

Freedom of Information Act 2000 (Section 50)

Decision Notice

28 July 2008

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

Summary Decision

The complainant requested information contained in a report by the Business Principles Unit of the Export Credits Guarantee Department (ECGD) of its assessment of the case for ECGD to support a United Kingdom interest in a project to build a pipeline to transport oil from Baku to Ceyhan via Tbilisi. He also requested the minutes of an ECGD meeting, held to review the report, and related correspondence along with a list of any correspondence and related information being withheld from him.

He also complained to the Commissioner of excessive delay by ECGD.

ECGD disclosed parts of the report and some related documentation but withheld parts of the report, the minutes and some correspondence, citing what it saw as relevant sections of the Act and the exceptions contained in Regulations 12(4)(e), 12(5)(a), and 12(5)(e) of The Environmental Information Regulations 2004.

The Commissioner decided that the Regulations applied to all of the information and that ECGD must disclose in full both the report and the relevant sections of the minutes. On procedural matters, he found that ECGD breached Regulations 5, 7 and 14. Exceptions breached were those specified under Regulations 12(4)(e) and 12(5)(a).

The Commissioner severely criticised ECGD's excessive delay in responding to the request.

The Commissioner's Role

1. The Commissioner's role 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.
2. The Environmental Information Regulations 2004 (EIR) were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation 18 provides

that the EIR shall be enforced by the Information Commissioner (the "Commissioner"). In effect, the enforcement provisions of Part 4 of the Act are imported into the EIR.

3. In 2000 the Export Credits Guarantee Department (ECGD) adopted a set of business principles and established a Business Principles Unit (BPU). The BPU is responsible for advising on whether prospective business for which ECGD support is sought, complies with ECGD's business principles and on other matters relating to those principles. The Baku – Tbilisi – Ceyhan pipeline project (the BTC project) was established to build a 1760km long pipeline to carry crude oil from Baku to Ceyhan, thereby providing an export route from the oilfields of the Azeri sector of the Caspian Sea to the coast of the Mediterranean Sea. The total project cost was put at around \$3.4bn. A due diligence process on the BTC project was carried out by ECGD from August 2002 until December 2003. In December 2003 BPU officials prepared a report (the BPU report) and ECGD's underwriting committee met to consider this report and other aspects of the BTC project on 5 December 2003. On 17 December 2003 ECGD agreed to provide financial cover in respect of UK procurement for the BTC project. In 2004 ECGD provided support for a line of credit with a value of \$150m for UK contractors involved in providing goods and services for the pipeline. The first oil flow took place in June 2006.

The Request

4. On 8 August 2005 the complainant asked ECGD to provide information which he believed should be available to him under the EIR; the request was large and complex and was in three sections, only the first of which is relevant to the Commissioner's decision, and was for:
 - 4.1 a copy of the BPU's assessment report on the BTC project as prepared for ECGD's underwriting committee.
 - 4.2 a list of all meetings held to discuss the BPU report, including attendees.
 - 4.3 all notes and/ or minutes of meetings held to discuss the BPU report including any written comments or appraisals.
 - 4.4 all correspondence with British Petroleum (BP) and or BTC Co relating to the BPU report.
 - 4.5 a schedule of documents that ECGD would be disclosing and a schedule of documents it would not disclose including, for each document, its title, date, a brief description of its contents and the basis for the exceptions cited.
5. On 7 September 2005 ECGD told the complainant that it held relevant information but would need to analyse public interest considerations before coming to a decision on disclosure. ECGD said that it needed to extend the response time limit by 20 working days to assess whether the public interest in withholding the information outweighed that in disclosing it. ECGD said that it planned to respond by 5 October 2005.

6. On 5 October 2005 ECGD told the complainant that it was not yet in a position to answer the request, which had proved more complex to assess than expected, but would do so as soon as possible.
7. On 17 October 2005 the complainant told ECGD that its decision to extend the timescale was not lawful under the EIR, which placed a 40 working day limit on the time to respond, a timescale which had expired on 4 October. He added that, if ECGD relied on the Act instead of the EIR, then a notice must still be issued in accordance with section 17 of the Act.
8. On 13 December 2005 ECGD replied apologising for the time taken to answer the request. As regards parts 4.1 and 4.3 of the request, the information was provided but with sections redacted. ECGD cited exemptions under sections 27, 36 and 42 of the Act and the exception under Regulation 12(4)(e) of the EIR. ECGD said that the public interest in maintaining the exemptions under the Act and the exception under the EIR outweighed the public interest in disclosure. ECGD added that, as regards part 4.2 of the request, one meeting had taken place, which was that held on 5 December 2003. ECGD provided a list of attendees, by job title. ECGD said it did not hold information that fell within the scope of part 4.4 of the request. As regards the section 36 exemption under the Act, ECGD said the Minister for Trade had approved the use of section 36 in all of the relevant instances.
9. On 12 January 2006 the complainant gave notice of his intention to seek an internal review of the ECGD decisions to withhold some information. On 2 February 2006 the complainant wrote to ECGD to protect his position in relation to the EIR time limit for seeking an internal review of a decision and said that there was already good reason to appeal direct to the Commissioner, even without a review, which could reduce the time to resolve the complaint.
10. On 8 February 2006 the complainant formally asked ECGD for an internal review of: the items redacted from the BPU report (notably ECGD's own assessments); information redacted from the minutes of the meeting held on 5 December 2003 (the minutes); and, the full text of three referenced emails. He said that he had a particular concern about ECGD's reliance on section 36 of the Act but stressed that the request was made under both the Act and the EIR so that the 40 working day time limit under Regulation 11 of the EIR applied.
11. On 14 November 2006, some nine months later, ECGD provided the results of its internal review; ECGD apologised for the delay but offered no explanation for it. The review had found that, apart from a few instances, ECGD had correctly applied the exemptions under the Act and exceptions under the EIR and had weighed up the public interest correctly. A few fairly minor pieces of information were found to have been withheld wrongly and would be released. ECGD said that the names of those attending the meeting had been redacted correctly but the official positions of those attending should have been released. Regarding the request for a list of documents, part 4.5 of the request, ECGD said that it did not hold such a list and did not believe that it

was obliged to create what it described as “new information” including a description of the information withheld.

The Investigation

Scope of the case

12. On 20 December 2006 the complainant contacted the Commissioner to complain about the way in which ECGD had handled his request for information under both the Act and the EIRs. The Complainant specifically asked the Commissioner to consider ECGD’s continuing refusal to:
 - disclose all of the items redacted from the report (notably ECGD’s own assessments as set out in the BPU report), [complaint 1](#).
 - disclose the 5 December 2003 minutes, [complaint 2](#).
 - give details of the documents that had been withheld in full, [complaint 3](#).
13. The complainant also made a separate complaint about the considerable and, he said, manifestly unlawful length of time ECGD had taken to carry out its internal review, [complaint 4](#).
14. The remainder of this Notice addresses only matters relating to these four complaints. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.

Chronology of the case

15. On 23 January 2007 the Commissioner’s staff provided details of the complaint to ECGD. On 23 September 2007 the Commissioner began his investigation. On 19 October 2007 ECGD provided the Commissioner with the information being withheld and detailed its reasons for non-disclosure.
16. On 13 November 2007 the Commissioner’s staff met with ECGD representatives to review ECGD’s reasons for withholding the information.
17. Arising from the 13 November 2007 meeting the Commissioner, at the request of ECGD, asked the complainant if he would be content for ECGD to withhold the names of officials who had attended the 5 December 2003 meeting. On 15 November 2007 the complainant agreed but did so without prejudice to his view that there might be no lawful basis for withholding the names should he require them.
18. ECGD consulted the Foreign and Commonwealth Office (FCO) about the possible application of the exemption in section 27 of the Act and the exception in Regulation 12(5)(a) of the EIR before responding to questions raised by the Commissioner - which it did on 18 January 2008.

19. In its letter of 18 January 2008 ECGD set out for the Commissioner some additional information and sought to clarify points raised at the 13 November 2007 meeting with the Commissioner's staff. ECGD made clear that the letter supplemented, but did not replace, its earlier letter of 19 October 2007. ECGD said that some of the information being withheld under the exception in Regulation 12(4)(a) was also exempt under the Regulation 12(5)(a) exception as it could reveal the views of third parties and so have an adverse effect on international relations, in particular the UK's relationship with certain foreign states and international organisations. ECGD said that, while most of the information was clearly environmental, it reserved the right to maintain that some of the information at issue was not environmental.
20. ECGD told the Commissioner that it had decided to disclose a further small amount of information, which it provided to the complainant on 19 March 2008. Also, on 19 March 2008 ECGD provided the complainant with outline details of the titles, dates and a brief description of each document that it would be releasing and each document that it would not be releasing.

Findings of the case

21. On 13 October 2005 the office of the relevant Minister confirmed to ECGD that the Minister had agreed that some of the information should be withheld. Two further similar ministerial submissions were agreed, on 2 December 2005 and 9 November 2006 respectively.
22. The complainant has confirmed to the Commissioner that he is content not to press ECGD for the names of individual officials to be disclosed.
23. On 19 March 2008 ECGD answered complaint 3 by providing the complainant with outline details of the titles, dates and a brief description of each document that it was withholding.
24. On 13 October 2005, and on 2 December 2005 in respect of other material, the then Minister for Trade and Investment, acting as a qualified person, agreed to the use of the exemption at section 36 of the Act to withhold the information from the BPU report. ECGD had used the section 36 exemption under the Act in addition to, or in the alternative to, the exception in Regulation 12(4)(e). The matter was put again to the then Minister at the time of the 2006 internal review. The then Minister (not the same Minister as in 2005) also agreed to the information continuing to be withheld under the section 36 exemption.

Analysis

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

Application of the EIR

26. The complainant in his initial request assumed that the EIR and not the Act applied to his request. In later correspondence however, he assumed that both sets of legislation were likely to apply.
27. ECGD told the Commissioner that, in its view, although most of the information was clearly environmental, there might be instances where the information was not, or might not be, environmental information. In particular, ECGD said, most of the BPU assessment information concerned: information on the state of elements of the environment; factors likely to affect the elements of the environment; measures and activities likely to affect those elements and factors; cost benefit analyses; and/ or the state of human health and safety, conditions of human life and cultural sites that might be affected by those matters. ECGD said it reserved the right to maintain that some of the information, which it did not specify, should be considered under the Act rather than under the EIR.
28. The Commissioner has seen that the information relates to the design and construction of a route for the BTC project pipeline running for a considerable distance through parts of three countries, and the possible impact of the proposed pipeline on:
- the state of the elements of the environment (Regulation 2(1)(a)) – the air, water, soil, land, landscape and natural sites through which the route of the pipeline passed,
 - the potential impact on the environment of factors arising from the construction and any maintenance works, and any releases into the environment of material carried through the pipeline (Regulation 2(1)(b));
 - measures being put in place to minimise the adverse effects of the pipeline on the land and communities through which it passed (Regulation 2(1)(c));
 - the state of human health and safety including contamination of the food chain, ground water, conditions of human life and cultural sites (Regulation 2(1)(f)).
- The Commissioner has seen that the withheld information relates to the BTC project pipeline and the crude oil passing through it, any escape of which is likely to affect the elements of the environment and the state of human health and safety. He is therefore satisfied that the EIR, and not the Act, apply.

Procedural breaches

29. ECGD took until 13 December 2005 to respond to the complainant's request for information of 8 August 2005. This was well in excess of the 20 working days specified by Regulation 5(2) and also well in excess of the extension of the further period of 20 working days allowed by Regulation 7(1). The Commissioner found that ECGD had breached the procedural requirements set out in both Regulation 5 and Regulation 7.

30. In its refusal notice of 13 December 2005 ECGD sought to apply both the EIR and the Act to the extent that the information was, or was not, environmental but did not clarify in many cases which information was being withheld under the Act and which under the EIR. This uncertainty continued through ECGD's further consideration of the case and into its discussions with the Commissioner's staff. In failing to clarify what information, if any, was being withheld under the Act rather than the EIR, ECGD was in breach of Regulation 14.
31. On 8 February 2006 the complainant requested a review of ECGD's decision – this request was made within the 40 working days allowed under Regulation 11(2). However ECGD did not complete its review of his complaint until 14 November 2006, some nine months later, and grossly in excess of the 40 working days specified by Regulation 11(4). Even then ECGD offered no explanation for its excessive delay. In his complaint 4 the complainant referred to the 'manifestly unlawful' time taken by ECGD to complete its review. The Commissioner has found complaint 4 to have been amply justified and criticises ECGD accordingly for its extremely poor performance and cavalier disregard for the procedures set out in the legislation.

Exceptions

32. Complaint 1 to the Commissioner relates to information redacted from the BPU report. The majority of this information is being withheld under Regulation 12(4)(e) (Internal communications). Other fragments of information are being withheld under Regulation 12(5)(a) (International relations) and Regulation 12(5)(e) (Commercial confidence). Complaint 2 is that information is being redacted from the minutes. The redacted sections of the minutes are all being withheld under the Regulation 12(4)(e) exception.

Regulation 12(4)(e) – internal communications

33. The Commissioner has seen that both the withheld sections of the BPU report and the withheld minutes were written by one or more units within ECGD for the benefit of colleagues elsewhere in ECGD. He is therefore of the view that these comprise internal communications and that the exception in Regulation 12(4)(e) is thus engaged. He went on to consider whether, in all the circumstances of the case, the public interest in maintaining the exception outweighed the public interest in disclosing the information (a 'public interest test').
34. As regards the public interest test, the complainant said that there was a broader interest in respect of the types of documents being sought and a specific public interest in the BTC project.
35. As regards the broader public interest, the complainant said that the manner in which ECGD conducted its business as an export credit agency had been for sometime a matter of very considerable and well publicised concern. He said that ECGD received a substantial annual subsidy from the taxpayer, who

was also ultimately responsible for any losses that ECGD might incur, and that ECGD had suffered some very large financial losses, during the 1990s for example. He said that there was thus a clear public interest in ensuring that the ECGD's due diligence of its projects, including its assessment of social and environmental risk, should be conducted with the utmost rigour to safeguard public funds. It was also important to ensure that ECGD's support for the project complied with the UK's own policies on social, environmental and human rights issues. That there was considerable public interest in ECGD's support for such projects was evidenced by a series of no fewer than 12 parliamentary enquiries which had been set up into aspects of its work since 1999. In 2000 ECGD had, in response to concerns raised by Parliament and the public, established BPU and adopted a set of business principles. Serious concerns had been expressed, backed by documentary evidence, that ECGD's due diligence of projects had been insufficiently rigorous. Unless the documents requested were released, it would be impossible for the public to judge: if the concerns raised by non-governmental organisations and other stakeholders had been adequately taken into consideration by ECGD; the nature of the assessment by BPU of the concerns raised; whether the conditions recommended by BPU were sufficient to prevent infringement of human rights and adverse environmental impacts; and, whether those conditions were accepted by the ECGD's underwriting committee and included in the loan agreements.

36. As regards the particular public interest in the BTC project, the complainant said that the parliamentary inquiry into ECGD support had demonstrated the considerable public concern regarding the UK's financial support for the BTC project. This had, he said, included an ECGD guarantee for over £80m; there might also possibly have been further support from ECGD's overseas investment insurance scheme. He added that significant elements of the BTC project had been politically driven. Shortly before announcing its involvement with the project BP, the lead company in the consortium building the pipeline, had for a time told the UK government that the pipeline was commercially unviable, and that such politically driven projects had caused the greatest losses to the taxpayer in the past. The complainant concluded that the pipeline passed close to several conflict zones and through a politically unstable region so that inadequate attention to the political risks - including those arising from terrorism, conflict and tensions with local communities affected by it - could translate into economic risks for the taxpayer.
37. In summary, the complainant said that there was an exceptionally strong public interest in disclosure arising from: the nature of the BTC project; the large sums of public money involved; the need for careful scrutiny of ECGD's discharge of its export credit functions; the fact that the BPU assessments may have translated into conditions attached to the agreed ECGD financial support; and, disclosure would help to ensure that trust in the ECGD's procedures was soundly based.
38. ECGD said, as regards the balance of the public interest, that it accepted that there was a public interest in transparency of decision making and accountability in the deployment of public funds, and in the promotion of

informed and meaningful public participation in the democratic process. ECGD recognised that projects of the size and complexity of the BTC project were always of particular interest to the public.

39. ECGD said that it did not accept that any public interest in disclosure arose from a public duty to show that ECGD complied with its own policies and principles. ECGD referred to the Select Committee which, having received a copy of the BPU report, stated that it was satisfied that ECGD did take full account of the concerns expressed by those who had contributed to ECGD's prior disclosure procedure and that, in deciding to support the BTC pipeline, ECGD had acted in accordance with its business principles. Nor did ECGD accept that disclosure was necessary to determine whether the material concerns raised by the complainant and his collaborators had been adequately addressed by ECGD, since the BPU report had contained a summary of the concerns raised by non-governmental organisations in each area of risk. ECGD said that it also did not accept that disclosure was necessary in order for the public to judge whether the conditions recommended by BPU had been accepted by the underwriting committee since that was already a matter of public record. ECGD said that it had publicised other relevant information, including an explanation of the reasons for its decision to support the BTC project in December 2003. Interested parties had had an opportunity to challenge its decision to support the BTC project at that stage, e.g. by way of judicial review, but had chosen not to do so.
40. ECGD added that there was a strong public interest in allowing officials to be able to reach decisions in a free space. Ministers and officials needed time and space to develop their thinking and to think through all the implications of particular options. They also needed to be able to undertake rigorous and candid assessments of the risks to particular programmes and projects. Analysing the environmental, social and human rights impacts of the large, media-sensitive BTC project was the purpose of the BPU assessment and, as ECGD underwrote risks on behalf of the taxpayer, it was vital that advice and opinions were provided as freely and candidly as possible. ECGD added that there was a very strong public interest in its having all the relevant information needed to carry out its due diligence. It was not in the public interest for ECGD to make decisions on incomplete information and without the benefit of the best advice from BPU so that it was vital for all relevant information to be captured and clearly set out in the BPU report.
41. The Commissioner has considered carefully the points put to him by the complainant and ECGD. He has also noted views of the qualified persons in 2005 and 2006 (when ECGD had considered that section 36 of the Act might apply). The Commissioner has seen that the commitment of large sums of public money was at issue during ECGD's consideration of the matter. He sees that in itself as a strong factor supporting disclosure of information in the public interest. He also considers that putting the BPU report into the public domain would provide insight into ECGD's decision making process and that non-publication might be thought to be inconsistent with ECGD's professed commitment to transparency in its business.

42. In weighing the arguments put to him by ECGD, the Commissioner saw that ECGD did not accept that any public interest in disclosing the information requested arose from a public duty to show that ECGD complied with its own policies and principles. This is an assertion which the Commissioner does not accept because he sees it as being in the public interest for ECGD to be able to demonstrate that it does not espouse one set of principles in public but practice another in private.
43. The exception in Regulation 12(4)(e) appears to the Commissioner to provide an exception from the duty to disclose information which may not yet represent the settled view of an authority. The effect is therefore both to provide some protection for the “private thinking space” of senior officials or ministers and also to guard against the risk that disclosure of advice or other information provided by junior officials might, wrongly, be taken to represent an official view. Although the scope of the exception is potentially wide, in practice it is narrowed by the application of the public interest test. When refusing information on the ground that it relates to internal communications, public authorities must be satisfied that disclosure would firstly cause harm, for instance by misleading the public, or by making the formulation of policy difficult or impossible and, secondly, that there is not a stronger public interest in disclosure increasing public input into the debate.
44. In considering this issue, the Commissioner has taken account of the views of the Information Tribunal in its Decision of 20 August 2007 in the matter of *the Friends of the Earth and the Information Commissioner and ECGD (EA/2006/0073)*, which also related to a pipeline project. The Tribunal said, in that case, that ECGD had failed to demonstrate a sufficient public interest in withholding certain interdepartmental responses and had failed to specify clearly and precisely the harm to the public that would result from disclosure of environmental information. The Tribunal also referred to the *Department for Education and Skills case (EA/2006/0006)* and the set of principles established there. Reference was also made by the Tribunal to the decision in the *Office of Government Commerce cases (EA/2006/0068 and 0080)* that too much can be made of the alleged virtues of candour and frankness and the need for safe space for Ministers and officials to consider their positions: the touchstone remained, at all times, the public interest. The latter two cases refer to the Act but the Commissioner sees the principles raised there as having ready application to the EIR in his consideration of the public interest in this matter. Both the ECGD and OGC cases have been considered by the High Court, but the Tribunal’s views taken into account by the Commissioner remain relevant. By the time that ECGD had finally concluded its extremely protracted review of the request for information, which it did in November 2006, the key decisions taken by ECGD were already several years old, the pipeline had been built and oil had been flowing through it for several months. Any residual public interest there might have been in withholding the information on grounds of “private thinking space” was by then extremely weak.

45. For the reasons outlined above the Commissioner does not see, in all the circumstances of this case, that the public interest in maintaining the exception outweighs the public interest in disclosing the information. His decision is therefore that the information was wrongly withheld and should be disclosed.
46. For the avoidance of doubt, the Commissioner makes clear that the principles underlying his reasoning, and his decision, apply to information being withheld under the Regulation 12(4)(e) exception in both the BPU report and the minutes.

Regulation 12(5)(a) – international relations

47. ECGD told the Commissioner that it believed that for some small sections of the information being withheld under the Regulation 12(4)(e) – specifically text on pages 13, 23, 24, 27 and 49 of the BPU report - the exception in Regulation 12(5)(a) additionally applied as the information concerned international relations. ECGD said that disclosing such information was likely to have an adverse effect on international relations, in particular the United Kingdom's relationship with other States or international institutions. The Commissioner accepts that the information is capable of having some impact on international relations and that the exception in Regulation 12(5)(a) is therefore engaged. He now needs to consider the public interest test.
48. The views of the complainant as regards the public interest are set out above in the context of Regulation 12(4)(e) and are, in summary, that there was an exceptionally strong public interest in disclosure arising from: the nature of the BTC project; the large sums of public money involved; the need for careful scrutiny of ECGD's discharge of its export credit functions; the fact that the BPU assessments may have translated into conditions attached to the agreed ECGD financial support; and, that disclosure would help to ensure that trust in the ECGD's procedures was soundly based.
49. ECGD told the Commissioner that it relied heavily on being able to exchange views and share information with export credit agencies in other countries and other international bodies. Failure to observe relevant protocols in safeguarding information was likely to provoke a negative reaction from the other states and international organisations involved; it would prejudice relations with them and impair ECGD's ability to deal productively with them in the future.
50. ECGD said that it recognised that its views regarding the location of the BTC pipeline would have been of public interest. However, given that the location of the pipeline terminal was already in the public domain, the information withheld was, in ECGD's view, unlikely to significantly increase public debate about the location of the BTC pipeline terminal. ECGD said that it also recognised that there would have been a strong public interest in the effective conduct of the United Kingdom's international relations and in not prejudicing effective communications with Turkey. The public interest in maintaining this exception was very strong since disclosure of this type of information would

inhibit the willingness of Turkey to deal with the United Kingdom in the future. ECGD said that, in the context of the circumstances existing at the date of the request, the public interest in withholding the information was stronger than the public interest in disclosing it. ECGD added that, even at March 2008, the public interest still remained in favour of withholding it.

51. The Commissioner, in weighing up the public interest has taken into account the views of the parties. He has taken into account the position as it was at the relevant times of the December 2005 refusal notice and the November 2006 internal review. He has seen that by the end of 2005, the route of the pipeline was settled and construction largely complete; by the end of 2006, construction was fully complete and oil was flowing through the pipeline. He has noted too that, by this stage in the life of the project, a considerable volume of other information was available to interested parties. The Commissioner has reviewed the contents of the sections to which ECGD has drawn his attention but is not persuaded that the content is likely to cause particular offence or provoke significant adverse reaction from relevant governments and international agencies. Accordingly, his decision is that the public interest in maintaining the exception does not outweigh the public interest in disclosing the information.

12(5)(e) – commercial interest

52. The Commissioner has seen that, for a small section of four lines of text in the middle of page 36 of the BPU report, ECGD said that it believed that the exception in Regulation 12(5)(e) applied in addition to that in Regulation 12(4)(e). The Commissioner has seen that the information covered by the Regulation 12(5)(e) exception potentially includes a range of commercially sensitive information such as trade secrets, information supplied by contractors, information supplied as part of a tendering or procurement process, and information held by regulators. The Commissioner sees strong links between the Regulation 12(5)(e) exception and the exemption at section 43 of the Freedom of Information Act relating to commercial interests. The focus of the Regulation 12(5)(e) exception is upon information relating to the commercial interests of third parties. In the circumstances of the BTC case, the Commissioner has seen that the references to commercial interests in the disputed text are of a general nature and add little if anything to the information already in the public domain at the time of the refusal notice (December 2005). He has also noted that the BTC project is unique, which makes commercial information about it less portable to other environments: he does not therefore see that the information at issue, relating specifically to the BTC project, would be of significant commercial value in other arenas or would add significantly to information already in the public domain about the BTC project. It follows that the Commissioner does not consider the exception to be engaged in this instance.

The Decision

53. The Commissioner's decision is that the public authority did deal with some areas of the request for information in accordance with the Act, but failed to deal correctly with others. On procedural matters, ECGD breached Regulations 5, 7 and 14. Exceptions breached were those specified under Regulations 12(4)(e) and 12(5)(a).

Steps Required

54. The Commissioner requires ECGD to take the following steps to ensure compliance with the Act: to disclose to the complainant the full text of the BPU report and the full text of the minutes of the ECGD committee's 5 December 2003 discussion of it, subject only to the redaction of the names of junior officials.
55. ECGD must take the steps required by this notice within 35 calendar days from the date of this notice.
56. 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

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

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

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

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 28th day of July 2008

Signed

**Richard Thomas
Information Commissioner**

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

Statutory Instrument 2004 No. 3391

The Environmental Information Regulations 2004 (EIR)

Interpretation

2. - (1) In these Regulations -

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on -

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
- (d) reports on the implementation of environmental legislation;
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);

....

Duty to make available environmental information on request

5. - (1) Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.

(2) Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.

....

Extension of time

7. - (1) Where a request is made under regulation 5, the public authority may extend the period of 20 working days referred to in the provisions in paragraph (2) to 40 working days if it reasonably believes that the complexity and volume of the information requested means that it is impracticable either to comply with the request within the earlier period or to make a decision to refuse to do so.

(2) The provisions referred to in paragraph (1) are -

- (a) regulation 5(2);
- (b) regulation 6(2)(a); and
- (c) regulation 14(2).

(3) Where paragraph (1) applies the public authority shall notify the applicant accordingly as soon as possible and no later than 20 working days after the date of receipt of the request.

....

Representations and reconsideration

11. - (1) Subject to paragraph (2), an applicant may make representations to a public authority in relation to the applicant's request for environmental information if it appears to the applicant that the authority has failed to comply with a requirement of these Regulations in relation to the request.

(2) Representations under paragraph (1) shall be made in writing to the public authority no later than 40 working days after the date on which the applicant believes that the public authority has failed to comply with the requirement.

(3) The public authority shall on receipt of the representations and free of charge -
(a) consider them and any supporting evidence produced by the applicant; and
(b) decide if it has complied with the requirement.

(4) A public authority shall notify the applicant of its decision under paragraph (3) as soon as possible and no later than 40 working days after the date of receipt of the representations.

....

Exceptions to the duty to disclose environmental information

12. - (1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if –

- (a) an exception to disclosure applies under paragraphs (4) or (5); and
- (b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

....

(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that -

- (a) it does not hold that information when an applicant's request is received;

....

- (e) the request involves the disclosure of internal communications.

(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect -

- (a) international relations, defence, national security or public safety;

....

(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;

.... .

Refusal to disclose information

14. - (1) If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation.

(2) The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.

(3) The refusal shall specify the reasons not to disclose the information requested, including -

(a) any exception relied on under regulations 12(4), 12(5) or 13; and

(b) the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b) or, where these apply, regulations 13(2)(a)(ii) or 13(3).

(4) If the exception in regulation 12(4)(d) is specified in the refusal, the authority shall also specify, if known to the public authority, the name of any other public authority preparing the information and the estimated time in which the information will be finished or completed.

(5) The refusal shall inform the applicant -

(a) that he may make representations to the public authority under regulation 11; and

(b) of the enforcement and appeal provisions of the Act applied by regulation 18.