

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 21 May 2009

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

Summary

The complainant requested information from the Export Credits Guarantee Department (ECGD) relating to allegations made against a British company and its work in the Philippines. ECGD refused to disclose the requested information in reliance on sections 31 and 36 of the Act. The Commissioner finds that the exemptions are engaged, but that the public interest lay in disclosing some of the information rather than maintaining the exemptions. The Commissioner therefore requires ECGD to release some of the withheld information to the complainant. The Commissioner finds that ECGD breached section 1(1)(b) and section 10(1) in that it failed to provide this information to the complainant in response to his request.

The Commissioner also finds that ECGD's refusal notice breached the requirements of section 17(1)(b) and (c) in that it failed to provide a refusal notice within the statutory time limit which specified the exemptions relied upon.

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 requested the following information from ECGD on 1 November 2005:

“My request relates to contracts won by Mabey & Johnston, a Reading-based firm, to build a series of bridges and flyovers in the Philippines.

A series of allegations have been made by politicians and local groups about this contract in the media in the Philippines...

Under the act, I would like to request complete copies of documents held by the Export Credits Guarantee Department which relate to these allegations. I assume that this request would cover, but not be restricted to, meetings between Mabey & Johnson and the ECGD, correspondence with other government departments, and correspondence with Mabey & Johnson.”

3. ECGD responded to the complainant on 30 November 2005. It advised that it held information relevant to the request, and provided some of this information to the complainant. ECGD advised that the remainder of the information held was exempt by virtue of sections 23 and 36 of the Act.
4. The complainant was dissatisfied with this response, and requested an internal review on 5 December 2005.
5. ECGD wrote to the complainant on 14 June 2006 to advise that it had now completed the internal review. ECGD advised that it upheld the decision to refuse some information under section 36 of the Act, but that on reflection it considered that section 23 had inappropriately been applied to some other information. ECGD advised that this information should have been withheld under section 31 of the Act, and it was now relying on that exemption.

The Investigation

Scope of the case

6. On 26 June 2006 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant alleged that ECGD had wrongly withheld the requested information, as it was his view that the public interest favoured disclosure.

Chronology

7. On 19 November 2007 the Commissioner wrote to ECGD to request copies of the withheld information. ECGD responded to the Commissioner on 10 December 2007, providing full copies of the requested information, and indicating which exemptions were applied to each piece of information.
8. Having had sight of the withheld information, the Commissioner wrote to ECGD on 27 February 2008 to ask for further information in relation to the way it had handled the request. In particular the Commissioner asked why the internal review took six months to complete. The Commissioner also asked a

number of questions about ECGD's reliance on the exemptions under sections 23, 31 and 36 of the Act.

9. ECGD responded to the Commissioner on 14 April 2008. In relation to the internal review, ECGD advised that it had taken six months to complete because it required consideration of public interest arguments. However ECGD also advised that it now had increased resources, and it anticipated that future internal reviews would not take as long. In relation to the exemptions, ECGD provided the Commissioner with detailed submissions. ECGD also provided background information to assist the Commissioner's deliberations.
10. On 2 June 2008 the Commissioner wrote to ECGD with comments on the requested information. The Commissioner's view at this stage was that some of the information could be released to the complainant, and the Commissioner asked ECGD to consider whether the case might be resolved informally.
11. ECGD responded to the Commissioner on 16 June 2008. It advised that, having considered the Commissioner's comments, it remained of the view that none of the requested information should be disclosed.

Findings of fact

12. ECGD defines its role as "to benefit the UK economy by helping exporters of UK goods and services win business, and UK firms to invest overseas, by providing guarantees, insurance and reinsurance against loss, taking into account the Government's international policies".¹
13. In August 2005, ECGD provided a guarantee for a contract awarded to Mabey & Johnston by the Filipino Department of Finance. The contract was worth approximately £90million, and was to supply bridges and flyovers in the Philippines.
14. In August 2005 the Singag NG Bayan Foundation made a complaint to the Philippines' Ombudsman. This complaint included allegations about corrupt Filipino officials and about the siting and quality of some of the bridges supplied by Mabey & Johnston. At the time of the complainant's request the Philippines' Ombudsman was undertaking an investigation into the allegations.

Analysis

Procedural matters

Section 17: refusal notice

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

15. Where a public authority refuses a request for information it is required under section 17 of the Act to provide the applicant with a 'refusal notice' explaining the exemption or exemptions relied upon. This notice should be provided to the applicant within twenty working days. ECGD responded to the request of 1 November 2005 on 30 November 2005, citing the exemption under section 23 of the Act to withhold some of the requested information. However, at the internal review stage ECGD decided that in fact section 31 was more appropriate in relation to this part of the withheld information.
16. Accordingly, the Commissioner finds that ECGD's refusal notice breached the requirements of section 17(1)(b) and (c) in that it failed to provide a refusal notice within the statutory time limit which stated the relevant exemptions.

Section 1(1)(b): duty to provide information

17. Section 1(1)(b) of the Act requires a public authority to provide information to an applicant in response to a request. For the reasons set out below the Commissioner is of the view that some of the requested information ought to have been disclosed to the complainant at the time of his request. As this information was wrongly withheld the Commissioner concludes that ECGD failed to comply with section 1(1)(b) of the Act.

Section 10(1): time for compliance

18. Section 10 of the Act states that a public authority must comply with section 1(1) promptly, and in any event not later than twenty working days after the request has been received.
19. As the Commissioner is of the view that ECGD wrongly withheld some information from the complainant, it follows that ECGD failed to communicate this information to the complainant within the statutory time limit. Therefore the Commissioner finds that ECGD failed to comply with section 10(1) in relation to this information.

Exemptions

Section 31(1)(a): prejudice to the prevention or detection of crime

20. Section 31(1)(a) provides an exemption where disclosure of the information would, or would be likely to, prejudice the prevention or detection of crime. ECGD applied this exemption to three separate pieces of information, and provided a detailed submission to the Commissioner as to why it considered the exemption to be engaged.
21. In considering this exemption the Commissioner is assisted by the Information Tribunal's view as expressed in *Hogan v Oxford City Council & The Information Commissioner*². In this case the Tribunal stated that the "an

² Appeal nos EA/2005/0026 and EA/2005/0030

evidential burden rests with the decision maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice."

22. Having considered ECGD's submission, and having had sight of the information withheld under section 31, the Commissioner is satisfied that its disclosure would be likely to prejudice the prevention or detection of crime in the way described by ECGD.

Public interest test

23. Section 31 is a qualified exemption and is subject to the public interest test. In this respect, section 2(2)(b) of the Act states that the duty to disclose information under section 1(1)(b) of the Act does not apply if, or to the extent that, 'in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information'. The Commissioner has therefore examined ECGD's consideration of the public interest arguments relating to this information.
24. ECGD identified to the Commissioner the public interest in transparency and openness in relation to law enforcement and criminal justice systems. ECGD recognised that disclosure of appropriate information would support public confidence in these areas. However ECGD also identified strong arguments in support of maintaining the exemption. In its internal review letter of 14 June 2006 ECGD advised the complainant that:
- "The public interest in openness and transparency was considered, but was out weighed by the public interest in maintaining the confidentiality of investigation into allegations of corruption".
25. ECGD provided very detailed submissions to the Commissioner about its public interest considerations in relation to this information. The Commissioner agrees with ECGD's acknowledgement that there is a strong public interest in the public being assured that these systems and processes are fair and impartial. An adequate level of transparency is essential in order to ensure that justice is seen to be done.
26. However the very nature of law enforcement requires a degree of protection from public comment in certain circumstances. In this particular case the Commissioner has taken into account the nature of the information, and the context in which it was recorded. The Commissioner is satisfied that the information does require this level of protection, and as such, it would not be in the public interest for the information to be disclosed into the public domain. Therefore the Commissioner is satisfied that in all the circumstances of this case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information in question.

Section 36(2)(b) and (c): prejudice to the effective conduct of public affairs

27. Section 36(2)(b) and (c) provide that information is exempt if in the reasonable opinion of a qualified person, disclosure of the information would, or would be

likely to prejudice the effective conduct of public affairs. Subsection (b) is applicable where 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. Subsection (c) applies where disclosure would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs. ECGD applied this exemption to the remainder of the withheld information (ie the withheld information not exempt under section 31).

28. In order to establish that the exemption has been applied correctly the Commissioner must:
- Establish that an opinion was given;
 - Ascertain who was the qualified person or persons;
 - Ascertain when the opinion was given;
 - Consider whether the opinion was objectively reasonable and reasonably arrived at;
29. ECGD advised the Commissioner that the request to consider the application of section 36 was submitted on 28 November 2005 to Ian Pearson MP, the then Minister for Trade and Investment. The Minister agreed that section 36 could be engaged and that the public interest test was satisfied. The submission was approved on 2 December 2005.
30. ECGD summarised the factors considered by the Minister in determining that the exemption was engaged:
- Officials need free space to be able to discuss sensitive issues. If the withheld information were to be disclosed this would not be the case. Government officials would be unable to receive full and frank advice and opinions on the factors which influence how ECGD responds to such issues, and this would prejudice the effective conduct of public affairs.
 - Disclosure of the withheld information would also be likely to result in reluctance to record advice and views which may be seen as sensitive or controversial.
 - When allegations of impropriety are made which may relate to an ECGD supported case, it is important that officials are able to fully express their initial views and opinions and decide how best to respond. Disclosure of the withheld information could make officials reluctant to provide full and frank views in writing, adversely affecting ECGD's ability to make a considered and thorough response to such allegations.
 - If some of the withheld information were disclosed it would inhibit the channels of communication between ECGD and its customers. Customers may decline to provide written information to ECGD and insist that consultations are undertaken verbally. This would be damaging to ECGD's record keeping and management of its legal risk. ECGD must be able to keep full records in order to ensure compliance with policies designed to manage risk.

31. In deciding whether the Minister's opinion was 'reasonable' the Commissioner is assisted by the Tribunal's decision in the case *Guardian Newspapers & Brooke v Information Commissioner & BBC*³. The Tribunal concluded that 'in order to satisfy the sub-section the opinion must be both reasonable in substance and reasonably arrived at'.
32. The Commissioner has also been guided by the Tribunal's indication that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur, rather than the severity, extent or frequency of such inhibition or prejudice (although it must not be trivial).
33. The Commissioner notes that ECGD did not provide the Commissioner with any documentary evidence as to the Minister's opinion. Therefore the Commissioner does not have evidence of the information the qualified person had in front of them when making their decision. However ECGD did provide the Commissioner with a detailed submission as to why it considered the exemption to be engaged. ECGD has confirmed to the Commissioner that this information was provided to the Minister when he was asked to form an opinion on the exemption.
34. It appears to the Commissioner that the arguments put forward by ECGD relate to subsections (b) and (c) of the section 36(2) exemption. ECGD claimed that disclosure of the withheld information would have a detrimental effect on officials' abilities to exchange views, and that disclosure would damage working relationships between ECGD and companies. In light of the above the Commissioner is prepared to accept that in this case the opinion of the qualified person is a reasonable one that was reasonably arrived at. Therefore the Commissioner finds that the exemption is engaged.

Public interest test

35. Sections 36(2)(b) and (c) are qualified exemptions and are therefore subject to the public interest test as set out in section 2(2) of the Act. The Commissioner must therefore decide if the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
36. ECGD did provide the Commissioner with a detailed submission in relation to its public interest test. This combined arguments in relation to section 36(2)(b) and 36(2)(c). In favour of disclosure, ECGD recognised that there is a public interest in disclosing information to promote trust and engagement between citizens and government. ECGD acknowledged the importance of the public being sufficiently informed to enable participation in public debate, and recognised the value of transparency in decision making.
37. With particular regard to the withheld information, ECGD accepted that the public is often interested in issues surrounding allegations of corruption, and recognised the public interest in providing assurances to the public that ECGD

³ EA/2006/0011 & EA/2006/0013

has robust procedures for ensuring that corruptly won contracts are not supported.

38. However, ECGD expressed the view that disclosure of the withheld information in this case would not be in the public interest as it would not greatly support those factors identified above. The nature of the information was such that its disclosure would not serve to inform the public about ECGD's attitude towards addressing corruption. Disclosure would merely disclose internal communications within ECGD, and would not inform the public as to the wider issues in the case.
39. In addition, ECGD emphasised its view that disclosure would have an adverse impact on the ability of government officials to receive and provide full and frank advice and opinions. As ECGD was of the view that disclosure would not actively benefit the public interest, ECGD argued that the adverse impact would not be mitigated by the general factors in favour of disclosure.
40. In reaching a decision as to where the balance of the public interest lies the Commissioner is assisted by the Information Tribunal's view in *McIntyre v ICO and the MOD*⁴:

"this category of exemption is intended to apply to those cases where it would be necessary in the interest of good government to withhold information, but which are not covered by another exemption, and where disclosure would prejudice the public authority's ability to offer an effective public service or to meet its wider objectives or purposes due to the disruption caused by the disclosure or the diversification of resources in managing the impact of disclosure."
41. The Commissioner has had particular regard to the content of the withheld information in this case. The Commissioner does not accept that disclosure of all of the withheld information would be likely to have the serious negative impact argued by ECGD. In the Commissioner's view some of the withheld information could be disclosed without inhibiting officials to the degree suggested at paragraph 30 above.
42. In addition, the Commissioner is of the view that both government officials and ECGD's customers are under a duty to exchange and discuss views which should be recorded. The Commissioner notes ECGD's argument at paragraph 30 above that customers would be less likely to agree to written records being kept. However ECGD itself recognises that it is obliged to keep records in order to comply with governance policies. The Commissioner is therefore of the view that, although the precise nature of the records may change, the quality of the records that must be kept ought not to be affected by the possibility of disclosure. The Commissioner also notes ECGD's argument that its customers may become reluctant to engage openly with ECGD. However the Commissioner believes that companies which engage with public authorities, particularly those who receive support from the public

⁴ Appeal no EA/2007/0068

purse, must understand that their interaction with the public authority is open to greater public scrutiny as a result. The Commissioner is of the view that the perceived fear of disclosure would not prevent such companies from wishing to benefit from having contracts guaranteed by the UK government. Therefore the Commissioner does not accept ECGD's argument that companies will be less likely to engage with ECGD if the information were to be released.

43. The Commissioner considered each piece of withheld information carefully, and finds that the information varies in terms of detail and sensitivity. Some of the information has already been released to the complainant in other documents, and the Commissioner finds that there is no reason to withhold similar information simply because it is contained in a separate document. The Commissioner is satisfied that some of the remaining information has been correctly withheld, as the public interest in maintaining the exemption does outweigh the public interest in disclosing the information. However the Commissioner is also of the view that some information ought to be provided to the complainant. With regard to this information the Commissioner finds that, in all the circumstances of this case, the public interest in maintaining the exemption does not outweigh the public interest in disclosing the requested information. The Commissioner has provided a confidential schedule to ECGD detailing the information he requires to be disclosed.

The Decision

44. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
- ECGD correctly withheld information in reliance on the exemption under section 31(1)(a) of the Act.
 - ECGD correctly withheld some information in reliance on the exemption under section 36(2)(b) and (c) of the Act.

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

- ECGD failed to provide a refusal notice within the statutory time limit which stated the relevant exemptions, thereby breaching section 17(1)(b) and 17(1)(c)
- ECGD wrongly withheld some information in reliance on the exemption under section 36(2)(b) and (c) of the Act, thereby breaching section 1(1)(b).
- ECGD failed to communicate this information to the applicant within the time limit set out at section 10(1)

Steps Required

45. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
 - Disclose to the complainant the information previously withheld under section 36(2)(b) and (c) as detailed in the confidential schedule.
46. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Other matters

47. Although it does not form part of this Decision Notice the Commissioner has considered the time taken by ECGD to conduct an internal review. The Commissioner considers that a reasonable time for completing an internal review is 20 working days from the date of the request for review. There may be a small number of cases which involve exceptional circumstances where it may be reasonable to take longer, but in no case should the total time taken exceed 40 working days.
48. The Commissioner notes that ECGD took six months to conduct an internal review. This clearly exceeds the timescale recommended above. However the Commissioner acknowledges that this took place in 2005-2006, in the earlier days of FOI access rights. ECGD has advised the Commissioner that it now has increased resources to deal with information rights matters, and it expects that this will prevent recurrence of similar delays.

Failure to comply

49. 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

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

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

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

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

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

Dated the 21st day of May 2009

Signed

**Anne Jones
Assistant Commissioner**

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

Legal Annex: Relevant statutory obligations

1. **Section 1(1)** provides that:

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

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him.

2. **Section 10** provides that:

(1) ... a public authority must comply with section (1)(1) promptly and in any event not later than the twentieth working day following the date of receipt.

3. **Section 17(1)** provides that:

A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request, or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which –

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.

4. **Section 23(1)** provides 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).

Section 23(3) provides that –

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.

5. **Section 31(1)(a)** provides that –

Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (a) the prevention or detection of crime

6. **Section 36(1)** provides that:

This section applies to-

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

Section 36(2)(c) provides that –

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

- ...
(b) would, or would be likely to, inhibit-
 - (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purposes of deliberation, or
- (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

Section 36(5) provides that –

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