IN THE INFORMATION TRIBUNAL **APPEAL NO. EA/2008/0071**

BETWEEN

EXPORT CREDITS GUARANTEE DEPARTMENT

Appellant

-and-

THE INFORMATION COMMISSIONER

Respondent

-and-

MR NICHOLAS HILDYARD on behalf of CORNER HOUSE

Additional Party

SKELETON ARGUMENT

ON BEHALF OF ECGD

FOR HEARING ON 6-8 JULY 2009

INTRODUCTION

1. These are the written submissions filed on behalf of ECGD for the purposes of the hearing before the Information Tribunal on 6-8 July 2009. This skeleton argument addresses both ECGD's appeal and Mr Hildyard's cross-appeal.

2. The ECGD appeals from the Decision Notice dated 28 July 2008 ("DN"), requiring ECGD to disclose to the complainant the full text of the report by ECGD's Business Principles Unit ("the BPU Report") and the relevant sections of the minutes of the ECGD's Underwriting Committee meeting on 5 December 2003 ("the Minutes").

3. The Information Commissioner and Mr Hildyard oppose the appeal and invite the Information Tribunal to uphold the decision of the Information Commissioner.

4. Mr Hildyard cross appeals against the DN in so far as it requires ECGD only to disclose those parts of the Minutes of the Underwriting Committee meeting of 5 December 2003 that concern discussion of the BPU Report.

5. ECGD opposes the cross-appeal. The Information Commissioner does not oppose the cross-appeal.

6. ECGD has suggested (and Mr Hildyard agrees) that the cross-appeal should be dealt with in two stages: at the first stage, the Tribunal is invited to determine the scope of the request and whether or not the DN requires ECGD to disclose the entirety of the Minutes; if the cross-appeal is successful in respect of those issues, then (subject to any appeal on those issues) the Tribunal is invited to determine, at a separate hearing, whether ECGD should be required to disclose the entirety of the Minutes. This will involve determination of the following issues: (1) the applicability of FOIA/EIRs, (2) the applicability of any exemptions relied on by ECGD, and (3) whether the public interest in maintaining the exemptions outweighs the public interest in disclosing the information. It will be necessary to agree directions for the filing of submissions and evidence in the event that the second stage is necessary.

7. This skeleton argument is intended to be read in conjunction with the Grounds of Appeal and Reply to the Cross Appeal filed on behalf of ECGD in this matter **[p6 of OB1[1] and p992 of OB3]**, and the witness statements submitted on behalf of ECGD **[p387 and p413 of OB1 and p1006 of OB3[2]]**.

[1] OB is a reference to the Open Bundle.

[2] The closed versions of these witness statements are found at pages 148, 174 and 218 of the Closed Bundle.

BACKGROUND

8. The Tribunal is invited to read paragraphs 8-39 of the witness statement of Steven Dodgson and paragraphs 8-43 of the witness statement of David Allwood, which set out relevant background information about the ECGD, the BPU and the BTC pipeline project.

9. In summary, ECGD is the UK's Export Credit Agency. Its existence and powers are governed by the Export and Investment Guarantees Act 1991. Its primary role is to provide support in connection with the exports of goods and services from the United Kingdom, and to assist overseas investment by UK firms. It does so by issuing credit insurance policies to UK exporters and financial guarantees to commercial banks in respect of loans to overseas buyers of UK exporters' goods and services.

10. The issue of guarantees and insurance policies creates contingent liabilities for the UK taxpayer; it does not involve expenditure of public funds. In all but one year since 1991, ECGD has operated at no net cost to the taxpayer.

11. ECGD established the Business Principles Unit ("BPU") in 2001 to ensure compliance with its Business Principles, which require ECGD to consider not only the payment risks of a project but also the underlying quality of a project, including its environmental, social and human rights impacts. The BPU is responsible for analyzing the environmental and social impacts of all civil, non-aerospace projects and for advising ECGD management (including the Risk Committee) on whether projects comply in all material respects with the relevant international standards and the Business Principles.

12. The Risk Committee (known at the relevant time as the Underwriting Committee) is responsible for advising the Chief Executive of ECGD on the effective management of ECGD's credit risk exposures, in accordance with ECGD's credit risk policies. The decision on whether to provide support in respect of a project is taken by the Chief Executive (in his role as Accounting Officer) or his delegatee, on the basis of advice received from Risk Committee.

13. The BTC pipeline project was a project to construct a 1,760km long pipeline to transport crude oil from the Caspian Sea to the Turkish Mediterranean coast at Ceyhan. The BTC

pipeline is owned and operated by a consortium of energy companies led by BP. The total project cost was recently estimated as US$4 billion. The first oil from the pipeline was exported in June 2006.

14. The BTC project was assessed in accordance with ECGD's Case Impact Analysis Process ("CIAP") and was categorised as 'high potential impact'. The BPU carried out a thorough assessment of the environmental, social and human rights impacts of the project between August 2002 and December 2003.

15. In December 2003, the BPU completed the BPU Report and its related recommendations on the project. The Underwriting Committee met to consider the BPU Report and other aspects of the BTC project on 5 December 2003. The Underwriting Committee concluded that the environmental, social and human rights impacts of the project were properly addressed and that the project complied in all material respects with the relevant guidelines and standards under ECGD's Business Principles. It also concluded that the risks of providing cover for the project were acceptable. On 17 December 2003, the Accounting Officer took the decision to provide support for the BTC Project, subject to a number of conditions.

16. ECGD provided its support for the project in February 2004 by issuing a guarantee in respect of a US$106 million loan facility used to finance the supply of goods and services from the UK exporters. ECGD was one of a number of institutions that provided support to the BTC pipeline project. Other members of the Lender Group comprised the International Finance Corporation ("IFC"), European Bank for Reconstruction and Development ("EBRD"), and other countries' export credit agencies ("ECAs").

THE REQUEST FOR INFORMATION

17. On 8 August 2005, Mr Hildyard (on behalf of Corner House) made a request for information from ECGD **[OB1, p62]**. The request was detailed and in three parts. The first part was headed "The Business Principles Unit's Assessment of the BTC Project" and sought, inter alia:

    "(i) A copy of the Business Principles Unit's Assessment Report on the BTC project as prepared for the ECGD's Underwriting Committee;

(ii) A list of all meetings held to discuss the BPU's assessment report, including attendees;

(iii) All notes and/or minutes of meetings held to discuss the BPU's assessment report, including any written comments or appraisals;

…"

18. ECGD regarded the scope of this part of the request as clear and unambiguous, namely, as requesting disclosure of information relating to the BPU Report: see the witness statement of Steve Roberts-Mee at paras 15 and 26 **[OB3, p1008 & 1010]**.

19. ECGD responded to the request on 13 December 2005 **[OB1, p67]**. ECGD provided a large amount of information, including a redacted copy of the BPU Report **[OB1, p72]**. The BPU Report contained a description of the methodology used to assess the project. It then considered each environmental and social aspect of the project. For each aspect, the Report contained (i) an introductory section that included, where appropriate, identification of the relevant international standards; (ii) a summary of the relevant comments received from NGOs; and (iii) the BPU's assessment of the project's compliance with the relevant international standards and, where appropriate, the BPU's recommendations. ECGD disclosed most of the BPU Report, but redacted parts of it, including the sections containing the BPU's assessments.

20. ECGD also inadvertently disclosed (in redacted form) the part of the Minutes that related to discussions about the BPU Report **[OB1, p135]**: it had not intended to disclose any part of the Minutes, as evident from its response letter[3] **[OB1, p68]**.

21. In support of its redactions, ECGD relied on a number of exceptions and exemptions under FOIA and the EIRs.

22. On 8 February 2006, Mr Hildyard requested an internal review of ECGD's handling of the request, including "all items redacted from the BPU review of the BTC project" and "a minute from the underwriting committee meeting of 5 December 2003" **[OB1, p190]**.

[3] ECGD stated in its response letter: "Additionally, a minute from the Underwriting Committee meeting of the 5 December 2003 has not been disclosed under s.36."

23. On 14 November 2006, ECGD responded to the internal review request **[OB1, p194]**, upholding its original response with the exception of certain information which it found was wrongly withheld.

24. On 20 December 2006, Mr Hildyard complained to the Information Commissioner under s.50 of FOIA and Reg 18 of EIRs **[OB1, p198]**. Mr Hildyard stated that he wished to complain about:

> "ECGD's continuing refusal to release the following information:
>
> - All items redacted from the Departmental Business Principles Unit's review of the BTC project (notably ECGD's own assessments);
> - A minute from the underwriting committee meeting of 5 December 2003".

25. There followed an exchange of correspondence and discussions between the ICO and ECGD concerning, inter alia, the scope of the request for information. On 13 November 2007, representatives of ECGD attended a meeting with Dr Roy Wernham of the ICO. There was a discussion about the extent to which the whole of the Minutes of the Underwriting Committee meeting fell within the scope of the request. This discussion was set out in an email from Dr Wernham to ECGD on 14 November 2007 **[OB1, p252]**.

26. In a letter of 18 January 2008 **[OB1, p273]**, ECGD set out its view of the scope of the request. It pointed out that the Minutes contained information relating to discussions about the BPU Report, and also contained additional information that did not relate to the BPU Report, and that this additional information did not fall within the scope of the request **[OB1, pp282-283]**.

27. On 6 March 2008, Dr Wernham emailed ECGD to inform it that the Information Commissioner planned to proceed to a decision notice **[OB1, p288]**. ECGD emailed Dr Wernham that day to ask whether the Commissioner had reached a decision on the Minutes, i.e. in the context of the previous discussions and correspondence, whether the Commissioner had reached a view as to the scope of the request. Dr Wernham stated in a reply email sent on the same day that the ICO would require disclosure of:

"the minutes of the BPU report discussion but not the rest" **[OB1, p289]**.

THE DECISION NOTICE

28. The Information Commissioner issued the DN on 28 July 2008 **[OB1, p43]**. The Commissioner made the following relevant findings:

    (1) that the EIRs, and not FOIA, applied to the information (paragraph 28);

    (2) that the withheld sections of the BPU Report and the Minutes comprised internal communications, and therefore that the exception in Reg 12(4)(e) was engaged (paragraph 33);

    (3) however, the public interest in maintaining the exception did not outweigh the public interest in disclosing the information (paragraphs 41-45);

    (4) that some of the withheld information (pages 13, 23, 24, 27 and 49 of the BPU Report) was capable of having some impact on international relations, and that the exception in Reg 12(5)(a) was engaged (paragraph 47);

    (5) however, the public interest in maintaining the exception did not outweigh the public interest in disclosing the information (paragraph 51).

29. In paragraph 54 of the DN, the Information Commissioner required 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." (emphasis added) **[OB1, p55]**

30. In the summary of the decision, the Information Commissioner decided that:

    "ECGD must disclose in full both the report and the relevant sections of the minutes" (emphasis added) **[OB1, p43]**

THE RELEVANT LEGAL FRAMEWORK

The correct approach to the right of access and the public interest balancing exercise

31. Under Regulation 5(1) of the EIRs, *"a public authority that holds environmental information shall make it available on request"*, subject to exceptions set out in Regulation 12.

32. Regulation 12(1) provides that a public authority may refuse to disclose environmental information requested if:

    (a) An exception to disclosure applies under Regulation 12(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.

33. Regulation 12(4)(e) permits a public authority to refuse to disclose information "*to the extent that the request involves the disclosure of internal communications*".

34. Regulation 12(5) provides that:

    "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;

    (c) *the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;"*

35. The following principles as to the nature and scope of the right of access to information are to be derived from the language of the EIRs and the relevant case law:

    (a) The EIRs provide a right of access to information, not documents. See Philip Coppel *Information Rights* (2nd ed.), paras 9-001 and 14-001.

    (b) The information to which an applicant is entitled is defined and limited by the terms of the request: see Boddy v Information Commissioner and North Norfolk District Council [2008] EA/2007/0074.

(c) Therefore, it follows that, where an applicant requests information, he or she is only entitled to be provided with the information requested (subject to any exemptions). Further, where an applicant requests information which forms part of a document, he or she is only entitled to receive that part of the document falling within the terms of the request. See Philip Coppel *Information Rights* (2nd ed.), para 14-003.

(d) A request is to be interpreted objectively by the public authority, or "taken at face value". A public authority is not required to inquire into the motive or intention of the person making the request. Therefore, if the request is clear and unambiguous on its face, the public authority is not obliged to provide advice and assistance or seek clarification from the applicant in respect of the request: Boddy at [24-25]; Keely v Information Commissioner [2008] EA/2007/0113 at [11]; Berend v Information Commissioner and London Borough of Richmond upon Thames [2007] EA/2006/0049 & 50 at [46].

36. The following principles as to the correct approach to the public interest balancing exercise are to be derived from the language of the EIRs and the relevant case law:

(a) The balancing exercise begins with both scales empty and therefore level. The public authority must disclose information unless the public interest in maintaining the exception outweighs the public interest in disclosing the information: see Department for Education and Skills v Information Commissioner and Evening Standard [2007] EA/2006/0006 at [64-65].

(b) Although the EIRs contain an express presumption in favour of disclosure, the presumption will only operate in cases where the respective public interests are equally balanced. Where the public interest in maintaining the exception outweighs the public interest in disclosing the information, the presumption does not operate: see Guardian Newspapers Ltd and Heather Brooke at [83].

(c) The assessment of the public interest in maintaining the exception should focus on the public interest factors associated with that particular exception. In carrying out this exercise, it will be relevant to consider what specific harm would follow from the

disclosure of the particular information in question: see Secretary of State for Work and Pensions v Information Commissioner [2007] EA/2006/0040 at [24].

(d) The balance of public interests must be assessed "in all the circumstances of the case". This will involve a consideration of both direct and indirect consequences of disclosure, including "secondary signals": see DfES at [70].

(e) Having considered each applicable exception separately, it is necessary to weigh the aggregate public interest in maintaining the exceptions against the public interest in disclosure. Where more than one exception applies, they must be considered together for the purpose of the public interest balancing exercise: see Ofcom v Information Commissioner [2009] EWCA Civ 90.

(f) The relevant time at which the balance of public interest is to be judged is the time when the request is considered by the public authority, not the time when the Commissioner made his decision or when the Tribunal hears the appeal: see Secretary of State for Work and Pensions v Information Commissioner at [30]; Bellamy v Information Commissioner & Secretary of State for Trade & Industry [2006] EA/2005/0023 at [6].

(g) The "public interest" signifies something that is in the interests of the public. It is not a reference to matters which are merely interesting to the public, or which the public would like to know about: Guardian Newspapers & Brooke [at 34]; Department of Trade & Industry v Information Commissioner [2006] EA/2006/0007 at [50].

The role of the Information Commissioner

37. The powers of the Information Commissioner are set out in section 50 of FOIA, which applies to the EIRs by virtue of Regulation 18, with specified modifications. Section 50 provides in material part:

> *"(1) Any person (in this section referred to as "the complainant") may apply to the Commissioner for a decision whether, in any specified respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of [Parts 2 and 3 of these Regulations]."*

38. It follows from the clear language of section 50 that the role of the Information Commissioner is limited to considering whether, as a matter of fact and law, the request for information has been dealt with in accordance with the requirements of the EIRs.

39. This will require the Information Commissioner to determine the scope of the request, the applicability of FOIA or the EIRs, the applicability of exceptions or exemptions, and the balance of the public interest.

The powers of the Tribunal on an appeal

40. The appeal and cross appeal against the DN are brought under section 57 of FOIA. The Tribunal's powers on appeal are set out in section 58. Section 58 provides:

> *"(1) If on an appeal under section 57 the Tribunal considers-*
>
> *(a) that the notice against which the appeal is brought is not in accordance with the law, or*
>
> *(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*
>
> *the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.*
>
> *(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based."*

41. The principles as to the nature of the Tribunal's appellate jurisdiction have been considered in the case law of the Information Tribunal (see, for example, Guardian Newspapers Limited and Heather Brooke v Information Commissioner and the BBC [2007] EA/2006/0011 & 0013) and can be summarized as follows:

(a) The starting point for the appeal is the decision notice, but the Tribunal is not limited to considering the material which was available to the Commissioner.

(b) In considering whether the decision notice is in accordance with the law, the Tribunal must consider whether the provisions of the EIRs have been correctly applied. The Tribunal is not bound by the Commissioner's views or findings but will arrive at its own

view, giving such weight to the Commissioner's views and findings as it thinks fit in the particular circumstances.

(c) Where facts are in dispute, the Tribunal may review any finding of fact made by the Commissioner and will reach its conclusions on the factual issues on the whole of the material properly before it on the appeal. Having decided the factual issues, the Tribunal must consider the correct application of the law to the facts as found.

(d) Adjudging the balance of public interest under Regulation 12 is a mixed question of fact and law, and does not involve the exercise of discretion by the Commissioner. Therefore, if the Tribunal comes to a different conclusion on the balance of public interest, this will involve a finding that the decision notice was not in accordance with the law.

(e) The Tribunal's task is likely to require an analysis of what is said in the decision notice. It is the language used in the notice which embodies the Commissioner's factual findings, reasoning and conclusions, and therefore requires close attention. On the other hand, where the overall intent is clear, the Tribunal should interpret the notice accordingly, disregarding any minor errors of infelicities of expression or reasoning which do not affect the substance of the matter.

THE CROSS APPEAL

42. As Mr Hildyard's cross appeal concerns the scope of the request and the DN, for convenience it is addressed first.

43. Mr Hildyard conditionally cross-appeals against the DN that if, contrary to his primary contention, the DN does not require ECGD to disclose the entirety of the Minutes, then the Tribunal should substitute a fresh DN ordering disclosure of the entirety of the Minutes, on the basis that his request for information sought a full copy of the Minutes.

44. Thus, there are two issues for the Tribunal to determine at this stage of the proceedings:

(1) First, what is the scope of the DN?

(2) Second, what is the scope of the request?

The scope of the DN

45. ECGD contends that the DN is clear and unambiguous in its meaning and scope. Paragraph 54 of the DN requires ECGD to disclose the Minutes in so far as they relate to the Underwriting Committee's discussion of the BPU Report. If ECGD loses its appeal, it will not be required to disclose the entirety of the Minutes.

46. This is evident from the actual language of paragraph 54: the words "discussion of it" plainly refer to the BPU Report. In addition, the Information Commissioner has accepted, both in his Reply **[OB3, p989]** and in Dr Wernham's witness statement **[OB3, p1098]**, that the DN only requires disclosure of those parts of the Minutes relating to discussion of the BPU Report.

47. The Information Commissioner has sought to argue that the wording of paragraph 54 of the DN was a "drafting error", and that it was his intention to order disclosure of the entirety of the Minutes, including the parts of the Minutes that related to discussion of the BTC pipeline as a whole. As to this contention:

(1) In determining the meaning and scope of the DN, Dr Wernham's subjective intention when drafting the DN is wholly irrelevant. The Tribunal is required to interpret the DN objectively, having regard to the plain meaning of the actual words used.

(2) In any event, paragraph 54 does not contain a drafting error and does in fact reflect the Information Commissioner's intention for the reasons set out below.

a. Paragraph 54 is consistent with the rest of the DN (see the summary decision which states: "ECGD must disclose in full both the report and the relevant sections of the minutes" and paragraph 3 of the DN which states: "ECGD's underwriting committee met to consider the report and other aspects of the BTC project on 5 December 2003").

b. Contrary to Mr Hildyard's and the Information Commissioner's contention, there is no inconsistency with paragraph 12 of the DN: paragraph 12 merely

records the scope of the complaint, which (for the reasons set out below) cannot have any bearing on the scope of the request.

c. The Information Commissioner's true intention was set out in Dr Wernham's email of 6 March 2008 in which he confirmed that the DN about to be issued would require disclosure of "the minutes of the BPU report discussion but not the rest" **[OB1, p289]**. By this email, the Information Commissioner was making clear that he regarded anything not concerning the BPU Report as falling outside the scope of the request. Paragraph 54 of the DN is entirely consistent with Dr Wernham's stated intention. The email gave rise to a legitimate expectation on ECGD's part that the Information Commissioner would proceed to issue a DN in those terms, and conversely, would not issue a DN in different terms without providing ECGD with the opportunity to make submissions. In other words, having sent that email, the Information Commissioner could not properly have resiled from his position and issued a DN requiring disclosure of the entirety of the Minutes without affording ECGD a proper opportunity to respond.

48. If the Tribunal agrees with the ECGD's contentions as to the meaning and scope of the DN, it will then be necessary to consider the cross appeal and in particular, the scope of the request.

The scope of the request

49. ECGD contends that the request was likewise clear and unambiguous. Part A(iii) of the request sought all minutes of meetings in so far as they discussed the BPU Report.

50. This is clear both from the language and context of that part of the request. Part A of the request was solely concerned with the BPU's assessment of the BTC project; to the extent that Mr Hildyard sought information about other aspects of the BTC project, he did so under other parts of the request. Further, the relevant part of the request was specifically restricted to "minutes of meetings held to discuss the BPU's assessment report"; it did not refer to minutes of meetings held to discuss any other topic. Therefore, the information being sought was information restricted to discussions of the BPU Report.

51. In addition, ECGD's interpretation of the request is the only available interpretation as a matter of law. Contrary to Mr Hildyard's contention, the request could not properly be interpreted as a request for the entirety of the Minutes, including those parts of the Minutes relating to matters other than the BPU Report. As stated above, the right of access under the EIRs is a right to information and not to documents. Hence, the request could not entitle Mr Hildyard to the entirety of the Minutes of the 5 December 2003 meeting simply because this was a meeting at which the BPU Report was one of the matters discussed. To the extent that the Minutes relate to matters other than a discussion of the BPU Report, they fall outside the terms of the request.

52. ECGD reasonably regarded the scope and meaning of the request as clear and unambiguous. In those circumstances, the issue of providing advice and assistance to Mr Hildyard to clarify his request did not arise: see Boddy, Keely and Berend.

53. To the extent that Mr Hildyard may have intended to ask for the minutes of discussions of any matter concerning the BTC project, such subjective motive or intention is irrelevant in determining the scope of the request: see Boddy, Keely and Berend.

54. Neither Mr Hildyard's request for an internal review nor his complaint to the Information Commissioner could have the effect of retrospectively altering or expanding the scope of the initial request for information. Whether or not the internal review request or the complaint sought the entirety of the Minutes cannot assist in determining the scope of the initial request. In any event, Mr Hildyard did not seek a full copy of the Minutes in his internal review request or in his complaint; rather, he sought to complain about ECGD's failure to release any part of the Minutes (in the reasonable but mistaken belief that ECGD had not disclosed any part of the Minutes).

55. Accordingly, the Tribunal is invited to find that the request did not seek the entirety of the Minutes, as alleged by Mr Hildyard, and that instead the request was restricted to the parts of the Minutes that concerned a discussion of the BPU Report.

56. Accordingly, the Tribunal is invited to dismiss the cross appeal in its entirety.

THE APPEAL

57. ECGD's grounds of appeal all concern the Commissioner's assessment of the balance of public interest, in relation to the internal communications exception in Regulation 12(4)(e) and the international relations exception in Regulation 12(5)(a). ECGD's case is that the Commissioner erred in his approach to the question whether, in all the circumstances of the case, the public interest in maintaining the exception outweighed the public interest in disclosing the information.

Regulation 12(4)(e)

Ground 1 – Failure to place weight on information already in the public domain regarding ECGD's decision making process

58. In paragraphs 41 and 42 of the DN, the Commissioner set out those factors that he considered favoured disclosure of the information. The Commissioner found, in paragraph 41, that "putting the BPU Report into the public domain would provide insight into ECGD's decision making process". The Commissioner clearly considered that improving public understanding of ECGD's decision making process was an important factor in favour of disclosure, and that disclosure of the BPU Report would achieve this end.

59. However, the Commissioner's reasoning was logically flawed because:

    (1) Disclosing the withheld sections of the BPU Report would not have materially improved public understanding or provided any meaningful insight into the process by which ECGD reached decisions, either generally or in relation to the BTC project. The BPU assessment sections simply set out the conclusions and recommendations of the BPU; and

    (2) The Commissioner failed to appreciate or place any proper weight on the information already in the public domain concerning ECGD's decision-making process, which significantly reduced the public interest in disclosure of the disputed information.

60. The information in the public domain concerning ECGD's decision-making process included the BPU Report itself, the majority of which was disclosed to the complainant in

response to the request. The disclosed parts of the BPU Report indicated the process by which the BPU made its overall assessment of the BTC project, by setting out the methodology used to assess the project, and considering each environmental and social aspect of the project by reference to relevant international standards, comments received from NGOs. A person reading the redacted version of the BPU Report would understand the process by which the BPU reached it assessment, even if he or she did not have access to the actual assessment.

61. Other information in the public domain concerning ECGD's decision making process both generally and in relation to the BTC project included the Business Principles **[OB2, p520?]**, guidance notes on ECGD's Case Handling Process **[OB1, p314-322]**, the CIAP **[OB1, p323-342 and OB2, p494?]**, the notice on ECGD's website concerning the application for support for the BTC pipeline project and setting out details of the project **[OB1, p343]**, and the notice on ECGD's website setting out a summary of its decision to support the project **[OB1, p345-349]**. Contrary to the Commissioner's contention, the existence in the public domain of this information does facilitate public understanding of the decision-making process in relation to the BTC project.

62. It was also public knowledge that (a) a due diligence process was carried out from August 2002 to December 2003; (b) the BPU Report was prepared and provided to the Underwriting Committee for its consideration in December 2003; (c) the BPU's recommendations were accepted by the ECGD; (d) ECGD's support for the BTC project was made subject to a number of conditions; and (e) a Parliamentary Select Committee concluded in 2005 that ECGD's decision-making procedures in relation to the BTC project were consistent with its Business Principles and that the BPU represented the views of concerned third parties in a balanced way in its Report **[OB1, p350 at p354]**.

63. The availability in the public domain of information about ECGD's decision-making process was a factor which was highly relevant to the assessment of the weight to be afforded to the public interest in disclosure of the disputed information: see ECGD v Friends of the Earth [2008] EWHC 638 (Admin) at [43]. Further, where (as here) the disputed information would not materially have increased public understanding of ECGD's decision making process, the

public interest in disclosure of the information was greatly diminished: see Foreign and Commonwealth Office v Information Commissioner and Friends of the Earth [2007] EA/2006/0065 at [43-44]; Department for Culture Media & Sport v Information Commissioner [2008] EA/2007/0090 at [27].

64. The Commissioner should have concluded, in light of the very large amount of information in the public domain about the BTC project, the BPU Report and ECGD's decision-making process, that disclosure of the disputed information was unjustified.

Ground 2 – Error of law in imposing duty on ECGD to show that it had complied with its own policies and procedures

65. In paragraph 42 of the DN, the Commissioner stated:

> "*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." (emphasis added)*

66. The plain meaning of this statement was that the Commissioner regarded ECGD as being under a public duty to demonstrate that it had complied with its own policies and procedures. The Commissioner held, in terms, that ECGD was required to prove that it had not engaged in any form of wrongdoing.

67. The Commissioner erred in law in finding that ECGD was under any such public duty or that any public interest in disclosure arose from such a public duty. In the first place, there is no such general duty on a public authority to prove that it has complied with its own policies and principles or to prove that it has not engaged in wrongdoing: Lord Baker v Information Commissioner and Department for Communities and Local Government [2007] EA/2006/0043 at [24].

68. Secondly, to the extent that there is any duty on a public authority to prove that it was not engaged in wrongdoing, such a duty only arises in circumstances where there is some prima facie evidence of wrongdoing: see, for example, Guardian Newspapers Ltd v Information

Commissioner and Chief Constable of Avon and Somerset Police [2007] EA/2006/0017. In this case, there is no evidence whatsoever for the implication in the DN that ECGD "espoused one set of principles in public but practiced another in private". To the extent that the Commissioner's reasoning appears to suggest that ECGD failed to comply with its own policies and principles, it is denied that there is any evidential basis for such a suggestion.

69. Thirdly, irrespective of whether the Commissioner's reasoning is to be characterised as imposing a duty on ECGD to disprove wrongdoing, the Commissioner's reliance on transparency concerning compliance with internal policies and procedures effectively imposed an absolute obligation on ECGD to disclose the disputed information. The practical effect of the Commissioner's reasoning is that whenever a public authority has policies and procedures which it requires to be followed, information concerning compliance with those policies and procedures would always have to be disclosed. The Commissioner was therefore wrong to place so much weight on the issue of transparency: see Department for Culture Media & Sport at [26].

70. Finally, and in any event, any general public interest in ensuring compliance with ECGD's policies and procedures has already been satisfied by release of the redacted information, publicly available information concerning ECGD's support for the BTC project, scrutiny by the Information Commissioner and/or Tribunal of the unredacted information, and the extensive governance framework within which ECGD operates.

Ground 3 – Error of fact in finding that public money was committed to the BTC project

71. In paragraph 41 of the DN, the Commissioner stated that:

> *"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."*

72. The plain meaning of this statement was that the Commissioner regarded large sums of public money as having been committed by virtue of ECGD's support for the project. The phrase "commitment" in this context means that the public authority has committed itself to spending public money.

73. This factual finding was both misleading and inaccurate. ECGD provided support for the BTC project by issuing a financial guarantee in respect of a US$106 million loan facility. This creates a contingent liability for the UK taxpayer, reflecting the risk that ECGD may be required to pay claims in the event of a payment default. However, in the case of a guarantee, ECGD charges the bank a risk-related premium on business it supports, and the borrower has an unconditional obligation to the lending bank to repay an ECGD guaranteed loan. Further, ECGD pursues recoveries in respect of claims paid, which reduces the scope of any loss. Public money is ultimately only at risk where, having taken account of all recoveries, ECGD's financial reserves are not sufficient to cover any residual loss. This has not occurred in recent years. Even if there were such a loss, it would be highly unlikely to result from environmental matters. Therefore, disclosure of the BPU assessments would be unlikely to assist any public interest in this issue.

74. In any event, it was inappropriate for the Commissioner to place so much weight on the commitment of public money. The effect of the Commissioner's reasoning is that whenever public funds are spent or are at risk, the public authority will be obliged to disclose information concerning the commitment. This is flawed as a matter of logic.

Ground 4 – Erroneous approach to public interest arguments in favour of maintaining the exemption

75. In paragraphs 43 and 44 of the DN, the Commissioner went on to consider public interest arguments in favour of maintaining the exemption. He stated that:

> *"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."*

76. ECGD submits that it is clear from this part of the DN that the Commissioner regarded the purpose of the internal communications exception as to provide protection from disclosure of information in the period before a public authority reaches a decision. According to the Commissioner, "private thinking space" for senior officials and ministers is only necessary

before an authority has reached a settled view, and junior officials are to be protected only against incorrect attribution of views.

77. The Commissioner's reasoning was wholly defective. In the first place, the internal communications exception is clearly not restricted to communications made prior to a decision being reached (which the Commissioner accepts in his Reply to the Appeal): see Lord Baker at [16].

78. Secondly, the Commissioner misunderstood or mischaracterised the public interest in maintaining the internal communications exception. ECGD contends that the public interest in protecting the confidentiality of internal communications lies in the need to uphold the conduct of good government and the principle of ministerial responsibility, so as to protect civil servants from compromise or unjust public criticism. The need to protect civil servants applies particularly in cases where a civil servant's advice contributed to a high profile or controversial administrative decision: see DfES at [75] and Lord Baker at [15-17 & 28]. The Commissioner failed to give any proper weight to the public interest in upholding the principle of civil service neutrality.

79. Thirdly, having misunderstood the public interest in maintaining the exception, the Commissioner wrongly analysed the effect of the timing of the request. The Commissioner found (in paragraph 44 of the DN) found that any residual public interest in withholding the information was, by the time ECGD completed its review of the request in November 2006, "extremely weak". In fact, the public interest in protecting civil servants from compromise or unjust public criticism does not diminish over time; and in this case, the public interest in maintaining the exception remained as strong as it was at the time the decision was initially made to provide ECGD support.

80. In addition, the Commissioner erred in his approach to the question of harm. In paragraph 43 of the DN, the Commissioner stated that:

> *"When refusing information on the ground that it relates to internal communications, public authorities must be satisfied that the disclosure would first cause harm, for instance by misleading the public, or by making the formulation of policy difficult or impossible."*

81. The examples of harm offered by the Commissioner indicated that he was imposing too high a threshold for demonstrating harm. The Commissioner failed to appreciate, or place any weight on, the harm that would be caused by disclosure in this case. The harm in this case is both direct and indirect: the direct effect of disclosure of the withheld information would be to expose easily identifiable BPU officials to the risk of public criticism for the views they have expressed and the advice they have given. In turn, this would erode the principle of ministerial responsibility and the principle of civil service neutrality, and is likely to lead to difficulties in recruitment and retention of experienced environmental specialists in the BPU, which would be to the detriment of ECGD's decision-making processes. Such harm would not be diminished if disclosure were to take place now.

82. Further, the Commissioner erred in placing weight on the reasoning of the Tribunal in the Friends of the Earth and Office of Government Commerce cases in circumstances where both of those decisions were appealed to the High Court, where aspects of that reasoning was criticized.

Ground 5 – Failure to consider legal professional privilege arguments

83. ECGD withheld two paragraphs of the BPU Report (the second paragraph of section 2.2.5 and part of section 3.7.2) on the grounds that they were legally privileged and therefore fell within the exception in Regulation 12(4)(e). The Commissioner wholly failed to address the arguments advanced by ECGD concerning legal professional privilege in the DN.

84. In the first place, the Tribunal is invited to find that the exception in Regulation 12(4)(e) (or Regulation 12(5)(b)) is engaged in respect of these two paragraphs:

    (1) First, the paragraphs in question are covered by legal advice privilege in that they record advice given by overseas legal counsel to their clients, the export credit agencies (which included ECGD).

    (2) Second, such privilege has not been waived by ECGD because the material has not been disclosed to the general public or a third party without restriction.

(3) Third, the relevant paragraphs of the BPU Report constitute internal communications and therefore the exception in Regulation 12(4)(e) is engaged. Alternatively, disclosure of the paragraphs would adversely affect the course of justice and therefore the exception in Regulation 12(5)(b) is engaged: see Kirkcaldie v Information Commissioner and Thanet District Council [2006] EA/2006/001 at [20-21]. The Tribunal is entitled to consider the applicability of this exception, even though it was not relied on by ECGD in the course of the Commissioner's consideration of this case: see Archer v Information Commissioner [2007] EA/2006/0037 at [39].[4]

85. The Tribunal is also invited to find that the public interest in maintaining the exception outweighs the public interest in disclosing the legally privileged information.

86. It is now well established in the case law that:

(1) there is a strong public interest inbuilt into the privilege itself, deriving from its historical importance, namely that a party must be able to obtain informed legal advice in confidence on the basis of full disclosure of all the relevant facts;

(2) legal professional privilege has a greater weight than inherent in the other exceptions to which the balancing test applies, which has to be considered in the balancing exercise; and

(3) therefore, there is a high hurdle to be overcome if disclosure is to be ordered, in the sense that strong countervailing considerations need to be adduced to override the public interest in maintaining legal professional privilege.

See the Tribunal case law beginning with Bellamy v Information Commissioner [2006] EA/2005/0023 and up to Rosenbaum v Information Commissioner [2008] EA/2008/0035 and the more recent High Court decision in Department for Business Enterprise and Regulatory Reform v Information Commissioner and O'Brien [2009] EWHC 164 (QB).

[4] The Commissioner has accepted in his skeleton argument that where legally privileged information is in issue, Reg 12(5)(b) is the more apt exception than 12(4)(e) and the Commissioner has invited the Tribunal to permit late reliance on this exception.

87. It is clear that, in this case, the Commissioner failed to acknowledge either the in-built public interest in this exception or the strength of that public interest, and that it failed to weigh the in-built public interest in the balance.

88. The Commissioner has belatedly addressed legal professional privilege arguments in his Reply to this appeal. He has concluded that the public interest in maintaining the exception does not outweigh the public interest in disclosing the information because (a) the advice relates to historical rather than ongoing matters and (b) the references to legally privileged material are anodyne, and would not cause any harm or prejudice if disclosed.[5]

89. This reasoning is wholly defective, and fails to accord sufficient weight to the in-built public interest. It is nothing to the point that the advice relates to historical matters or that the references to legally privileged material are anodyne. It is not necessary to demonstrate specific harm or prejudice from disclosure of the material in question: see BERR at [51]. Rather, the real harm caused by disclosure of legally privileged material is that it will undermine ECGD's ability to obtain full and frank legal advice in future: see Stephen Dodgson's witness statement at paras 80-85 **[CB, p171-172]** and David Allwood's witness statement, paras 65-68 **[CB, p190-191]**.

Regulation 12(5)(a)

Applicability of the exception

90. In paragraph 47 of the DN, the Commissioner found that the requested information was capable of having some impact on international relations and therefore that the exception in Regulation 12(5)(a) was engaged.

91. Mr Hildyard does not accept that Regulation 12(5)(a) is engaged, and invites the Tribunal to depart from the DN in this respect.

[5] The Information Commissioner in his skeleton argument now appears to accept that the public interest in maintaining the exception outweighs the public interest in disclosing the legally privileged information, and that it should not be disclosed.

92. ECGD contends that the Commissioner was right to find the exception engaged. Contrary to Mr Hildyard's assertion, it is clear that the Commissioner found (even if he did not express it in those exact terms) that disclosure of the information would adversely affect international relations. That was a correct finding. In order to show that disclosure of information "would adversely affect international relations", it is simply necessary to show that disclosure would make international relations more difficult or would require a diplomatic response to contain or limit damage which would not otherwise have been necessary or would expose the UK to the risk of an adverse reaction from another state or international organization. It is not necessary to demonstrate actual harm to international relations in terms of quantifiable loss or damage: see (in the FOIA context) Campaign against the Arms Trade v Information Commissioner and Ministry of Defence [2008] EA/2006/0040 at [81]. On the facts of this case, the test was clearly satisfied. It is not accepted that the evidence adduced by Mr Hildyard affects this conclusion.

93. Accordingly, the Tribunal should uphold the Commissioner's finding that Regulation 12(5)(a) was engaged.

Ground 6 – Failure to give weight to the public interest in maintaining international relations

94. Paragraph 51 of the DN contains the Commissioner's assessment of the public interest. The Commissioner stated that:

> *"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."*

95. The Commissioner does not identify or address any of the public interest factors in favour of maintaining the exception. Nor does the Commissioner give any weight to the public interest in maintaining international relations.

96. The Commissioner ought to have found, and the Tribunal is invited to find, that the public interest factors in favour of maintaining the exception include:

(1) The public interest in maintaining the confidences of foreign states and international organisations or institutions such as other export credit agencies;

(2) The public interest in the effective conduct of the United Kingdom's international relations and in not prejudicing effective communications with other states and organisations;

(3) The public interest in ECGD maintaining the ability to play a full role within a lender group, which depends in a large part on mutual trust and confidence.

97. The Tribunal is invited to find that the public interest factors in favour of maintaining the exception outweigh those in favour of disclosing the information, having regard to the harm that would be caused by disclosure (which is addressed below).

Ground 7 – Failure to properly assess harm to international relations caused by disclosure

98. The Commissioner's assessment of the harm that would be caused to international relations by disclosure was defective.

99. In the first place, the Commissioner imposed too high a threshold for demonstrating harm by requiring ECGD to show that the content was likely to cause "particular offence" or "provoke significant adverse reaction" from relevant governments or international bodies.

100. Secondly, the Commissioner failed to appreciate the nature of the harm likely to be caused to international relations by disclosure of the requested information. There are two types of information covered by the request: (a) information supplied by a foreign state or international organization on the understanding or expectation that it was supplied in confidence and would not be disseminated without the approval of that state or organization; and (b) information which, if disclosed, would be expected to adversely affect relations between the UK and another state or international organization. Therefore, the harm caused by disclosure of the information would be (a) harm to ECGD's ability to work with other states and international organizations in the future as a result of the lessening of trust and confidence in ECGD, to the detriment of UK exporters; and (b) harm (or the risk of

harm) to relations between the UK and other states or organizations. The Commissioner focused only on the second type of harm and ignored the first type of harm.[6]

Aggregate public interest in maintaining the exceptions

101. Given that more than one exception applies to much of the information, the Tribunal is required to weigh the aggregate public interest in maintaining the exceptions against the public interest in disclosing the information. It is submitted that the aggregate public interest in maintaining the exceptions outweighs the public interest in disclosure.

RELIEF

102. Accordingly, the Tribunal is invited to:

(1) Dismiss the cross appeal

(2) Allow the appeal by declaring the DN to be not in accordance with the law.

Catherine Callaghan

Blackstone Chambers

29 June 2009

[6] The Information Commissioner now accepts in his skeleton argument that ECGD's evidence in relation to the "partners information" strongly supports ECGD's case that the public interest balance weighs in favour of maintaining the exception. ECGD does not accept that there is a distinction to be drawn with the "Turkey information". This will be addressed further in evidence and submissions.