

Information Commissioner
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**BY RECORDED DELIVERY
AND EMAIL**

(Email: mail@ico.gov.uk)

Our Ref: PM/119.2

20 December 2006

Dear Commissioner

Complaint about Freedom of Information request to the Export Credits Guarantee Department

**FRIENDS OF THE EARTH
RIGHTS & JUSTICE CENTRE**

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1. This is a complaint under s.50 of the Freedom of Information Act 2000 and under Reg. 18 of the Environmental Information Regulations 2004.
2. I am writing on behalf of Corner House, a non-governmental organisation which campaigns to ensure that activities supported by Britain's Export Credits Guarantee Department (and therefore guaranteed by the UK taxpayer) are compliant with the environmental, human rights and developmental policies of the UK government. As part of that work, Corner House has closely monitored ECGD's involvement in the BP-led Baku-Tbilisi-Ceyhan (**BTC**) oil pipeline, for which the department approved £81,703,893 in guarantees in February 2004¹.
3. Corner House wishes to complain about the refusal of the ECGD to release information contained in documents relating to the social and environmental assessment of the project, as detailed below.
4. Corner House has exhausted ECGD's internal review procedure.

I. The request process

5. The following sets out the chronology of the request and internal review process.
 - On **8th August 2005**, Corner House submitted a request to the ECGD for certain information relating to the BTC pipeline project [**Tab 1a**].
 - On **8th August 2005**, ECGD responded giving the request a reference number IAR (05)35 [**Tab 1b**].
 - On **7th September 2005** [**Tab 1c**] and subsequently on **5th October 2005** [**Tab 1d**], ECGD extended the deadline for responding.
 - On **17th October 2005**, Corner House requested an internal review of the ECGD's decision to extend the deadline for responding [**Tab 1e**]. The letter was copied to the Information Commissioner with a request for an investigation. The ECGD subsequently apologised for its extension (unlawful under the EIR 2004) and the complaint to the Commissioner was withdrawn.

1. ECGD, List of Guarantees Issued 2003-04, http://www.ecgd.gov.uk/index/pi_home/pi_lgi/pi_lg2004.htm



- On **13th December 2005**, the ECGD released:
 - ⇒ A redacted copy of the assessment prepared by the Department's Business Principles Unit (BPU) on the BTC project [Tab 2a], the redactions being claimed under FOIA Sections 27(1)(a) (International Relations), 36(2)(b) and 36(2)(c) (Effective Conduct of Public Affairs) and 42 (Legal Professional Privilege) and Regulation 12(4)(e) (internal communications) of the EIR 2004 [Tab 1f].
 - ⇒ The list of meetings to discuss the BPU's assessment report and the names of the attendees [**Tab 1f**].
 - ⇒ Confirmation that ECGD did not hold any correspondence with BP or BTC Co relating to the assessment [**Tab 1f**].
 - The ECGD refused disclosure of the minutes of the Underwriting Committee of 5 December 2003 under Section 36 of FOIA [**Tab 1f**].
 - On **12th January 2006**, Corner House wrote to ECGD stating that it intended to file a request for a further internal review over ECGD's decision to withhold some of the information requested and seeking clarification as to how best to ensure that the review avoided placing an unnecessary burden on ECGD's time [**Tab 1g**].
 - On **2nd February 2006**, Friends of the Earth Rights & Justice Centre wrote to ECGD on behalf of Corner House seeking ECGD's agreement for Corner House to proceed directly to the Information Commissioner on the basis that the decision to apply s.36 had been made on the authority of the Minister and that there was therefore no realistic (fair) way for such a decision to be made subject to 'internal review' [**Tab 1h**].
 - On **8th February 2006**, in the absence of a reply from ECGD to Mr Michaels' letter of 2nd February 2006, Corner House requested an internal review [**Tab 1i**] seeking, in particular:
 - ⇒ 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;
 - ⇒ A full copy of an email of 10 February 2005 from Tina Shari;
 - ⇒ A full copy of email of 16 February 2005 from Tina Shari to Peter Ball;
 - ⇒ A full copy of email from Paul Redman to Tina Shari of 13 October 2005.
 - This complaint to the Commissioner now relates to (1) the redacted elements of the BPU assessment report; and (2) the withheld minutes of the Underwriting Committee.
 - On **14th November 2006**, ECGD responded to the second internal review request, releasing some further information but denying the substantive part of the redacted information, citing, in addition to previously cited exemptions, 12(5)(e) (Commercial interest) of the EIR and Section 41 (Breach of Confidence) of the FOIA [**Tab 2b**].
6. All of the above communications are attached at **Tabs 1 and 2**. The documents relevant to this complaint which were released to Corner House on 13th December 2005 and 14th November 2006 are attached at **Tab 2a** and **2b**.

II. Summary of complaint

7. We wish 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)² (**Tab 2a**);

2. Certain of the information originally withheld (by redaction) has now been provided by ECGD (under cover of their letter of 14 November 2006). This complaint concerns the remainder of the information withheld.

- A minute from the underwriting committee meeting of 5 December 2003.
8. We also wish to complain about ECGD's continuing refusal to provide us with details of the documents that have been withheld in their entirety. In its original request Corner House asked for "*a schedule of documents that ECGD will be releasing to us and a schedule of documents that it will not with a brief description of each document (title of document, date of document, brief description of nature of document and basis for the exemptions cited)*". ECGD have refused to supply such a list.
 9. Separate complaint is made as to the considerable (and manifestly unlawful) length of time taken to process and complete the internal review.

III. Factual Background to the BTC process

10. The following background is necessarily a summary only. ECGD was approached for financial support (under section 1 of the Export and Investment Guarantees Act 1991) in respect of the BP-led BTC pipeline, which runs from the Caspian to the Mediterranean, in 2002. ECGD deemed the project a "prior disclosure"³ case and a High Potential Impact Project. In accordance with its case handling procedures, the ECGD invited comments from the public on the project's environmental and social impact assessment in 2003.
11. Throughout the comment period, which lasted until 10 November 2003,⁴ Corner House, individually and/or as part of the Baku Ceyhan Campaign of which it was a founding member, submitted detailed evidence to ECGD documenting the project's failure to comply with the ECGD's stated policies on environment, development and human rights. Corner House also submitted evidence to the Foreign and Commonwealth Office and the Department for International Development, the government departments from which ECGD seeks advice, respectively, on the human rights and developmental impacts of projects being considered for support.⁵ In addition, concerns were raised during meetings with ECGD officials.⁶
12. The documentation submitted to ECGD and other interested government departments is summarised below. Where the documentation is available on the websites, reference is made to the sites. Documents that are not available via the internet are at Tab 3.
 - 12.1. The findings of in-depth on-the-ground fact finding missions to Turkey (2002⁷ and 2003⁸), Georgia (2002⁹ and 2003¹⁰) and Azerbaijan (2002¹¹ and 2003¹²), including details of unlawful

3. ECGD, Case Impact Analysis Process, May 2004, paras 8.1-8.3, http://www.ecgd.gov.uk/index/pi_home/case_impact_analysis_process.htm. Prior disclosure cases are "High Potential Impact" projects which the ECGD's Underwriting Committee has confirmed should be made public prior to ECGD making a decision on approval. In such cases, ECGD obtains the relevant consents and publishes on its website a brief account of the project (project name, location, a brief description and the source of environmental information). Interested parties may forward their comments to the BPU. Material comments will be taken into consideration. High impact cases are defined (para 6.4) as: "Cases relating to greenfield projects or major expansions in potentially damaging business sectors, or cases which involve other issues / activities such as those identified [in Annex B of the ECGD's Case Handling Process], are normally categorised as having High potential impacts. For such cases a formal environmental impact assessment, social impact assessment and/or a resettlement action plan is required."

4. Letter from Jeanette Swindon, Business Manager Construction, ECGD, to Corner House et al., 31 October 2003.

5. ECGD, Case Impact Analysis Process, May 2004, para 51.3: "ECGD investigates whether support for overseas projects might breach any international obligations or policies of the UK government and consults other government departments, as appropriate."

6. DfID, "Informal Record of UK Government Meeting with NGOs on BTC Oil Pipeline", 30 October 2002; DfID, "Note of UK Government Meeting with NGOs on the BTC Pipeline on 29th May 2003". The documents are to be found at **Tab 3a and 3b**.

7. "International Fact Finding Mission, Preliminary Report: Azerbaijan, Georgia, Turkey Pipeline Project – Turkey Section, August 2002", available from <http://www.bakuceyhan.org.uk/publications/pipelines-factfinding-turkey.pdf>, sent to ECGD 13th November 2002, as attachment to "Memorandum from Concerned NGOs".

8. Corner House, letter to Vivian Brown, Chief Executive, ECGD, 5 May 2003, and Baku Ceyhan Campaign et al to Vivian Brown (Chief Executive of ECGD) et al, "Moratorium on BTC Pipeline Project", 27 May 2003, enclosing "Report of International Fact Finding Mission: Baku-Tbilisi-Ceyhan Pipeline – Turkey Section", available from http://www.bakuceyhan.org.uk/publications/Tu_FFM.pdf.

9. "International Fact Finding Mission, Preliminary Report: Azerbaijan, Georgia, Turkey Pipeline Project – Georgia Section, July 2002", available from <http://www.bakuceyhan.org.uk/publications/pipelines-factfinding-georgia.pdf>, sent to ECGD 13th November 2002, as attachment to "Memorandum from Concerned NGOs".

10. "Second International Fact Finding Mission to Baku-Tbilisi-Ceyhan Pipeline, Georgia Section, Initial Summary Report, 4 June 2003", available from <http://www.foe.org/camps/intl/institutions/GaFFM03.pdf>, sent to ECGD 13 October 2003, as enclosure with Review of the Environmental Impact Assessment for the Baku-Tbilisi-Ceyhan Oil Pipeline.

- expropriation of land for the pipeline, corruption in the expropriation process, inadequate compensation and intimidation of affected villagers and project critics;
- 12.2. Update reports (October 2003) from NGOs in Georgia and Azerbaijan on the failures in the implementation of the project;¹³
 - 12.3. June 2002 letter, signed by over 60 regional and international non-governmental organisations (NGOs), raising a range of environmental, human rights, developmental and environmental concerns;¹⁴
 - 12.4. Testimony from affected villagers and critics of the project alleging human rights abuses;¹⁵
 - 12.5. Testimony from pipeline workers, alleging major breaches of standard quality assurance practices, including inadequate record keeping, and evidence that faulty welding has been permitted to go un-repaired;¹⁶
 - 12.6. Legal analysis of the adverse human rights and environmental implications of the agreements that established the legal regime for the project;¹⁷
 - 12.7. A detailed Memorandum (November 2002), also signed by international and regional NGOs, outlining major concerns relating to: denial of Public Purpose; regional development and poverty alleviation concerns; debt implications of Host Government Agreements; the Turnkey Agreement and IMF loan ceilings; overwhelming Georgia's institutional capacity and undermining the transition to democracy; corruption concerns; legal implications of Intergovernmental and Host Government Agreements: concerns over conflicts with international law, EU law and Turkey's accession undertakings; pipeline security, human rights, conflict and militarisation of the region; violations of World Bank Safeguard Standards on consultation and ethnic minority issues.¹⁸
 - 12.8. A Complaint under the OECD Guidelines on Multinational Enterprises, alleging that the BTC project breached the guidelines in relation to: exerting undue influence on the regulatory framework of the host governments; seeking or accepting exemptions related to social, labor, tax and environmental laws; failing to operate in a manner contributing to the wider goals of sustainable development; failing to adequately consult with project-affected communities on pertinent matters; and undermining the host governments' ability to mitigate serious threats to the environment, human health and safety.¹⁹

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11. "International Fact Finding Mission, Preliminary Report: Azerbaijan, Georgia, Turkey Pipeline Project – Azerbaijan Section, September 2002", available from <http://www.bakuceyhan.org.uk/publications/pipelines-factfinding-azerbaijan.pdf>, sent to ECGD 13th November 2002, as attachment to "Memorandum from Concerned NGOs".
 12. "Second International Fact Finding Mission to Baku-Tbilisi-Ceyhan Pipeline, Azerbaijan Section, Initial Summary Report, 4 June 2003", available from <http://www.foe.org/camps/intl/institutions/AzFFM03.pdf>, sent to ECGD 13 October 2003, as enclosure with Review of the Environmental Impact Assessment for the Baku-Tbilisi-Ceyhan Oil Pipeline.
 13. "Georgia Update" [Tab 3c] and "Comments from Azerbaijan NGOs on consultation" [Tab 3d] sent as attachments to Corner House et al, Letter to Jeanette Swindon, Business Manager Construction, ECGD, 10 November 2003 [Tab 3e].
 14. Letter from NGOs to International Financial Institutions, "Baku-Tbilisi-Ceyhan Main Export Oil Pipeline Project - MDB and ECA involvement", June 2002, available from http://www.bakuceyhan.org.uk/correspondence/ngo_proposals_ifi.htm, with accompanying Memorandum "NGO Proposals on IFI loans or guarantees for BTC pipeline" [Tab 3f]. Sent to ECGD on 13 November 2002 as attachment to Memorandum from Concerned Citizens, see reference 18.
 15. Baku Ceyhan Campaign, "Witness Statements by Applicants", <http://www.bakuceyhan.org.uk/publications/statements.pdf>, made available to ECGD at NGO Seminar held at 11 Carlton House Terrace on 29 May 2003, "Does BP's Baku-Tbilisi-Ceyhan Project break EU law and Turkey's Accession Agreements".
 16. Corner House et al. "Further comments, including allegations of faulty welding", Letter to Jeanette Swindon, ECGD, 10 November 2003 [Tab 3e], enclosing "Annex 3 – Anonymised Statement on Construction Violation" [Tab 3g] and "Annex 4, Anonymous Emails Alleging Construction Violations" [Tab 3h].
 17. "Preliminary Analysis of the Implications of the HGA between Turkey and the BTC Consortium", October 2002, available at http://www.bakuceyhan.org.uk/publications/preliminary_legal_analysis_oct_02.pdf, sent to ECGD 13th November 2002, as attachment to "Memorandum from Concerned NGOs" (see reference 18); Baku Ceyhan Campaign See: Moser, P., "In the Matter of The Baku-Tbilisi-Ceyhan Pipeline: Counsel's Opinion, 15 January 2003", http://www.bakuceyhan.org.uk/publications/opinion_moser.pdf; Baku Ceyhan Campaign, made available to ECGD at NGO Seminar held at 11 Carlton House Terrace on 29 May 2003, "Does BP's Baku-Tbilisi-Ceyhan Project break EU law and Turkey's Accession Agreements" and sent to ECGD 13 October 2003, as enclosure with Review of the Environmental Impact Assessment for the Baku-Tbilisi-Ceyhan Oil Pipeline, see reference 20; "Statement in response to the BTC Human Rights Undertaking", 6 November 2003, <http://www.bakuceyhan.org.uk/statementondeedpoll.doc>.
 18. Corner House et al to Vivian Brown (Chief Executive of ECGD), 13th November 2002, [Tab 3i] attaching "Memorandum from Concerned NGOs", available from http://www.bakuceyhan.org.uk/correspondence/DfID_memo_feb_2003.pdf.
 19. Corner House et al, "BTC Project: Complaint under OECD Guidelines on Multinational Enterprises, available at http://www.bakuceyhan.org.uk/publications/oecd_complaint_final_uk.doc, sent to ECGD 13 October 2003, as enclosure with "Review of the Environmental Impact Assessment for the Baku-Tbilisi-Ceyhan Oil Pipeline" (see ref 20).

- 12.9. A detailed critique of the environmental and social impact assessment for the project, including documentation of 173 violations of the World Bank Safeguard Policies to which ECGD is committed, EU directives and local law.²⁰
13. In accordance with its procedures, and for the reasons set out below, the ECGD's Business Principles Unit ('BPU') carried out its own 'due diligence' and assessment of the project and project documentation from August 2002 to December 2003²¹ (see below for an explanation of the role of the BPU). The BPU produced a document entitled *BPU Review of Baku-Tbilisi-Ceyhan Pipeline Project* (dated 3 December 2003) ('the BPU Review' [Tab 2a]). That report was provided to the ECGD's Underwriting Committee. The Underwriting Committee met two days later and on 17 December 2003 ECGD announced its decision to support the project. Our understanding is that a number of recommendations in the BPU report were incorporated into the decision to grant support by way of conditions. The extent to which that is the case is obviously of considerable importance in understanding the effectiveness of the BPU due diligence process.
14. The principal information withheld and complained about is (1) information contained in the BPU Report; and (2) the minute of the meeting of the Underwriting Committee.
15. Subsequently, in 2004, the House of Commons Select Committee on Trade and Industry announced an inquiry into ECGD's support for the BTC project. In evidence to the inquiry, Corner House and others acknowledged that the project had been subject to extensive social and environmental impact scrutiny and that ECGD had been receptive to NGO concerns. However, Corner House jointly presented evidence with the Baku Ceyhan Campaign, documenting a number of areas – particularly relating to human rights and environmental impacts – where the ECGD's due diligence appeared to have been deficient, raising wider questions as to institutional practices within the ECGD that require addressing.²²
16. In response, ECGD provided the Committee on a confidential basis with a copy of the BPU Review. The Committee identified the significance of the BPU Review in terms of the ECGD's decision-making procedures:

*This document constituted a major element of the information considered by the Department's Underwriting Committee prior to its decision to authorise support for the project.*²³

17. In its report, the Select Committee rejected ECGD's reasoning for refusing to make the document public (or to allow the Committee to do so). The Committee recommended that it should have been disclosed:

*We were . . . disturbed at the Department's reluctance to put its own BPU report into the public domain, particularly as this would have provided an essential insight into ECGD's decision making process . . . We found ECGD's explanation for its reluctance to put its own assessment of the BTC project into the public domain unconvincing and unsatisfactory . . . it runs counter to the Department's professed commitment to transparency in its business. It should have been possible for ECGD to demonstrate how it had considered all of the concerns raised during the consultation exercise on this project without betraying commercial and political confidences.*²⁴

20. Letter to Vivian Brown, Chief Executive ECGD, "Baku-Tbilisi-Ceyhan oil pipeline: Violations of World Bank Safeguard Policies and Host Country Law", 23 October 2003, available at http://www.bakuceyhan.org.uk/correspondence/letter_to_ECGD_re_EIA_oct_03.doc, enclosing all documents relating to "Review of the Environmental Impact Assessment for the Baku-Tbilisi-Ceyhan Oil Pipeline", available at http://www.baku.org.uk/eia_review.htm.

21. ECGD, BPU Review of Baku-Tbilisi-Ceyhan Pipeline Project, 3rd December 2003, p.1, at **Tab 2a**.

22. Memorandum by Baku Ceyhan Campaign, Appendix 3, Ninth Report from the Trade and Industry Committee, Session 2004-05, *Implementation of ECGD's Business Principles*, Volume II, Oral and Written Evidence, HC 374-II, Ev 38, <http://www.publications.parliament.uk/pa/cm200405/cmselect/cmtrdind/374/374ii.pdf>

23. Trade and Industry Committee, Implementation of ECGD's Business Principles, Ninth Report of Session 2004-05, para 16, <http://www.publications.parliament.uk/pa/cm200405/cmselect/cmtrdind/374/374.pdf>.

24. Trade and Industry Committee, Implementation of ECGD's Business Principles, Ninth Report of Session 2004-05, paras 17 and 19, <http://www.publications.parliament.uk/pa/cm200405/cmselect/cmtrdind/374/374.pdf>.

18. The ‘*unconvincing and unsatisfactory*’ reason given to the Committee by the then Chief Executive of ECGD for not making the document available was as follows²⁵:

This is because it was an element of our own internal decision-making which ultimately formed the basis of advice to Ministers when we recommended to them that they endorse the decision of the Underwriting Committee to support the BTC pipeline. Clearly the document was not written with an eye to subsequent publication and I think it does contain a few, but not perhaps very many, items which are sensitive in that they have got information about third parties or indeed comments by third parties and there might be some sensitivity about publishing that, particularly as those third parties may often be governments of the countries involved in the pipeline. The code of practice on access to information does provide for an exemption on disclosure for that sort of document.

19. It is notable that the focus of the ECGD’s reasons for withholding the BPU Report at that stage was the fact that it contained information relating to (or provided by) third parties. Mr Weiss indicated that it contained ‘*a few, but not perhaps very many*’ such items. However, as the Commissioner will now note, the BPU Report has been provided to us in a form that redacts BPU’s assessments in respect of all but one of the issues covered.
20. Corner House shares the Committee’s assessment of the overwhelming importance of the BPU Review and hence of the compelling public interest case for releasing that document. In a letter to the Committee (reproduced at **Tab 4**), Corner House detailed nine areas where access to the assessments would be critical to making an informed judgement as to the adequacy or otherwise of ECGD’s due diligence procedures and thus to improving ECGD’s practice. We would ask that the Information Commissioner have particular regard to those points.

IV. The Complaint

21. Our complaint concerns both the applicability of the relevant exemptions relied upon (that is, whether those particular sections or regulations apply to the information withheld in respect of them) and in all appropriate cases the application by the ECGD of the public interest test to those exemptions.
22. As noted above, the information that Corner House wishes to obtain, and which ECGD seeks to withhold, is information contained in the following documents:
- The BPU Report (redacted elements);
 - Minutes of the meeting of the underwriting committee.
23. Before making reference to the specific documents, some context is necessary so as to understand why Corner House considers there to be such a strong public interest in disclosure of the information requested. Such context falls into two categories: First, the broader public interest in respect of documents of this type having regard to the nature of ECGD and High Impact Projects generally; Second the specific public interest in information relating to the BTC pipeline.

The Broader Interest

24. The ECGD is an Export Credit Agency (ECA). ECAs are public bodies that provide government-backed loans, guarantees and insurance to corporations from their home country that wish to do business in developing countries and emerging markets. The manner in which ECAs conduct their business has for sometime been a matter of very considerable, and well publicised, concern²⁶. The BTC project has been a project of particular concern to civil society groups concerned with ECA issues^{27 28 29}.

25. Ibid. Oral Evidence. Question 2.

26. <http://www.eca-watch.org/>

27. http://www.eca-watch.org/problems/oil_gas_mining/btc/index.html

28. <http://www.bankwatch.org/project.shtml?w=147580&s=153907>

29. <http://www.platformlondon.org/carbonweb/showitem.asp?article=5&parent=66&link=Y&gp=3>

25. The ECGD currently receives an annual subsidy from the taxpayer of £150 million^{30 31}. Due to insufficiently-rigorous risk assessment procedures ECGD has in the past cost the taxpayer billions of pounds in accumulated losses³². In addition, and despite ongoing reforms to ECGD's financial structure³³, the taxpayer is ultimately responsible for any losses that ECGD incurs, losses that cannot be recovered. There is thus a clear public interest in ensuring that ECGD's due diligence on the projects it supports – including its assessment of social and environmental risk – should be conducted with the utmost rigour in order to safeguard public funds.
26. Furthermore, many of the projects that ECGD is asked to support (in particular its High Impact Projects such as this) are projects that by their nature have very significant social, environmental and human rights implications (hence the existence of organisations such as ECA Watch³⁴). The UK tax-payer in being asked to provide financial support for such projects needs to be satisfied that such support is compliant, as a minimum, with the UK's own policies on social, environmental and human rights issues.
27. ECGD's support for large-scale infrastructure projects with serious environmental and social impacts is a matter of considerable public interest, as evidenced by the concerns raised by a series of twelve parliamentary inquiries since 1999, notably by the International Development Committee,³⁵ the Environmental Audit Committee³⁶ and the Trade and Industry Committee³⁷ as well as by the large number of letters sent to the ECGD by members of the public in relation to specific projects.
28. In response to the concerns raised by parliamentarians and the public, the ECGD, in 2000, established its Business Principles Unit and adopted a set of Business Principles with which projects that it finances are expected to comply. In particular, the decision on ECGD support *must* take into account "the Government's international policies, including those on sustainable development, environment, good governance and trade."³⁸ ECGD is also committed to ensuring that projects "*comply in all material respects with the relevant safeguard policies, directives and environmental guidelines of the World Bank Group*".³⁹ The UK is also a signatory to the OECD's Recommendation on Common Approaches, which obliges ECGD to ensure compliance of its projects with host country standards.⁴⁰
29. In order to ensure that the ECGD has complied with the above policies, it is not sufficient that ECGD

30. The UK Government has assessed the annual subsidy to ECGD at £150 million <http://www.dti.gov.uk/files/file16384.pdf>

31. A 2003 study for ECGD by NERA found that, between 1992 and 2002, the subsidy for three of ECGD's products - EXIG (export insurance and export credit guarantees), Overseas Investment Insurance and FREF (Fixed Rate Export Finance) – amounted to £637-718 million (although, since FREF in particular has since been reformed, NERA emphasised that this figure does not represent an accurate representation of the ongoing subsidy). See: NERA, Estimating the Economic Costs and Benefits of ECGD: A Report for the Export Credits Guarantee Department, January 2003.

32. Recent reports have revealed that huge losses have amassed from ECGD business prior to 1991, when a break-even objective was initiated. The debts from this business are in the region of £9.5 billion. These debts represent a cost to the UK taxpayer in terms of revenue forgone.

33. For example, the moves to transform the ECGD into a Statutory Trading Fund.

34. <http://www.eca-watch.org/>

35. See: International Development Committee, Seventh report, Session 1999-2000,

<http://www.publications.parliament.uk/pa/cm199900/cmselect/cmintdev/923/92302.htm>; Sixth report, Session 1999-2000,

<http://www.publications.parliament.uk/pa/cm199900/cmselect/cmintdev/862/86202.htm> and

<http://www.publications.parliament.uk/pa/cm199900/cmselect/cmintdev/211rep/21102.htm>; Fourth report, Session 1999-2000,

<http://www.publications.parliament.uk/pa/cm199900/cmselect/cmintdev/813/81302.htm>; First report, Session 1999-2000,

<http://www.publications.parliament.uk/pa/cm199900/cmselect/cmintdev/73/7302.htm>.

36. See: Environmental Audit Committee, Seventh Special Report, Session 2002-03,

<http://www.publications.parliament.uk/pa/cm200203/cmselect/cmenvaud/1238/1238.pdf>; Seventh report, Session 2002-03,

<http://www.publications.parliament.uk/pa/cm200203/cmselect/cmenvaud/689/689.pdf>.

37. See: Trade and Industry Committee, Ninth Report, Session 2004-05,

<http://www.publications.parliament.uk/pa/cm200405/cmselect/cmtrdind/374/374.pdf>; Sixth report, Session 2004-05,

<http://www.publications.parliament.uk/pa/cm200405/cmselect/cmtrdind/506/506ii.pdf>; Seventh Report, Session 2003-04,

<http://www.publications.parliament.uk/pa/cm200304/cmselect/cmtrdind/1043/1043.pdf>; Sixth Report, Session 2003-04,

<http://www.publications.parliament.uk/pa/cm200304/cmselect/cmtrdind/506/506.pdf>; Twelfth report, Session 2000-01,

<http://www.publications.parliament.uk/pa/cm200001/cmselect/cmtrdind/512/51202.htm>; Third report, Session 1999-2000,

<http://www.publications.parliament.uk/pa/cm199900/cmselect/cmtrdind/52/5202.htm>.

38. ECGD, "Statement of ECGD's Business Principles", in "ECGD's Business Principles", http://www.ecgd.gov.uk/index/pubs_home/pr_bp.htm: "We will promote a responsible approach to business and will ensure our activities take into account the Government's international policies, including those on sustainable development, environment, human rights, good governance and trade."

39. Business Principles Unit, Case Impact Analysis Process, ECGD, May 2004, p.2,

http://www.ecgd.gov.uk/index/pi_home/case_impact_analysis_process.htm

40. OECD, Working Party on Export Credits and Credit Guarantees, Updated Recommendation on Common Approaches in Environment and Officially Supported Export Credits, TD/ECG (2005) 3, 25 February 2005, para 12.2.

should simply assert this to be the case – the more so where serious concerns, backed by documentary evidence, have been expressed that ECGD’s due diligence has been insufficiently rigorous to substantiate such an assertion. If the public is to be reassured that the ECGD’s decision to back the BTC pipeline was sound – and if deficiencies in its procedures are to be identified and corrected – then it is critical that the key documents on which its environmental and social assessment was based should be open to public scrutiny. Without such documents, it is impossible for the public to judge the following issues:

- Whether or not the material concerns raised by NGOs and other stakeholders had been adequately taken into consideration by ECGD, in line with its stated policy⁴¹;
- The nature of the assessment made by the BPU in respect of the key issues of concern raised;
- Whether the conditions recommended by the BPU were sufficient to prevent infringements of human rights and adverse environmental impacts; and, critically
- Whether those conditions were accepted by the Underwriting Committee and included in the loan agreements.

The particular interest in BTC

30. As demonstrated by the parliamentary inquiry into the ECGD’s support for BTC there is a very considerable public interest in disclosure of information relating to the UK’s financial support of the BTC project.
31. ECGD support for the BTC project has been of particular concern to non-governmental organisations monitoring the ECGD’s portfolio and to members of the public resulting in a vigorous public campaign. The following issues highlight the very considerable public interest in this subject:
32. The ECGD’s financial support for the BTC project is considerable. Not only was the guarantee agreed in 2003 – £81,703,893 – the largest issued in 2003-04;⁴² it is also possible that further support was granted under the ECGD’s Overseas Investment Insurance (OII) scheme.⁴³ Documents released to Friends of the Earth (England, Wales and Northern Ireland) confirm that such OII support was sought (**Tab 5a, p.2**). However, the sum requested – and ECGD’s decision – are unknown, since ECGD does not disclose details of OII loans.
33. As acknowledged by ECGD,⁴⁴ significant elements of the BTC project were politically-driven. Moreover, shortly before announcing its involvement in the project, BP, the lead company in the consortium building the pipeline, informed the government that the pipeline was commercially unviable.⁴⁵ (For further details, see correspondence at **Tab 5b, p.1 and p.3**.) It is precisely such politically-driven projects that have caused the greatest losses to the taxpayer in the past.
34. The pipeline passes close to several conflict zones and through a politically unstable region⁴⁶. Inadequate attention to the political risks – including those arising from terrorism, conflict and tensions with local communities affected by the project – could translate into economic risks for the taxpayer.

V. The Documents (the Information)

35. As noted by the Trade and Industry Select Committee (quoted above), the BPU report is of fundamental importance to understanding the way in which the BPU carried out its social, human rights

41. ECGD, Case Impact Analysis Process, May 2004, paras 8.3: “material comments” received as a result of such consultation exercises “will be taken into consideration”

42. ECGD, Annual Review and Resource Accounts 2003-04, “List of Guarantees Issued 2003-04”, pp.14-15, http://www.ecgd.gov.uk/ecgd_review_accounts_2003-04.pdf.

43. “Letter from Hall (ECGD) to O’Donnell (HM Treasury), Update to HMT on BTC, 2 May 2003 (redacted), p.5.

44. In a briefing on the BTC project for its Advisory Council, ECGD stated: “Politics had dictated the route”. See: Export Guarantees Advisory Council, Minutes, 2004, 2nd Meeting, 17 March 2004, para 5.2.4, available from http://www.ecgd.gov.uk/index/pi_home/pi_ac/the_advisory_council_-_minutes.htm.

45. “BPA [BP Amoco] have not changed its view about the current commercial viability of B-C [Baku-Ceyhan]: traditional pipeline economics will not make B-C happen now – it needs tangible commitment by those who have long espoused the geopolitical imperatives”, FCO telegram from Ken Forrest, 8 October 1999.

46. The pipeline route passes through or near seven different war-zones, see: http://www.bakuceyhan.org.uk/more_info/humanrights.htm

and environmental due diligence functions.

36. It is only in that document that members of the public would be able to understand the result of the lengthy consultation and due diligence exercises and in particular to understand the conclusions that were reached in respect of the decision to provide support.
37. The BPU Report covers a considerable range of issues including, for example, involuntary resettlement and compulsory land acquisition, damage to cultural and historic sites, child labour, minority or vulnerable groups, use of armed security guards, water pollution, wildlife & habitats, degradation of land, waste generation, atmospheric pollution and others.
38. The structure of the report is, in respect of each issue, broadly similar. In each case the BPU Report sets out a summary of the issues, a summary of NGO comments and an assessment (or conclusion) by BPU. The report concludes with an 'overall assessment' (originally withheld but released on internal review, see letter of 14 November at **Tab 2b**) followed by a 'Synopsis of BPU recommendations etc'.
39. In every case, bar one⁴⁷, ECGD have withheld their assessment of the relevant issue. Furthermore, the ECGD have also withheld the crucial 'synopsis of BPU recommendations'. As a result, the information of greatest importance (i.e., the BPU's own conclusions (in respect of each issue) and its recommendations to the underwriting committee) have been withheld. It is precisely that information in respect of which there is the greatest public interest in disclosure.
40. The majority of the information withheld from the BPU Report is withheld on the basis of s.36(2) (or Reg. 12(4)(e)) – in either case the argument being, in essence, that disclosure would adversely affect the frankness and candour of discussions in the future and that the public interest in maintaining the exemption outweighs the public interest in disclosure.
41. Whilst Corner House accepts that there is a possibility that disclosure of certain of the information currently redacted might have the effect contended, we do not accept that the majority of the BPU's assessments would have such an effect. In our view, they therefore simply do not fall within the scope of the exemptions claimed. In any event, to the extent that it would have such effect it is contended that the effect would be small and that it is certainly outweighed by the strong public interest in disclosure.
42. For all of the reasons set out in this letter this is a case in which there is an exceptionally strong public interest arising out of (1) the particular nature of the BTC project; (2) the very large sums of tax-payer money involved; and (3) the need for careful scrutiny of the manner in which the ECGD discharges its export credit functions (particular in respect of its business principles and compliance with relevant national and international policies, laws and regulatory frameworks).
43. It is considered that there is a further, and particularly strong, public interest in disclosure of the BPU's assessment as it is our understanding that those assessments, in a number of cases, were eventually translated into conditions attached to the grant of financial support.⁴⁸
44. Furthermore, and without questioning the professionalism or integrity of the BPU staff, Corner House is concerned that the BPU's assessment of the BTC project failed to include material facts which, if included, could have affected the assessment of the project's compliance with the ECGD's policies. It is entirely possible that such issues were in fact analysed within the sections of the BPU report that have been redacted. However, unless the full report is made public, the issue cannot be resolved. There is a clear public interest in ensuring that the public's trust in ECGD's procedures is not eroded as a result.
45. Four examples are illustrative:

47. See p.43 of BPU Report, Health and Safety at **Tab 2a**.

48. Export Guarantees Advisory Council, Minutes, 2004, 2nd Meeting, 17 March 2004, para 5.2.10 notes that pre-conditions were set on disbursement of funds ("All pre-conditions to disbursement had now been met, and the first loan drawdown was scheduled."), available from http://www.ecgd.gov.uk/index/pi_home/pi_ac/the_advisory_council_-_minutes.htm

46. Use of Armed Security Guards (BPU Assessment pp.41-42)

- 46.1. A Note (**Tab 6a at p.3**) prepared by ECGD in May 2003, and appended to a briefing prepared by the Department for Trade and Industry for a meeting between Lord Browne of BP and the Prime Minister, clearly expresses concern that pipeline security forces “*could be used to repress specific groups or communities*” and notes that ECGD had asked BP “*whether ‘terms of engagement’ had been drawn up and agreed for the pipeline security forces?*”⁴⁹
- 46.2. The BPU assessment correctly notes that, under the legal framework for the project, responsibility for security rests with the host governments. It also states that the BTC Consortium will only employ unarmed observers.
- 46.3. However, a handwritten note by BPU staff of a meeting held with BP on 24 August 2004 (**Tab 6b at pp.68 and 70**),⁵⁰ thus after ECGD had approved financial support for the project, confirms that:
- “Tabaksai – Armenian village – has been blocking ROW for several weeks; trained riot police used but without firearms; BTC provide food and funds for riot police to remain in area; contractors resumed work on Sunday; villagers concerns may be well founded but there are procedures in hand to deal with this.”
 - “BTC contractors are paying commercial wing of Georgian Security Services (unarmed guards) – these payments help fund non-commercial services”
- 46.4. Such practices are in possible contravention of the legal framework for the project.
- 46.5. Of further concern is a telegram, dated 4 April 2004 (**Tab 6c**), from the British Embassy in Baku, Azerbaijan, which states:

Lack of Azeri capacity in civil emergency planning and crisis response a growing concern, both for pipeline security and in response to wider security threats . . . The bad news is that there is no machinery for policy co-ordination or planning input from relevant ministries or agencies beyond the Presidential Apparatus, and no link into the National Security Council. So in a major civil contingency or terrorist attack, apart from a purely military response there would be no civil command structure, no lead agency and probably no effective communication between relevant ministries and agencies. This leaves BP's own crisis response team exposed, as they laconically put it, to ‘over- or under-enthusiasm’ from the military and other interested agencies getting in the way of an effective response . . . There are wider issues too – including Azerbaijan's capacity to respond effectively and appropriately to major civil contingencies or to a terrorist attack.

- 46.6. Such concerns, raised a year after ECGD funded the project, and despite ECGD's own stated disquiet, strongly suggest that the Department failed to ensure that adequate measures were in place prior to approval of finance to guard against human rights abuses by the security forces and, indeed, to ensure that emergency plans were adequate to cope with a major terrorist or pollution incident, raising questions as to ECGD's due diligence and risk mitigation procedures. It is also to be noted that the Foreign Office telegram stands in sharp contrast to assurances given by BPU staff in March 2004 to the ECGD's Export Guarantees Advisory Council, a statutory body, that “improvements had been made to the oil spill response plan in case a

49. ECGD, “Annex H: Status of key Business Principles issues at 1 May 2003”, p.23 in “Sep 2004 Browne (BP) meeting PM briefing and feedback.doc”, briefing appended to UK Trade and Investment, email 9 September 2004, names of correspondents withheld, released under Freedom of Information request submitted by Friends of the Earth (England, Wales and Northern Ireland), January 2006 – at **Tab 6a, p.3** “**Security Arrangements**” para ii.

50. Notes of meeting held on 24 August 2004 between David Allwood of ECGD's BPU and Harriet and Alistair Long, released to Corner House by ECGD under FOIA request IR (05) 43, at **Tab 6b**.

terrorist attack did cause a leak from the pipeline.”⁵¹

47. IGAs and HGAs (BPU Assessment p.46 – at **Tab 2a**)

- 47.1. A major issue of concern raised by NGOs during the consultation period with ECGD was the environmental implications of the Host Government Agreements and Intergovernmental Agreement that provide the legal framework for the project. In response BP had argued that the legal regime for the project imposes higher environmental standards than would otherwise be applicable,⁵² thus (in the company’s view) justifying the exemptions gained by BTC Co from all local environmental and social legislation.
- 47.2. Notes released under FOIA of a meeting held between BP and the ECGD’s BPU on 15 October 2002 (**Tab 6b, p.4**), thus prior to ECGD approving support, contradict BP’s reassurances. The BPU records: “*Host country numeric standards reported to be so stringent that they are not achievable.*”⁵³
- 47.3. That admission strongly endorses NGO concerns that, far from requiring BTC to adhere to higher standards than those required under local law, the Host Government Agreements have allowed BP to work to lower standards.

48. Consultation with Stakeholders

- 48.1. In submissions to ECGD, Corner House and others raised major concerns over the adequacy of consultation by the BTC group with those affected by the project and with interested stakeholders, in regard to resettlement planning, compensation and environmental impacts. These concerns are acknowledged by the BPU (see p.5 and p.35 at **Tab 2a**): however, the BPU’s assessment of them has not been released.
- 48.2. Any material failure by BTC to consult with stakeholders would place the project in non-compliance with World Bank safeguard policies and thus with ECGD’s own stated policies. It is thus of concern that documents released under US Freedom of Information legislation clearly reveal that BP specifically excluded any groups that it considered “polarizers” (that is, critics) from its consultations (**Tab 6d, p.14**). Such groups included CEE Bankwatch and the Georgian Greens, two of the main NGOs in Georgia working with communities affected by the pipeline. A presentation made by BP to the lenders groups for the project states: “*No need to engage actively – this would only legitimize their case. But by all means engage opportunistically.*”⁵⁴
- 48.3. A key question, answerable without access to the full BPU report, is whether ECGD knew of this BP policy and, if so, how it assessed the implications.

49. Vulnerable Groups

- 49.1. ECGD is committed to ensuring that projects comply with the World Bank Group’s Safeguard Policies, one of which (OD 4.20 “Indigenous Peoples”) covers ethnic minorities and indigenous peoples. Corner House had argued that this policy was applicable to the project, because of the pipelines acknowledged impacts on three ethnic minorities in Turkey - the Alevi, Çerkez and Kurds.⁵⁵ ECGD rejected that view.

51. Export Guarantees Advisory Council, Minutes, 2004, 2nd Meeting, 17 March 2004, para 5.3.2, available from http://www.ecgd.gov.uk/index/pi_home/pi_ac/the_advisory_council_-_minutes.htm.

52. BTC, “Citizens Guide to the BTC Project Agreements: Environmental, Social and Human Rights Standards”, p.6, available at <http://subsites.bp.com/caspian/citizens%20guide%20final.pdf>: “It is important to note that the legal arrangements for BTC do not replace existing laws and regulations but are designed to build on and supplement the legal framework, and only supersede provisions that directly conflict with the project agreement requirements.”

53. Notes of “ESAP discussion”, 15 October 2002, released to Corner House by ECGD under FOIA request IR (05) 43, at **Tab 6b, p.4**.

54. “Environmental and Social Impact Assessment Programme Update”, Presentation Notes, 14 pages, F2003-00348, Undated, Released to National Security Archive by US Department of Energy, 4 June 2004, available from <http://www.freedominfo.org/ifti/iftifoia/BTC/35.pdf>, reproduced at **Tab 6d**.

55. For further details, see Corner House et al, *Review of the BTC EIA and RAP (Turkey section): Ethnic Minorities*, 2002, <http://ifiwatchnet.org/doc/btcch8.pdf>.

- 49.2. Documents released under FOIA strongly suggest that the decision to exempt the BTC project from OD 4.20 was motivated by a concern not to recognize the policy as applying to the Kurds, for fear of offending the Turkish Government. In a briefing prepared by ECGD in May 2003 [Tab 6a at p.4], the ECGD is quoted as stating: “ECGD understands the pragmatic need to avoid identifying any group as an ‘indigenous peoples’ . . .”⁵⁶ The quote strongly suggests that the thrust of the ECGD’s environmental screening was directed at finding reasons to exempt the project from the World Bank’s Indigenous Peoples’ policy rather than neutrally assessing whether compliance was required.
- 49.3. Clearly the politicization of the ECGD’s risk assessment procedures is a matter of very considerable concern to the public, both from the perspective of protecting taxpayers money but also from the perspective of ensuring that ECGD projects do not result in negative environmental, human rights and developmental impacts.
- 49.4. Again, access to the redacted sections of the BPU report that address the issue of OD 4.20 are critical to reassuring the public.
50. In Corner House’s view, it is of critical importance that the public is able to assess, in each of the above cases, whether or not the information available to the BPU was incorporated into its assessment and whether the concerns arising from that information were (adequately) addressed.

Minutes of the Underwriting Committee

51. The minutes of the underwriting committee represent the culmination of several years of work by ECGD in respect of consideration of the BTC application. The importance of the meeting cannot be overestimated.
52. It appears from the information released that the BPU recommended a number of conditions and that a number of concerns remained unaddressed at the time that the project was considered by the Underwriting Committee.
53. It is assumed that these were discussed at the meeting of the underwriting committee on 5 December 2005, whose minutes have been withheld in their entirety, and in subsequent meetings, whose minutes have been partially disclosed [Tab 2a at p.64ff].
54. However, without access to the full minutes of the underwriting committee meeting, it is impossible to tell whether the BPU’s conditions were accepted or to understand the consideration that was given to them by the Underwriting Committee. It is certainly not possible to determine how the outstanding issues were resolved – a key test of the extent to which the ECGD’s case handling procedures are sufficiently rigorous to ensure that projects comply with ECGD stated social and environmental policies.
55. Again, we would suggest that the public interest case for full disclosure is overwhelming.
56. Whilst there may be elements of the document that it would be appropriate to redact we do not accept that it is legitimate to withhold the entirety of the document.

VI. Delay

57. We would also like to invite the Commissioner to seek a full explanation from ECGD as to the extensive delays that have occurred in this case and to make appropriate findings. The internal review took 9 months. The limit set down in the EIR 2004 is 40 days.

56. ECGD, “Annex H: Status of key Business Principles issues at 1 May 2003”, quoted at p.23 in “Sep 2004 Browne (BP) meeting PM briefing and feedback.doc”, briefing appended to UK Trade and Investment, email 9 September 2004, names of correspondents withheld, released under Freedom of Information request submitted by Friends of the Earth (England, Wales and Northern Ireland), January 2006, at Tab 6a, p.4, “ESIA Assessment”, para vi.

VII. Documents

58. Attached to this complaint is an index of documents. The documents at Tab 1 (consisting of the communications between Corner House and ECGD) are in paper form. The remainder of the documents are in electronic form. It is not suggested that the Commissioner needs to read or consider the entirety of the documents attached (many of which are voluminous). However, such documentation is provided to ensure that the Commissioner understands the points made in this letter (in context) and to ensure that the Commissioner has sufficient information to enable him to give proper consideration to the question of where the public interest lies. In addition to the documents attached reference is made in this complaint to a number of documents that are publicly available on-line. In such cases a web-link is provided.

59. If you require any further documentation or information, you should not hesitate to contact me, preferably by email (phil.michaels@foe.co.uk).

Yours sincerely,

Phil Michaels
Friends of the Earth
Rights & Justice Centre