

**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

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**INFORMATION COMMISSIONER'S SKELETON ARGUMENT**

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*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”);<sup>1</sup> 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.<sup>2</sup>
2. The following is a summary of the issues which arise in this appeal and the Commissioner’s case on those issues.<sup>3</sup>

### **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*

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<sup>1</sup> 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]

<sup>2</sup> 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].

<sup>3</sup> 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))<sup>4</sup>

- (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].*

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<sup>4</sup> 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 taxpayer'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<sup>5</sup>**

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],<sup>5</sup> 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]);

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<sup>5</sup> 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



