

Freedom of Information Act 2000 (Section 50)

Decision Notice

20 October 2009

Public Authority: Export Credits Guarantee Department
Address: PO Box 2200
2 Exchange Tower
Harbour Exchange Square
London
E14 9GS

Summary

The complainant asked the Export Credits Guarantee Department (ECGD) to provide information about an insurance agreement with BAE Systems Ltd (BAES) in 2004. He referred to articles published by The Guardian newspaper and asked for complete copies of a number of related documents. He also asked ECGD to provide a schedule of relevant documents. A detailed investigation led to the consideration of seven exemptions applied by ECGD and further information was identified as being suitable for release.

As regards the request for a schedule of documents, the Commissioner decided that, to the extent it is held by ECGD, the information should be provided in the form of a schedule as requested by the complainant.

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

Role of ECGD

2. ECGD conducts its business on behalf of the Secretary of State for Business Innovation and Skills under powers set out in the Export and Investment Guarantees Act 1991. The Chief Executive, as Accounting Officer, is authorised to carry out the functions necessary to execute the Secretary of State's powers under the 1991 Act. ECGD's core purpose of facilitating exports is achieved by assuming risks. In doing

so, its key aim is to assist British exporters while meeting the objectives agreed by Ministers. ECGD's risk acceptance and policy of pricing to risk are both determined by the need to achieve these objectives. At the operational level, ECGD's credit and treasury risks are overseen by ECGD's Risk Committee. Prior to establishing the Risk Committee, an Underwriting Committee and a Market Committee carried out those functions.

Al Yamamah programme

3. The Al Yamamah (AY) programme is a government-to-government programme between the Kingdom of Saudi Arabia and the UK Government, represented by the Ministry of Defence. In effect, BAE Systems Ltd (BAES) acts as sub-contractor to the Ministry of Defence, and applies to ECGD for insurance in respect of the AY programme.

The Request

4. In a request dated 20 February 2005, and received by ECGD late on 21 February 2005, the complainant asked ECGD to provide information about an insurance agreement they had made with BAES. He referred to an article published by The Guardian newspaper on 14 December 2004 and a subsequent article [which was published on 15 December 2004]. Specifically he asked for:
 - a) complete copies of BAES's application for this insurance
 - b) complete copies of documents which describe how ECGD evaluated the applications and the reasons why ECGD agreed to the application
 - c) complete copies of documents detailing the decision to keep the existence of this insurance secret
 - d) complete copies of correspondence between ECGD and BAES before and after the two articles appeared in the Guardian detailing what ECGD's response to the article was to be.

... [and] to provide a schedule of documents that are relevant ... [including] ... a brief description of each relevant document including the nature of the document, the date of the document, and whether the document was released or not.
5. On 25 February 2005 ECGD acknowledged receipt of the request.
6. On 21 March 2005 ECGD told the complainant that his request raised complex public interest considerations which needed to be analysed. The exemptions then under consideration were: section 36 (Prejudice to effective conduct of public affairs), section 27 (International relations) and section 29 (The economy), also section 41 (Information obtained in confidence). ECGD said that they needed to extend the response time by 15 working days in order to assess the balance of the public interest.
7. Considerably more than 15 working days later, on 11 August 2005, ECGD provided a small amount of information to the complainant but withheld most of the information

requested. ECGD said that they wished to rely on additional exemptions in the Act: section 35 (Formulation of government policy, etc), section 40 (Personal information) and section 43 (Commercial interests). ECGD said that the public interest in withholding the information was 'not outweighed by the public interest in disclosure'.

8. On 27 January 2006 the complainant asked ECGD for an internal review of the decision. Referring back to his original request of 20 February 2005, the complainant added that he would like ECGD, in reviewing his request and ECGD's own response to it, to release a fuller and more detailed schedule of documents.
9. Some five months later, on 5 July 2006 ECGD told the complainant that a review had been carried out and had upheld application of the exemptions cited in the refusal notice of 11 August 2005. ECGD said that the Minister had confirmed that there were no grounds for altering the original approval of the use of the section 36 exemption. ECGD acknowledged that there had been a breach of section 17(1) of the Act as that reasoning had not been provided in the refusal notice; ECGD set out a summary of the arguments for each of the exemptions cited. ECGD acknowledged that the section 35 and 36 exemptions could not be used cumulatively and that the section 35 exemption had been incorrectly cited in their response. However they said that if section 36 were to be held not to apply (which they believed it did) then certain ministerial communications would fall within the scope of the section 35 exemption. ECGD added that they believed that the names of individuals sending and receiving the relevant correspondence fell outside the scope of the initial request for information and, if the complainant wished to receive that information, he should submit a further request for that information in the usual way. With regard to the request for a schedule of documents being withheld, ECGD said that the information was not held and that they were not obliged to create new information to satisfy a request.

The Investigation

Scope of the case

10. The Commissioner considered ECGD's handling of the matter, the application by ECGD of the exemptions claimed and the balance of the public interest as it applied to all of the qualified exemptions cited by ECGD.
11. In considering whether the information had been withheld correctly, the Commissioner first considered each part of the request and ECGD's application of the exemptions to each. For information which he decided had been correctly withheld under the section 27 and 43 exemptions of the Act, the Commissioner did not consider application of other exemptions. He considered the application of the section 36 and 35 exemptions where these had been relied upon but did not consider the section 29 and 42 exemptions. He also considered application of the section 40 and 41 exemptions and whether or not ECGD should have complied with the request for a schedule of documents.

12. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.

Chronology

13. On 1 September 2006 the complainant contacted the Commissioner to complain about the way his request for information had been handled. Aside from a direct challenge of the application of the section 41 exemption, the complainant did not explicitly challenge engagement of the exemptions relied upon by ECGD but said that he believed that the public interest was in favour of full disclosure.
14. On 6 May 2008 the Commissioner opened his investigation of the complaint and on 4 June 2008, following clarification of the matters under investigation, ECGD indicated an intention to respond in about two weeks and subsequently asked for an extension to 27 June which was then rescheduled to 11 July 2008 before ECGD finally replied on 18 July.
15. On 18 July 2008 ECGD provided the Commissioner with a full response to the matter, including helpful background information, and provided copies of the information being withheld but omitted to refer to the complainant's request for a schedule of documents. For the first time in this matter, ECGD indicated an intention to rely on the section 42 exemption (Legal professional privilege) in withholding some information.
ECGD clarified that the section 35 exemption was only being applied to the 2002 ministerial correspondence at annex A of a submission to the Underwriting Committee.
16. On 25 September 2008 ECGD confirmed to the Commissioner details of the qualified person who had given a reasonable opinion concerning the application of the section 36 exemption to the matter.
17. On 15 October 2008 ECGD provided the Commissioner with further representations as regards application of the public interest test under the section 36(2)(b) exemption.
18. On 21 January 2009 the Commissioner's staff asked ECGD to provide him with the relevant submissions to the qualified persons when activating the section 36(2)(b) exemption. On 26 February 2009 ECGD provided the Commissioner with the submissions which had had explained the matter in detail and had been approved by the relevant qualified persons on 10 August 2005 and 4 July 2006 respectively. During March 2009 there were further exchanges of correspondence between the Commissioner's staff and ECGD about this matter and a related matter which had been the subject of a then recent Decision Notice by the Commissioner (reference FS50128406) which ECGD appealed on 23 March 2009.
19. On 27 May 2009 the Commissioner's staff provided ECGD with an initial view on this matter and invited ECGD to accept or discuss his provisional outcome.
On 25 June 2009 ECGD declined to accept the Commissioner's view and put to him additional representations relating to four discreet points which were: withholding the names of junior officials; the 'non-standard elements' of the BAES application form to

ECGD; paragraph 1.2.3 of the minutes of the relevant ECGD meeting; and, the complainant's request to provide a schedule of documents. Reference was also made to a parallel investigation by the Commissioner into a related matter, ICO reference FS50229756.

Findings of fact

20. The starting date of cover for BAES for the AY deal had been 1 September 2004; it ran until 31 August 2005.
21. ECGD confirmed to the applicant and to the Commissioner on 18 July 2008, that no documents existed "detailing the decision to keep the existence of the insurance secret" (part c of the request).
22. As regards application of the section 36 exemption, the qualified person at the original request stage had been Ian Pearson MP, his opinion had been dated 10 August 2005; at the internal review stage it had been Ian McCartney MP whose opinion was dated 4 July 2006. The Commissioner found these to have been reasonable opinions which had been arrived at reasonably.
23. The Commissioner has noted a series of newspaper reports published during the autumn of 2006 alleging corrupt practices during the negotiation of the series of AY arms deals. These were based on research by members of the public into documents placed in The National Archives. Some of those documents were subsequently found to have been placed there in error and were withdrawn by the originating departments.
24. During late 2006 the Serious Fraud Office (SFO) conducted an investigation into related matters but disengaged from it in December 2006. Contemporary news reports by the BBC reported the then Attorney-General as saying that the SFO investigation had been stopped because of doubts over the prospects of success in any potential prosecution and also on grounds of national security. The then Prime Minister had reportedly said that the UK's relationship with Saudi Arabia was vitally important for the UK in terms of counter-terrorism, in terms of the broader Middle East, in terms of helping in respect of Israel and Palestine, and that that UK strategic interest came first.

Analysis

25. The Commissioner has considered the public authority's response to the complainant's request for information.

Procedural matters

26. Where a request is made for a schedule or list of documents, even if the schedule itself does not exist, but where - as here - the information which would be in the schedule is also a part of other held information, it will also be held, and should be disclosed unless exempt. ECGD's failure to disclose the information identified by the

Commissioner as proper to have been disclosed, including the failure to provide a schedule of relevant documents, was in breach of sections 1(1)(b) and 10(1) of the Act.

27. The complainant made his request to ECGD on 20 February 2005. ECGD issued a partial refusal notice on 21 March 2005, but did not reply fully until 11 August 2005, well beyond the 15 working day extension ECGD had initially promised. ECGD quoted incorrectly the test for balancing the public interest in saying that the public interest in withholding the information was not outweighed by the public interest in disclosure; this was corrected when ECGD provided the outcome of their internal review of the complaint on 5 July 2006. ECGD's failure to cite the relevant subsections of the Act by the time of the completion of the internal review was a breach of section 17(1)(b) of the Act.
28. ECGD said they accepted, and the Commissioner confirmed, that the failure to provide reasons when applying the exemptions in the refusal notice of 20 October 2005 was a breach of section 17(1)(c) of the Act. ECGD at the internal review stage accepted that they had erred in citing the section 35 and 36 exemptions together initially. ECGD's suggestion that they might revert from the section 36 exemption to the section 35 exemption in the alternative was erroneous.
29. In July 2008 ECGD sought to rely on the section 42 exemption. This late citation of the exemption was a breach of section 17(1)(b) of the Act. The Commissioner noted that all of the information to which ECGD sought to apply the section 42 exemption, was also the subject of other exemptions, exemptions that he was minded to accept. Accordingly he did not consider it necessary to accept that ECGD might now rely on the section 42 exemption.

Exemptions

30. ECGD sought to rely on the following exemptions: section 27 (International relations), section 29 (The economy), section 35 (Formulation of government policy, etc), section 36 (Prejudice to effective conduct of public affairs), section 40 (Personal information), section 41 (Information provided in confidence), section 42 (Legal professional privilege), and section 43 (Commercial interests).
31. References to the information, and the exemptions applied to each part of it by ECGD, along with the Commissioner's decision, are set out in detail in annex 2 to this Notice.
32. There were multiple instances where ECGD had applied two or more exemptions to the same information. In those cases, where the Commissioner decided that the information had been correctly withheld under one exemption, he did not then proceed to consider the application of further exemptions to that same information.

The request

a) Complete copies of BAES's application for this insurance

33. As detailed at annex 2 to this Notice, ECGD first applied the section 41 and 43 exemptions to some of the information which they withheld. During the Commissioner's investigation, ECGD also applied the section 27 exemption to some parts of this information. The Commissioner did not accept that the section 41 exemption had been correctly applied, for the reasons set out below. However he did accept that the section 43 exemption had been correctly engaged and that some of the information exempted under section 43 had been withheld correctly as, for that information, the public interest in maintaining the exemption outweighed that in disclosing the information. Where ECGD had later applied the section 27 exemption, the Commissioner accepted that it had been correctly engaged and, in all cases, that the public interest in maintaining the section 27 exemption outweighed that in disclosing the information.

Section 43 – Commercial interests

34. The complainant did not challenge the engagement by ECGD of the section 43 exemption.

35. ECGD told the Commissioner that disclosure of the relevant information would prejudice the commercial interests of BAES.

36. After applying the prejudice tests to this matter, the Commissioner is satisfied that disclosure of the information he regards as falling within this exemption, and which is set out at annex 2 to this Notice, would prejudice the commercial interests of ECGD as well as those of BAES. The Commissioner has noted that disclosure of the relevant information would be detrimental to ECGD's negotiating position in future business dealings, not just with BAES but with other companies, and could lead to a reduction in ECGD's ability to obtain best value for money for itself and the taxpayer. The Commissioner considered ECGD's argument carefully. He took the view that, following implementation of the Act, companies contracting with public authorities can reasonably expect that their commercial dealings will be subject to a high level of public scrutiny and that this should be seen as part of the conditions of contracting with ECGD and other public authorities. However, he recognised that ECGD needs to maintain the confidence of its commercial partners. Accordingly the Commissioner is satisfied that, in releasing the information, there is a real and significant risk of prejudice to the commercial interests of ECGD and BAES and he decided that the exemption is engaged.

Public interest test and section 43

37. The complainant said that the public interest was in favour of full disclosure. The agreement covered a very large amount of money but very little was known about it and disclosure of this information would help to hold to account the government about whether it should have entered into this agreement, thereby making for a more informed public debate. In particular, he said, there had been criticism that the government had agreed to pay more than £1bn to BAES if the Saudi Arabian regime

collapsed. He added that the need to account for the way in which British taxpayers money had been handled overrode any potential damage to relations between Britain and Saudi Arabia. Moreover he said, BAES derived commercial benefit from this agreement with the government. In return it should forgo the right to maintain all-encompassing alleged commercial confidentiality, since the need to explain to the taxpayer how public money had been handled was more important.

38. The complainant continued that the government had argued that insurance agreements such as these had to be kept secret as disclosure would encourage the purchaser to default. He said that, in a change to that argument, the government had confirmed the existence of that agreement but had refused to give further details. He said they should now do so, as giving more detail would be unlikely to give any further encouragement to default to any regime which took over from the current government and which would, he said, be likely to default.
39. The complainant also said that disclosure was important for another reason. The British government had said it was committed to preventing bribery and corruption by British companies. In 2002, he said, the government had passed a law making it illegal for British companies to pay bribes to foreign politicians and officials to win contracts abroad and was committed to stopping corruption in contracts supported through ECGD. He said that the SFO was [at the time of his writing in September 2006] investigating allegations of BAES having made corrupt payments in relation to its Saudi and other contracts. ECGD had, he said, introduced procedures designed to stop corruption in contracts which were given public support. It was, he said, in the public interest to be able to judge whether the procedures had enough teeth to make a difference and whether they were being implemented properly. Full disclosure in this matter would enable the public to see how ECGD had acted and therefore hold the department to account. It would also help to improve public understanding of the issues and therefore aid the democratic process.
40. ECGD told the Commissioner that the disclosure of this information would prejudice the commercial interests of BAES. The public interest in openness and transparency in the accountability of public funds was outweighed by the prejudicial effect of disclosure on the commercial interests of BAES. It is not in the public interest for BAES's commercial position to be as significantly undermined as it would be.
41. The Commissioner has considered carefully the case put by both the complainant and ECGD as regards the public interest. He accepted that, for the information he decided should continue to be withheld, disclosure would have the prejudicial effects noted above and that this would not be in the public interest. He is satisfied that there is considerable merit in transparency in the use of public funds and in strong accountability for the commercial arrangements adopted by ECGD, both in this instance and more widely. However he has also noted that both ECGD and BAES operate within highly competitive commercial and international environments and that the relevant information could be of value to the competitors of either or both. He was therefore satisfied that the public interest in the disclosure of the information which he had identified at annex 2 to this Notice as being exempt under section 43 is outweighed by the public interest in maintaining the exemption.

Section 27 – International relations

42. Late in the Commissioner's investigation, on 25 June 2009 and prompted in part by events in the Commissioner's investigation of another related matter, ECGD additionally relied upon the section 27 exemption in withholding some of the relevant information. The Commissioner considered whether it would be just, at that stage, to allow ECGD to rely on that exemption. Having regard to relevant case law, notably in the *Gilby* cases (*Gilby v The Information Commissioner and FCO*, EA/2008/0071, 0077, 0079), he decided that it would not be in the interests of justice for him to disregard the section 27 exemption where he was satisfied that it had been applied correctly if belatedly. Accordingly he decided to take into account ECGD's representations regarding the section 27 exemption.
43. ECGD told the Commissioner that some of the redacted information should have been withheld under section 27 of the Act because disclosing it would reveal a substantial amount of detail included in confidential government to government memoranda of understanding and other agreements. ECGD said that this information engaged the exemptions in sections 27(1)(a), (c) and (d) of the Act together with that in section 27(2) with section 27(3). In the view of ECGD, disclosure would, or would be likely to, prejudice relations between the governments of the UK and Saudi Arabia, the interests of the UK abroad, and the promotion or protection by the UK of its interests abroad. Almost all of the relevant information was also confidential information obtained from Saudi Arabia. ECGD said that this was also the view of the Ministry of Defence (MOD), which ECGD had taken into account in deciding this matter. ECGD had also sought the views of the Foreign and Commonwealth Office (FCO) who had considered that MOD were best placed to comment on the information. ECGD said that both they and MOD had taken into account the Information Tribunal's decision in the *CAAT* case, (*CAAT v The Information Commissioner and MOD*, EA/2006/0040) in relation to a previous request for information contained in Memoranda of Understanding between the UK and Saudi Arabian governments. The *CAAT* case had highlighted the strong sensitivity of the Saudi Arabian government to disclosure of matters which related to the defence of Saudi Arabia.
44. As regards the engagement of the exemptions, the Commissioner noted that the section 27 exemptions are prejudice based. He noted the case put forward by ECGD and took into account the decisions of the Information Tribunal in related matters in the *CAAT* and *Gilby* cases.
45. As regards the prejudice test, the Commissioner identified applicable interests for the UK government in maintaining good relationships with the government of Saudi Arabia. He saw that the relevant information had been provided to ECGD in confidence within the meaning of sections 27(2) and (3) of the Act and that its disclosure would also prejudice relations with Saudi Arabia and UK interests abroad for the purposes of section 27(1)(a), (c) and (d) of the Act. In this he followed the decision of the Tribunal in the *CAAT* case.
46. While the *CAAT* case related to matters as they stood in 2005, based on the evidence of ECGD and the findings of the Tribunal in the *CAAT* case as regards accidental disclosures of related information in 2006 and 2007, the Commissioner

decided that the passage of time had not made a significant difference to the interests that would be prejudiced. In deciding this, the Commissioner took into account what he regarded as the reasonable expectations of the Saudi Arabian government and noted the diplomatic responses made in 2006 and 2007 to avert damage to the international relationship, and that these responses would not otherwise have been necessary, had it not been for the accidental disclosure of confidential information. He recognised the nature of the likely prejudice to the interests of the UK and the probability that the prejudice foreseen would arise. The Commissioner therefore decided that prejudice had been demonstrated and that the section 27 exemptions were engaged.

Public interest test

47. ECGD told the Commissioner that any public interest in disclosing the information was outweighed by the public interest in maintaining the exemption. The harm that disclosure would cause to relations with the government of Saudi Arabia and to UK interests abroad would not be in the public interest, nor would it be in the public interest to disclose details that the Saudi Arabian government expected the UK government to keep confidential.
48. ECGD said that their primary function was to make arrangements that facilitated exports. To do this, ECGD issued guarantees and insurance in respect of certain risks. ECGD had sophisticated processes for evaluating risk, which drew on considerable internal and external economic, financial and other expertise. In any transaction ECGD was asked to support, the redacted information would not help the complainant to determine whether or not ECGD were justified from a risk perspective in providing support to the transaction and would not assist debate about ECGD's activities. The export credit cover related primarily to underlying agreements between the UK and Saudi Arabian governments.
49. ECGD said that the complainant had referred to the SFO investigation of BAES's transactions with Saudi Arabia but, be that as it may, the withheld information had been properly subjected to the exemptions ECGD had cited. The redacted information would not assist the complainant in any consideration of whether or not his "suspicions of wrongdoing" were well-founded. ECGD had been as transparent as possible, while taking into account the provisions of the Act to preserve confidentiality and international relations as the Act envisaged.
50. The Commissioner, through his staff, has examined the information withheld and has taken full account of its content in reaching his decision. He saw that, for the information for which section 27 is engaged, the issues favouring disclosure are that, through ECGD's contract, a substantial sum of public money was put at risk. He had regard to the need for transparency and openness in public affairs. However he has also seen that disclosing the information would prejudice the UK government's relationship with the government of Saudi Arabia. He accepted that disclosure would breach confidences which ECGD had accepted in good faith. Disclosure would cause severe damage to confidence in ECGD as a business partner of BAES and its customer. Accordingly he decided that the damage to the public interest that would result from disclosure of the relevant information would heavily outweigh the benefits from making that information generally available. The Commissioner therefore decided that the public interest in maintaining the section 27 exemptions outweighed the public interest in disclosing the information.

Section 41 – Information provided in confidence

51. The exemption provided by Section 41 of the Act provides, at section 41(1) that information is exempt information if it was obtained by the public authority from any other person (including another public authority), and if its disclosure would constitute an actionable breach of confidence. For the purposes of section 41 a breach will always be actionable if: the information has the necessary quality of confidence; it was imparted in circumstances importing an obligation of confidence; and, there was an unauthorised use of the information to the detriment of the confider (although the element of detriment is not always necessary).
52. ECGD sought to apply the section 41 exemption to much of the information being withheld under part a) of the request (the application by BAES for insurance). ECGD also applied the section 43 exemption to much of the same information. In determining this part of the matter, the Commissioner saw that some of the relevant information had been correctly withheld under the section 43 exemption. He did not proceed to consider the application of the section 41 exemption to the information that he decided had been withheld correctly under the section 43 exemption. The Commissioner did however consider the application of the section 41 exemption to the information that had not been correctly withheld under the section 43 exemption.
53. ECGD said that this relevant information was exempt under section 41 as it was information that had been provided in confidence, had the necessary quality of confidence, and the disclosure of which would constitute an actionable breach of confidence. They said that disclosure of details of BAES's contractual responsibilities would damage the relationship of BAES with the UK government and that of Saudi Arabia and would provide information which would be useful to BAES's competitors. This would cause substantial harm to BAES given the importance of this contract to their UK operations.
54. The complainant questioned the reliance of ECGD on the section 41 exemption. He said that he believed the chances that BAES "would" initiate legal action against a UK government agency such as ECGD for an actionable breach of confidence were negligible. He added that BAES were one of the main users of ECGD's services and needed to do business with ECGD to obtain contracts such as this at a much cheaper price than the private sector. It was therefore unlikely, he said, that BAES would jeopardise this relationship by launching legal action against ECGD.
55. The Commissioner noted that, in addressing the issue raised by the complainant of a breach of confidence being actionable, his concern was not with whether BAES "would", as a matter of policy, initiate action against ECGD but whether, as a matter of law, they had a reasonable prospect of being able to mount an arguable case.
56. To the extent that the relevant information comprised a written agreement between two parties the Commissioner does not regard it as constituting information obtained by one of them from the other; it did not therefore fall within the scope of section 41(1)(a) of the Act.
57. As regards the issue of whether or not the disclosure of the remaining relevant information would constitute an actionable breach of confidence, the first question for

the Commissioner is whether the information has the necessary quality of confidence. For information to have the necessary quality of confidence it must not be otherwise accessible, and be more than trivial. Information which is shared in public is not confidential because the circumstances in which it is provided do not give rise to an obligation of confidence. The Commissioner saw that information such as company address details, and aspects of the AY agreements that were already in the public domain did not have the necessary quality of confidence. The circumstances in which BAES had provided information to ECGD meant that for some, but not all, of the information there was an obligation of confidence

58. In some cases the public interest in disclosure will outweigh any harm to the commercial interests of the confider as seen for instance in the *Derry* case (*EA/2006/0014 tba*). In this matter, for the relevant information, the Commissioner saw that BAES would have recognised and accepted that the considerable sums of public money needed to underwrite the business they proposed to insure with ECGD would need to be justified by ECGD within government, to other public authorities, to taxpayer representatives and more widely. For the information BAES provided to ECGD that was of key commercial value, the disclosure of which would result in detriment to BAES as the provider, there was a clear obligation of confidence. The less sensitive information would not result in detriment to BAES and its disclosure by ECGD would not therefore be actionable. In this matter, the Commissioner saw that the information that was commercially sensitive had been correctly withheld under the section 43 exemption. The less sensitive information did not have the necessary quality of confidence and its disclosure would not therefore be actionable.

b) Complete copies of documents which describe how ECGD evaluated the applications and the reasons why ECGD agreed to the application

59. The Commissioner found that ECGD had taken this part of the request to refer to the paper submitted to ECGD's Underwriting Committee that had considered the provision of cover for AY for 2004 (the paper) and the minutes of the meeting recording that decision (the minutes). In withholding the information contained in the paper and the minutes, ECGD had relied variously on the exemptions contained in sections 27, 29, 35, 36, 41, 42, and 43 of the Act. The Commissioner's decision with respect to this information is set out at annex 2 to this Notice.

60. As regards the application of sections 27, 43 the Commissioner decided, for the reasons set out above, that some information had been correctly withheld. Where more than one exemption had been applied to information and he had decided that it had been correctly withheld under one exemption, the Commissioner did not proceed to consider the application of other exemptions to that same information. Where ECGD had relied on the section 41 exemption, the Commissioner decided that it had not been correctly applied for the reasons set out above. His decisions and reasoning in considering the remaining exemptions applied by ECGD follow.

The section 35 and section 36 exemptions

61. ECGD clarified that the section 35 exemption had only been applied in respect of two items of ministerial correspondence contained in the paper.

62. The Commissioner accepts that section 35 public authorities may claim the section 36 exemption as an alternative or fall back exemption to the extent that section 35 is not engaged and a reasonable opinion in respect of all relevant information has been given by a qualified person. The section 36 does not apply to information which is exempt by virtue of section 35, and the Commissioner has decided that section 35 does in fact apply to the relevant information in this case, the information therefore cannot be exempt by virtue of section 36. Even if section 36 had been engaged, the Commissioner considers that the public interest test would have raised similar issues and produced the same result, as his analysis and decision in relation to section 35.

Section 36 – Prejudice to effective conduct of public affairs

63. In withholding the information ECGD relied upon the exemption set out in section 36(2)(b) of the Act saying that, in the reasonable opinion of a qualified person, disclosure of the information would, or would be likely to, inhibit the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation. ECGD applied this exemption indiscriminately to all of the information in both the paper and the minutes. The Commissioner did not consider the application of the section 36 exemption to information that he had decided should be withheld under the section 27, 35 and 43 exemptions.

64. As regards application of the section 36 exemption, ECGD said that the withheld information (the paper and the minutes) was exempt in its entirety under section 36(2)(b) of the Act. In the reasonable opinion of a qualified person, disclosure of the withheld information would, or would be likely to, inhibit the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation, and would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs. The relevant Minister (the “qualified person”) had confirmed to ECGD that the foregoing was his opinion at both the original request stage and at the internal review stage.

65. ECGD said that the qualified person’s opinion was reasonable because taking decisions about covering risk (including whether to accept risk or not, whether to stipulate conditions, and the price to charge) was at the core of ECGD’s operations. Submissions to, and meetings of, the committee were the way in which ECGD performed its assessment of whether or not to commit its support (and therefore funds of the taxpayer) to a particular programme. ECGD’s statutory function was to facilitate exports, and in so doing to assume financial risk, through the issue of insurance policies and guarantees; in some cases, such as in this one, it involved taking on risks of a significant nature and size. The result was that the government assumed a contingent public expenditure liability. Therefore, ECGD must balance the interests of exporters and the UK taxpayer. Achieving this balance for a piece of business of the size and nature of AY was not easy. The particular risk was more difficult to quantify because of the causes of loss which BAES was seeking insurance for and the risk assessment therefore necessarily required the consideration of very sensitive information, which went to taking a view about the future situation of Saudi Arabia, and touched on ECGD’s customer and the UK government’s relationship with a foreign government with which both were engaged in a close relationship.

66. In order for ECGD to arrive at a fully informed decision about the risk before committing its support and funds of the taxpayer, it was essential that ECGD considered fully all relevant factors. Risk assessment documents needed to be as full and frank as possible. If the information and views contained within any submission to the committee were disclosed in full or in part, those preparing such documents would inevitably be much less forthcoming in future in the provision or presentation of information, views, opinions or advice. Officials, sensitive to the possibility of expressing views which might cause friction or dispute with third parties, would feel constrained by the threat of possible future disclosure. This would most obviously be the case in any future submission to the committee on AY or related matters, but would also be the case in future submissions to the committee on other programmes or projects that ECGD might consider supporting.
67. ECGD added that the committee's discussions also needed to be as full and frank as possible. If the minutes were disclosed in full or in part, or were at risk of being wholly or selectively quoted, persons attending such meetings would be more circumspect in their contributions. There would also be likely to be an adverse effect on how minutes were taken or agreed in the future on AY and in future submissions to the committee on other programmes or projects.
68. ECGD told the Commissioner that the test was not whether officials *ought* not to be influenced in such a way that the full and frank provision of advice or the free and frank exchange of views for the purposes of deliberation was inhibited, or whether officials had a general duty not to be influenced in such a way, but whether officials would or would be likely to be influenced in such a way. The free and frank provision of advice would also be inhibited if exporters were given a disincentive to make full and frank disclosure of all relevant facts to ECGD, as officials would be in possession of less facts upon which to base their advice. Disclosure of the requested information would have an inhibitory effect on exporters who would be likely to make less full and frank disclosure of facts which would otherwise be released into the public domain. Again, this would most obviously be the case in respect of the provision of information on AY and related matters, but also on other programmes or projects that ECGD might be asked to support.
69. The Commissioner saw that ECGD had obtained the opinion of a qualified person and was satisfied from the evidence that ECGD provided, which included the relevant submissions showing that the qualified person had had before him the information at issue, that the opinions were reasonable and had been reasonably arrived at. He therefore decided that the exemption had been correctly engaged.

Public interest test and section 36

70. The Commissioner took into account the views expressed by the complainant set out above as regards the application of the public interest when considering the balance of the public interest in this matter.
71. ECGD told the Commissioner that in all the circumstances of the case, the public interest in maintaining the exemption outweighed the public interest in disclosing the information. ECGD accepted that there was a general public interest in transparency of decision making and accountability in the commitment of public funds. However

ECGD believed that this was outweighed by the following factors in respect of information contained within future submissions to, and minutes of, meetings of the committee, particularly on any future consideration of support for AY and related matters and also on considerations of support for other programmes and projects. ECGD said that it was not in the public interest for officials to be provided with a disincentive to make full and candid submissions. It was not in the public interest for ECGD to commit its support and funds of the taxpayer without being the recipient of full and frank advice, and without the ability to conduct a free and frank exchange of views for the purposes of deliberation. There was a public interest in ensuring risk was properly assessed and controlled by ECGD and in ensuring that such risk did not result in unacceptable financial loss. There was a public interest in allowing ECGD to comply with the financial objectives it had been set by government, which it could only do by fully and rigorously assessing the risks of the projects and programmes it was asked to support. Decisions made on the basis of incomplete information were likely to be less soundly based and therefore more risky with an increased exposure to potential loss. This would lead to more adverse financial outcomes for ECGD and the taxpayer. It was not in the public interest for minutes of future meetings of the committee to be abridged or not taken at all. Given the significance of the decisions taken, it was important that there was a full audit trail in the form of a written record of the discussions leading to the decisions taken.

72. ECGD referred to case law which they regarded as relevant. In the *ECGD* case (*ECGD v Friends of the Earth [2008] EWHC 638 (Admin)*), ECGD said, the High Court had referred to the fact that disclosure of advice within or between departments relating to decisions which had to be taken at ministerial level would significantly inhibit the conduct of good government. Mr Justice Mitting had stated that there was a legitimate public interest in maintaining the confidentiality of advice within and between departments on matters that would ultimately result, or were expected ultimately to result, in a ministerial decision. Whilst the weight to be given to those considerations would vary from case to case, he had said that he could: "state with confidence that the cases in which it will not be appropriate to give any weight to those considerations will, if they exist at all, be few and far between."
73. ECGD added that, in their view, individual paragraphs of papers and minutes of the committee should not be viewed in isolation. Disclosure of any part would result in those officials making submissions to the committee and its members being in a position where they lacked certainty as to what might be disclosed in future. Officials, unsure of which parts of their submissions or minutes might be considered to be disclosable by the ICO in isolation from the rest of the submissions or minutes, would have an incentive to reduce submissions and minutes to the minimum possible, excluding, for example, valuable background material and references to other documents. Even partial disclosure would create a significant incentive for similar material to be kept out of future submissions and minutes. This too would not be in the public interest.
74. In addition ECGD said that it would not be in the public interest to disclose ECGD's internal deliberations about the Saudi Arabian government, other government departments (including investigative agencies), Parliament, ECGD's Minister, and BAES. ECGD said that disclosure would cause its relationships with those groups to suffer and, as a result, ECGD would be less able to carry out its statutory functions. It

would not be in the public interest for these relationships to be harmed, nor for ECGD's ability to carry out its statutory functions to be hampered.

75. As regards the information he has not already decided should be exempt under other exemptions, the Commissioner took account of the public interest arguments put to him by both the complainant and ECGD. He also had regard to the concerns and opinion of the qualified person in determining whether or not prejudice would arise. After a careful evaluation of these arguments the Commissioner concluded that, subject to his findings on the application to some of the relevant information of the section 27, 35 and 43 exemptions of the Act, the balance of the public interest in relation to the section 36 exemption is in favour of disclosing the remainder of the information sought. This view is based on his belief that any potential harm to the policy and business analysis of future projects and programmes within ECGD, which he has considered, would not outweigh the considerable public interest in disclosing the information.
76. The complainant argued that some at least of the withheld material should have been disclosable; as this decision makes clear, the Commissioner agrees. The Commissioner noted the views of the complainant and considers that any public debate would be materially assisted by the availability of relevant information.
77. The Commissioner saw that the agreed cover was of high monetary value so that a substantial sum of public money would potentially be at risk from ECGD underwriting this matter. The Commissioner saw this as a matter for legitimate public concern and debate that would be assisted by appropriate transparency of information about the ECGD underwriting decision and the process by which it had been made.
78. The Commissioner noted that the complainant was concerned about the now closed SFO investigation into connected matters. The Commissioner saw that the SFO investigation was not closed until December 2006 so that, at the time of the internal review of this matter by ECGD in July 2006, it was still continuing. The Commissioner accepts that this too could properly be regarded as a matter for legitimate public concern and debate, a debate which could have been illuminated by the greater availability of relevant information. However he saw very little of substance within the content of the information requested, and which he has reviewed, which concerned ECGD's underwriting decisions and process, and which could be said to have any direct bearing on the SFO matter and therefore he decided that the SFO matter was of very little relevance to determining the balance of the public interest in this matter.
79. Turning to the issues raised by ECGD, the Commissioner acknowledges that the relevant withheld information (not including the information he has already decided should be withheld under other exemptions) contains frank and candid comments and views and recognises that it is important that the decision makers within ECGD should be fully aware of them. The Commissioner noted the concerns of ECGD that the prospect of potential disclosure could have a "chilling effect" on the way in which advice or discussions are recorded. However the Commissioner does not accept that the officials responsible for providing advice and recording information would cease to perform their duties properly for fear that their advice may be disclosed subsequently. Such public servants would be in breach of their professional duty as public servants should they deliberately withhold relevant information or fail to

behave in a manner consistent with the Civil Service Code. It is a matter for the bodies concerned, including ECGD, to ensure that their officials continue to perform their duties according to the required ethical standards. Because public authorities have a duty to keep proper records of meetings for the purposes of effective administration, the Commissioner does not find persuasive the argument that disclosing minutes in one case may discourage proper minute keeping in some future matter.

80. The Commissioner believes that, when public authorities are promoting and defending a particular policy decision (such as underwriting a high value contract), it is beneficial if the public has a clear understanding of the preceding discussion and advice in order to better gauge the thoroughness and robustness of the government policy formulation process. The civil servants concerned have a duty to their senior officers and to ministers which would unquestionably include the provision of full, honest and impartial advice. In the Commissioner's view, civil servants would be in breach of their duty, and damage their integrity as servants of the Crown, if they knowingly withheld relevant information from senior officials or ministers or gave advice other than the best that they were capable of providing. In addition, the Commissioner is aware of judicial support (from Mason J in *Sankey v Whitlam (1978) 142 CLR 1*) for the view that the possibility of future publicity should act as a deterrent against officials providing advice which is specious or expedient. A central argument for the freedom of information legislation is to expose decision-making processes to greater transparency, unless there is a good reason for confidentiality. Such greater transparency – which may sometimes reveal differences of view or emphasis – need not inhibit frankness and candour and may even act to increase them. In this case, however, the Commissioner does not believe that disclosure of the information he has identified as suitable for disclosure would create any real risk of inhibiting officials in future matters. The relevant decisions had already been taken and he has seen nothing in the content of the information that would be likely in the future to inhibit the officials submitting it to senior officers or ministers. He does not therefore accept that the ability or willingness of officials to provide advice with frankness and candour would, or would be likely to be, affected by the disclosure of the information in dispute in this case. In reaching this view, he has had regard to the judgment of Mr Justice Mitting in the *ECGD* case that the cases in which it will not be appropriate to give any weight to those considerations will, if they exist at all, be few and far between.
81. The Commissioner has also taken account of the views of the Information Tribunal in its Decision of 20 August 2007 in the matter of *the Friends of the Earth and the Information Commissioner and ECGD (EA/2006/0073)*. The Tribunal said, in that case, that ECGD had failed to demonstrate a sufficient public interest in withholding certain interdepartmental responses and had failed to specify clearly and precisely the harm to the public that would result from disclosure of environmental information. The Tribunal also referred to the *Department for Education and Skills* case (*EA/2006/0006*) and the set of principles established there. Reference was also made by the Tribunal to the decision in the *Office of Government Commerce* cases (*EA/2006/0068 and 0080*) that too much can be made of the alleged virtues of candour and frankness and the need for safe space for Ministers and officials to consider their positions; the touchstone remained, at all times, the public interest.

82. The Commissioner believes, given the high monetary value of the ECGD underwriting contract, that there is an inherently strong public interest in ECGD being transparent in the policy decisions taken in order to promote accountability in the commitment and spending of public money. If more background information to the decision making process is made public, there is a strong argument that such increased transparency will improve the quality of future advice given by officials and therefore the quality of future decisions and will enable the public to form a view about whether public authorities such as ECGD are acting appropriately. In particular, disclosure of parts of the paper and parts of the minutes would enable the public to appreciate the quality of the advice and the issues considered by ECGD prior to taking the underwriting decision.
83. Finally, the Commissioner notes that it is in the public interest to disclose information where this would help further public understanding of, and participation in, debate of issues of the day. There is an interest in increasing public understanding of how public authorities' decisions affect the public as citizens and taxpayers and, where appropriate, in allowing the public to debate these decisions. The Commissioner considers that, for the public to participate in a debate in an informed way, the issues need to be known. The Commissioner notes that there is a continuing public interest in relation to AY and related matters and, consequently, that there is a public interest in providing further information to the public about the various issues that were being considered prior to the ECGD underwriting decision.
84. The Commissioner therefore considers that, subject to his findings on the other prejudice based exemptions, disclosure of the relevant information would result in more effective public scrutiny of the ECGD decision making process. The Commissioner also considers that this increased transparency should provide an incentive to improve the quality of future decisions within ECGD. Finally, in his view, disclosure would contribute to enabling the public to form a view as to whether ECGD had acted appropriately. Accordingly, the Commissioner is satisfied that the public interest in ECGD maintaining the section 36 exemption does not outweigh the public interest in ECGD disclosing the information that he has identified at annex 2 of this Notice as suitable for disclosure.
85. The Commissioner considered, but did not accept, ECGD's concern that disclosing information selectively might give a misleading impression. He decided that it would be immediately evident to all parties that the information he decided should be disclosed was partial, and it would be open to ECGD to provide any necessary appropriate explanatory background.

Section 35 – Formulation of government policy, etc

86. Section 35(1)(b) exempts information if it relates to ministerial communications.
87. Certain information contained in the paper (that at pages 17 – 21 inclusive) was considered by ECGD to be exempt from disclosure under section 35 of the FOIA as it comprised ministerial correspondence which had taken place in 2002. ECGD explained that they had not cited this exemption correctly in their response to the original request which had purported to cite sections 35 and sections 36 cumulatively. In the internal review, ECGD had found that the relevant information

was exempt under section 35 but said that if the Commissioner concluded that this was incorrect, the information was exempt under section 36 in the alternative. Unfortunately this finding had not been accurately reflected in the ECGD response letter to the complainant's request for an internal review, which had said that "the internal review found that if section 36 were held not to apply (contrary to the findings earlier in this letter) certain Ministerial communications which are attached to [the paper] would fall within the scope of section 35."

88. The Commissioner saw that the relevant information (at pages 17 – 21) of the paper comprised an exchange of correspondence in mid-2002 between then government ministers. He had already decided that part of the information, on page 17, is exempt by virtue of the section 27 exemptions and that the information on page 21 is also exempt by virtue of the section 43 exemption and that the balance of the public interest was in favour of maintaining those exemptions. Therefore he did not consider the application of section 35 exemption to the information he had already decided had been correctly exempted by virtue of the section 27 and 43 exemptions. For the rest of this information, he decided that the section 35(1)(b) exemption is engaged. He has seen that the section 35 exemption was correctly applied by ECGD to this information; it follows that the section 36(2)(b) exemption cannot apply to that same information. This continues to be the case even though the Commissioner has concluded that, by virtue of the section 2 public interest test (as determined in the next following paragraph), the duty to disclose the information that is potentially exempt under section 35 remains.

Public interest test

89. As regards the balance of the public interest in relation to the information that is exempt under section 35(1)(b), the Commissioner decided that the public interest issues were broadly the same as those for the section 36 exemptions. ECGD did not make separate representations with regard to the section 35 public interest test but the Commissioner took into account their extensive representations, made in the context of the sections 36 exemption. He also remained cognisant of the complainant's representations as regards the public interest and took account of one further issue that was specific to the section 35 exemption. This was that the ministerial correspondence was dated mid-2002 and related to the cover being applied for, cover which began on 1 September 2004 and expired on 31 August 2005. The ministerial correspondence therefore predated by over two years, and the commercial matter predated by one year, the July 2006 internal review by ECGD of the complaint. The Commissioner regarded the passage of time as having further weakened the public interest in withholding the information to which the section 35(1)(b) exemption applied. He decided that the public interest in maintaining the exemption did not outweigh that in disclosing the information.

Section 29 – The economy

90. The Commissioner saw that the section 29 exemption was only applied by ECGD to information that he decided had been withheld correctly under other exemptions. Accordingly he did not proceed to consider the application of the section 29 exemption.

Section 42 exemption (Legal professional privilege) – late citation

91. Where a public authority has not referred to a particular exemption when refusing a request for information, the Commissioner may exercise his discretion and decide whether, in the circumstances of the case, it is appropriate to take the exemption into account if it is raised in the course of his investigation. Having considered the matter, the Commissioner decided not to accept ECGD's application to rely on the section 42 exemption, which was not made until July 2008.
92. The Commissioner is under no positive duty to consider exemptions which have not been referred to by a public authority although he may do so if it seems appropriate to him in any particular case. The issue was clarified by the Information Tribunal in the *BERR* case (*Department for Business, Enterprise and Regulatory Reform v Information Commissioner and Friends of the Earth, (EA/2007/0072)*). The Tribunal questioned "whether a new exemption can be claimed for the first time before the Commissioner" and concluded that the Tribunal, and by extension the Commissioner, "may decide on a case by case basis whether an exemption can be claimed outside the time limits set by [sections] 10 and 17 depending on the circumstances of the particular case". The Tribunal also added that: "it was not the intention of Parliament that public authorities should be able to claim late and/or new exemptions without reasonable justification otherwise there is a risk that the complaint or appeal process could become cumbersome, uncertain and could lead public authorities to take a cavalier attitude towards their obligations".
93. The Commissioner has adopted this approach generally and regarded it as appropriate and proportionate to do so here owing to the excessively late citation of the exemption and its applicability. He noted that, as no health and safety or human rights issues appeared to him to arise in the context of the information to which ECGD had sought to apply the section 42 exemption, there was no over-riding reason for him to consider the exemption in the interests of justice. He therefore did not proceed to consider application of the section 42 exemption either on his own initiative or in response to the excessively late request from ECGD for it to be considered. However, in the event, the Commissioner decided that the information to which ECGD wished to apply the section 42 exemption should be withheld under the section 43 exemption.

c) Complete copies of documents detailing the decision to keep the existence of this insurance secret.

94. ECGD confirmed to the Commissioner that no information is held which falls within the scope of this part of the request. The Commissioner accordingly gave this part of the matter no further consideration.

d) Complete copies of correspondence between ECGD and BAES before and after the two articles appeared in the Guardian detailing what ECGD's response to the article was to be.

95. ECGD confirmed to the Commissioner that an email chain was held and had been disclosed to the complainant in response to the initial request but with the personal

details of officials redacted, citing the section 40 (Personal information) exemption. ECGD later said that these personal details were outwith the scope of the request.

Section 40 – Personal information

96. The complainant told the Commissioner that he had asked for the names of the relevant individuals to be disclosed on the grounds that ECGD had done this in response to a previous freedom of information request by him. The complainant said that he believed that ECGD's response on the point (that the details were outwith the scope of the request) had been essentially bogus and tendentious. He added that obviously when he requested copies of correspondence, he was requesting all of the information in those documents; ECGD's response went against the spirit of the Act and over-complicated the legislation when commonsense dictated that requesters should not have to request names specifically when submitting requests. ECGD had, he said, failed to address the point of why names had been released previously but not now.
97. ECGD said that the internal review of the complaint had found that, rather than being exempt under section 40 of the Act, the names contained within the email chain actually fell outside the scope of the initial request for information as the initial request had been for copies of correspondence between BAES and ECGD as organisations, rather than correspondence between specific named individuals. ECGD had suggested that the applicant submit a request for information in the usual way if he wished to request the names of the individuals. No such request has been received by ECGD, but if it were, ECGD said that they would need to consider the provisions of the Data Protection Act 1998 (the 1998 Act) to establish whether ECGD were precluded from disclosure under section 40 of the Act. This would require ECGD to establish whether or not disclosure could be made fairly and lawfully and, in particular, with at least one of the conditions in Schedule 2 to the 1998 Act being met. ECGD would be likely to establish whether or not it had or could obtain the consent of the relevant individuals and, if it did not, or if that consent were not forthcoming, it was likely that ECGD would have to consider whether the disclosure was necessary for the purposes of legitimate interests pursued by the applicant and whether the processing would be unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the individuals. The legislation needed to be applied to each specific request carefully and, although unclear about what previous matter the complainant was referring to, when citing previous disclosure of information by ECGD as a precedent, the fact that ECGD had disclosed personal data in the past did not mean that ECGD would not conduct a thorough analysis of the legislation in respect of each and every request for information it received.
98. In further representations to the Commissioner on the matter on 25 June 2009 ECGD said that the names of junior ECGD officials (which ECGD had defined as officials below the level of the senior civil service) appeared in other parts of the information the Commissioner was minded to order should be disclosed. ECGD said that these names should be withheld under s40(2) (Personal information) of the Act as it constituted personal data of someone other than the applicant, and one of the conditions set out in section 40(3) of the Act was satisfied. The first condition included where disclosure would contravene any of the data protection principles, set

out in the 1998 Act. ECGD considered that disclosure of these names would contravene the first data protection principle set out in Schedule 1 Part 1 of the 1998 Act, because none of the conditions in Schedule 2 to the 1998 Act had been met. ECGD considered that disclosure was unwarranted by reason of prejudice to the rights, freedoms and/or legitimate interests of those individuals. These individuals had both a reasonable expectation of anonymity and a legitimate interest in carrying out their responsibilities, whether at ECGD or elsewhere, without undue interference linked to their involvement with ECGD's AY programme.

99. The Commissioner found persuasive the case put by the complainant that the names of officials fell within the scope of the request - which had been for "complete copies" of the documents and he so decided.

100. In the matter of naming officials, the Commissioner considered carefully the views of ECGD put forward on behalf of itself and the relevant officials. The Commissioner has seen that in the *BERR* case (*BERR v ICO and Friends of the Earth EA/2007/0072*) the Tribunal reviewed relevant case law and considered whether the names of officials attending meetings were personal data. The Tribunal had concluded that senior officials and spokespersons for organisations could have no expectation of privacy in relation to their names or recorded comments attributed to them. In contrast junior officials who were not spokespersons or who were attending as observers or stand-ins for more senior officials should have an expectation of privacy, so where junior officials acted as spokespersons they would be unable to rely on an expectation of privacy, the question of the level of the official being a matter of fact in each case. In relation to this matter, the Commissioner decided that ECGD had been correct in withholding the personal information of junior officials who would have had a reasonable expectation not to be named in disclosed information.

... [and] to provide a schedule of documents that are relevant ... [including] ... a brief description of each relevant document including the nature of the document, the date of the document, and whether the document was released or not.

101. There was a further part of the request which was for a schedule of documents held. At first, ECGD did not respond to this part of the request at all.

102. When the Commissioner asked ECGD for a response, ECGD told him that the complainant had asked ECGD to provide a schedule of documents relevant to his request, containing a brief description of the document, including its nature and date, and whether or not the document was to be released. ECGD has not provided any such schedule. This point was not addressed in relation to the original request, but at the internal review stage, ECGD had told the complainant that no schedule had been provided because ECGD did not hold the relevant information (meaning that ECGD had not prepared such a schedule) and, that the Act did not oblige ECGD to create new information. ECGD continued to maintain that position before the Commissioner.

103. ECGD said that they had indicated whether or not information relevant to each part of the applicant's request was held as required by section 1(1) of the Act (General right of access to information held by public authorities). However, it was ECGD's view that their obligations under section 17 (Refusal of request) of the Act

were, where they considered that a qualified exemption applied to any information, to state that the information is exempt, specify the applicable exemption, explain why that exemption is considered applicable, weigh up the public interests in favour of maintaining the exemption or disclosing the information, and advise the applicant of the outcome of such exercise. ECGD maintained that the Act created no obligation to list or provide summaries of exempt information, and in consequence, ECGD did not feel that a schedule should be provided.

104. The Commissioner has seen that ECGD argued that the requested information was not held, and that there was no requirement to create new information. This is not the correct approach. Requests are for “recorded information” and not for documents. The fact that a schedule does not exist does not mean that the information that it might contain does not exist. If the information which would be contained in the schedule described by the applicant is also contained in other documents held by a public authority, that information is held. Where the information already exists: the public authority cannot be said to be creating it and, while producing a list of the documents in which the relevant information is contained may be a new task, it is not creating new information; it is simply a re-presentation of existing information as a by-product of responding to the information request. Accordingly, the Commissioner required ECGD to provide the information requested, to the extent that it is held, in the form of a schedule as requested including a brief description of each relevant document and its nature, as for example in its title, the date of the document, and whether the document was released or not.

The Decision

105. The Commissioner’s decision is that the public authority did not deal with the request for information in accordance with the Act.

106. ECGD’s failure to disclose the information identified by the Commissioner as proper to have been disclosed, including the failure to provide a schedule of relevant documents, was in breach of sections 1(1)(b) and 10(1) of the Act.

107. As regards procedural matters, the Commissioner decided that:

108. ECGD’s failure to disclose the information identified by the Commissioner as proper to have been disclosed, including the failure to provide a schedule of relevant documents, was in breach of sections 1(1)(b) and 10(1) of the Act. ECGD were in breach of the 20 day time limit specified by sections 10(1) and 17(1) of the Act. ECGD also breached section 17(1) of the Act by not providing the full reasoning for refusing the request in the refusal notice. ECGD failed to provide reasons when applying the exemptions in the refusal notice in a breach of section 17(1)(c) of the Act. ECGD’s extremely late reliance on the section 42 exemption breached section 17(1)(b) of the Act.

109. As regards application of the exemptions relied upon by ECGD, the Commissioner decided that:
prejudice had been demonstrated so that the section 27 exemptions were engaged

and the public interest in maintaining those exemptions outweighed the public interest in disclosing the information;
the section 43 exemption was engaged for the relevant information and the public interest in disclosing the information was outweighed by that in maintaining the exemption;
no information fell to be withheld under the section 41 exemption that was not to be withheld under the section 27 and 43 exemptions;
the section 36 exemption did not apply to the information for which the section 35 exemption was engaged;
for the remaining relevant information, the section 36(2)(b) exemption had been correctly engaged but, for the information identified by him as suitable for disclosure, the public interest in maintaining the exemption did not outweigh the public interest in disclosure;
the section 35(1)(b) exemption applied but the public interest in maintaining the exemption did not outweigh that in disclosing the information; and
he did not need to consider application of the section 29 exemption.
He did not consider the section 42 exemption in response to the excessively late request from ECGD to rely upon it. The Commissioner decided that the information to which ECGD wished to apply the section 42 exemption was correctly withheld under the section 43 exemption.
ECGD confirmed to the Commissioner and the Commissioner is satisfied that no information was held detailing a decision to keep the existence of the insurance secret.

110. As regards correspondence between ECGD and BAES before and after the two Guardian articles detailing what ECGD's response was to be, the Commissioner decided that: information about the names of officials contained within the relevant documents fell within the scope of the request - which had been for "complete copies" of the documents. ECGD had been correct in relying on the section 40(2) exemption in withholding the names of junior officials since they had a reasonable expectation not to be named in disclosed information.
111. As regards the request for a schedule of documents, the Commissioner decided that, to the extent that it is held by ECGD, the information should be provided in the form of a schedule as requested by the complainant.

Steps Required

112. The Commissioner requires ECGD to take the following steps to ensure compliance with the Act: to provide the complainant with the information listed in annex 2 to this Notice as required to be disclosed and, provide the complainant with a summary of the information held in the form of a schedule as directed by the Commissioner.
113. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Other matters

114. Although they do not form part of this Decision Notice the Commissioner wishes to highlight his concern at the excessive delays by ECGD in dealing with this matter. These included the time to assess the balance of the public interest and the internal review, as well as the time taken by ECGD on occasion in responding to enquiries from the Commissioner. He recognises however that ECGD has more recently improved response times.

Failure to comply

115. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

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

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

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

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.

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

Dated the 20th day of October 2009

Signed

**Graham Smith
Deputy Commissioner**

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

Legal Annex

General Right of Access

Section 1(1) provides that -

“Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

Time for Compliance

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.”

Refusal of Request

Section 17(1) provides that -

“A public authority which ... is to any extent relying:

- on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request, or
- on a claim that information is exempt information

must, within the time for complying with section 1(1), give the applicant a notice which –

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies.”

Section 17(3) provides that -

“A public authority which ... is to any extent relying:

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

- on a claim that in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information

must either in the notice under section 17(1) or in a separate notice within such time as is reasonable in the circumstances, state the reasons for claiming -

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

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

International Relations

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.”

Section 27(3) provides that –

“For the purposes of this section, any information obtained from a State, organisation or court is confidential at any time while the terms on which it was obtained require it to be held in confidence or while the circumstances in which it was obtained make it reasonable for the State, organisation or court to expect that it will be so held.”

The economy.

Section 29(1) provides that –

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

- (a) the economic interests of the United Kingdom or of any part of the United Kingdom, or

- (b) the financial interests of any administration in the United Kingdom, as defined by section 28(2).”

Formulation of Government Policy

Section 35(1) provides that –

“Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

- (a) the formulation or development of government policy,
- (b) Ministerial communications,
-

Prejudice to effective conduct of public affairs.

Section 36(1) provides that –

“This section applies to-

- (a) information which is held by a government department or by the National Assembly for Wales and is not exempt information by virtue of section 35, and
- (b) information which is held by any other public authority.

Section 36(2) 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-

- (a) would, or would be likely to, prejudice-
 - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
 - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
 - (iii) the work of the executive committee of the National Assembly for Wales,
- (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
- (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

Personal information.

Section 40(1) provides that –

“Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.”

Section 40(2) provides that –

“Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.”

Section 40(3) provides that –

“The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
 - (i) any of the data protection principles, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”

Information provided in confidence.

Section 41(1) provides that –

“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.”

Legal Professional Privilege

Section 42(1) provides that –

“Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.”

Commercial interests.

Section 43(1) provides that –

“Information is exempt information if it constitutes a trade secret.”

Section 43(2) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”