

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 2 March 2011

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

Summary

The complainant requested information about how ECGD had handled a previous request for information. ECGD refused to disclose the information citing section 14(1), 36(2)(b)(i) and (ii) and 36(2)(c). The complainant subsequently made a similar request. ECGD refused this request under sections 14(2), 36(2)(b)(i) and (ii) and 36(2)(c). The Commissioner finds that ECGD was incorrect to refuse the first request under section 14(1). However the Commissioner finds that the information was correctly withheld under section 36(2)(b)(ii). The Commissioner also finds that ECGD was incorrect to rely on section 14(2) in respect of the second request. Again, the Commissioner finds that the information was correctly withheld under sections 36(2)(b)(ii). During the course of the investigation ECGD sought to rely on section 21 in relation to one piece of information. The Commissioner finds that this exemption was wrongly applied, and that this information ought to be disclosed to the complainant. The Commissioner also recorded a number of procedural breaches in the handling of the request.

The Commissioner's Role

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

Background

Role of ECGD

2. The Export Credits Guarantee Department (ECGD) defines its role as “to benefit the UK economy by helping exporters of UK goods and services win business, and UK firms to invest overseas, by providing guarantees, insurance and reinsurance against loss, taking into account the Government’s international policies”.¹ ECGD conducts its business on behalf of the Secretary of State for Business, Innovation and Skills under powers set out in the Export and Investment Guarantees Act 1991 (the 1991 Act). The Chief Executive, as Accounting Officer, is authorised to carry out the functions necessary to execute the Secretary of State’s powers under the 1991 Act. ECGD’s core purpose of facilitating exports is achieved by assuming risks. In doing so, its key aim is to assist British exporters while meeting the objectives agreed by Ministers. ECGD’s risk acceptance and policy of pricing to risk are both determined by the need to achieve these objectives. At the operational level, ECGD’s credit and treasury risks are overseen by ECGD’s Risk Committee. Prior to establishing the Risk Committee, an Underwriting Committee and a Market Committee carried out those functions.
3. The requests which are the subject of this Notice form part of a series of requests relating to ECGD’s financial support to the sale of armoured vehicles to the Suharto regime in Indonesia in 1995 and 1996. Indonesia subsequently defaulted on its obligations to pay. In December 2004 the Guardian Newspaper revealed that according to court documents, executives of Alvis Vehicles Limited (part of BAES) had made excessive payments to relatives of the Indonesian President who allegedly acted as agents.

Related Requests

4. The complainant in this case has made three requests to ECGD on this subject matter. At Annex A of this Notice there is a table which shows the timing and sequence of the multiple requests and complaints. The Commissioner also notes that there has been a large volume of correspondence between the complainant, ECGD and the Commissioner on all requests and related complaints. The Commissioner has already dealt with a complaint about the first of these requests in a separate Decision Notice².

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

² Reference FS50199771, issued on 30 June 2010.

5. This Decision Notice deals with the second and third requests in that series of related requests. For consistency the Commissioner has used the same references as in the previous Decision Notice, i.e. request 2 and request 3, part 2.

The Request(s)

Request 2

6. The complainant submitted request 2 to ECGD on 27 March 2006. Request 2 was a request for information about how ECGD handled a previous request³:

"1) a copy of all correspondence (including emails) relating to the Corner House Freedom of Information request IAR (05)21 between (1) ECGD and (2) either or both of (a) BAE Systems or their representatives; and/or (b) any other government department; and

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

7. On 28 June 2006 ECGD told the complainant it was refusing to provide the requested information under section 36 of the Act.
8. The complainant requested an internal review of that decision on 7 July 2006.
9. On 7 March 2007 ECGD wrote to the complainant with the outcome of the internal review. ECGD upheld its original decision not to release the information under section 36, and clarified that it was relying on subsections 36(2)(b) and 36(2)(c). ECGD also advised the complainant that it considered the request to be vexatious, although it did not cite the relevant provision of the Act, section 14(1).
10. On 22 March 2007 the complainant contacted the Commissioner to complain about ECGD's refusal of this request. Given that the request had been made in 2006, the Commissioner considered it appropriate to explore the scope for informal resolution of the case. It was agreed that the complainant would submit a fresh request, so that ECGD could

³ Request 1 in DN FS50199771

consider whether the passage of time meant that the information could now be disclosed.

Request 3, part 2

11. On 25 September 2007 the complainant submitted a further request (request 3) to ECGD which was in two parts. The first part of the request has been dealt with by the Commissioner in the separate complaint referred to above, and the second part of the request was for:

"all of the information previously requested and withheld".

The complainant explained to ECGD that he was making this request:

"because it may well be your [ECGD's] position that the public interest in maintaining the exceptions is not now as strong as you considered that it was previously".

12. ECGD sought clarification of request 3 from the complainant and on 15 October 2007 he confirmed he was seeking the information which he had previously requested on 27 March 2006 (request 2).
13. ECGD wrote to the complainant on 19 March 2008 and told him that it was refusing the request under section 36 of the Act.
14. On 30 March 2008 the complainant requested an internal review of the decision.
15. On 22 July 2008 ECGD wrote to the complainant with the outcome of the internal review. ECGD upheld its decision to rely on section 36, and in addition now sought to refuse the request under section 14(2), which applies to repeated requests.

The Investigation

Scope of the Case

16. As set out in the background section above, the Commissioner has already issued a Decision Notice dealing with some of the complainant's requests. In that Notice the Commissioner explained that he would consider request 2 and request 3, part 2 in a separate Notice:

"26. The Commissioner considers that request 2 is a 'meta' request, as it is a request for information generated during the handling of a previous request. It is the Commissioner's view that although request 2 is about how ECGD handled request 1, it is an entirely separate request that has no direct influence on how the

Commissioner investigates request 1. Accordingly the Commissioner considers it appropriate that the complaint about request 2 be dealt with separately under reference FS50306973 and the Commissioner has not referred to it further in this Notice.

32. *The Commissioner notes that part 2 of request 3 is a repeat of request 2. Having already determined that request 2 will be dealt with separately as detailed in paragraph 26 above, has decided that it is appropriate to deal with both request 2 and the part 2 of request 3 together and this will be considered in a separate Notice (reference FS50306973). Accordingly the Commissioner has not included part 2 of request 3 in the scope of this investigation”.*
17. However, because of the relationship between all of the requests and complaints, it will be necessary, within the body of this Notice, to refer to all related requests.
18. It is important to note that this Decision Notice does not relate to the information originally requested (request 1 in Decision Notice FS50199771). This Decision Notice deals only with the “meta request”, ie the request about the handling of the original request. Therefore the withheld information in this case is that generated during the handling of request 1. The Commissioner does not consider it necessary to repeat his analysis in relation to request 1, as the withheld information in that case is not the subject of this Decision Notice.

Chronology

19. On 22 March 2007 the complainant contacted the Commissioner to complain about how request 2 had been handled, and on 30 March 2008 about how request 3, part 2 had been handled. The complainant requested that the Commissioner consider ECGD’s handling of both requests.
20. Regrettably, due to the heavy workload at the Commissioner’s office, the investigation did not get fully under way until the Commissioner undertook a review of all the related case files in early 2010 and defined the scope of the case.
21. On 17 May 2010 the Commissioner confirmed the scope of his investigation with the complainant and ECGD and determined that the complaints about both requests would be dealt with together. The Commissioner asked ECGD to provide a copy of the withheld information in respect of request 2 and request 3, part 2 together with an explanation of its handling of both these requests.

22. ECGD provided a full response to the Commissioner on 28 June 2010,

Findings of Fact

23. This case is complicated by the volume and frequency of communication between the complainant and ECGD, some (but not all) of which related to the requests. As noted above the complainant made requests in 2006 and 2007, which the Commissioner has considered separately. The Commissioner notes that ECGD has sought to refuse each of the requests on two grounds:

- 1) Firstly, that the complaints should be refused under the section 14 exclusion;
- 2) Secondly, that the requested information could be withheld under various exemptions.

24. During the course of the Commissioner's investigation ECGD advised that the withheld information also included a copy of a transcript which had accompanied communications about the handling of request 1. ECGD told the Commissioner that that this information was already publicly available, therefore it was exempt under section 21.

Withheld Information

25. As explained above, this Decision Notice deals only with the "meta request", ie the request about the handling of the original request. Therefore the withheld information in this case is that generated during the handling of request 1, comprising various communications within ECGD, and between ECGD and BAES.

Analysis

Substantive Procedural Matters

Section 14: vexatious and repeated requests

26. The Commissioner notes that ECGD sought to rely on section 14(1) in respect of request 2, and section 14(2) in respect of request 3, part 2. The Commissioner has considered each request in turn.

Request 2 – section 14(1)

27. Section 14(1) is an exclusion that provides that:

"Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious".

28. The Commissioner has published guidance in relation to the issue of vexatious requests⁴. This guidance explains that for a request to be deemed vexatious, the Commissioner will consider the context and history of the request. The Commissioner will also consider the strengths and weaknesses of the arguments presented by the complainant and the public authority against the following five factors:
- Could the request fairly be seen as obsessive?
 - Is the request harassing the authority or causing distress to staff?
 - Would complying with the request impose a significant burden in terms of expense and distraction?
 - Is the request designed to cause disruption or annoyance?
 - Does the request lack any serious purpose or value?
29. To decide whether a request is vexatious it is often necessary to look at its context and history. Relevant factors include whether the request is likely to cause unjustified distress, disruption or irritation. The Commissioner takes the view that a public authority must provide arguments of sufficient weight to demonstrate that the request falls into one or more of the categories described above for section 14 to be engaged.
30. In its letter to the Commissioner of 19 July 2010 ECDG put forward arguments relating to two of the five factors. The Commissioner has considered these arguments below, and has also considered the other arguments put forward by ECGD.

Could request 2 fairly be seen as obsessive?

31. ECGD argued to the Commissioner that request 2 could be seen as obsessive because it "ran parallel with an appeal to the ICO about ECGD's refusal to supply the information that was the subject of the underlying request". ECGD was of the view that the appropriate process would be for the Commissioner to examine the correspondence between ECGD and BAES when considering the complaint made by the complainant about request 1. ECGD contended that complying with request 2 could, in effect, amount to a pre-disclosure before the Commissioner had considered the complaint.
32. In evaluating this argument the Commissioner is assisted by the Information Tribunal's decision in *Home Office and Ministry of Justice v*

⁴http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/vexatious_and_repeated_requests.pdf

*ICO*⁵. In this case the Tribunal attached little weight to arguments that meta-requests circumvented other provisions of the Act. Rather, the Tribunal commented that meta-requests are valid requests in their own right, and should be treated like any other request.

33. For the reasons set out above, the Commissioner is not satisfied that ECGD has demonstrated that request 2 could fairly be seen as obsessive.

Would complying with the request impose a significant burden in terms of expense and distraction?

34. ECGD argued to the Commissioner that dealing with request 2 at the same time as responding to the Commissioner about the complaint about request 1 imposed a significant burden on its time and resources. ECGD explained that the information held in respect of request 2 helped to inform its decision about request 1. Therefore, attempting to deal with request 2 at the same time meant that ECGD was required to consider the same information on repeated occasions to check for consistency. ECGD also told the Commissioner that the internal review in relation to request 2 was conducted by a member of ECGD's Executive Committee which also distracted them from their main responsibilities in terms of time and resources. Finally, ECGD was of the view that the complexity of the various requests, the volume of correspondence and inaccuracies with reference numbers also impacted on the delays and contributed to additional burden on ECGD.
35. The Commissioner recognises that ECGD has spent a considerable amount of time dealing with the confusion of multiple requests, complaints and related correspondence. However, for the purposes of section 14(1) the Commissioner must consider whether dealing with the request in question would impose a significant burden. The Commissioner is also mindful that the Act contains a separate provision (section 12) that relates to requests which are particularly time-consuming. However, the Commissioner is not inclined to accept that this would be the case, since the withheld information is fairly well defined and already collated by ECGD.
36. The Commissioner is of the view that ECGD has failed to provide any convincing evidence that dealing with request 2 would cause a disproportionate diversion of resources.

⁵ Appeal no EA/2008/0062

Did request 2 have any serious purpose or value?

37. In addition to the arguments raised above, ECGD argued to the Commissioner that the request related to background information which informed ECGD's handling of request 1. The Commissioner interprets this to suggest that ECGD considered that request 2 had no serious value or purpose.
38. The Commissioner notes that the Tribunal considered this argument in *Home Office and Ministry of Justice v ICO* but did not accept it as valid. The Commissioner is of the view that all requests, including meta-requests, should be objectively assessed. There can be no assumption that a request for "background information" automatically lacks value.
39. In light of the above, the Commissioner is not satisfied that ECGD has demonstrated that request 2 was vexatious. He does not accept that the request created a significant burden, nor that it could be characterised as obsessive.
40. As the Commissioner finds that ECGD was incorrect to refuse the request under section 14(1) he has gone on to consider ECGD's reliance on the exemptions claimed, namely sections 36(2)(b)(i) and (ii), 36(2)(c) and 21.

Exemptions claimed

Section 21 – information accessible to the applicant by other means

41. Section 21 of the Act states that information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information. It is an absolute exemption, therefore no public interest test is required.
42. ECGD did not claim reliance on section 21 in any of its communications with the complainant. During the course of the Commissioner's investigation ECGD told the Commissioner that section 21 applied to a copy of a transcript which had been attached to an email.
43. It is the Commissioner's view that the relevant consideration in relation to section 21 is whether the requested information is reasonably accessible to the complainant. For the exemption to be engaged the Commissioner must be satisfied that:
 - the complainant has already found the information; or
 - the public authority is able to direct the complainant precisely to the requested information i.e. it must be reasonably specific about where the information can be found so the complainant can find it himself without difficulty.

44. ECGD explained to the Commissioner that the transcript was exempt under section 21 because it was available "from online sources of law reports or hard copies in libraries".
45. However, the Commissioner does not consider that this explanation satisfies the requirements of section 21. This is because ECGD has not advised the complainant that it holds this information, nor has it provided the complainant with any information to enable him to access the information. Therefore the Commissioner finds that section 21 is not engaged in relation to this information, and ECGD should disclose it to the complainant.

Section 36 – prejudice to the effective conduct of public affairs

46. As indicated in the findings of fact section above, the withheld information in this case is that generated during the handling of request 1, comprising various communications within ECGD, and between ECGD and BAES. The Commissioner considers that these communications fall into three broad classes:
 - 1) "Covering" correspondence – emails between ECGD and BAES discussing how to handle request 1.
 - 2) Detailed arguments put forward by ECGD and BAES setting out their respective views on disclosure of the information withheld in relation to request 1.
 - 3) Documentation relating to the qualified person's opinion obtained in relation to request 1.
47. ECGD relied upon three limbs of the section 36 exemption in relation to all the withheld information: section 36(2)(b)(i), 36(2)(b)(ii) and section 36(2)(c). The Commissioner considers that it is acceptable to claim more than one limb of section 36(2) for the same information, as long as arguments can be made in support of the claim for each individual subsection.
48. Section 36(2)(b) and (c) provide 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.

49. In order to establish whether the exemption has been applied correctly the Commissioner considers it necessary to:

- Establish that an opinion was given;
- Ascertain that it was given by a qualified person;
- Ascertain when the opinion was given; and,
- Consider whether the opinion was reasonable

50. If the Commissioner finds that the exemption is engaged he will then go on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure.

The opinion of the qualified person

51. ECGD confirmed that the qualified person in respect of request 2 was Mr Ian McCartney, the then Minister for Trade and Industry and Foreign Affairs. The opinion was sought on 8 June 2006 and given on 16 June 2006. The Commissioner is satisfied that Mr McCartney was a qualified person under section 36(5) of the Act.

52. In determining whether or not the opinion is reasonable, the Commissioner will take into account the information that was provided to the qualified person when he formed his opinion. The Commissioner has had sight of the detailed submission on which the qualified person gave his opinion in relation to request 2. This included the withheld information and detailed arguments in relation to the exemption and the public interest test.

53. The Commissioner considers it acceptable to claim more than one limb of section 36(2) in relation to the same information, as long as arguments can be made in support of the claim for each individual subsection. ECGD provided detailed arguments in relation to each limb claimed, so the Commissioner has looked first at section 36(2)(b)(i) and (ii). If the Commissioner finds that neither of these limbs is engaged in relation to any of the withheld information he will go on to examine section 36(2)(c).

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

54. The submission to the qualified person included consideration of the following factors:

- Some of the information was generated for the purpose of obtaining BAES's views as to disclosure of the requested information, including consideration of exemptions under the Act.
 - Request 2 was for information relating to an export contract which could be confidential or commercially sensitive or might be prejudicial to international relations. In light of this it is important that ECGD be able to have full, frank and robust exchanges of views with relevant third parties (ie, BAES) so it can satisfy itself whether any relevant exemption is applicable.
 - Third parties such as BAES would be less likely to engage in such frank exchanges if they believed their explanations would be put into the public domain. This in turn could harm ECGD's ability to make informed decisions, and could result in an inadvertent disclosure of confidential, commercially or internationally sensitive information resulting in potential legal action against ECGD.
55. Having examined all the relevant information the Commissioner is satisfied that the qualified person's opinion was reasonable. The Commissioner considers it reasonable for the qualified person to have formed the opinion that disclosure of the information would be likely to inhibit the free and frank exchange of views between ECGD and BAES.
56. The Commissioner also accepts that it would be virtually impossible for ECGD to have exchanged views without detailed reference to the withheld information in relation to request 1. Disclosure of these detailed views would be likely to result in less frank exchanges, as ECGD and third parties would necessarily limit their reference to the withheld information when discussing the request. This would also make it more difficult for ECGD to determine the extent to which information could be disclosed.
57. In light of the above the Commissioner considers that the exemption at section 36(2)(b)(ii) is engaged in relation to all of the withheld information. The Commissioner does not therefore consider it necessary to examine ECGD's arguments in relation to section 36(2)(b)(i) or 36(2)(c) unless he concludes that the public interest in maintaining section 36(2)(b)(ii) does not outweigh the public interest in disclosure of the information.

Public interest arguments in favour of disclosure

58. ECGD accepted that it would be in the public interest for the public to be able to scrutinise information to ensure that exporters make more considered representations to ECGD. Disclosure could assist the public in a more robust and comprehensive analysis of relevant background information from third parties. ECGD also said that it understood the

public interest in the need for transparency in government decision making.

59. The Commissioner is mindful that the issue of financial support for contracts to supply arms to Indonesia and other countries and the controversy of commission payments to agents has been the subject of significant public debate. In respect of this particular case Indonesia had defaulted on the loan underwritten by ECGD with taxpayers' money, and as such there is a legitimate interest in the public being informed as to the relationship between ECGD and BAES as well as how that relationship affected how to respond to a request for information.

Public interest arguments in favour of maintaining the exemption

60. ECGD argued that there is a strong public interest in it being able to have frank discussions with third parties who would be affected by disclosure of information. ECGD argued that it was not in the public interest that third parties such as BAES should feel inhibited in being candid and frank in communicating their views to ECGD. ECGD was of the view that the public interest lay clearly in protecting its ability to provide and obtain views on the merits of disclosing information which those parties may consider extremely sensitive. ECGD argued that disclosure of the withheld information in this case would be likely to prejudice ECGD's ability to make informed decisions about handling information requests.
61. ECGD drew the Commissioner's attention to advice provided by the then Department for Constitutional Affairs (the DCA, now the Ministry of Justice, or MOJ). This advice set out the view that requests about handling of previous requests seek to circumvent the general FOI framework. It said that the mechanism laid down by Parliament for the Commissioner to enforce the Act exists for applicants who are dissatisfied with the way in which their requests are handled. It argued that it would not be in the public interest to allow the bypassing of this mechanism. However the Commissioner notes that the Information Tribunal considered these arguments in the case of *Home Office and MoJ*, and found them unconvincing. The Commissioner does not attach any weight to arguments that meta-requests circumvent the provisions of the Act.
62. ECGD also argued that its officials may be reluctant in future to explain why they consider certain exemptions of the Act apply if there was a risk that their explanations would be disclosed. Similarly, ECGD officials may feel inhibited in putting their views to third parties, particularly when challenging the views of these parties. ECGD further argued that this could also result in poorer quality decision making, which would not be in the public interest.

63. ECGD argued that the procedures for handling freedom of information requests under the Act were in place to ensure that the enforcement mechanisms of the Act are correctly applied and that officials continue to be able to offer free and frank advice about how to handle requests for information. It argued that it would not be in the public interest that the ability to consult effectively with third parties is hindered when considering a request for information.

Balance of the public interest arguments

64. The Commissioner has inspected the withheld information and, as stated above, accepts that it was reasonable for the qualified person to have concluded that disclosure in this case would be likely to have an inhibiting effect on future discussion and decisions. The Commissioner has therefore given some weight to the opinion of the qualified person in considering the public interest test.
65. In considering the public interest in maintaining the exemption, the Commissioner is mindful that the withheld information does in part contain the views of third parties (eg BAES). The Commissioner understands that the complexity and sensitivity of the information in respect of the relationship between ECGD and BAES. Therefore the Commissioner considers that disclosure of this information would be likely to have a significant inhibitory effect on these parties expressing themselves candidly in relation to the information request.
66. The withheld information contains quite complex and detailed discussions which clearly demonstrate free and frank discussions between ECGD and BAES. 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, and it is clear to the Commissioner that whilst the public interest in understanding the discussions is relatively high. However the Commissioner is of the view that equally it would not be in the public interest to inhibit such free discussions on such a sensitive subject matter. Therefore the Commissioner finds that the information which consists of communications between ECGD and BAES was correctly withheld.
67. The Commissioner has also carefully considered the internal ECGD correspondence. Some of this information is relatively innocuous, and although the Commissioner has afforded the qualified person's opinion due consideration, he does not consider disclosure would have such a prejudicial effect as the communications with BAES. However, the Commissioner also recognises that the information contains detail and reference to the original request and as such the sensitivity of those discussions is attributed significant weight by the Commissioner.

68. The Commissioner is of the view that the competing arguments in favour of disclosure and in favour of maintaining the exemption are finely balanced. However the Commissioner is satisfied that in this particular case the public interest in maintaining the exemption at section 36(2)(b)(ii) does outweigh that in disclosure of the withheld information.
69. Having determined that section 36(2)(b)(i) and (ii) are engaged in relation to the withheld information, and that the public interest lies in favour of maintaining the exemptions the Commissioner has not gone on to consider sections 36(2)(b)(i) and 36(2)(c).

Request 3, part 2

70. As explained above, request 3, part 2 was a similar request to request 2. On 25 September 2007 the complainant made a request to ECGD for:

“all of the information previously requested and withheld”.

The complainant explained that he was making this request as he was of the view that the public interest in maintaining the exemptions may have changed since he made his earlier requests.

71. In its refusal notice of 19 March 2008 ECGD refused the request under section 36 of the Act, but at the internal review ECGD also sought to claim that the request was repeated and therefore could be refused under section 14(2). Therefore the Commissioner has first considered the exclusion at section 14(2), and if he finds that this is not engaged he will go on to consider the exemptions claimed by ECGD.

Section 14(2) – repeated requests

72. Section 14(2) of the Act provides that a public authority is not obliged to comply with a repeated request. The Commissioner has issued guidance which describes a repeated request as:
- one that has been submitted by the same person;
 - the wording is identical to that of the previous request; and
 - asking for the same information that has already been provided or refused.
73. Even if the conditions above are satisfied, the public authority must consider whether a reasonable period of time has elapsed since that request. The definition of what is reasonable will be dependent on the circumstances, such as:
- how likely the information is to change;
 - how often records are updated; and

- any advice previously given to the requester (for example on when new information is likely to be available).
74. ECGD maintained that request 3, part 2 was a repeat of request 2 as it requested the same information. ECGD argued that it had considered whether the passage of time between the two requests could have been considered a reasonable interval, but concluded that it had not.
75. The complainant advised ECGD and the Commissioner that he made the repeat request as it was his view that the passage of time may have affected the public interest in withholding the information under some or all of the exemptions claimed.
76. The Commissioner is satisfied that the request is the same as request 2 as it was made by the same person and is for the same information. He must therefore determine whether a reasonable period of time has elapsed since the initial request.
77. The Commissioner notes that request 3, part 2 was made in 2008, but related to information created in response to request 1, which was made in 2005. The Commissioner appreciates the complex chronology of correspondence in this case, and accepts that the situation was not helped by the significant delays in investigating the complaint submitted in relation to request 1. Therefore the Commissioner understands the frustration on the part of the complainant and the public authority.
78. However, the Commissioner is mindful that that Act does not prevent a complainant from submitting a request which has been previously refused if the complainant considers that circumstances may have changed. This is particularly relevant where a request has been refused on the basis of qualified exemptions, where the public interest test hinges on the circumstances at the time the request is made. The Commissioner does not consider it unreasonable for the complainant to have assumed that the passage of time may have resulted in a different decision regarding his request.
79. In addition, the Commissioner notes that ECGD initially treated the request as valid and sought the opinion of the qualified person in relation to the section 36 exemption, rather than seeking to refuse the request as repeated. Therefore the Commissioner is minded to accept that ECGD should reasonably have concluded that the request, although identical to the previous request, should be looked at in the light of the passage of time. The Commissioner is satisfied that ECGD was incorrect to rely on section 14(2) in relation to request 3, part 2, and has accordingly gone on to consider the exemptions claimed.

Section 36 – prejudice to the effective conduct of public affairs

80. As with request 2, ECGD claimed that the information requested under request 3, part 2, was exempt under three limbs of the section 36 exemption section 36(2)(b)(i), 36(2)(b)(ii) and section 36(2)(c). In examining ECGD's arguments the Commissioner has adopted the approach set out in relation to request 2. The withheld information is that categorised at paragraph 44 above.
81. ECGD confirmed that the qualified person in respect of request 3, part 2 was Mr Malcolm Wicks MP, the then Minister of State for Energy. The opinion was sought on 14 February 2008 and given on 6 March 2008. The Commissioner accepts that Mr Wicks was a qualified person under section 36(5) of the Act.
82. The Commissioner has had sight of the detailed submission on which the qualified person gave his opinion in relation to request 3, part 2. This included the withheld information and detailed arguments in relation to the exemptions and the public interest test.
83. As with request 2, the Commissioner has looked first at section 36(2)(b)(i) and (ii). If the Commissioner finds that neither of these limbs is engaged in relation to any of the withheld information he will go on to examine section 36(2)(c).

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

84. The submission to the qualified person in relation to request 3, part 2 included a copy of the submission which had been prepared in relation to request 2. The submission in relation to request 3, part 2 advised the qualified person of ECGD's view that the arguments put forward in the previous submission were still applicable. These arguments are set out at paragraph 52 above. The submission to the qualified person did not identify any new arguments as to why the exemptions were engaged.
85. The Commissioner notes that ECGD used similar arguments in its submissions to the respective qualified persons to engage the exemptions in relation to both requests. However the Commissioner does not consider that this would render the qualified person's opinion unreasonable in relation to request 3, part 2, and he notes that this submission did address the need to consider the passage of time. The Commissioner is satisfied that the qualified person was provided with copies of the relevant correspondence and other information, including the submission in relation to request 2. The Commissioner is therefore satisfied that the qualified person was provided with sufficient information for him to reach an informed and reasonable opinion on the application of the exemptions claimed.

86. Having considered the information provided by ECGD, the Commissioner is satisfied that the exemption at section 36(2)(b)(ii) is engaged in relation to all of the withheld information. The Commissioner has therefore gone on to consider the public interest test.
87. ECGD advised the Commissioner that it still sought to rely on the public interest arguments identified in relation to request 2. In addition ECGD provided the Commissioner with evidence of its consideration of the passage of time. Rather than repeat the arguments already presented, the Commissioner has summarised below the additional arguments provided by ECGD. He has considered them together with the arguments already summarised at paragraphs 54-57 above.

Public interest arguments in favour of disclosure

88. ECGD recognised that there was a general public interest in disclosing information to promote trust and engagement between citizens and government. ECGD also accepted that knowledge of the way government works can increase public contribution to topical debate.
89. However ECGD did not consider this argument to be particularly strong, as the relevant information in this case did not relate to the allegations of corruption, but rather how ECGD should deal with an information request. ECGD therefore remained of the view that, as with request 2, the arguments in favour of disclosure were broad and not persuasive.

Public interest arguments in favour of maintaining the exemption

90. ECGD emphasised to the Commissioner the importance of maintaining strong working relationships with exporters such as BAES. ECGD remained of the view that, given the qualified person's opinion that inhibition of views would be likely to occur, it would not be in the public interest to disclose the information. ECGD argued that there was a much stronger public interest in protecting channels of communication between the relevant parties, including discussions about disclosure of information into the public domain and application of exemptions under the Act. As it was accepted that disclosure would make it more difficult for ECGD to obtain the information it needed to make decisions, ECGD was of the view that the public interest lay clearly in favour of maintaining the exemption.
91. ECGD reiterated its position that the appropriate mechanism to challenge the handling of a request was a section 50 complaint to the Commissioner (and additionally, the right of appeal to the Information Tribunal). ECGD maintained that its officials may be reluctant in future to explain why they consider certain exemptions of the Act apply if there was a risk that their explanations would be disclosed into the public domain, rather than considered by the Tribunal. ECGD was of the view

that the public interest was better served by protecting the abilities of officials to put forward strong, frank and even controversial views, in the knowledge that such information would not be routinely disclosed into the public domain.

Balance of the public interest arguments

92. As with request 2, the Commissioner has accepted that it was reasonable for the qualified person to have concluded that disclosure in this case would be likely to have an inhibiting effect on future discussion and decisions. The Commissioner has therefore given some weight to the opinion of the qualified person in considering the public interest test.
93. The Commissioner has also had due regard to the impact of the passage of time. The Commissioner is of the view that sensitivities which may exist around the disclosure of information will often decrease over time. In many cases information which could be appropriately withheld at a certain time, may be able to be disclosed at some point in the future.
94. The Commissioner is mindful, however, that in this case the withheld information goes beyond merely asking a third party whether information should be disclosed. The Commissioner has seen evidence that ECGD's discussions with BAES, and internally between ECGD officials, included sensitive details of the information withheld in respect of request 1. Although in theory the sensitive details could in many instances be redacted, the remaining information would be rendered meaningless. The Commissioner is of the view that it would not be a meaningful or reasonable step to focus on this information. The Commissioner understands the complainant's motives in submitting a fresh request, and on other cases he has found that the passage of time has sufficiently decreased the harm, prejudice or sensitivity, such that the information can be disclosed. However, in this particular case the Commissioner is unable to reach this conclusion as the wider sensitivities surrounding such a case would still have been strong at the time the request was made.
95. For the reasons set out above the Commissioner is satisfied that in respect of request 3, part 2 the public interest in maintaining the exemption at section 36(2)(b)(ii) does outweigh that in disclosure of the withheld information.
96. As the Commissioner finds that all of the information was correctly withheld under section 36(2)(b)(ii), the Commissioner has not considered the other exemptions claimed by ECGD.

Procedural Requirements

Section 1(1)(b) and section 10(1) – duty to provide information within the statutory time limit

97. Section 1(1)(b) of the Act requires a public authority to provide information to an applicant in response to a request. Section 10(1) states that this must be done promptly, and in any event no later than the twentieth working day after the date the request is received.
98. As the Commissioner is of the view that ECGD wrongly withheld some information in reliance on section 21 of the Act, 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 1(1)(b) and section 10(1) in relation to this information.

Section 17 – refusal notice

99. 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' within the time for complying with section 1(1), which is twenty working days. ECGD's refusal notice in relation to request 2 was issued on 28 June 2006, some three months after the request was received. ECGD's refusal notice for request 3, part 2 was dated 19 March 2008 which also exceeded the statutory time limit, this time by five months.
100. The Commissioner notes that the complainant had been in substantial correspondence with ECGD and submitted a number of similar requests. Although the Commissioner expects public authorities to adhere to the statutory timescales, he appreciates that the chronology of this case has been quite complicated. In addition, the Commissioner has seen nothing to indicate that ECGD deliberately delayed dealing with the request.
101. In light of the above the Commissioner finds that ECGD breached section 17(1) of the Act in relation to request 2 and request 3, part 2, in failing to issue a refusal notice within the time limit specified.
102. The Commissioner also finds that ECGD breached section 17(1)(b) in failing to advise the complainant that it was relying on the exemption at section 21 in relation to some of the requested information.

The Decision

103. The Commissioner's decision is that ECGD dealt with the following elements of the requests in accordance with the requirements of the Act:

- ECGD correctly withheld information in reliance on the exemption at section 36(2)(b)(ii) of the Act.

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

- ECGD wrongly sought to refuse request 2 under section 14(1) and request 3, part 2 under section 14(2);
- ECGD breached section 17(1) in failing to issue a refusal notice within the statutory time limit with respect to request 2 and request 3, part 2;
- ECGD breached section 17(1)(b) in failing to cite the exemption at section 21, which it later sought to rely on; and
- ECGD wrongly sought to rely on the exemption at section 21 in relation to some information, and breached section 1(1)(b) and section 10(1), in failing to provide this information to the complainant.

Steps Required

105. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

- Provide the information withheld under section 21 to the complainant.

106. The public authority must take the steps required by this notice within 35 calendar days of the date of this Notice.

Failure to comply

107. 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

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

Internal review

109. In respect of request 2 the complainant requested an internal review on 7 July 2006 but ECGD did not provide a substantive response until 7 March 2007. In respect of request 3, part 2, the complainant requested an internal review on 30 March 2008 but ECGD did not provide a substantive response until 22 July 2008.

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

111. The Commissioner does not consider that 8 months for request 2 and 4 months for request 3, part 2 are acceptable time periods to conduct an internal review in any case. The Commissioner appreciates that this was a complex case, but would expect that steps have been taken to avoid a recurrence of this level of delay.

Right of Appeal

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

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

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

113. 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.

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

Dated the 2nd day of March 2011

Signed

**Steve Wood
Head of Policy
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Annex A

Request	Date of Request	Date of Refusal Notice	Date Internal Review requested	Date of Internal Review Outcome	Date of complaint to the Commissioner	Date of outcome of complaint
Request 1	21 Feb 2005	30 Sept 2005	7 Sept 2005	7 March 2006	30 March 2006	30 June 2010
Request 2	27 March 2006	28 June 2006	7 July 2006	7 March 2007	22 March 2007	
Request 3, part 1	15 Oct 2007	4 Sept 2008				30 June 2010
Request 3, part 2	15 Oct 2007	19 March 2008	30 March 2008	22 July 2008	30 March 2008	

Legal Annex

Section 1(1) provides that:

“(1) 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.”

Section 10(1) provides that:

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

Section 17(1) provides that -

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

- on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request, or
- on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which –
 - (a) states that fact,
 - (b) specifies the exemption in question, and
 - (c) states (if that would not otherwise be apparent) why the exemption applies.”

Section 14 provides that:

- “(1) Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious.
- (2) Where a public authority has previously complied with a request for information which was made by any person, it is not obliged to comply with a subsequent identical or substantially similar request from that person unless a reasonable interval has elapsed between compliance with the previous request and the making of the current request.”

Section 36(1) provides that –

“This section applies to-

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

Section 36(2) provides that –

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

...

- (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