

Freedom of Information Act 2000 (Section 50)

Decision Notice

27 November 2006

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

Summary

The request was for copies of minutes of meetings, agendas and all correspondence prepared for or connected with meetings since January 2004 between the Export Credits Guarantee Department (ECGD), the CBI and the Airbus consortium relating to ECGD's revised bribery and corruption procedures. A large bundle of the requested information was made publicly available on the ECGD's website on the same day as it responded to the complainant's request. The ECGD refused to provide the remainder of the information because it argued that some of the withheld information related to the formulation and development of government policy (section 35) and that disclosure of some of the information would prejudice the effective conduct of public affairs (section 36). It also cited section 42 (legal professional privilege) and section 23 (security bodies) as grounds for withholding some of the information. The Commissioner's decision is that the public interest lies in the release of some of the withheld information to which section 35 was applied. However he decided the ECGD had correctly applied section 36 to some of the withheld information and that the public interest lies in withholding the information. The Commissioner also accepts that section 23 of the Act has been correctly applied to some of the information. However he has decided that section 43 has not been correctly applied to some of the information. The Commissioner also did not accept the ECGD's argument that the production of a schedule of documents constituted the creation of new information.

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.

The Request

2. The complainant originally made his request for information on 25 October 2004 under the Code of Practice on Access to government information. The ECGD replied on the 21 January 2005 confirming that the request would be dealt with under the terms of the Freedom of Information Act 2000. It should be noted that the request was made prior to the implementation of the Act. However on the basis of correspondence between the ECGD and the complainant it is clear that the ECGD was content to deal with the request as if it had been made under the Act. The Commissioner is therefore prepared to consider the request as valid for the purposes of the Act.
3. The complainant requested the following information relating to new procedures introduced by the ECGD to combat bribery and corruption on business deals supported by the ECGD:
 - a) "complete copies of the minutes and agendas of any and all meetings between the ECGD and the Airbus consortium (a joint company comprising BAE Systems and EADS) since January 1 2004 relating to these procedures, and any and all papers, briefing material, documents, memos, emails, memorandums of conversations, telephone logs, which were prepared for or connected with these meetings, either before or after the event.
 - b) complete copies of any and all correspondence between the ECGD and the Airbus consortium (a joint company comprising BAE Systems and EADS) since January 1 2004 relating to these procedures. I assume that this request would cover letters, emails, faxes, and any other forms of correspondence.
 - c) complete copies of any and all correspondence between the ECGD and the CBI (also known as the Confederation of British Industry), relating to these procedures, and any and all papers, briefing material, documents, memos, emails, memorandums of conversations, telephone logs, which were prepared for or connected with these meetings, either before or after the event.
 - d) complete copies of any and all correspondence between the ECGD and the CBI (also known as the Confederation of British Industry) since January 1 2004 relating to these procedures. I assume that this request would cover letters, emails, faxes, and any other forms of correspondence."

The complainant also asked the ECGD in answering this request to provide a schedule of documents which are relevant to this request. He stated that he believed this should be a brief description of each relevant document including the nature of the document, the date of the document, and whether the document is being released or not.

4. The ECGD provided a refusal notice to the complainant as required by section 17 of the Act on 21 January 2005. It stated that all correspondence between the ECGD and both the CBI and the Airbus Consortium since 1 January 2004 in relation to the bribery and corruption procedures was exhibited to ECGD witness statements in the judicial review litigation which was instigated by the Corner House Research. It advised the complainant that there were no formal agendas

or minutes prepared in connection with any of the meetings but correspondence disclosed in connection with the judicial review litigation will include documentation showing how meetings were convened and the items for discussion selected. It then stated that in relation to the various categories of information that were prepared for or connected to meetings between the ECGD and both the CBI and the Airbus Consortium, some of the documents containing this information were also exhibited in the same litigation and can be viewed by the public on its website.

5. As far as the remainder of the information requested is concerned the ECGD argued that this is exempt information by virtue of either section 35 (1) (a) – (formulation or development of government policy) or section 36 (2) (b) or (c) of the Act (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 or prejudice to the effective conduct of public affairs). It argued that some of the withheld information relates to the refinement of government policy, and some of it is internal correspondence generated for the purposes of discussion and providing advice. However it did enclose some of the exempt information where it considered the public interest in disclosing the information outweighed the public interest in maintaining the exemption. In respect of the remainder of the withheld information it considered the public interest in maintaining the exemptions under section 35 and section 36 outweighed the public interest in disclosing the information. The refusal notice did not however specifically address the complainant's request for a schedule of documents.
6. On 28 January 2005 the complainant requested an internal review of the ECGD's decision. The ECGD did not respond to his request for internal review until 28 July 2005.
7. In its internal review letter of 28 July 2005 the ECGD upheld its original decision to withhold the remaining information on the basis of section 35 and section 36. The review also found that the release of a schedule of documents was also exempt from disclosure under section 35 and section 36 because in its view disclosure of a schedule would in itself provide some of the information requested.

The ECGD explained that the following factors supported the public interest in maintaining the exemptions under section 35 and section 36 and therefore the withholding of the information:

- disclosure could deter companies and industry groups involved from engaging in constructive dialogue with government, and so harm Department of Trade and Industry's (DTI) relations with industry more widely and could harm the ECGD's negotiating position
- documents relate to the development and refinement of ECGD's policy on bribery and corruption, and release could inhibit free and frank discussion within Government on policy options
- there is a public interest in maintaining an effective dialogue between the DTI and ECGD and industry groups given that there will now be

further revisions to the procedures. Release of the information would harm the ECGD's negotiating position

The Investigation

Scope of the case

8. The complainant contacted the Commissioner on 7 June 2005 to complain about the ECGD's lack of response to his request for an internal review and about the substantive issue of whether the ECGD should publish the withheld information. The Commissioner interpreted this as a complaint about the grounds on which the request was refused and a complaint about the delay by the ECGD in providing him with the results of its internal review.

Chronology

9. **16 September 2005.** The Commissioner wrote to the ECGD and the complainant asking whether it had now carried out an internal review of the complainant's request. This was because at the point the Commissioner began his investigation of the case there was no indication from the complainant that the internal review had been carried out. The Commissioner also asked the ECGD to explain in more detail why it believed the exemptions were engaged. As both the exemptions cited were subject to the public interest test the Commissioner asked the ECGD to explain why it believed the public interest in maintaining the exemptions outweighs the public interest in disclosing the information. The ECGD was also asked to provide the Commissioner with a copy of the withheld information and documentation in support of its reliance on section 36.
10. **4 November 2005.** The ECGD enclosed the exempt information which the Commissioner notes consists of a series of internal emails numbered 4 to 12. The Commissioner was advised that numbers 1 to 3 were made publicly available on the ECGD's website prior to the complaint to ICO. It also confirmed that an internal review of its refusal had been completed and that it had written to the complainant on 28 July 2005 to advise him of its decision.

It explained that the review upheld its original decision that some of the information was exempt from disclosure under section 35 and to the extent that section 35 does not apply, section 36 does. It also indicated that it considered some of the information exempt under section 42 (legal professional privilege) and section 23 (security bodies). These additional exemptions were not however cited in the refusal notice to the complainant or in its internal review letter. It also explained that it took the view that it was not obliged to provide a schedule of documents that it considered exempt to the complainant. It added that in order to produce such a schedule it would effectively need to create new information and the summary would have communicated exempt information to the complainant.

11. In its reply to the Commissioner the ECGD also explained why it believed the information was exempt under section 35. It explained that disclosure would harm the process of development and formulation of government policy if the thought process and deliberations of ministers and officials were to be made public. It pointed out that ECGD's ability to receive information and conduct discussions with key stakeholders to enable it to better inform its policy deliberations would also be adversely affected by disclosure.
12. It continued that in respect of the information to which it applied section 36 and to those parts of the information to which it put forward section 36 as an alternative to section 35 disclosure would inhibit the ability of officials to provide free and frank briefing. It argued that it is important that officials are able to provide briefings to Ministers for use at meetings that is candid and fully explores the issues involved. Disclosure of the information to which section 36 applied could deter such frankness and candour in future ministerial briefing and advice. It explained that the decision to withhold some of the information under section 36 had been authorised by the Secretary of State for Trade and Industry.
13. Whilst the ECGD acknowledged that there are public interest arguments in favour of disclosure it considered the risk of harm to the quality of ministerial advice and consequently government decision making to outweigh any public interest arguments in favour of disclosure. It concluded by stating that it believes that the public interest in information about the bribery and corruption procedures has been met by the full public consultation on this issue that was underway at the time of the request, and the publication of documents that followed the attempted Judicial Review.
14. **6 December 2005.** The Commissioner asked the ECGD to clarify which exemptions it had applied to which specific information to as this was not clear from the correspondence he had received. The Commissioner also asked for further evidence regarding the application of section 36 in order to confirm the qualified person's opinion. Furthermore he also asked the ECGD if it had fully explained to the complainant its reasons for not supplying a schedule of documents.
15. **16 January 2006.** The ECGD replied to the Commissioner's letter and explained which exemption/s it had applied to which document. It took the view that arguably all the withheld information was covered by section 35 (1) (a) because it could be said to relate to revisions to the bribery and corruption procedures. However it continued that to the extent section 35 does not apply to any of the information, the information is covered by section 36 for the reasons it had explained in its previous correspondence. The ECGD also supplied a copy of a document in support of its application of section 36. It explained that it had not yet written to the complainant about its refusal to supply a schedule and to inform him that it was releasing some additional material that it no longer believed to be exempt. This additional material comprised of document 4 and part of document 7.
16. **22 February 2006.** The Commissioner wrote again to the ECGD and explained that there were a number of issues he still wished to investigate. The

Commissioner explained that he was not yet persuaded that he had been provided with all the information he required in order to be satisfied with the ECGD's application of section 36. He therefore asked to see further documentation confirming a submission was made to the qualified person, the date this was made together with confirmation of the opinion given by the qualified person. He also considered each withheld document and asked for further comments as to why the ECGD believed that the disclosure of some of the withheld information would lead to the harm identified by the ECGD making specific comments on the content and nature of each withheld document. He also asked the ECGD to clarify why it believed section 42 applied to one particular document. Finally in relation to the schedule of documents, the Commissioner asked the ECGD to consider whether it would be prepared to inform the complainant of at least the number of documents it held and which documents it considered were exempt or contained exempt information, particularly as it had already confirmed that it held information falling within the scope of the complainant's request.

17. **10 March 2006.** The ECGD replied and indicated that it was preparing a substantive response to the Commissioner's letter and would be sending this shortly. It also attached two additional pages that were missing from the package of documents originally sent to the Commissioner's office and which it also believed to be exempt. The documents were the second page of document 5 and the second page of document 12. The ECGD also explained that the second page of document 5 was partially disclosed to the complainant in January 2005 when the complainant originally made his request.
18. **30 March 2006.** The ECGD provided a very detailed written response to the Commissioner's letter of 22 February.
19. The ECGD firstly addressed the issue of the schedule of documents but maintained its position that it did not consider it was obliged to provide a schedule or summaries of exempt information neither was it obliged to create new information.

It indicated that its obligations under section 17 of the Act where it considers an exemption applies to any information is to state the exemption it considers applicable, explain why that exemption is applicable and to weigh up the competing public interest arguments and advise the complainant of the outcome of this exercise. It did not consider the Act obliged it to provide summaries of exempt information, especially where to do so would necessitate the disclosure of exempt information.

20. The ECGD also attached a copy of a letter it sent to the complainant dated 21 February 2006. This letter outlined the ECGD's views about why it did not have to provide a schedule of documents. It also enclosed the additional information it no longer considered exempt (as referred to in point 15 above). This consisted of all of document 4 and some of document 7 with redactions being made to those parts it maintained were exempt under section 35(1)(a) or section 36(2)(b).

21. In respect of the application of section 36, the ECGD explained that although it did not possess any written documentation supporting the application of s.36 it confirmed that the Secretary of State did receive both oral and written briefing on both section 35 and section 36. On the basis of this on 21 January 2005 the Secretary of State formed his reasonable opinion that section 36 applied to some of the information. The ECGD pointed out that the Act does not require written documentation but that it accepted that as a matter of good practice and in line with the Information Commissioner's Office guidance, departments should ensure there is a clear audit trail of the process of securing the opinion of a qualified person on the application of section 36 and that the ECGD does now have robust procedures in place to ensure this happens in every case.
22. The ECGD letter then continued to deal with each of the documents in turn and it explained more fully its views as to why the information should not be disclosed. It examined the effect disclosure of the information contained in each document would have and why it considered the public interest in maintaining the exemptions it applied to the information outweighed the public interest in disclosure.
23. **9 May 2006.** The Commissioner rang the ECGD to seek clarification as to why the ECGD had applied section 42 (legal professional privilege) to document 8. The ECGD clarified that section 42 actually applied to part of document 5 although it maintained that section 42 also applied to part of document 8.
24. **28 June 2006.** The Commissioner wrote to the ECGD providing his preliminary views on the application of the exemptions by the ECGD to each document and whether he considered the public interest in maintaining the exemption in respect of each document outweighed the public interest in disclosing the information. In this letter the Commissioner also pointed that he was not convinced that section 42 applied to the part of document 5 highlighted by the ECGD and therefore asked the ECGD to provide its further comments as to why it believed that this exemption was engaged.
25. **12 July 2006.** The ECGD provided a brief response to the Commissioner's letter. It referred to document 6 stating that it took the view that disclosure would have the effect of deterring officials from recording their discussions and advice fully and without reservation. It argued that officials would inevitably be mindful of potential disclosure when preparing such records, and that prospect could have a "chilling effect" in the way such advice or discussions are recorded. It did not address the application of section 42 to document 5.

Findings of fact

26. The ECGD assists UK exporters of capital goods and services to win overseas orders. It is able to insure UK businesses abroad against the risk of loss of their investments arising from political risks. ECGD is a separate department of the UK government reporting to the Secretary of State for Trade and Industry.
27. The request relates to an announcement by the ECGD on 1 April 2004 to implement improved procedures to reduce the risk of bribery and corruption on

business transactions supported by the ECGD. These new procedures were introduced on 1 May 2004. However on 5 November 2004 the ECGD subsequently published revised procedures which relaxed some of the new requirements as from 1 Dec 2004. This was apparently because the ECGD's major customers, its trade associations and banks had expressed concerns that the new rules introduced in April 2004 would be unworkable for them. This subsequent announcement in relation to the relaxing of the new rules led to serious criticism by some groups that there was a lack of public consultation by the ECGD prior to the revision. This criticism subsequently led to the Corner House Research (a group that campaigns for enforcement of the law in overseas corruption offences) initiating judicial review proceedings against the then UK Secretary of State for Trade and Industry in December 2004. However on 13 January 2005 just before the hearing was due to take place an agreement was reached to instigate a full public consultation on the ECGD's changes to its anti corruption rules. As a consequence of the agreement the ECGD published documents on its website on 21 January 2005 relating to its negotiations with industry representatives which began after the intervention of the Secretary of State for Trade and Industry to whom the CBI and others had complained. On 18 March 2005 ECGD launched a consultation on the changes to the anti-bribery and corruption procedures it introduced in December 2004. The consultation closed on 18 June 2005. As a result revised procedures came into force on 1 July 2006. The ECGD believes that these new safeguards are robust enough to reduce the risk of supporting contracts tainted by corruption without becoming burdensome for ECGD's customers.

Analysis

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

Procedural matters

Request for a Schedule of Documents

29. The ECGD has argued that it is under no obligation to provide a schedule or summary of the requested information, particularly when that would involve the disclosure of exempt information. It has also stated that the Act does not oblige a public authority to create new information in order to answer a request or to provide a list of exempt documents in respect of any refusal to disclose information pursuant to that Act. It believes the duties of public authorities in respect of any refusal to disclose information are those set out in Section 17 of the Act.
30. The Commissioner does not accept this view. He has considered the issue about requests for a schedule of documents in his Decision Notice FS50070854. In FS50070854 he explained that the information already exists therefore the public authority cannot be said to be creating it. 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. In this case it is clear that the ECGD does hold recorded information falling within the scope of the complainant's request for a schedule of documents. It is therefore obliged to comply with section 1(1) of the Act.

31. The ECGD argues that providing a schedule in this case would involve the disclosure of exempt information.
32. The Commissioner accepts that in this case in order to provide a meaningful schedule in accordance with the complainant's request the ECGD would have to briefly describe the contents of the documents which it believes would be fall within the parameters of the request. The Commissioner is therefore persuaded that in this case and having seen the information it is not unreasonable to conclude that the exemptions cited by the ECGD in paragraph 7 above to cover the contents of the documents might also be applicable to the descriptions of those documents contained in the schedule. However in requesting a schedule of documents the complainant also asked the ECGD to provide him with the dates of the relevant documents. The Commissioner is of the view that the provision of solely the dates of the exempt documents in the form of a schedule would not be exempt.
33. On this basis it is the Commissioner's view that in this case the release of the descriptions contained in a schedule would make available information which he has indicated below, it would not be in the public interest to release. He does not consider it would be possible in this case to release a meaningful summary to the complainant without disclosing exempt information. Therefore he does not believe that any further information should be released to the complainant in respect of the schedule of documents other than the dates of the exempt documents. The only exception to that would be in respect of the information referred to in paragraphs 42 to 44 below, where the Commissioner has taken the view that the information itself can be released.

Exemptions

Section 35(1) (a) – Formulation and development of government policy

34. Section 35(1) (a) states that information held by a government department is exempt if it relates to the formulation or development of government policy. The exemption is subject to the public interest test.
35. The ECGD applied section 35(1) (a) to all of the withheld information except Document 11 in the alternative to section 36(2)(b) or (c).
36. The Commissioner has considered the information requested and takes the view that all of the withheld information to which the ECGD has applied this exemption does relate to the formulation and development of its bribery and corruption procedures. He therefore considers that the exemption under section 35(1) (a) is engaged in respect of all the documents to which it has been applied.

The Public Interest Test

37. Section 35 is a qualified exemption and is subject to a public interest test under section (2) (2) (b) of the Act which favours disclosure, unless:

“in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure of the information.”

38. The ECGD assert that the public interest in maintaining the exemption does outweigh the public interest in disclosing the information.

39. The public interest arguments advanced by the ECGD in relation to the various documents focus on its concerns about the negative impact which disclosure would have on the process of policy formulation and development. In particular, it argued:

- Officials may be deterred from making frank assessments of an issue or these may not be recorded if there was an expectation of it reaching the public domain in the near future
- Officials need a protected space in which to discuss policy options, handle strategies and operational issues. Disclosure would undermine the free flow of information and constructive policy debate and would harm the quality and rigour of the policy-making process
- Officials need space to discuss internal strategies for approaching meetings and handling stakeholders. Disclosure would erode the confidence of officials in providing honest and full comments thereby inhibiting the discussion process and could deter officials from recording such discussions
- Officials need to be able to make candid assessments of the views and policies of other organisations but also maintain effective and constructive working relations with them
- ECGD's ability to receive information and conduct discussions with key stakeholders to enable it to better inform its policy deliberations would also be adversely affected by disclosure of this information. Disclosure could make parties more circumspect about their discussions and reporting them in future. ECGD customers should be able to make comments about ECGD business and policy in a way that does not expose them to personal scrutiny or censure by the press or members of the public. ECGD needs to draw heavily on specialist customer knowledge and if this was not forthcoming it would have an adverse effect on ECGD's ability to operate effectively
- Disclosure would inhibit the ability of officials to provide free and frank briefing. It is important that officials are able to provide briefing to Ministers to use at meetings that is candid and fully explores the issues involved. Disclosure could deter such frankness and candour in Ministerial briefing and advice

40. The ECGD recognised that there are also public interest arguments favouring disclosure:

- There is a strong public interest in understanding how government formulates policy and in ensuring that there is well-informed public debate on this and other important issues
 - There is also a general public interest in increasing public confidence that decisions are made on the basis of the best available information, and that the ECGD is taking action to ensure that it does not support corruptly won contracts.
41. The Commissioner has closely examined the information to which the ECGD has applied this exemption and considers that in all the circumstances of the case the public interest in maintaining the exemption in respect of some of the withheld information outweighs the public interest in disclosing some of the withheld information. However in respect to the remaining information the Commissioner has decided that the public interest in maintaining the exemption does not outweigh the public interest in disclosure. The Commissioner has identified the information which he has decided should be disclosed specifically in a separate letter to the ECGD. However he has summarised the reasons for his decision below.
42. **Document 5.** The Commissioner is not persuaded that the information contained in document 5 is of such a nature that it will have the detrimental affect described by the ECGD. He does not consider that the disclosure of the specific information in this document will harm the working relationship with its key stakeholder. Neither is he sufficiently persuaded that the comments are of a nature that they would not have been put forward if disclosure was contemplated or that disclosure in this case would undermine the flow of information or constructive policy debate. The Commissioner accepts that in some cases where a frank assessment or expression of opinion is provided this could damage a business relationship with a key stakeholder .In such cases the information should not be disclosed. However he does not consider the information in this document to fall within that category and therefore it should be disclosed.
43. **Document 6.** The Commissioner does not accept that disclosure of this information will inhibit the process of exploring policy options. Neither is he persuaded that the disclosure of this information will have the effect of deterring officials from recording their discussions. He notes the concerns of the 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 on the ground that the information may be disclosed. 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 the ECGD, to ensure that their officials continue to perform their duties according to the required ethical standard. Therefore the Commissioner does not accept that the disclosure of this document would lead to

the “chilling effect” described by the ECGD. He has therefore decided this document should be disclosed.

44. **Document 7.** Some of this document has already been disclosed as discussed at point 20 above. The Commissioner accepts that some of the information contained in this document does not fall within the scope of the complainant’s request. He has therefore not considered this aspect of the document for the purpose of assessing the application of section 35. However in respect of the remaining redactions, the Commissioner takes the view that the public interest favours disclosing this information. He is not persuaded that disclosure will damage the ECGD’s relationship with its stakeholder. Neither is he persuaded that disclosure will inhibit the free and frank exchange of views or information. On the contrary, he considers that there is a strong argument for disclosure in the interests of transparency and accountability.
45. **Document 8.** The Commissioner notes that the ECGD applied section 23 to this document as well as section 35. Section 23 is an absolute exemption and the Commissioner is satisfied for the reasons specified at points 64 to 66 below that the information is exempt under section 23. The Commissioner has therefore not considered the application of section 35 to this document any further.
46. **Document 9.** The ECGD argue that officials need to make candid assessments of the views and policies of other organisations but also be able to maintain effective and constructive working relations with them. The ECGD has argued that it needs to draw heavily on specialist customer knowledge and if this working relationship was damaged this would have an adverse effect on its ability to operate effectively. Having considered the information contained in this document the Commissioner considers that disclosure in this case could damage working relationships with other bodies. Therefore in respect of this document the Commissioner considers the public interest favours maintaining the exemption.
47. **Document 10.** The Commissioner has considered the nature and content of the information contained in this document. The Commissioner recognises that the information in this document is expressed very frankly and candidly and that the ability to be able to do this is essential in order to explore all policy options and for the policy development process. He accepts there is a need in certain circumstances for this process to be able to be carried out in private so that a wide range of views and opinions can be expressed. He is therefore willing to accept that in this case these views and opinions may be expressed less candidly if it was thought that they would be accessible in the public domain. He considers that it is the fact the information contained in this document is expressed very candidly and deals with sensitive, complex and tactical issues about how to develop the policy that distinguishes it from the nature of the information contained in document 6. He therefore considers that in this case disclosure is likely to inhibit the free and frank exchange of views and opinions. He accepts disclosure could harm the process of policy development and there is therefore a stronger public interest in protecting this process which outweighs the public interest in disclosing the information.

48. **Document 12.** For the same reasons cited in point 47 above the Commissioner has decided that the public interest in maintaining the exemption in respect of this document outweighs the public interest in disclosure. Again he notes that this document deals very candidly about issues and tactics surrounding the development of the policy. The Commissioner accepts that the ability to be able to do so is essential for the policy development process. The Commissioner is not satisfied that the nature of the information in this document is such that the public interest in its disclosure is sufficiently strong to outweigh the damage to the policy process that its disclosure might cause.
49. In summary, the Commissioner is not satisfied that the public interest in maintaining the exemption relating to the formulation and development of government policy outweighs that in disclosure in respect of some of the information which has been withheld. The Commissioner has taken into account that at the time the ECGD provided its refusal notice on the 21 January 2005, the government had agreed on 13 January 2005 to a full public consultation taking place on its changes to the bribery and corruption procedures. This consultation was launched on 18 March 2005. The Commissioner accepts that the ECGD released a substantial amount of documentation into the public domain on 21 January 2005.

However the Commissioner considers that in view of the fact that an agreement to initiate a full public consultation was reached by the time the ECGD issued its refusal notice in January 2005 there was a very strong public interest in the disclosure of information about the bribery and corruption procedures which could have fed into this public consultation. In the Commissioner's view the disclosure of some of the withheld information may have enhanced public confidence and awareness in understanding how and why the ECGD conducted its revision of its bribery and corruption procedures.

Section 36 – Prejudice to the effective conduct of public affairs

50. The ECGD applied section 36 to all of the withheld documents in the alternative to section 35. Section 35 was not applied in relation to Document 11.
51. In light of the Commissioner's findings in respect of the application of section 35 and section 23, to the relevant information, the Commissioner has only considered the application of the exemption under section 36 (2) (a) and (b) of the Act in respect of the information contained in document 11.
52. Section 36 (1) (a) states that this section applies to information which is held by a government department or by the National Assembly for Wales and is not exempt by virtue of section 35.
53. The ECGD applied section 36(2) (a) (i) as well as section 36 (2) (b) to a specific part of the information contained in document 11. Section 36(2)(a)(i) states that information is exempt if in the reasonable opinion of a qualified person disclosure would, or would be likely to, prejudice the maintenance of the convention of

collective responsibility of Ministers of the Crown. It explained that disclosure could make it more difficult for Ministers and departments to act collaboratively and cohesively. It could increase the extent to which some individual members can be held responsible for government decisions and therefore undermine the convention of collective responsibility. It argued that ministers should be able to debate freely in private in the expectation that when decisions have been reached they will present a united front. The risk of disclosure would make Ministers feel inhibited in voicing their opinions in discussions.

54. Section 36 (2) (b) states that information is exempt if in the reasonable opinion of a qualified person disclosure 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. The ECGD argued that the disclosure of this information would inhibit the ability of officials to provide free and frank briefing and may deter officials from recording their views or advice.
55. Section 36 requires that the exemption be applied by a qualified person expressing a reasonable opinion. The exemption is also a qualified exemption and is therefore subject to the public interest test as defined at point 37 above.
56. The Commissioner is satisfied that the person making the decision was the appropriate “qualified person,” in this case the Secretary of State. The Commissioner is satisfied that the opinion given by the qualified person that disclosure under section 36(2)(b)(i) would inhibit the ability of officials to provide free and frank briefings, or undermine the ability of ECGD to obtain full and frank information from its stakeholders is a reasonable one. The Commissioner is also satisfied that the opinion given by the qualified person that disclosure under section 36 (2) (a) (i) would, or would be likely to prejudice the maintenance of the convention of the collective responsibility of Ministers of the Crown is a reasonable one. The exemption is therefore engaged.

The Public Interest Test

57. The Commissioner recognises that in this case there is a public interest in ensuring that the public are confident that decisions taken about the anti bribery and corruption procedures are taken on the best available advice. There is a public interest in informing the public concerning matters of public debate. At the time of the request there was concern in the media about representations made by businesses to the ECGD seeking to change the tighter procedures introduced by it in May 2005. There is therefore a public interest in disclosure of the information to ensure that any revisions to the policy do not increase the risk of bribery and corruption and that the ECGD is taking the correct action to make certain it does not support corruptly won contracts. There is therefore a strong public interest in transparency and openness in this process. However, in order to withhold the information under this exemption, the public interest in maintaining the exemption must outweigh the public interest in disclosing it.

58. The Commissioner recognises that there is a public interest in the ability of officials and Ministers to be able to provide free and frank provision of advice and exchange of views and express themselves openly and fully about the need for any revisions to the bribery and corruption procedures. This ensures that decision-making is based on upon full consideration and discussion of all possible options. He also recognises that there is a public interest in not undermining the concept collective ministerial responsibility. Again this enables Ministers to express their views in the expectation that they can argue freely and frankly in private, whilst maintaining a united position once decisions have been reached.
59. The Commissioner has looked at the information contained in document 11, and considers that the information contained in this document is of such a nature that disclosure could have an inhibiting effect on the discussions and the exchanges of views and opinions resulting in a negative impact on the decision-making process. In this case the Commissioner recognises there was a need for officials to be able to engage in full, frank and inhibited discussions in order to fully address all possible options to the revision of the bribery and corruption procedures. He therefore accepts the argument that in this case such views might be expressed less candidly if it was thought that they would be accessible in the public domain.
60. However having considered the competing public interest arguments, the Commissioner considers that in all the circumstances of the case the public interest in disclosing the information in document 11 is not sufficiently strong to override the public interest in maintaining the exemption in respect of section 36(2)(a)(i) and section 36(2)(b)(i). The Commissioner notes that disclosure of the information in this document may have contributed to the public's understanding about the operation of the ECGD and the issues and concerns which were being considered by it at the time of the request about its bribery and corruption policies. However in this case the Commissioner is satisfied from an inspection of the information that the public interest to be gained from disclosure would be slight and that the public interest in maintaining the exemption is significantly stronger. The Commissioner has taken into account that a great deal of information about the subject of the request was placed in the public domain at the time the ECGD issued its refusal notice and that he has also now ordered the disclosure of further information in this Decision Notice. In the Commissioner's view this goes as far as possible in addressing the issues of transparency and openness without prejudicing the ability of officials to speak candidly and fully about the revision of the bribery and corruption procedures. Therefore whilst recognising the existence of public concern at the time of the request in relation to this subject, the Commissioner is of the view that in the case of document 11 the public interest favours maintaining the exemption.

Section 42 – Legal Professional Privilege

61. The ECGD also applied section 42 to parts of documents 5 and 8. Having sought clarification with the ECGD the Commissioner is not persuaded that section 42 is engaged in respect of document 5. Legal professional privilege made for the

purposes of obtaining legal advice may be invoked in respect of confidential communications made for the purpose of obtaining legal advice between a professional legal adviser and his client. The Commissioner considers that the basic requirements for legal advice privilege are that:

- the communications must be confidential
- the communications must be made for the sole or dominant purpose of obtaining legal advice
- the communications must be between a professional legal adviser and his client.

62. The Commissioner considers that the particular information identified by the ECGD does not satisfy this criteria. The Commissioner notes that the ECGD did not provide any further comments to support its application of this exemption as referred to in points 26 and 27. His decision is therefore that section 42 is not engaged in respect of document 5.
63. The ECGD also applied section 42 to part of document 8. Given that the Commissioner has decided the information in document 8 is exempt under section 35 and section 23 he has not considered the application of section 42 to document 8 any further in this Notice.

Section 23 (1) – Security bodies

64. As a result of correspondence with the Commissioner, the ECGD explained that it should have applied this exemption to document 8. This was not cited in the original reply to the complainant or at internal review.
65. Section 23 (1) states that information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3). This is an absolute exemption and is therefore not subject to a public interest test.
66. Having considered the information contained in document 8 the Commissioner accepts that the information is also exempt by virtue of section 23 (1). This is because the information directly relates to one of the bodies named in section 23 (3).

The Decision

67. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the following requirements of the Act since the exemptions it relied on to withhold some of the information either did not apply, or could not be maintained in the public interest.

Section 1(1) – in that it failed to communicate to the complainant such of the information specified in his request that did not fall within any of the absolute exemptions from the right of access nor within any of the qualified exemptions

under which the consideration of the public interest in accordance with section 2 of the Act would authorise the public authority to refuse access.

Steps Required

68. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- The ECGD must disclose the particular information falling within the scope of the request which has been identified by the Commissioner in this Decision Notice and separately communicated by letter to the ECGD. This should also include the dates of the documents which the Commissioner has decided are exempt.
69. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.
70. 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.

Other matters

71. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
- As regards the application of section 36, the Commissioner recognises there is no requirement in the Act for the qualified person to sign a certificate or to give an opinion in writing. However the Commissioner considers that as a matter of good practice a public authority should keep proper records about the application of Section 36. In this case the Commissioner welcomes the decision by the ECGD to adopt procedures that will provide for a clear audit trail in future cases where section 36 is applied.
 - The Commissioner is concerned by the ECGD's use of section 36 in the alternative to section 35. The Commissioner considers this is a highly undesirable approach which should only be adopted very exceptionally in cases of very genuine doubt. Given that the Act strongly suggests that the two exemptions are mutually exclusive and that section 36 only applies when section 35 does not, the Commissioner expects a public authority to rely on the most appropriate exemption and explain why it applies in any particular case.
 - The Commissioner is concerned about the time taken by the ECGD to respond to the complainant's request for an internal review. The Act does not specify a timescale by which a public authority should reply to an internal review request. However, the Commissioner has made it clear in his Progress Report of October 2006, in response to the report of to the

Constitutional Affairs Select Committee, that in future he intends to exercise greater control over unacceptably lengthy delays and use his discretion under section 50 of the Act to begin his investigation, in cases where he considers that the complaints process has effectively been exhausted.

Failure to comply

72. 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

73. 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@dca.gsi.gov.uk

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 27th day of November 2006

Signed

**Richard Thomas
Information Commissioner**

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

Legal Annex

Freedom of Information Act 2000

Formulation of Government Policy

35. - (1) 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,
- (c) the provision of advice by any of the Law Officers or any request for the provision of such advice, or
- (d) the operation of any Ministerial private office.

(2) Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded-

- (a) for the purposes of subsection (1) (a), as relating to the formulation or development of government policy, or
- (b) for the purposes of subsection (1) (b), as relating to Ministerial communications.

(3) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).

(4) In making any determination required by section 2(1)(b) or (2)(b) in relation to information which is exempt information by virtue of subsection (1)(a), regard shall be had to the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking.

(5) In this section-

"government policy" includes the policy of the Executive Committee of the Northern Ireland Assembly and the policy of the National Assembly for Wales;

"the Law Officers" means the Attorney General, the Solicitor General, the Advocate General for Scotland, the Lord Advocate, the Solicitor General for Scotland and the Attorney General for Northern Ireland;

"Ministerial communications" means any communications-

- (a) between Ministers of the Crown,
- (b) between Northern Ireland Ministers, including Northern Ireland junior Ministers, or
- (c) between Assembly Secretaries, including the Assembly First Secretary, and includes, in particular, proceedings of the Cabinet or of any committee of the Cabinet, proceedings of the Executive Committee of the Northern Ireland Assembly, and proceedings of the executive committee of the National Assembly for Wales;

"Ministerial private office" means any part of a government department which provides personal administrative support to a Minister of the Crown, to a Northern Ireland Minister or a Northern Ireland junior Minister or any part of the administration of the National Assembly for Wales providing personal administrative support to the Assembly First Secretary or an Assembly Secretary;

"Northern Ireland junior Minister" means a member of the Northern Ireland Assembly appointed as a junior Minister under section 19 of the Northern Ireland Act 1998.

Effective conduct of public affairs.

36. - (1) 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.

(2) 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.

(3) The duty to confirm or deny does not arise in relation to information to which this section applies (or would apply if held by the public authority) if, or to the extent that, in the reasonable opinion of a qualified person, compliance with section 1(1) (a) would, or would be likely to, have any of the effects mentioned in subsection (2).

(4) In relation to statistical information, subsections (2) and (3) shall have effect with the omission of the words "in the reasonable opinion of a qualified person".

(5) In subsections (2) and (3) "qualified person"-

- (a) in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown,
- (b) in relation to information held by a Northern Ireland department, means the Northern Ireland Minister in charge of the department,
- (c) in relation to information held by any other government department, means the commissioners or other person in charge of that department,
- (d) in relation to information held by the House of Commons, means the Speaker of that House,
- (e) in relation to information held by the House of Lords, means the Clerk of the Parliaments,
- (f) in relation to information held by the Northern Ireland Assembly, means the Presiding Officer,
- (g) in relation to information held by the National Assembly for Wales, means the Assembly First Secretary,
- (h) in relation to information held by any Welsh public authority other than the Auditor General for Wales, means-
 - (i) the public authority, or
 - (ii) any officer or employee of the authority authorised by the Assembly First Secretary,
- (i) in relation to information held by the National Audit Office, means the Comptroller and Auditor General,
- (j) in relation to information held by the Northern Ireland Audit Office, means the Comptroller and Auditor General for Northern Ireland,
- (k) in relation to information held by the Auditor General for Wales, means the Auditor General for Wales,
- (l) in relation to information held by any Northern Ireland public authority other than the Northern Ireland Audit Office, means-
 - (i) the public authority, or
 - (ii) any officer or employee of the authority authorised by the First Minister and deputy First Minister in Northern Ireland acting jointly,
- (m) in relation to information held by the Greater London Authority, means the Mayor of London,
- (n) in relation to information held by a functional body within the meaning of the Greater London Authority Act 1999, means the chairman of that functional body, and

- (o) in relation to information held by any public authority not falling within any of paragraphs (a) to (n), means-
 - (i) a Minister of the Crown,
 - (ii) the public authority, if authorised for the purposes of this section by a Minister of the Crown, or
 - (iii) any officer or employee of the public authority who is authorised for the purposes of this section by a Minister of the Crown.
- (6) Any authorisation for the purposes of this section-
 - (a) may relate to a specified person or to persons falling within a specified class,
 - (b) may be general or limited to particular classes of case, and
 - (c) may be granted subject to conditions.
- (7) A certificate signed by the qualified person referred to in subsection (5) (d) or (e) above certifying that in his reasonable opinion-
 - (a) disclosure of information held by either House of Parliament, or
 - (b) compliance with section 1

Legal Professional Privilege

42. - (1) 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.
- (2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.

Information supplied by, or relating to, bodies dealing with security matters

23. - (1) Information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).
- (2) A certificate signed by a Minister of the Crown certifying that the information to which it applies was directly or indirectly supplied by, or relates to, any of the bodies specified in subsection (3) shall, subject to section 60, be conclusive evidence of that fact.
- (3) The bodies referred to in subsections (1) and (2) are-
 - (a) the Security Service,
 - (b) the Secret Intelligence Service,
 - (c) the Government Communications Headquarters,
 - (d) the special forces,
 - (e) the Tribunal established under section 65 of the Regulation of Investigatory Powers Act 2000,

- (f) the Tribunal established under section 7 of the Interception of Communications Act 1985,
- (g) the Tribunal established under section 5 of the Security Service Act 1989,
- (h) the Tribunal established under section 9 of the Intelligence Services Act 1994,
- (i) the Security Vetting Appeals Panel,
- (j) the Security Commission,
- (k) the National Criminal Intelligence Service, and
- (l) the Service Authority for the National Criminal Intelligence Service.

(4) In subsection (3)(c) "the Government Communications Headquarters" includes any unit or part of a unit of the armed forces of the Crown which is for the time being required by the Secretary of State to assist the Government Communications Headquarters in carrying out its functions.

(5) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1) (a) would involve the disclosure of any information (whether or not already recorded) which was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).

Certificates under ss.23 and 24: supplementary provisions

25. - (1) A document purporting to be a certificate under section 23(2) or 24(3) shall be received in evidence and deemed to be such a certificate unless the contrary is proved.