

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 30 June 2010

Public Authority: Export Credits Guarantee Department
Address: PO Box 2200
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London
E14 9GS

Summary

The complainant made a request to ECGD for information relating to the sale of armoured vehicles to Indonesia and the payment of agent's commission on the transaction. ECGD refused to disclose the information relying on sections 27(1)(a), 36(2)(b)(i) and (ii), 36(2)(c), 41, and 43. The Commissioner found that ECGD was correct to withhold the information and requires no further steps to be taken.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the Act). This Notice sets out his decision.

Background

Role of ECGD

2. ECGD defines its role as "to benefit the UK economy by helping exporters of UK goods and services win business, and UK firms to invest overseas, by providing guarantees, insurance and reinsurance against loss, taking into account the Government's international

- policies".¹ 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.
3. 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.
 4. The three requests discussed in this Notice relate to ECGD's financial support for the sale of armoured vehicles to the Suharto regime in Indonesia in 1995 and 1996. Indonesia subsequently defaulted on its obligations to pay. In December 2004 the Guardian Newspaper reported that, according to court documents, executives of Alvis Vehicles Limited (part of BAE Systems) had made excessive payments to relatives of the Indonesian President who allegedly acted as agents.

The Requests

Request 1

5. On 21 February 2005 the complainant submitted a request ('request 1') to ECGD for the following information relating to the sale of armoured vehicles by Alvis Vehicles Ltd to Indonesia and the agent's commission on that transaction:
 1. *"A copy of the transaction documentation, including:*
 - a. *All correspondence between ECGD, Alvis and any banks involved.*
 - b. *The initial request for support and any supporting documents.*
 - c. *The Premium and Recourse Agreement.*
 - d. *The Contract of Sale.*
 - e. *The agreements with the bank.*
 2. *Documents relating to ECGD's awareness of the use of agents on the transaction by Alvis, including:*

¹ <http://www.ecgd.gov.uk/index/aboutecgd/ecgdmissionandobjectives.htm>

- a. *The agreements between Alvis Plc and Global Select and Basque, if held by ECGD.*
 - b. *The agreements with PTSK and PT Truba, if held by ECGD.*
 - c. *Correspondence between ECGD and Alvis on the use of agents.*
 - d. *All documentation provided by Alvis to ECGD about the use of agents on the transaction.*
 - e. *Correspondence between ECGD and other Government departments including the Foreign and Commonwealth Office, the Defence Export Services Organisation and the Treasury, on the use of agents by Alvis on the transaction.*
 - f. *Internal ECGD memoranda, briefings and due diligence assessments on the use of agents.*
 - g. *Minutes of any meetings at which the use of agents was discussed.*
 - h. *Correspondence with Alvis and BAE Systems, minutes of meetings with Alvis and BAE Systems, and any other documents relating to discussion between ECGD and Alvis or BAE Systems with regard to the Chan U Seek v Alvis Vehicles Ltd case and the allegations raised by the Guardian newspaper.*
 - i. *Internal memoranda and briefings on the Chan U Seek v Alvis Vehicles Ltd case and the allegations raised by The Guardian newspaper”.*
6. On 18 March 2005 ECGD responded to the request indicating that some information was not held and that some information may be confidential. ECGD advised that it required more time to assess whether the information was confidential.
 7. On 7 June 2005 ECGD sent the complainant a schedule of documents held and requested that the complainant indicate which ones he was interested in receiving.
 8. On 26 August 2005 the complainant indicated that he would like all of the documents listed on the schedule provided by ECGD.
 9. ECGD wrote to the complainant again on 29 September 2005. ECGD provided some information to the complainant, and advised that some information was not held. ECGD further advised that it was refusing part 1(a) of the request (which was for all correspondence between ECGD, Alvis and any banks involved) as to comply would exceed the cost limit set out at section 12 of the Act. Finally, ECGD refused to disclose the remainder of the requested information in reliance on the exemptions set out at sections 27, 36(2)(b)(i) and (ii), 36(2)(c), 41 and 43 of the Act.

10. On 7 October 2005 the complainant requested an internal review of ECGD's decision. ECGD responded to the complainant on 7 March 2006 advising that following the internal review, it had decided to uphold its decision to refuse the request.

Request 2

11. On 27 March 2006 the complainant submitted a further request to ECGD (request 2) to request a copy of all correspondence and records of communications between ECGD and BAE Systems or their representatives, and ECGD and other government departments relating to how request 1 had been handled:

"We are writing to request the following:

- 1) a copy of all correspondence (including emails) relating to [name of complainant] Freedom of Information request IAR (05)21 between (1) ECGD and (2) either or both of (a) BAE Systems or their representatives; and/or (b) any other government department; and*
- 2) a copy of all records of other communications (including but not limited to notes of telephone conversations and minutes of meetings) relating to [name of complainant] Freedom of Information request IAR (05)21 between (1) ECGD and (2) either or both of (a) BAE Systems or their representatives; and/or (b) any other government department".*

12. On 28 June 2006 ECGD wrote to the complainant refusing to provide the information in reliance on section 36 of the Act. The complainant requested an internal review of this refusal on 7 July 2006.
13. On 7 March 2007 ECGD advised the complainant of the outcome of the internal review. ECGD upheld their initial refusal under section 36(2)(b) and (c).

Request 3

14. On 25 September 2007 the complainant made a further request to ECGD:

"We are writing to you now to make a further request that you disclose to us all of the information previously requested and withheld. Notwithstanding the existence of a complaint, we are doing so because it may well be your position that the public interest in maintaining the exemptions is not now as strong as you considered that it was

previously (some two years having passed since our initial request and nearly six months since your last communication with us)

We should therefore be grateful if you would treat this as a formal request for information and if you would consider that request in light of the further passage of time”.

15. On 15 October 2007 the complainant clarified to ECGD that his request of 25 September 2007 was in fact a repeat of his requests of 21 February 2005 (request 1) and 27 March 2006 (request 2).
16. Having received clarification from the complainant, ECGD separated request 3 into two parts:
 - Part 1, which repeated the request of 21 February 2005, and
 - Part 2, which repeated the request of 27 March 2006.

Part 1 of request 3

17. ECGD wrote to the complainant on 4 September 2008, refusing to provide the information at part 1 of request 3 in reliance on sections 12, 36(2)(b)(i) and(ii), 36(2)(c), 41 and 43 of the Act.
18. No further action was taken in relation to part 1 of request 3 at this stage.

Part 2 of request 3

19. ECGD wrote to the complainant on 19 March 2008 refusing to disclose the information at part 2 of request 3 in reliance on section 36 of the Act.
20. On 30 March 2008 the complainant specifically requested an internal review of ECGD's decision of 19 March 2008 (in relation to part 2 of request 3).
21. On 22 July 2008 ECGD advised the complainant of the outcome of its internal review of part 2 of request 3. ECGD informed the complainant that it was upholding its decision not to disclose the information under section 36(2)(b) and (c). ECGS also advised the complainant that it was refusing part 2 of request 3 under section 14(2) of the Act, as it was a repeated request.

The Investigation

Scope of the case

22. Following a complete review of the case files in early 2010 the Commissioner determined that, given the length of time that the complaints had taken to resolve and the complexity of the intertwined cases that it would be appropriate to review the entirety of the requests and complaints to ensure that a thorough investigation could be conducted to resolve the complaint(s) to the satisfaction of all parties. The Commissioner wrote to the complainant and ECGD on 1 April 2010 to reach agreement on all the parties' understanding of the outstanding complaints and to also agree the scope of the new investigation.
23. The Commissioner notes that this complaint is particularly complex owing to the number and nature of the requests made. For ease of reference the Commissioner has dealt with requests 1, 2 and 3 separately.

Request 1

24. On 30 March 2006 the complainant contacted the Commissioner complain about the way request 1 had been handled by ECGD. The complainant raised the following issues:
 - The complainant provided the Commissioner with background information relating to his complaint. The complainant was involved in an ongoing dispute with ECGD in relation to its handling of allegations of bribery and corruption.
 - The complainant wished to challenge both the application of the various exemptions, and in relation to qualified exemptions, the public interest test.
 - The complainant also asked the Commissioner to consider ECGD's handling of this request, in particular the delays in responding to the requests and in conducting internal reviews
25. The Commissioner notes that the complainant did not mention ECGD's reliance on section 12 either in his request for an internal review, or as part of his complaint to the Commissioner. Therefore the Commissioner has only considered the application of the various exemptions cited in the analysis below and has not considered the part of the request refused under section 12.

Request 2

26. The Commissioner considers that request 2 is a 'meta' request, as it is a request for information generated during the handling of a previous request. It is the Commissioner's view that although request 2 is about how ECGD handled request 1, it is an entirely separate request that has no direct influence on how the Commissioner investigates request 1. Accordingly the Commissioner considers it appropriate that the complaint about request 2 be dealt with separately under reference FS50306973 and the Commissioner has not referred to it further in this Notice.

Request 3

27. As stated above, ECGD split request 3 into 2 parts:

- Part 1, which repeated the request of 21 February 2005, and
- Part 2, which repeated the request of 27 March 2006.

Part 1 of request 3

28. ECGD advised the Commissioner that no internal review had been conducted in relation to part 1 of request 3 as none had been requested by the complainant.

29. The complainant has indicated that he was not fully aware of the fact that ECGD had split the request into 2 parts, but given the complexity of the multiple requests and the passage of time he could not be sure. The complainant further advised the Commissioner that he believed that it may have been his understanding that when he requested an internal review on 30 March 2008, he believed it was for a review of the whole of request 3, but in the absence of written confirmation he could not be certain of this.

30. Having considered the correspondence within the file the Commissioner appreciates the complainant's confusion as to the status of request 3. In fact it was not clear to the Commissioner on first sight of the file that this had been the course of action taken by ECGD, as some of the correspondence refers to separate 'parts' of the request. However, on further consideration of ECGD's correspondence, particularly that of 19 March 2008, it is clear that the content and substance of that response relates to part 1 of request 3 which was a repeat of the complainant's original request (request 1). The Commissioner can understand how the complexity and intertwined nature of the requests has added to the confusion and contributed to this oversight. The Commissioner also acknowledges his own delay in commencing an investigation into this

complaint and as such he can understand why the complainant was motivated to make a repeat request (request 3) before the original complaints process had been exhausted.

31. Under section 50(2) the Commissioner is not obliged to accept a complaint if the complainant has not exhausted the complaints process provided by a public authority. Therefore the Commissioner has considered the complexity and nature of the requests, the interlocking requests and repeat requests and the information provided as part of his investigation. The Commissioner understands that ECGD may not have been that clear in its letters, but he also is aware that the complainant should have understood the status of his requests, given the multiple and overlapping nature of them. Taking all of these circumstances into account the Commissioner concludes that part 1 of request 3 can not be included in the scope of this investigation although it may be referred to for clarity later in this Notice.

Part 2 of request 3

32. The Commissioner notes that part 2 of request 3 is a repeat of request 2. Having already determined that request 2 will be dealt with separately as detailed in paragraph 26 above, has decided that it is appropriate to deal with both request 2 and the part 2 of request 3 together and this will be considered in a separate Notice (reference FS50306973). Accordingly the Commissioner has not included part 2 of request 3 in the scope of this investigation.

Scope of the case - summary

33. On the basis of the above paragraphs the Commissioner has determined that the scope of the investigation in this Decision Notice will, because of reasons already provided above, be confined to request 1 only. The Commissioner will consider the application of the exclusion at section 12, and the exemptions at sections, 27, 36(2)c, 36(2)(b)(i) and (ii), 41 and 43 to this request. The Commissioner has therefore considered the request on the circumstances around the time it was made, February 2005.

Chronology

Request 1

34. Regrettably, due to the heavy workload at the Commissioner's office, the investigation into the complaint about request 1 did not get under way until 10 September 2007, when the Commissioner asked ECGD for

- a copy of the withheld information together with an explanation of its handling of the request.
35. On 12 November 2007 the Commissioner received a copy of the information and a written response as requested. Following further enquiries by the Commissioner ECGD provided additional information in support of its position on 19 December 2007.
 36. At this stage the Commissioner corresponded with the complainant in order to ascertain the relevant issues, and there followed multiple contacts and correspondence between the complainant, the Commissioner and ECGD. During this time responsibility for the case was transferred twice owing to changes in the Commissioner's staff. The Commissioner sincerely regrets the delay in progressing the investigation.
 37. As explained at paragraph 22 above, the Commissioner undertook a review of the case files in early 2010 and defined the scope of the case. On 24 May 2010 the Commissioner confirmed the scope of his investigation with the complainant and ECGD. The Commissioner invited ECGD to provide a further and final submission in relation to its handling of request 1.
 38. The Commissioner received a response to his request of 24 May 2010. ECGD confirmed that it held no additional information in relation to request 1 that had not previously been provided to the Commissioner. ECGD also confirmed that it did not wish to provide any further arguments in relation to its application of exemptions.

Finding of fact

39. The information withheld by ECGD in relation to request 1 comprises the following:
 - Purchase contracts (partial copies).
 - Correspondence relating to use of agents.
 - Information about internal discussions on how to respond to the Guardian Articles
 - Premium and recourse agreements.
 - Loan agreements.
 - Support agreements.
 - Applications.
 - Extracts from Guardian newspaper article
 - Factual background to Guardian newspaper article.

- Transaction agreements.

Analysis

Exemptions claimed

Section 27 – International Relations

40. ECGD advised the Commissioner that both section 27(1)(a) and section 41 were engaged in relation to copies of purchase contracts. The Commissioner will first consider the application of section 27(1)(a) to this information.
41. The exemption at section 27(1) applies if its disclosure would, or would be likely to, prejudice international relations.
42. The Commissioner is assisted by the Information Tribunal (Information Rights) in the case of Campaign Against the Arms Trade v The Information Commissioner and Ministry of Defence (EA/206/0040) where it commented on the nature of the prejudice which the section 27(1)(a) exemption is designed to protect:

“Prejudice is not defined, but we accept that it imports something of detriment in the sense of impairing relations or interests or their promotion or protection and further we accept that the prejudice must be ‘real, actual or of substance’...”
43. In that case the Tribunal went on to say that:

“...prejudice can be real and of substance if it makes relations more difficult or calls for a particular damage limitation response to contain or limit damage which would not have otherwise have been necessary. We do not consider that prejudice necessarily requires demonstration of actual harm to the relevant interests in terms of quantifiable loss or damage.”
44. In deciding whether or not the exemption is engaged, the Commissioner has had regard to the nature of the withheld information. The Commissioner is mindful of the need to ensure that he does not disclose exempt information in this Notice and so has referred to the information generally rather than specifically.
45. ECGD told the Commissioner that at the time of the request it only held partial copies of purchase contracts. In applying section 27 ECGD

was of the view that disclosure of this information would be likely to prejudice relations between the UK and Indonesia. ECGD explained that the documents contained amongst other things classified information as to the requirements of the buyers, release of which would provide information about the supplier's relationship with its buyers. ECGD concluded that disclosure of the contracts of sale into the public domain would be likely to prejudice relations between the UK and Indonesian governments. ECGD advised the Commissioner that it was not usual practice for ECGD to possess supply contracts and that on occasion it would request sight of such documents. In this case ECGD held only partial copies of the purchase contracts at the time of the request.

46. ECGD advised that the decision to apply section 27(1)(a) to the purchase contracts was view based on consultation with the Foreign and Commonwealth Office (FCO). ECGD was of the view that disclosing information relating to defence contracts would be likely to damage the UK's relationship with the Indonesian government. ECGD considered defence exports to be fundamental to the UK's relations with the Indonesian government and was of the view that even older contracts were linked to issues which were current at that time. ECGD argued that the UK hoped to develop a future relationship with the new Indonesian government and disclosing the withheld information would be likely to provoke a negative reaction which would jeopardise that future relationship. ECGD drew the Commissioner's attention to the fact that, since defaulting on the loan, the Indonesian government had entered into a restructuring agreement for payment through the Paris club².
47. Having viewed copies of the partial purchase contracts and considered carefully ECGD's analysis, the Commissioner is satisfied that section 27 is engaged in relation to this information.

Public Interest Test

48. In finding that the exemption at section 27(1)(a) is engaged, the Commissioner accepts that disclosure of the withheld information

² The Paris Club is an informal group of official creditors whose role is to find coordinated and sustainable solutions to the payment difficulties experienced by debtor countries. As debtor countries undertake reforms to stabilize and restore their macroeconomic and financial situation, Paris Club creditors provide an appropriate debt treatment. Paris Club creditors provide debt treatments to debtor countries in the form of rescheduling, which is debt relief by postponement or, in the case of concessional rescheduling, reduction in debt service obligations during a defined period (flow treatment) or as of a set date (stock treatment).

would be likely to prejudice relations between the UK and Indonesia. However, the exemption is qualified so the Commissioner must now consider where the public interest lies. Section 2(2) provides that exempt information must still be disclosed unless, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosing the information.

Public interest arguments in favour of disclosing the requested information

49. The complainant submitted a number of arguments in favour of disclosing the information. The complainant told the Commissioner that the context of the complaint was of great importance in terms of openness and transparency in the spending of public money. The complainant drew the Commissioner's attention to the fact that ECGD, had out nearly £70 million of public funds when Indonesia defaulted on the loan, and argued that there was a strong public interest in the public being informed about this issue.
50. The complainant was of the view that the information already in the public domain suggested that a major UK exporter (Alvis, now part of BAE Systems) may have engaged in bribery and corruption in order to secure business. The complainant argued that the payment of large sums of money to "agents" could be considered bribes and that this was of great public interest and concern. The complainant further argued that bribery and corruption are serious criminal offences, and that the public interest in exposing such alleged activities is significant. The complainant also stated that the public interest should favour disclosure of the information as he believed that alleged corrupt activities of a private company should not be withheld from public scrutiny, particularly when much of the information, he believed, was in the public domain.
51. The complainant further argued that the public had a right to know what ECGD knew about the agency arrangements and why it apparently failed to spot that public funds were being used to guarantee the agent fee. The complainant was of the view that disclosure of the withheld information would hold ECGD to account and would inform the public.
52. ECGD also recognised the public interest arguments in favour of releasing the purchase contracts as this would aid further understanding and participation in public debate. ECGD acknowledged that release of the information could promote transparency in relation to the use of public funds.

53. ECGD reminded the Commissioner that it only held partial contracts and that this information did not contain any reference to identities of agents. Therefore ECGD was of the view that disclosing this information into the public domain would be unlikely to inform the public to any significant degree.

Public interest arguments in favour of maintaining the exemption

54. ECGD argued that disclosing information that related to defence contracts would be likely to damage the UK's relationship with the Indonesian government. ECGD said that FCO had expressed the view that defence exports are fundamental to the UK's relations with the Indonesian government and that there were even older contracts that could be linked to the current issues at that time.
55. ECGD also reminded the Commissioner of the FCO's view that the UK hoped to develop a better future relationship with the Indonesian government and that disclosing the information could jeopardise that. ECGD also noted that Indonesia had begun to establish a better repayment history with the restructuring arrangements and disclosure of the withheld information could have an adverse impact on future progress. ECGD was of the view that it would not be in the public interest to release information that could damage UK-Indonesian relations at a sensitive time.
56. ECGD maintained to the Commissioner that releasing the information would be likely to provoke a strong reaction from both the Indonesian government and Alvis Ltd, resulting in British companies being less likely to be awarded Indonesian government contracts in the future. Disclosure of the withheld information would be likely to have an adverse effect on other governments' willingness to share information with the UK in the future, which would make international relations more difficult, and which would not be in the public interest.. ECGD strongly believed that the effective conduct of the UK's international relations with Indonesia should be protected.

Balance of the public interest arguments

57. The Commissioner recognises that there is a general public interest in releasing information that would aid further understanding and participation in public debate. The Commissioner recognises the particular interest in this case given the amount of public money involved and the extent of the contracts that were supported by ECGD. The Commissioner agrees that the release of the information would support transparency in how public funds are used generally in such circumstances. He also understands that there has been legitimate

public debate in this issue and that there have been a well documented court cases about the alleged use of agents by BAE Systems. The Commissioner therefore accepts that the release of the information would lead to more informed debate when considered with the information already publicly available.

58. The Commissioner notes the complainant's arguments that the documents would provide evidence that evidence of bribery and corruption exists in relation to this particular transaction and that as ECGD paid claims on the case that this raises the public interest in disclosure. However, having inspected the withheld information and considered it in detail the Commissioner does not accept this as a strong public interest argument. The Commissioner notes that it is not for him to make a finding on these allegations and could only give significant weight to this argument if the withheld information clearly and obviously provided compelling evidence of wrongdoing. He accepts that there is some public interest in the public seeing the information themselves so that they have confidence in the way the sales to Indonesia were supported by ECGD and in ECGD conduct in general.
59. The Commissioner has considered the arguments put forward by ECGD about the likely impact on the international relationships with Indonesia and the views of the FCO. The Commissioner is mindful that there was a period of re-stabilisation in Indonesia, and that the UK wanted to actively develop the relationship between the two states. The Commissioner appreciates the importance generally of maintaining good relations with other States, particularly in relation to sensitive and difficult issues. Accordingly the Commissioner has attributed significant weight to this argument.
60. The Commissioner also notes ECGD's argument that disclosure of the information could cause severe damage to confidence in ECGD as a business partner of BAE Systems. For ECGD to conduct its business effectively there is a need to ensure that confidence in ECGD is not unnecessarily threatened, as it is in the public interest that ECGD should be able to operate effectively. The Commissioner has not given weight to the argument as damage to confidence in a public body with its business partners is not inherent in section 27.
61. In light of the arguments set out above, the Commissioner considers that the public interest in maintaining the exemption strongly outweighs the public interest in disclosing the information. Therefore the Commissioner is satisfied that this portion of information was correctly withheld under section 27(1)(a), and is not is not required to

make a decision in relation to the exemption at section 41 insofar as it was claimed in relation to this information.

Section 36 - Prejudice to the effective conduct of public affairs

62. 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 Cabinet of the Welsh Assembly Government,*

- (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”.*

63. ECGD applied the exemptions at sections 36(2)(b)(i) and (ii) to the correspondence between ECGD and other government departments on the use of agents. ECGD confirmed that, other than information provided by Alvis Ltd in their applications, the only information it held was information regarding how to respond to the 2004 stories in the Guardian. This information comprised of internal and intra-departmental correspondence about how to respond to the Guardian stories and how to answer a series of Parliamentary Questions that followed.

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

64. In order to establish that the section 36 exemption has been applied correctly the Commissioner considers it necessary to establish:

- whether an opinion was given;
- whether the person who gave that opinion is the qualified person for the public authority in question;
- when the opinion was given; and

- whether the opinion is reasonable.

The opinion of the qualified person

65. ECGD confirmed that the qualified person in respect of this case was the then Minister for Trade and Investment, who was a qualified person as set out in section 36(5) of the Act. The opinion was sought on 23 September 2005 and given on 26 September 2005. On 3 March 2006 at the stage of the internal review the Minister was asked again for his opinion and gave it on 6 March 2006.

What is a reasonable opinion?

66. In determining whether or not the opinion is reasonable, the Commissioner will consider the extent to which the opinion is both reasonable in substance and reasonably arrived at. The Commissioner has also been guided by the Tribunal's indication that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur, rather than the severity, extent or frequency of such inhibition or prejudice (although it must not be trivial).
67. Regarding whether or not the process of arriving at the decision was reasonable, the Commissioner will take into account what the qualified person had in front of him when forming his opinion. In this respect, he will consider to what extent all the relevant factors were taken into account.
68. In this case, the Commissioner notes that the qualified person was provided with a detailed submission at the time the initial response to the complainant's request was being prepared. This included the withheld information, along with detailed arguments in relation to the exemption and the public interest.
69. The Commissioner considers it acceptable to claim more than one limb of section 36(2) for the same information, as long as arguments can be made in support of the claim for each individual subsection. ECGD provided detailed arguments in relation to each limb claimed, so the Commissioner has looked first at section 36(2)(b) and then 36(2)(c).

Section 36(2)(b)(i) and (ii) - is the exemption engaged?

70. ECGD summarised the factors considered by the Minister in determining that the section 36(2)(b)(i) and (ii) exemption was engaged:

- Officials need free space to be able to discuss proposed responses to press enquiries and provide Ministers with full and frank advice on how to respond to parliamentary questions. This free space would be undermined by disclosure of the withheld information.
- Disclosure of the information would be likely to inhibit the ability of officials to share opinions, provide full briefings and to provide advice to Ministers in order to provide sound answers to Parliament.
- Disclosure of the information would be likely to result in officials being more circumspect in their views in future provision of views, opinions or advice.
- Disclosure of the information could weaken the audit trail of how decisions have been reached if officials were less likely to record their views particularly on sensitive or controversial matters.
- Disclosure of the withheld information would make it less likely that a frank and open expression of such sensitive matters would be included in discussions and advice and this would have a direct impact on how well informed Ministers and senior government officials would be. This would prejudice the effective conduct of public affairs.

71. Bearing in mind these factors, and the nature of the submissions to the qualified person, the Commissioner is satisfied that the qualified person only took into account relevant factors when reaching his opinion. In view of all the above, the Commissioner is satisfied that the qualified person's opinion was reasonably arrived at. Furthermore he is satisfied that the substance of the reasonable opinion was reasonable and the exemption is engaged.

Section 36(2)(b)(i) and (ii) - public interest test

72. Section 36(2) is a qualified exemption and therefore the Commissioner must consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure of the information. The Tribunal in *Guardian & Brooke* [EA/2006/0011 and 0013] indicated the distinction between consideration of the public interest under section 36 and consideration of the public interest under the other qualified exemptions contained within the Act:

'88. The application of the public interest test to the s 36(2) exemption involves a particular conundrum. Since under s 36(2) the existence of the exemption depends upon the reasonable opinion of the qualified person, it is not for the Commissioner or the Tribunal to form an independent view on the likelihood of

inhibition under s36(2)(b), or indeed or prejudice under s36(2) (a) or (c). But when it comes to weighing the balance of public interest under s 2(2)(b), it is impossible to make the required judgement without forming a view on the likelihood of inhibition or prejudice.'

73. In *Guardian & Brooke* the Tribunal indicated that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and thus 'does not necessarily imply any particular view as to the severity or extent of such inhibition [or prejudice] or the frequency with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant'. Therefore, in the Commissioner's opinion, this means that whilst due weight should be given to the reasonable opinion of the qualified person when assessing the public interest, the Commissioner can and should consider the severity, extent and frequency of the prejudice or inhibition to the effective conduct of public affairs.

Public interest arguments in favour in disclosing the information

74. The complainant argued that the key public interest argument in favour of disclosing this information is that ECGD is a taxpayer funded government department and its response to serious allegations of bribery and corruption on a project it supported is a matter of considerable public interest.
75. ECGD also considered the public interest in favour of disclosing the information. ECGD recognised the public interest in disclosing information to promote trust and engagement between citizens and government. ECGD also recognised that knowledge of the way government works increases the public contribution to topical debate and that transactions which may have attracted allegations of corruption may be of interest to the public.
76. The complainant pointed out that ECGD has in the past provided background information including questions and answers for the press, background briefs for Parliamentary Questions and internal correspondence in response to freedom of information requests. The complainant therefore questioned why this case should be different.
77. ECGD told the Commissioner that the information concerned was created specifically in relation to external events and that the information did not reveal information relating to the allegations of corruption but about how ECGD will respond to questions arising as a result. Therefore ECGD concluded that the public interest in disclosure was relatively weak.

Public interest arguments in favour of maintaining the exemption – section 36(2)(b)(i) and (ii)

78. ECGD considered that the risk of prejudice as set out in the engagement of section 36(2)(b)(i) and (ii) was such that the public interest favoured maintaining the exemption. ECGD was of the view that it was important to protect free space for officials to be able to discuss proposed responses to press enquiries and provide Ministers with full and frank advice on how to answer Parliamentary Questions. They also said that in their view it is vital that officials are able to advise and offer opinions on all relevant factors in the fullest possible manner and that Ministers and senior officials in ECGD and other Government departments can have confidence that they have received full, candid and objective advice on relevant factors prior to responding to press articles and Parliamentary Questions. Therefore ECGD was of the view that the public interest in maintaining the exemption was strong.
79. ECGD further argued the inhibiting effect of disclosure would lead to a reluctance to record details of advice and discussions which may be seen as sensitive or controversial and this may encourage views to be given 'off the record'. Again, ECGD was of the view that it was important to protect officials, so that they could feel secure in maintaining a full audit trail of the decision making process.
80. ECGD considered whether or not the inhibiting effect would be reduced after a response to a press enquiry or Parliamentary Question had been made. However, ECGD concluded that the disclosure of information whether at the date of the request or later, would be just as likely to inhibit free and frank discussion and advice and exchange of views as government officials continue to provide advice and opinions on how to respond and that disclosing the correspondence in this case would have the inhibiting effect in the candour of officials in respect of other cases which have sparked media interest.

Balance of the public interest

81. Whilst the Commissioner accepts that the opinion of the qualified person relating to section 36(2)(b)(i) and (ii) was objectively reasonable, and having reviewed the withheld information in this case, the Commissioner considers the options considered by ECGD officials were given freely and frankly and with the intention of providing advice. In relation to any 'chilling effect' on the frankness of future advice provided by officials that might result in poorer decision making, the guiding principle is the robustness of officials, i.e. they should not

be deterred from doing their jobs properly. The timing of the request is a key factor as to whether this principle should be deviated from.

82. The Commissioner accepts that public authorities need time, space and privacy when deciding how best to proceed when faced with significant issues to deal with. Whilst the Commissioner accepts that the time and space needed to deal with the PQs and article had passed to some extent by the time the request was made, the issue was still “live”. The Commissioner has also considered the fact that the request was made a short period after the article and PQs were responded to. He has also noted the sensitivity of the issues involved. Taking these circumstances into account he agrees that the chilling effect arguments in this case can be given significant weight.
83. The Commissioner has given some weight to the public interest factors in disclosure, noting the circumstances considered in the section 27 public interest analysis. On balance the Commissioner has concluded that the weight of the public interest arguments in maintaining the exemptions contained at sections 36(2) (b)(i) and (ii) outweigh the public interest in disclosing this information.

Section 36(2)(c) – is the exemption engaged?

84. ECGD advised the Commissioner that both section 36(2)(c) was engaged in respect of the premium recourse agreements, loan agreements and support agreements. ECGD firstly explained the difference between the 3 types of documentation:
- A loan agreement is between the borrower and the financing bank as well as in some cases ECGD.
 - A support agreement is a guarantee agreement between ECGD and the bank.
 - A premium and recourse agreement is an agreement between ECGD and the exporter.
85. Whilst ECGD informed the Commissioner that the standard templates for the agreements are available on request it pointed out that due to the nature of the contracts that can be undertaken, the template can be tailored to the specifics of each transaction. ECGD was therefore of the view that even releasing some parts of modified documents, by a process of elimination and matching with standard templates, would enable determination of which terms and conditions were open to negotiation. As such disclosure of this information would weaken the position of ECGD when negotiating such contracts in the future. This would pose a financial risk that less favourable loan arrangements would be offered. If an exporter, borrower or bank is aware that ECGD

has relaxed or modified certain terms on its standard agreements in relation to an earlier transaction then they would demand a similar arrangement.

86. ECGD also argued that disclosing the copies of the agreements would be likely to affect their contractual position when negotiating future contracts. ECGD considered that this would ultimately have a prejudicial effect on the way at ECGD carries out its statutory function of facilitating exports. ECGD maintained that it must have the ability to negotiate on standard documents where applicable.
87. The Commissioner considers it reasonable to conclude that disclosure of the agreements in this case has the potential to damage the key relationships identified. The Commissioner also accepts that disclosure of such information could lead to an impact of the ability of ECGD to carry out its statutory function and therefore its conduct of public affairs. With this in mind the Commissioner is of the view that the qualified person's opinion can be considered reasonable in substance and 36(2)(c) is engaged in relation to the information withheld.

Public interest arguments in favour of disclosing the information

88. The complainant felt that his arguments in relation to section 36(2)(b)(i) and (ii) were also relevant to section 36(2)(c), particularly in relation to the issue of alleged bribery and corruption in order to secure business.
89. ECGD accepted that transactions that have attracted allegations of corruption may be of particular interest to the public, and it was possible that some of the more general information contained within the various agreements could contribute to the public understanding and debate on the matter. However, ECGD did not attribute significant weight to this argument.

Public interest arguments in favour of maintaining the exemption

90. As set out above, ECGD drew the Commissioner's attention to its argument that releasing some parts of modified documents would enable identification of the terms and conditions that were open to negotiation. This would weaken the position of ECGD when negotiating such contracts in the future with exporters, borrowers or banks, and ECGD was of the firm view that this would not be in the public interest.
91. ECGD argued that disclosure of the information contained within the transaction agreements would only make a limited contribution to public debate because of the nature of it. However ECGD maintained

that any such contribution would be overshadowed by the potential prejudice to its effectiveness.

92. ECGD also argued that there was strong public interest in withholding the information as release of the information would be likely to prejudice the negotiating position of ECGD. ECGD made the point there was a strong public interest in not putting public funds at unnecessary risk by weakening the negotiating position of ECGD in relation to its recourse, support arrangements and loan arrangements. ECGD further pointed out that it would not be in the public interest to undermine confidence in ECGD and therefore prejudice the effective conduct of public affairs.

Balance of the public interest arguments

93. The Commissioner has considered the views of both ECGD and the complainant and notes that there was significant public debate about the sale of military equipment to the Government of a country that at the time had a leadership that had generated allegations of corruption through its regime. The Commissioner also notes that there has been and continues to be a public interest in the use of public funds generally.
94. However, the Commissioner also recognises the strong public interest in ECGD being able to operate effectively, which includes maintaining relationships with parties such as exporters, borrowers and banks. The Commissioner accepts that disclosure of the withheld information into the public domain would make these relationships more difficult, which would in turn make it harder for ECGD to act effectively. The Commissioner considers that the large sums of public money involved do increase the public interest in transparency, but also place a responsibility on ECGD to protect its position internationally.
95. The Commissioner has considered the arguments put forward by both ECGD and the complainant as set out above and has regarded the reasonable opinion of the qualified person. After careful evaluation of these arguments the Commissioner has concluded that the balance of the public interest in relation to the section 36(2)(c) exemption is in favour of withholding the information.
96. As the Commissioner is satisfied that as section 36(2)(c) is engaged in relation to the loan agreements, support agreements and premium and recourse agreement he has not gone on to consider the application of section 43 in relation to the same information.

Section 41 Information provided in confidence

97. Section 41 provides that:

"41(1) Information is exempt information if –

- (a) it was obtained by the public authority from any other person (including another public authority), and*
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person."*

98. ECGD applied section 41 to applications, purchase contracts and the extract from the background to the Guardian press article. The Commissioner has already determined that section 27(1)(a) applies to purchase contracts and so in this section will only consider the application of section 41 to applications and the extract from the background to the Guardian article.

Was the information supplied by another person?

99. The Commissioner notes that the information withheld under section 41 was provided to ECGD by Alvis Ltd and BAE Systems. Accordingly the Commissioner is satisfied that the first limb of section 41 is met.

Would disclosure of the information give rise to an actionable breach of confidence?

100. The approach usually adopted by the Commissioner in assessing whether the disclosure of commercial information would constitute an actionable breach of confidence is to follow the test set out in *Coco v A N Clark (Engineering) Ltd* [1968] FSR 415.

101. In *Coco v Clark* the following three pronged test was suggested in order to determine if information was confidential:

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

Quality of confidence

102. ECGD advised the Commissioner that it had disclosed some of the information relating to the applications but that the remainder was withheld as ECGD believed that the information had been provided in confidence. ECGD confirmed that the information contained in the applications related to price, contractual responsibilities, UK and non UK expenditure, terms of payment, terms of repayment. Alvis also provided some factual information in relation to the Guardian press article. ECGD confirmed that none of this information was in the public domain at the time of the complainant's request.
103. The complainant also considered that the quality of confidence in the information had diminished given the passage of time, the change in government of Indonesia and the fact that Indonesia defaulted on the loan. The complainant argued that there was no longer any contractual obligation between the bank, BAE Systems and Indonesia, and that any confidence attached would be historical in nature.
104. However, ECGD argued that the passage of time did not diminish the inherent quality of confidence in the withheld information. Parts of the purchase contracts were still live at the time of the request in respect of after sales service warranties. They also added that as defence contracts are infrequent, older contracts can still establish a pattern of dealings between parties which if disclosed would be advantageous to competitors for a considerable time in the future.
105. The Commissioner is not persuaded by the complainant's argument, and accepts that the information withheld under section 41(1) did have the necessary quality of confidence as set out in *Coco v Clark*. Therefore the first part of the test is met.

Obligation of confidence

106. The Commissioner then considered whether the information was imparted in circumstances giving rise to an obligation of confidence.
107. The Commissioner noted that the information relating to applications between ECGD and BAES was communicated in such a way that both parties would have been aware of the confidential nature of the information. ECGD argued that this constituted a clear implied duty of confidence. ECGD also advised the Commissioner that it had consulted with BAE Systems, who had confirmed its understanding of the confidentiality of the information.

108. The Commissioner is therefore satisfied that the information was provided to ECGD with an expectation of confidentiality and is further satisfied that BAES would have had an expectation of confidence when it provided this information.
109. The Commissioner is satisfied that, owing to the nature of the information and the circumstances in which it was provided to ECGD, an obligation of confidence exists.

Detriment to the confider

110. ECGD argued to the Commissioner that disclosure of the withheld information would cause detriment to Alvis Ltd (part of BAE Systems). If customers could not be satisfied that information provided in confidence would be kept confidential, future relationships with BAE Systems would be damaged.
111. Given the sensitive nature of information in question and the fact that it was still being used at the time of the request the Commissioner is satisfied that disclosure of this information would have a detrimental impact on BAES's commercial interests then and also in the future. Disclosure could therefore prejudice BAES's commercial interests as competitors may adjust their own prices terms and conditions accordingly affecting the ability of BAES to be awarded such contracts in the future.

Public interest defence

112. For the reasons set out above the Commissioner is satisfied that each part of the *Coco v Clark* test is met. As section 41 is an absolute exemption it is not subject to the public interest test. However under the common law, a duty of confidentiality can be overridden if there is an overriding public interest in disclosing the information concerned. The Commissioner therefore also considered whether the public authority could rely on a public interest defence so that a breach of confidence in the event of disclosure would not be actionable. However the Commissioner takes the view that a duty of confidence should not be overridden lightly, particularly in the context of a duty owed to an individual. Disclosure of any confidential information undermines the principle of confidentiality itself which depends on a relationship of trust between the confider and the confident.
113. Under the Act, the public interest starts from the assumption that the information should be disclosed unless the public interest in maintaining the exemption out weighs the public interest in disclosure. However under the law of confidence the test is different; it starts from

the assumption that the information should be withheld unless the public interest in disclosure outweighs the public interest in maintaining confidence.

114. In *Derry City Council (EA/2006/0014)* the Tribunal found that there did not have to be an exceptional case to override the duty of confidence. Instead, disclosure would be lawful if the public interest in disclosure outweighed the public interest in maintaining the duty of confidence.
115. The Commissioner is aware of the fact that this case has attracted media attention as well as representations made to him by the complainant who also referred to the Guardian newspaper coverage. However, the Commissioner does not consider that suspicion or rumour of misconduct without it being well founded, or indeed evidenced, will justify disclosure. The nature of the withheld information is such that, if released, it would adversely affect the commercial success of BAE Systems (itself a large UK business which impacts on the UK economy and trust in UK business by overseas buyers). There is also a risk that a breach of confidence by a government funded department (ECGD) would seriously harm the UK's ability to support future contracts and agreements and would in turn affect the confidence and trust in the UK government by other countries' administrations.
116. The Commissioner recognises the strong public interest in maintaining a duty of confidence where information is provided to a public authority; he also recognises that a duty of confidence is owed to the provider of the information. For example, if the duty of confidence is overridden often it may lead to a situation where contractors would be reluctant to provide information which may be of assistance to a public authority in determining the outcome of a procurement process. It is the Commissioner's view that this would not be in the public interest.
117. The Information Tribunal has endorsed this view in the case of *Bluck v IC & Epsom & St Helier University NHS Trust (EA/2006/0090)* where it quoted from the Lords decision of *Attorney General v Guardian Newspapers [199] 1AC109*:
- " ... as a general rule, it is in the public interest that confidences should be respected, and the encouragement of such respect may in itself constitute a sufficient ground for recognising and enforcing the obligation of confidence"*
118. The Commissioner accepts that disclosure of very detailed information about the Alvis applications and the Guardian extract, which are linked to the prices and terms and conditions in the contract, would lead to an actionable breach of confidence. The Commissioner accepts that some

arguments have been put forward by the complainant in favour of overriding the duty of confidence, but the Commissioner is not convinced that they would be sufficient to override any public interest defence should an action be taken against ECGD for disclosing confidential information. Accordingly the Commissioner agrees with ECGD that the information should not be disclosed.

119. The Commissioner notes that ECGD applied the exemptions at section 41 and 43 to the same information. As the Commissioner has determined that section 41 is engaged in relation to the information he has not gone on to consider section 43.

Procedural Requirements

Section 17: refusal notice

120. Where a public authority refuses a request for information it is required under section 17 of the Act to provide the applicant with a 'refusal notice' explaining the exemption or exemptions relied upon.
121. Section 17(1) states that the public authority must issue the refusal notice within the time for complying with section 1(1), which is twenty working days. ECGD's refusal notice of 29 September 2005 was issued well outside of the statutory time limit. However, the Commissioner notes that between the request being made on 21 February 2005 and the refusal notice being issued, ECGD and the complainant corresponded a number of times in order to clarify the request.
122. The Commissioner notes the complainant's request that he consider the time taken to deal with the request. The Commissioner also notes that the complainant had been in substantial correspondence with ECGD and submitted a number of similar requests. Although the Commissioner expects public authorities to adhere to the statutory timescales, he appreciates that the chronology of this case has been quite complicated. In addition, the Commissioner has seen nothing to indicate that ECGD deliberately delayed dealing with the request.
123. In light of the above the Commissioner finds that ECGD breached section 17(1) of the Act in failing to issue a refusal notice within the time limit specified.

The Decision

124. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

- ECGD correctly withheld information in reliance on the exemptions at sections 27(1)(a), 36(2)(b)(i) and (ii), 36(2)(c) and 41(1) of the Act.

125. However, the Commissioner has also decided that the following element of the request were not dealt with in accordance with the Act:

- ECGD failed to issue a refusal notice within the timescale set out at section 17(1) of the Act.

Steps Required

126. The Commissioner requires no steps to be taken.

Other matters

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

Internal review

128. The complainant requested an internal review on 5 October 2005 but did not receive a substantive response until 7 March 2006.

129. Part VI of the section 45 Code of Practice comments that internal review procedures encourage a prompt determination of the complaint. The Commissioner has also published guidance in which he advises that internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days.

130. The Commissioner does not consider 5 months an acceptable time to conduct an internal review in any particular case. The Commissioner appreciates that this was a complex case, but would expect that steps have been taken to avoid a recurrence of this level of delay.

Right of Appeal

131. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

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 sent.

Dated the 30th day of June 2010

Signed

Steve Wood
Head of Policy Delivery

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

Legal Annex

Freedom of Information Act 2000

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 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 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.

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.”