IN THE MATTER OF AN APPEAL TO THE INFORMATION TRIBUNAL UNDER REGULATION 18 OF THE ENVIRONMENTAL INFORMATION REGULATIONS 2004

EA/2008/0071

BETWEEN

EXPORT CREDITS GUARANTEE DEPARTMENT

Appellant

And

THE INFORMATION COMMISSIONER

Respondent

And

MR NICHOLAS HILDYARD

Additional Party

INFORMATION COMMISSIONER'S SKELETON ARGUMENT

The following abbreviations are used below:

EIR – Environmental Information Regulations 2004

ECGD – The Appellant

COHO – The Additional Party

DN – Information Commissioner's Decision Notice [B1/41-49]

GoA – ECGD's Final Amended Grounds of Appeal

ICO(R) – Information Commissioner's Reply to the Appeal

COHO(R) – Additional Party's Reply

COHO(X) – COHO's Cross-Appeal

ER(X) – ECGD's Reply to the Cross-Appeal

ICO(X) – Information Commissioner's Reply to the Cross-Appeal

SD – Witness Statement of Stephen Roderick Dodgson

DA – Witness Statement of David Michael Allwood

NH – Witness Statement of Nicholas Hildyard

NHX – Witness Statement of Mr Hildyard on the cross-appeal

SM – Witness Statement of Stephen Roberts-Mee

ISSUES AND SUMMARY CASE

1. This appeal concerns the application of a number of exceptions contained in the EIR to particular information which was requested from ECGD by COHO on 8 August 2005 [OB1/62-64]. The information in issue in this appeal ("the disputed information") can be summarised as follows:

   (1) information contained within a report which reveals how a particular Business Principles Unit within ECGD ("the BPU") assessed the environmental, social and human rights aspects of the Baku-Tibilisi-Ceyhan oil pipeline project ("the BTC project");[1] and

   (2) information contained in minutes of a meeting of ECGD's Underwriting Committee which took place on 5 December 2003 and at which the BTC project in general and the BPU report in particular were considered.[2]

2. The following is a summary of the issues which arise in this appeal and the Commissioner's case on those issues.[3]

Nature of the Information in Issue

(1) Did COHO's request on 8 August 2005 embrace a request for disclosure of the entirety of the minutes of the 5 December 2003 meeting or only that part of the minutes which in which the BPU was specifically discussed? (see COHO(X); ER(X) and ICO(X))

The Commissioner invites the Tribunal to accept COHO's case that: (a) the request was sufficiently broad that it

[1] An unredacted version of the report is at [CB/1-64]. The redacted version of the report which was disclosed is at [OB1/73-134]

[2] An unredacted version of the minutes is at [CB/65-72]. The redacted version of the minutes which was disclosed is at [OB1/136-138].

[3] Note, the Commissioner's case is based on the evidence and arguments currently before him. He reserves the right to change his position in light of evidence given at the hearing.

encompassed a request for the entirety of the minutes; (b) the DN ought to have reflected this fact; and (c) the DN ought also to have concluded by confirming that the entirety of the minutes should have been disclosed by ECGD under the EIR.

Application of the Exceptions

Internal Communications (r. 12(4)(e))

(2) In respect of the internal communications exception provided for under r. 12(4)(e), it appears to be accepted by all parties that the disputed information falls within the ambit of this exception. The issue therefore is whether the Commissioner erred when he concluded that, on an application of the public interest test under r. 12(1)(b) EIR, the public interest weighed in favour of disclosing the disputed information rather than maintaining the r. 12(4)(e) exception (see §§34-46 DN and §20-50 GoA).

Based on the evidence currently before him and subject to further examination in closed session, the Commissioner contends that ECGD has not discharged the burden it bears of proving that public interest weighs in favour of maintaining the r. 12(4)(e) exception.

International Relations (r. 12(5)(a))

(3) Was the international relations exception provided for in r. 12(5)(a) EIR engaged in respect of any of the disputed information? (see §§22-26 COHO(R)). The only information in respect of which this exception is now claimed is: (a) the information identified in §§58-59 and 64 DA [CB1/188] ("the partners information"); and (b) the information identified in §71 SD [CB/169] ("the Turkey information").

The Commissioner contends that the evidence which has been adduced by ECGD for the purposes of this appeal tends to confirm that he was right to have concluded that the

exception was engaged in respect of the partners information (see §47 of the DN and §§58-68 SD [CB/165-168]).

Were it not for evidence adduced by Mr Hildyard, the Commissioner would have been inclined to adopt a similar position on the Turkey information (see further §§69-69 SD [CB/168-171] and §§69-71 DA [CB/191-192]). However, evidence adduced by Mr Hildyard (particularly the BTC Flash Report exhibited to NHX) appears to throw the cogency of ECGD's evidence on the Turkey information very much into doubt. In the circumstances, and subject to further examination in closed session, the Commissioner is minded to invite the Tribunal to conclude that ECGD has not discharged the burden it bears of proving that r. 12(5)(a) was engaged in respect of the Turkey information.

(4) If r. 12(5)(a) was engaged in respect of the Turkey information and the partners information, did the Commissioner err when he concluded that, on an application of the public interest test under r. 12(1)(b) EIR, the public interest weighed in favour of disclosing that information rather than maintaining the r. 12(5)(a) exception? (see §§48-51 DN and §§51-55 GoA)

The evidence which ECGD has adduced for the purposes of this appeal strongly supports ECGD's case that the public interest balance weighs in favour of maintaining the exception in respect of the partners information. Based on this evidence (which was not before the Commissioner when he took his decision), the Tribunal is invited to find that the public interest weighed in favour of maintaining the r. 12(5)(a) exception in respect of the partners information.

Based on the evidence now before him, the Commissioner does not accept that the Turkey information fell within the ambit of r. 12(5)(a). However, if he is wrong about this, he will

say that, having regard in particular to the content of the Flash Report, on the available evidence ECGD has not discharged the burden it bears of proving that the public interest weighs in favour of maintaining the r. 12(5)(a) exception in respect of this information.

Legal Privilege (r. 12(5)(b))[4]

(5) Was the information identified at §84 SD [CB/172] legally privileged information at the time of the request such that r. 12(5)(b) was engaged?

The Commissioner invites the Tribunal to accept that the relevant information would have been legally privileged at the time of the request such that r. 12(5)(b) would have been engaged. (This information is referred to below as the LP information).

(6) Did the public interest weigh in favour of the r. 12(5)(b) exception being maintained in respect of that information?

The Commissioner is minded to invite the Tribunal to accept that, at the time of the request, the public interest would have weighed in favour of maintaining the r. 12(5)(b) exception in respect of the LP information. In reaching this view, the Commissioner has taken into account not least: (a) the strong public interest in protecting the confidentiality of legally privileged information which is built into the exception and, further, (b) the more specific evidence on the information in issue at §§8-86 SD [CB/171-173].

[4] It should be noted that ECGD did not explicitly identify r. 12(5)(b) in its refusal notice or latterly in its dealings with the Commissioner. It did however purport to rely on s. 42 FOIA (the legal privilege exemption). In the circumstances, the Tribunal is invited to allow late reliance on r. 12(5)(b) for the purposes of this appeal. The Commissioner contends that, where legally privileged information is in issue, r. 12(5)(b) is the more apt exception than r. 12(4)(e).

THE BACKGROUND

ECGD

3. ECGD is a department of State which operates subject to the Export and Investment Guarantees Act 1991. Its primary function is to facilitate exports of goods and services and overseas investment through the provisions of guarantees and insurance (§§8-9 SD [OB1/389]).

4. ECGD's operations are subject to regulation by a number of international instruments (see §§17-24 NH [OB1437-439], §13 SD [OB1/390] and see also the documents at [OB2/479-493 and 679-822]). It must also comply with a number of internally adopted policies and commitments, including its Business Principles (see §§18-21 SD [OB1/392-393] and §§27-38 NH [OB1/440-442]. The Business Principles are at [OB2/520-529]). The Business Principles require ECGD to assess, amongst other things, the environmental impact of a particular project [OB2/833-841]. They also incorporate a number of principles on the subject of 'transparency' [OB2/835 and 841]. Those principles confirm that:

   (1) ECGD has committed to being *'open and honest in all its dealings and will expect the same from others'*;

   (2) on major issues, ECGD will not only consult and listen to parties with a legitimate interest in ECGD but will also *'respond'* to those parties;

   (3) ECGD will be *'as open as possible, whilst respecting legitimate commercial and personal confidentiality'*;

   (4) ECGD will seek more information about the business it supports '*with a view to publication*'; and

   (5) ECGD will expand the information it publishes regarding its financial performance, business activities and '*the application of its Business Principles*'.

5. The guarantees and insurance granted by ECGD have intrinsic financial value and could ultimately be called upon in the event of default by the borrower/insured - see further:

   (1) ECGD's refusal notice which highlights that guarantees entail *'the deployment of public funds'* and that ECGD is underwriting risks *'on behalf of the tax payer'* [OB1/68];

   (2) ECGD's letter to the ICO dated 19 October 2007 where ECGD confirmed that the quality of the decisions it takes can affect the tax-payer's exposure to financial liability (§75 [OB1/248]);

   (3) §§1, 12 and 14 SD [OB1/387-391] which confirm that there have been instances where ECGD was required to pay claims made in respect of guarantees and insurance policies that have been called on (§1); that ECGD guarantees and insurance policies may be called upon thus creating '*contingent liabilities for the UK tax-payer, reflecting the risk that ECGD may be required to pay claims in the event of payment default'* (§12); that payment of claims comes out of ECGD's financial reserves (§14) and that the UK tax payer would be responsible for losses if, taking account of all recoveries, ECGD financial reserves were not sufficient to cover residual losses (§14).

6. In 2003/2004, ECGD *'issued guarantees and insurance worth £2.9 billion'* (see Chief Executive's report [OB2/910]). Its decisions for this year accordingly exposed UK tax-payers to substantial contingent liabilities (see further §§67-69 NH [OB1/450-451]).

7. As to the level of risk associated with ECGD financial commitments, ECGD has itself confirmed that it *'operates at the more risky end of the risk spectrum by definition'* (§16.1 of its 19 October 2007 letter to the ICO [OB1/235] - This is presumably a reference to the fact that the risk entailed upon the individual projects supported by ECGD is sufficiently high that it requires investments which are Government-backed). It is self-evident that the quality of ECGD's assessment of the risks attendant on a particular proposed project has a direct correlation with the degree of risk to which

tax-payers are exposed (see §75 of ECGD's 19 October 2007 letter to the ICO at [OB1/248]).

8. In addition, in 2005, the year of the request, ECGD received a subsidy from the taxpayer of £150m, albeit that ECGD contends that this is a subsidy only in a technical, hypothecated sense (see its letter to the ICO dated 19 October 2007 [OB1/234-235]).

9. Apart from financial liability attendant on ECGD decisions, if environmental risks are not adequately assessed by ECGD this can result in a situation where ECGD (and hence the tax-payer) is providing significant financial backing for projects which may in turn prove hugely damaging to the environment.

The Project

10. In 2002, ECGD was approached by a consortium of energy companies led by BP which was seeking financial support in respect of its involvement in the BTC project. This was a vast multinational project. The total cost of the project was estimated at around $3.4 billion (§25 DA [OB1/419]). By its very nature, the BTC project was bound to have a very substantial environmental impact on a significant geographical region.

11. As the project developed, concerns were expressed by NGOs that the project extensively violated international environmental and social standards (see the letter from BCC dated 23 October 2003 at [OB2/964-969]).

12. ECGD has accepted that the project was *'particularly controversial'* and was opposed by a number of NGOs (§36 of its letter to the ICO dated 19 October 2007 [OB1/240]; see also §§47-50 of NH [OB1/445-446]). Its Annual Report for 2003/2004 also confirms that assessment of the project *'was the most complex environmental and social assessment that the Department has carried out to date'*; that the project attracted *'significant public interest'* and that *'the lessons learnt from BTC are already being applied to other projects* [OB2/916-917]. It follows that the assessment

undertaken by ECGD in respect of BTC was a high profile assessment which had implications going beyond just the BTC project.

13. On 3 December 2003, the BPU produced a report which contained an assessment of the environmental, social and human rights impacts of the BTC project, "the BPU report" [CB/1-64]. It is not in dispute that the BPU report was *'one of the key documents used by ECGD's underwriting committee to consider and assess the environmental, social and human rights aspects of the BTC project'* (§35 of ECGD's letter to the ICO dated 19 October 2007 [OB1/250]).

14. At a meeting which took place on 5 December 2005, an ECGD Underwriting Committee considered a number of matters relating to the BTC project, including the content of the report (see the minutes at [CB/65-72]).

15. On 17 December 2003, ECGD approved the provision of cover in respect of the project, subject to a number of conditions. Thereafter, in 2004, ECGD issued guarantees worth £81,703,893 in respect of the project [OB2/546] (elsewhere this is referred to as a US$106m line of credit [OB1/557]). Total exposure including interest was US$150m (§32 SD [OB1/396]). It would appear that ECGD was one of a number of national and international institutions which provided support financial support for the project (see §28 DA [OB1/420]).

16. In its Annual Report for 2003/2004, ECGD held out its involvement in the BTC project as an example of ECGD's rigorous application of its Business Principles, including standards of transparency [B2/910].

Note of Decision

17. Also on 17 December 2003, ECGD published a 'Note of Decision' on its website relating to the decision to approve the provision of cover in respect of the BTC project [OB1/345]. The Note contains only a cursory account of the factors which were taken into account in reaching the decision. The Note fell a long way short of the assessment of the project produced by the

BPU. ECGD appears to have accepted that the Note was inadequate as, following a report produced by a Trade and Industry Select Committee in March 2005, it appears to have agreed to publish much more extensive information as to its assessments of individual projects (see the Committee's report at [OB1/350-386, and in particular 345, §§17-19 on 359-360 and §§1-2 on 377] and see further ECGD's response, as recorded in [OB2/658-9]).

18. As COHO confirms in its evidence, the Note does not set out the process by which the project was assessed and the standards against which it was benchmarked and does not give any explanation as to the conclusions reached by the ECGD (or BPU) on the issues listed in the Note or on the wider range of issues raised by NGOs; nor further does it indicate the basis for any conclusions reached on these issues (§§55-56 NH [OB1/447]).

Select Committee Report[5]

19. On 4 April 2005, a House of Commons Trade and Industry Select Committee reported on the implementation of ECGD's Business Principles, particularly with respect to the BTC project [OB1/350-380]. The following aspects of the Select Committee's report are particularly worthy of note as a matter of historical record:

    (1) whilst it was accepted in the report that ECGD's involvement in the BTC project was in accordance with its business principles [OB1/354], the report did not itself enable members of the public themselves to assess precisely how ECGD had applied the Business Principles or international regulatory standards to this project. Indeed, the Committee made clear in its report that, as a result of ECGD's insistence on keeping the report confidential had affected *'its ability to explain its own conclusions about ECGD's involvement in the project'* (§2 [OB1/377]);

[5] It is not open to the parties or the Tribunal to seek to impugn or question any of the conclusions reached by the Committee in its report. Nor further may they make submissions on or invite the Tribunal to draw inferences from those conclusions. However, the Tribunal is entitled to take account of the report's conclusions as a matter of historical fact (*Office of Government Commerce v IC & Attorney general* [2008] EWHC 737 (Admin), per Stanley Burnton J, §§46-50).

(2) the Committee was clearly *'disturbed'* that ECGD had itself refused to disclose the assessment in the report (§17 [OB1/359];

(3) the Committee was evidently of the view that there was no satisfactory explanation or basis for ECGD's reluctance to disclose the assessment (§19 [OB1/359-360]);

(4) in its Summary [OB1/354], the Committee confirmed that in fact *'Where the Department fell short in its implementation of its Principles was in the transparency of its communication of its decision. For such a large and potentially controversial project as the pipeline, publishing a brief explanation of its decision as the Department did was not enough';*

(5) the Committee went on to recommend that: '*In order to meet its commitment to openness in business transactions, ECGD should in future produce a review of the environmental and social implications of all large scale projects, including a summary of the issues raised during consultations, a detailed explanation of how it has addressed them and its plans for post-decision monitoring of the project'* [OB1/354]. In making this recommendation, the Committee did not suggest that, apart from the Business Principles, it was aware of the broader obligations to disclose environmental information on request under the EIR.

The Request

20. On 8 August 2005, COHO wrote to ECGD requesting disclosure, inter alia, of the BPU report and, at §A(iii) *'all notes and/or minutes of meetings held to discuss the BPU's assessment report…'* [OB1/62-64].

21. It is clear that, at the time of the request, ECGD had not published any detailed account of its assessment of the project or the objections which had been made and risks identified by NGOs (see further ECGD's review letter dated 14 November 2006 which acknowledges that much of the withheld information was, even then, not in the public domain [OB1/194]).

Response to the Request

22. Following receipt of the request, ECGD disclosed parts of the report [OB1/72-134]. However, it withheld that information which revealed how the BPU had itself assessed the project. It also withheld much of the 5 December 2003 meeting minutes (see the redacted version of the minutes which was disclosed at [OB1/135-138]). In its refusal notice dated 13 December 2005, ECGD asserted that the withheld information was exempt from disclosure under r. 12(4)(e) EIR [OB1/67-71]. It also relied upon a number of exemptions contained in FOIA, including s. 27 (international relations); s. 36 (effective conduct of public affairs) and s. 42 (legal professional privilege).

23. A review of the refusal notice was requested on 8 February 2006 [OB1/190]. The refusal notice was largely upheld on review (see the review letter dated 14 November 2006 at [OB1/194-197]).

Investigation by the Commissioner

24. On 20 December 2006, COHO submitted a complaint to the Commissioner with respect to ECGD's refusal notice [OB1/198-210].

25. In a letter to the ICO dated 18 January 2008, ECGD confirmed that, in addition to r. 12(4)(e), it was seeking to rely on r. 12(5)(a) EIR in respect of a limited amount of information [OB1/275-277]. During the course of correspondence with the ICO, ECGD also expressed concerns that individual civil servants would be identified if the information was released (see §§ 37-39 of its letter dated 19 October 2007 [OB1/240]). In response to this concern, COHO agreed, without prejudice to its legal rights, that civil servants' names could be redacted from the documents [OB1/254-258]. ECGD appeared content with this proposal (see §42 of its letter to the ICO dated 18 January 2008 [OB1/279]).

Commissioner's Decision

26. Upon complaint, the Commissioner decided as follows [OB1/43-59]:

(1) the disputed information fell within the ambit of r. 12(4)(e) (§33 DN);

(2) however, ECGD had not discharged the burden it bore of establishing that the public interest weighed in favour of maintaining the r. 12(4)(e) exception in respect of the disputed information (§§34-48 DN);

(3) some of the information also fell within the ambit of r. 12(5)(a) (§47 DN);

(4) however, ECGD had not discharged the burden it bore of establishing that the public interest weighed in favour of maintaining the r. 12(5)(a) exception in respect of the disputed information (§§48-51);

(5) ECGD should disclose the full text of the report and *'the full text of the minutes of the ECGD's committee's 5 December 2003 discussion of it'* (§54 DN).

GENERAL LEGAL FRAMEWORK

27. Regulation 5(1) EIR imposes a general duty on public authorities to make environmental information available on request.

28. That general duty is not, however, unlimited. Not least, it will be disapplied where the requested information is, at the time of the request, exempt from disclosure under one or more of the excepting provisions contained in rr. 12 and 13 EIR.

29. Regulations 12(4) and (5) contain a variety of different exceptions, including class based exceptions and prejudice based exceptions.

(1) Regulation 12(4)(e) is a class based exception which applies to all information amounting to an *'internal communication'*.

(2) Regulation 12(5)(a) is a prejudice based exception which applies to information the disclosure of which *'would adversely affect international relations…'* .

(3) Regulation 12(5)(b) is a prejudice based exception which applies to information the disclosure of which '*would adversely affect the course of justice…*'. This exception has been held to apply to legally privileged information (*Archer v IC*(EA/2006/0037).

30. A public authority is not at liberty to withhold particular environmental information simply because it falls within the ambit of one of the exceptions afforded under rr. 12(4) and (5). Instead, pursuant to r. 12(1)(b) EIR, it must still disclose that information unless: *'in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information'* (r. 12(1)(b)).

31. If the public interest scales are evenly balanced on an application of the public interest test, the public authority must disclose the information. In any particular case, it will be for the public authority to prove both that a relevant exception is engaged and that the public interest weighs in favour of maintaining the exception (*Department for Education & Skills v IC* (EA/2006/0006), §§61 and 65 ("*DFES*").

32. Under r. 12(2) EIR, whenever it is considering the application of exceptions, the public authority must apply a presumption in favour of disclosure.

33. It has been held by the Court of Appeal in *Office of Communications v IC* [2009] EWCA Civ 90 ("*Ofcom*") that, where multiple exceptions are engaged, the public authority need not conduct discrete public interest balancing exercises under each exception; instead, it may bundle up together all the relevant public interest considerations in a single public interest balancing exercise. The Commissioner is currently seeking leave to appeal against the Court of Appeal's judgment. He maintains for the purposes of this appeal that *Ofcom* was wrongly decided. The Commissioner accordingly contends:

(1) that in any case where consideration is being given to the application of the public interest test, the public authority must ensure that the public interests 'in favour of maintaining the

exception' are limited to those interests which are specifically tailored to the exception in issue; and

(2) in every case, consideration must be given to whether the particular public interests relied upon arise naturally out of the particular exception which is being relied upon;

(3) so far as the exceptions which are in issue in the instant case are concerned:

(a) the public interests arising naturally out of r. 12(4)(e) are those interests in preserving a 'safe space' for public authority deliberation (see §12 *ECGD v Friends of the Earth* [2008] EWHC 638 (Admin) ("*FoE*");

(b) the public interests arising naturally out of r. 12(5)(b) (insofar as it is the international relations limb being relied upon) are those interests in preserving the comity of nations and avoiding prejudice to the UK's relations with other States;

(c) the public interests arising naturally out of r. 12(5)(a) (insofar as the information in issue is legally privileged information) are those interests in preserving the confidentiality of legally privileged information.

However, for the avoidance of doubt, the Commissioner contends that on the facts of the instant case, the final results in terms of what information ought to have been disclosed by ECGD would be the same even on an application of the *Ofcom* principles.

34. The EIR were themselves enacted in order to give domestic effect to the European Directive 2003/4/EC On Public Access to Environmental Information ("the Directive"). The Directive was in turn adopted in order to give effect to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice on Environmental Matters ("the Convention"). It is apparent from both the Directive and the Convention that

all the exceptions provided for in the EIR should be construed narrowly (see recitals (1) and (16) and Arts 3.3 and 4.1(c) of the Directive and Art 4.3(b) of and the Preamble to the Convention). Recital (9) of the Directive states that:

> *'It is also necessary that public authorities make available and disseminate environmental information to the general public to the widest extent possible, in particular by using information and communication technologies.'* (emphasis added)

35. See also the Council's explanatory memorandum for an earlier draft of the Directive dated 29 June 2000. That memorandum stated that any exceptions to the general right of access to environmental information should be *'very tightly drawn'* so as *'to enable the Directive to actually meet its objective in practice'* (cited by the High Court in *FoE*, §12).

36. The justification for this limitative approach to exceptions to disclosure is that there is a strong public interest in facilitating access to environmental information, particularly in view of the need to create transparency and accountability in respect of public authority decisions on environmental matters and in view of the need to increase public participation in debates on such decisions.

37. The Tribunal's jurisdiction is determined by section 58 of the Freedom of Information Act ("FOIA"), which applies to environmental information cases by virtue of regulation 18 of EIR.

SUBMISSIONS

NATURE OF THE INFORMATION IN ISSUE

38. COHO's Cross-Appeal turns on the simple question of whether §A(iii) of COHO's 8 August 2005 request letter [OB1/62] should be construed as amounting to a request for disclosure of: (a) the entirety of the minutes of 5

December 2003 meeting; or (b) merely those minutes which record discussion of the BPU report.

39. The Commissioner contends that the request was for the entirety of the minutes. In support of that contention he relies on the following matters:

(1) the first sentence of the request letter confirms that it embraces a request for *'the following environmental information held by ECGD in relation to the Baku-Tibilisi-Ceyhan (BTC) oil pipeline'*. Accordingly, the request ought generally to be construed as being widely focussed on environmental information relating to the BTC project as a whole rather than just the BPU's assessment of the project;

(2) the wording of §A(iii) makes clear that the request was for *'all notes and/or minutes of meetings'* at which the BPUs assessment was discussed (i.e. not just those parts of the minutes where the report was discussed);

(3) had there been any doubt as how broadly the request contained in §A(iii) was to be construed, the burden lay on ECGD to clarify that issue in exercise of its powers under r. 9 EIR – in fact it never exercised those powers;

(4) COHO made clear that it was seeking the full minutes both in its application for a review on 8 February 2009 [OB1/190] and in its complaint to the ICO (§7 [OB1/199-200]).

40. The Commissioner accepts that the DN contains an error in that in §54 it refers only to those parts of the minutes where the BPU report was discussed. He invites the Tribunal to correct that error by holding that the entirety of the minutes ought to have been disclosed in response to the request.

41. The arguments advanced by ECGD in support of its case against the Cross-Appeal (see ER(X)) cannot be accepted.

(1) It is accepted that r. 5(1) applies to a request for information not documents. However, in the instant case it is clear that the information being requested was the information contained in all the minutes of the meeting.

(2) Given that the request for information did in fact embrace a request for the entirety of the minutes, it cannot reasonably be argued that the Commissioner (and hence the Tribunal) have no jurisdiction to consider whether the entirety of the minutes should be disclosed.

(3) ECGD's attempt to rely on the error in the DN to prevent the Tribunal considering whether the entirety of the minutes should be disclosed is misconceived.

(4) The evidence given by Mr Rylands Mee as to how he or indeed Dr Wernham may have construed the request is irrelevant. Judged objectively, the request plainly was sufficiently broad that it encompassed the entirety of the minutes.

APPLICATION OF THE EXEMPTIONS

Internal Communications – r. 12(4)(e)

42. It is not in dispute that the disputed information fell within the ambit of r. 12(4)(e). The issue under r. 12(4)(e) is whether the Commissioner erred when he concluded that ECGD had not discharged the burden of proving that the public interest weighed in favour of maintaining the exception.

43. In its GoA, ECGD identifies five grounds in support of its case that the Commissioner erred in this conclusion (§§20-50). The fifth ground is concerned with the application of principles legal professional privilege. Save that the Commissioner contends that the applicable exception in respect of the LP information is r. 12(5)(b), he accepts that ECGD was lawfully entitled to withhold the LP information and that the DN will need to be amended in this respect.

44. With respect to the four remaining grounds, the first three aim to challenge the Commissioner's conclusions that there was a strong public interest in disclosure of the disputed information. The fourth ground challenges the Commissioner's conclusions on the public interest in favour of maintaining the r. 12(4)(e) exception. The Commissioner's case on these grounds is as set out below.

Ground 1 – 'Failure to place weight on information in the public domain'

45. ECGD's arguments in respect of this ground are wholly misconceived.

(1) ECGD is bound to accept that, at the time of the request, there was no information in the public domain which revealed precisely how the BPU and then the Underwriting Committee assessed the BTC project and, further, NGO objections to the project. Indeed, as much was conceded in §4 of ECGD's review letter at [OB1/194].

(2) The fact that ECGD has disclosed other information in the report (particularly information revealing the nature of objections made and risks identified by NGOs and others) is neither here nor there. What has never been disclosed to the public is how the BPU and the Underwriting Committee assessed those objections.

(3) Similarly, the fact that BPU publishes information about its general decision-making processes does not assist members of the public in understanding precisely how the BPU responded to the very specific objections and risks which had been identified in respect of the BTC project.

(4) None of the published information identified in §23 GoA materially assists members of the public in understanding precisely how the BPU and the Underwriting Committee assessed the objections and risks identified with respect to the project.

(5) There is a very strong public interest in disclosing to the public information which reveals precisely how the ECGD assesses

objections and risks identified in connection with particular environmentally significant projects. The disclosure of such information is likely substantially to enhance public understanding of how credit agencies such as ECGD assess the risks associated with such projects and, hence, to facilitate public participation in debates surrounding such projects, including debates on whether the UK tax-payer should be providing financial under-writing for such projects. These public interests must be accorded even greater weight in view of the substantial nature of the BTC project and, further, the fact that ECGD's assessment of the project has apparently been used to inform subsequent assessment processes within ECGD.

(6) Accordingly, far from being 'highly relevant' to the public interest arguments (§25 GoA), the fact that there was some information in the public domain relating to ECGD's involvement in the project was if anything de minimis in all the circumstances (see further §75(vi) of *DFES*: *'If the information requested is not in the public domain, we do not regard publication of other information relating to the same topic for consultation, information or other purposes as a significant factor in a decision as to disclosure'*; see also §23 of *Lord Baker v IC* EA/2006/0043 and §77 of *ECGD v FoE* (EA/2006/0091), although cf. §43 of the High Court's judgment in *FoE*).

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

46. In §§26-31 GoA, ECGD criticises the Commissioner on the basis that, on its case, the DN imposed a duty on ECGD to show that it had complied with its own policies. The criticism is misconceived.

(1) The point which the Commissioner was seeking to make in §42 DN is that there is a public interest in revealing to the public information which enables members of the public, including representatives of NGOs, to reassure themselves that ECGD: (a) is acting in accordance with all relevant regulatory principles, including its own

internal policies; and (b) is otherwise reaching well-founded conclusions on the nature of the environmental and financial risks posed by a particular project. That conclusion is unimpeachable and dove-tails with ECGD's own policy on achieving transparency in respect of its decision-making processes.

(2) The Commissioner did not conclude that ECGD had to prove it was not engaged in any wrongdoing (§27 GoA). Instead, his analysis is simply aimed at reflecting the public policy principle which underpins the EIR, namely that the disclosure of environmental information is in the public interest: (a) because of the importance of achieving transparency and accountability in respect of decision-making processes affecting the environment; and (b) because of the importance of facilitating public participation in those processes.

(3) ECGD's case amounts to an argument that there will only be a public interest in disclosing environmental information in circumstances where that information reveals wrong-doing by the public authority (see §29 GoA). Such an argument is fundamentally misconceived and betrays a worrying lack of appreciation of the complex nature of the public interests which the EIR is intended to serve (see further §24 of *Lord Baker v IC* (EA/2006/0043): *'Disclosure of internal communications is not therefore predicated by a need to bring to light any wrongdoing of this kind. Rather, by making the whole picture available, it should enable the public to satisfy itself that it need have no concerns on the point'*).

(4) As for the argument (in §29 GoA) that the conclusions of the Select Committee are sufficient to meet any public interest in accessing the disputed information, this is misconceived.

(a) The argument effectively invites the Tribunal to find that the Select Committee's conclusions on whether ECGD had acted in accordance with its Business Principles were correct. Such an invitation breaches Parliamentary privilege and should be

refused (see *Office of Government Commerce* [2008] EWHC 737 (Admin), §§58-59).

(b) Further and in any event, the Committee's remit was confined to assessing whether ECGD's decision-making process in respect of the project complied with its Business Principles.

(c) Members of the public have not themselves been able to explore the Committee's conclusions in context as they have not been able to access the underlying information on which the Committee's decision was based – a matter which evidently seriously troubled the Committee itself.

(d) The EIR is aimed in particular at increasing public participation in decision-making on environmental matters. Plainly, the conclusions of the Select Committee notwithstanding, that participation is likely to be substantially enhanced by disclosure of the disputed information.

(5) ECGD's arguments at §30 GoA are also misconceived in that they are based on a premise that it is open to the Commissioner and the Tribunal themselves to assesses whether ECGD erred in its assessment of the risks posed by the BTC project. Such arguments are misconceived. The Commissioner and the Tribunal lack both the expertise and, more importantly, the jurisdiction to conduct this type of assessment.

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

47. This ground is again misconceived.

(1) It is clear that ECGD's approval of financial backing in respect of the project exposed tax-payers to very substantial 'contingent liabilities'. Those are liabilities which could, on a worst case scenario, translate into tax-payers paying out on a guarantee worth many millions of

pounds. In that sense at least, as ECGD conceded in its correspondence, public funds have been deployed in respect of the BTC project.

(2) The public clearly has a strong interest in understanding precisely how a government credit agency has arrived at the decision that:

(a) UK taxpayers should be exposed to $150m of contingent liability with respect to this project; and

(b) the UK government should provide substantial financial backing for this highly controversial and environmentally significant project.

48. The fact remains that the Commissioner was lawfully entitled to conclude that there were strong public interests in disclosure of the disputed information. Neither ECGD's arguments as set out in its GoA nor its evidence, as set out in its witness statements, operate to disturb this conclusion. Indeed, the correctness of the Commissioner's conclusion on this issue is substantially reinforced by the evidence given by Mr Hildyard.

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

49. In §37-39 GoA, ECGD purports to criticise the DN on the basis that it reveals that the Commissioner regarded the 'safe space' arguments as being relevant only before a decision is taken and not afterwards. This criticism is groundless.

(1) In the DN, the Commissioner did not suggest that 'safe space' arguments cease to have any effect after a decision is taken. Instead, he concluded that arguments that a safe-space needed to be maintained in respect of the particular disputed information were substantially weakened by virtue of the fact that the decision had been taken and acted upon and substantial time had passed since the decision was made (see §§44).

(2) That conclusion was a perfectly sound and lawful conclusion and in accordance with established case law (see §75(iv)-(v) of *DFES*, §85 of *Office of Government Commerce v IC* (EA/2006/0068) and §60 of *FoE* - this paragraph was not challenged on appeal to the High Court).

50. With respect to the criticisms made of the DN in §§ 40-42 and 45 GoA:

(1) it is not accepted that the Commissioner mischaracterised the public policy principles which underpin r. 12(4)(e) (see §§42-44 DN);

(2) however, it is in any event agreed:

(a) that the public policy principle underpinning r. 12(4)(e) is the need to create a 'safe space' for deliberations in the interests of enhancing good government and, further,

(b) that that principle inherently recognises the need to protect civil servants from compromise or unjust public opprobrium (see §74(iii) *DFES*);

(3) it is accepted that the Commissioner may have overstated the degree of harm which is required in order for there to be public interests in favour of maintaining the r. 12(4)(e) exception (see §43 of the DN). However, he maintains that, by itself, this error did not flaw the overall conclusions reached;

(4) he accepts that he ought to have referred to the judgments of the High Court in *OGC and ECGD* (both of these judgments were handed down in March 2008). However, again, he maintains that this omission did not itself flaw the overall conclusions reached by the Commissioner.

51. In light of the evidence which ECGD now relies upon (see particularly the witness statements of Mr Dodgson and Mr Allwood [CB/148-192]), the central issue which falls to be determined in respect of the application of the public interest test under r. 12(4)(e) is whether the Commissioner ought

to have found that the public interest balance tipped in favour of maintaining the exception, particularly by reason of the risks which disclosure posed in terms of exposing the actions of individual and identifiable civil servants to public scrutiny/criticism (§43 GoA).

Exposing Civil Servants

52. The Commissioner contends that, when reaching his decision, he was entitled to take the view that concerns expressed by ECGD about exposing individual civil servants had ceased to be in issue following COHO's agreement that any names in the report could be redacted (see §42 of its letter dated 18 January 2008 [OB1/279]).

53. However, he has now had an opportunity to consider the evidence contained in the witness statements of Mr Dodgson and Mr Allwood. In light of that evidence and subject to that evidence being tested at the hearing, the Commissioner advances the following submissions on the issue of exposing civil servants to criticism and unjustified public opprobrium:

(1) This is an issue which appears to have been raised in particular with respect to the BPU report (i.e. rather than the minutes of the 5 December meeting).

(2) The risk that individual civil servants may be exposed to criticism in the event of disclosure of the assessment is evidently a matter which is worthy of serious consideration, not least because it may be a matter which weighs heavily in favour of the exception being engaged.

(3) However, it is not accepted that disclosure of the assessments in the BPU report would per se expose individual civil servants to criticism and opprobrium.

(a) assessments of individual issues are not attributed to individual civil servants in the report;

(b) the fact that certain 'third parties' may know which particular member of the BPU is working on a particular assessments of a project by virtue of a project by virtue of meetings and correspondence with ECGD (§46 DA) does not per se mean that this information is or is likely to be made available to the general public;

(c) at the time of the request, informed members of the public would in any event have been likely to infer that civil servants within the BPU had assessed the project as meeting the necessary environmental, social and human rights standards, such that those civil servants would in any event not have been operating under the radar in terms of public criticism and opprobrium;

(d) further or alternatively, civil servants who had the important responsibility of assessing the environmental, social and human rights impacts of the BTC project could not reasonably have expected that their assessments would remain veiled in secrecy, particularly in view of the enactment of the EIR and ECGD's own Business Principles on the subject of transparency.

(4) As for arguments that disclosure may have an unduly chilling effect on the operations of the BPU in future, it is unclear whether such arguments are properly before the Tribunal.[6] However, to the extent that they are, they cannot be accepted.

(a) Central Government departments frequently express concerns that disclosure of particular policy information will have a chilling effect on the work of civil servants and future decision-making processes (see e.g. *DFES, Department of Work & Pensions v ICEA/2006/0040,* OGC and *Lord Baker*).

[6] ECGD specifically withdrew its case on the alleged indirect chilling effects of disclosure (see amended §43 GoA). However, similar arguments appear to have resurfaced in ECGD's evidence (see §§55-56 SD [CB/164/165) and §§48-49 DA [CB/186]).

However, the strength of those concerns will generally be substantially mitigated by the facts that:

(i) civil servants can be expected to continue complying with the Civil Service Code of Conduct and otherwise to display the courage and independence that is their hallmark (§75(vii) *DFES*);

(ii) civil servants, and particularly those who occupy senior and/or responsible positions, cannot generally expect that they will operate under the public radar and must generally be expected to be able to withstand a degree of public scrutiny of their actions (§75(vii)-(viii) *DFES*);

(iii) since FOIA and the EIR came into force civil servants should in any event have appreciated that their actions are likely to be more susceptible to public scrutiny than was hitherto the case.

(b) These general principles apply equally to civil servants working within the BPU. Indeed, civil servants working within the BPU:

(i) can be expected to be particularly conscious of the general imperative to disclose environmental information under the EIR;

(ii) will be aware that transparency is one of the guiding principles and objectives of ECGD; and

(iii) must in the circumstances be deemed to be particularly conscious of the fact that their assessments may be susceptible to disclosure under the EIR and/or in accordance with the Business Principles.

(c) Moreover, because of its pivotal role within ECGD it must be expected that career civil servants will continue to seek appointment to the unit, notwithstanding that, as with other areas of government decision-making, there is a risk that information relating to their assessments will be disclosable under FOIA or the EIR.

(d) In all the circumstances, and having regard to the nature of the information in issue and the timing of the request (nearly two years after the relevant decision was taken), it cannot be accepted that there was sufficient sensitivity over the disclosure of this information as to give rise to any real risk of a chilling effect on the BPU.

54. Further and in any event, any risks of chilling effect/exposing civil servants unduly to public criticism must be balanced against the very strong public interest in members of the public being able to access information which reveals how ECGD appraised and responding to the specific objections which were raised in respect of the BTC project. Having regard not least to the presumption in favour of the disclosure of environmental information and the nature of the information in issue, it cannot be accepted in all the circumstances that the public interest tipped in favour of maintaining the r. 12(4)(e) exception.

INTERNATIONAL RELATIONS (r. 12(5)(a))

The Partners Information

55. The Commissioner concluded in the DN (§47) that r. 12(5)(a) was engaged in respect of the partners information. The evidence which has been adduced by ECGD tends to confirm that that conclusion was correct (see further §§58-68 SD [CB/165-168] and §§50-64 DA [CB/186-190] and see also the correspondence at [CB/208-214]).

56. As to the application of the public interest to this information, in light of the evidence adduced by ECGD for the purposes of this appeal (which was not

before the Commissioner at the time he reached his decision), the Commissioner is minded to invite the Tribunal to conclude that:

(1) there is a strong public interest in members of the public being given access to information which reveals how third party members of the lenders group were responding to aspects of the BTC project;

(2) however, for all the reasons given by ECGD in its evidence, at the time of the request, there were preponderant public interests in favour of maintaining the r. 12(5)(a) exception in respect of the partners information;

(3) accordingly, at the time of the request, the public interest weighed in favour of maintaining the r. 12(5)(a) exception in respect of the partners information.

The Turkey Information

57. Particularly in light of information contained in the BTC Field Visit Flash Report (exhibited to NHX), it must now be doubted that r. 12(5)(a) was in fact engaged in respect of the Turkey information. This is because:

(1) the information in the Flash report is apparently equally if not more sensitive when compared with the Turkey information (see further particularly the third paragraph under the heading 'Selected Details' on p. 5 of the report and the penultimate paragraph of that report) and;

(2) the fact that ECGD has been content to release the information in the Flash Report tends to indicate that the Turkey information is not as sensitive as ECGD claims.

58. in all the circumstances, and subject to further examination in closed session, ECGD has not discharged the burden it bears of proving that disclosure of the Turkey information would have adversely affected international relations so as to engage r. 12(5)(a).

59. However, even if r. 12(5)(a) had been engaged engaged in respect of the Turkey information, on an application of the public interest test, there would still have been no preponderant public interests in favour of maintaining the exception in respect of that information. This is because:

(1) any adverse affect on international relations was bound to have been relatively mild in all the circumstances; and

(2) the public interests in avoiding that mild adverse effect would have been more than equalled by the public interest in disclosure of this information. This is particularly the case in view of the importance of the public being able to understand how third party countries have contributed to the BTC project.

60. In all the circumstances, ECGD has failed to establish that the public interest weighs in favour of maintaining the r. 12(5)(a) exception in respect of the Turkey information.

COURSE OF JUSTICE/LEGAL PRIVILEGE (r. 12(5)(b))

Exception Engaged

61. The LP information is identified in §84 SD [CB/172]. The Commissioner contends that that information amounts to information which is legally privileged.

62. Further he contends that the exception provided for in r. 12(5)(b) is engaged because, in view of its legally privileged nature, disclosure of the LP information would adversely affect the course of justice (see further *Archer v IC* (EA/2006/0037)).

Application of the Public Interest Test

63. Based on the evidence currently him, the Commissioner is minded to invite the Tribunal to reach the following conclusions on the application of the public interest test to the LP information:

(1) there is a strong public interest in members of the public being able to access information which reveals what legal advice members of the BTC lenders group were receiving in respect of the BTC project;

(2) however, that interest must be balanced against the general public interest in preserving the confidentiality of legally privileged information which is built in to the r. 12(5)(b) exception;

(3) it must also be balanced against the more specific public interests identified in §§80-84 SD [CB/171-172] and §§65-68 DA [CB/190-191];

(4) in all the circumstances of the case, at the time of the request, the public interest in maintaining the r. 12(5)(b) exception outweighed the public interests in disclosure.

CONCLUSIONS

64. In summary, the Commissioner contends that the Decision Notice should stand subject to the following amendments:

(1) the entirety of the minutes of the 5 December 2003 meeting should have been disclosed by ECGD in response to COHO's request;

(2) the entirety of the BPU report should have been disclosed, save for:

(a) the Turkey information and the partners information, which were exempt from disclosure under r. 12(5)(a) EIR; and

(b) the LP information, which was exempt from disclosure under r. 12(5)(b) EIR.

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18 June 2009