is now dated, he accepts that the level of detail could cause commercial detriment to BII at the lower level of prejudice.

Public interest test

63. Although the exemption is engaged regarding some of the information, the Commissioner also needs to consider whether it is in the public interest to disclose the withheld information or for it to remain withheld.

Public interest factors in favour of the disclosure of the requested information

64. The complainant argues that the prejudice to the commercial interest of BII is “highly tangential”. Co-investors are aware that BII is subject to the FOIA so this argument should be given little weight. Any negative effects on Abraaj are “unlikely to meaningfully impact an already non-existent reputation” and the public interest favours transparency. Although they acknowledge that there is information in the public domain, it does not cover the topic of what they requested.
65. BII acknowledges that there is a public interest in information relating to its investments as they are made with public funds and consequently its performance is of public interest to taxpayers.

Public interest factors in favour of maintaining the exemption

66. Conversely, BII argues that there is a strong public interest that “the commercial interests of public authorities and companies and parties working with public authorities are not prejudiced”. Any adverse impact

⁷ [fs50660914.pdf \(ico.org.uk\)](#)

resulting from disclosure that has an impact on BII's commercial activities is not in the public interest.

67. BII believes that it is not in the public interest to disclose the information as it would not add to the "broader understanding of its operations but which is likely to undermine its position in the market".

Balance of the public interest

68. Firstly, BII has cited section 43(2) of FOIA to information where it has also cited section 36 of FOIA. For the same reasons as the Commissioner has set out in paragraphs 47 and 48 regarding the public interest for section 36, he considers the release of some of this information to also be in the public interest. In deciding that part of the information should be disclosed, the Commissioner has, in this instance, set the public interest in transparency and accountability regarding a significant loss of public funds higher than the public interest in any potential commercial detriment that might arise from disclosure.
69. However, the withheld information contains some financial information that, on balance, should not be disclosed, despite its age. Although BII is subject to the FOIA, it is a financial investment company that relies on being able to operate on a relatively level playing field with private sector companies in order to make its investments. The complainant acknowledged in their information request that "some very specific financial information may be exempt". It is not in the public interest to disadvantage BII by revealing some of the specific information withheld under section 43(2) as it has the potential to undermine its operations which, in terms of BII's mission, is not in the public interest.
70. As the Commissioner has decided that this information should be withheld, he has not gone on to look at section 36(2)(c) in relation to the same information.

Procedural matters

71. Section 10 of the FOIA requires a public authority to disclose non-exempt information within 20 working days of receiving a request.
72. BII breached sections 1, and 10(1) of FOIA by failing to confirm that the information was held and providing information beyond the 20 working day statutory timeframe.

Right of appeal

73. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

74. 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.
75. 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

Janine Gregory
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