

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 23 February 2009

Public Authority: Export Credits Guarantee Department
Address: PO Box 2200
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London
E14 9GS

Summary Decision

The complainant asked the Export Credits Guarantee Department (ECGD) for a copy of the ECGD Underwriting Committee's assessment of the Al Yamamah deal with Saudi Arabia.

The Commissioner decided that ECGD had breached the Act in procedural matters in respect of: sections 1(1)(b) and 10(1) by failing to disclose information; section 17(1) by excessive delay; and, failing to cite relevant subsections in breach of section 17(1)(b).

ECGD had applied the section 36(2)(b) exemption to all of the information within the scope of the request. In addition ECGD has applied exemptions under sections 27, 29, 41 and 43 to different parts of the information. A late claim to section 42 was made in respect of part of the information. The Commissioner accepted that the section 36 exemption was engaged in respect of all of the withheld information but did not accept that the public interest in maintaining that exemption outweighed the public interest in disclosure. However he decided that the exemptions in sections 27 and 43 applied to parts of the withheld information (identified in annex 2 to this Notice) and that in those instances the public interest in maintaining the exemption outweighed the public interest in disclosing the information.

The Commissioner decided that the section 29 exemption was engaged for a small amount of information (identified in annex 2) but in respect of that information the public interest in maintaining the exemption did not outweigh the public interest in disclosing the information.

The Commissioner decided that the section 41 exemption was not engaged as regards the relevant information.

The Commissioner did not accept the late application of the section 42 exemption, but in any event he decided that the information had been properly withheld under section 43.

The Commissioner therefore decided that ECGD had failed to deal with the matter in accordance with the Act and must provide the applicant with further information as set out in annex 2 of this Notice but was right to withhold the information specified in annex 3.

The Commissioner's Role

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

The Request

2. On 16 September 2005 the complainant asked the Export Credits Guarantee Department (ECGD) for a copy of the ECGD Underwriting Committee's assessment of the Al Yamamah deal with Saudi Arabia.
3. On 20 October 2005 ECGD replied saying that they had interpreted the request for a copy of the ECGD Underwriting Committee's assessment of the Al Yamamah deal with Saudi Arabia as referring to a paper (the paper) that had been submitted to the ECGD Risk Committee (the Committee), and the minutes of a meeting of the Committee that had recorded the Committee's decision (the minutes). The paper had considered the provision of cover for 2005/6 for the Al Yamamah (AY) deal. The date of the meeting was withheld as it constituted part of the information under appeal. ECGD said that both documents were exempt under section 36(2)(b) of the Act, a decision that had been approved by the then Minister of Trade acting as the qualified person. ECGD added that the balance of the public interest lay with non-disclosure. ECGD said that elements of the paper and the minutes were also exempt under the section 27, 29, 35, 41 and 43 exemptions and that the public interest in maintaining the exemptions outweighed the public interest in disclosing the information.
4. On 30 January 2006 the complainant requested an internal review of the ECGD decision, saying that it seemed inconceivable to her that no part of the documents could possibly be disclosed. She added that ECGD had failed to comply with the requirements of section 17(1)(c) of the Act by not giving reasons why the section 27, 29, 35, 41 and 43 exemptions applied. The complainant added that there was a very specific public interest in information about AY.
5. On 3 July 2006 ECGD gave the complainant the results of their internal review of the complaint. ECGD said that the application of the section 36 exemption had been confirmed by the then Minister. ECGD acknowledged that it had not provided the complainant with a statement of its reasoning when applying the section 27, 29, 41, 43 exemptions as section 17(1) of the Act required. ECGD added that the section 35 exemption had been incorrectly cited in conjunction with the section 36 exemption. However should the section 36 exemption be held not to apply, ECGD said [incorrectly] that it could and would apply the section 35 exemption in the alternative.

The Investigation

Scope of the case

6. The Commissioner considered ECGD's handling of the matter, the application by ECGD of the exemptions claimed and the balance of the public interest as it applied to all of the qualified exemptions cited by ECGD.
7. In considering whether the information should have been withheld, the Commissioner first considered the application of the exemptions provided by sections 27, 29 and 43 of the Act. For all of the information which the Commissioner decided should not have been withheld under section 27, 29 or 43 he went on to consider the application of the section 36 and 41 exemptions.
8. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.

Chronology of the case

9. On 28 July 2006 the complainant contacted the Commissioner through an intermediary acting as an advocate on her behalf (the advocate) to complain about the way her request for information had been handled. The advocate particularly asked the Commissioner to consider, as the complainant's principal complaint, that the approaches taken to section 36(2)(b) and to the accompanying public interest balancing exercise, had both been flawed. The advocate set out the complainant's case on this aspect in some detail and also made brief representations to the Commissioner on the other exemptions cited, i.e. those provided by sections 27, 29, 41 and 43 of the Act.
10. On 5 December 2006 the advocate wrote to the Commissioner drawing his attention to some then recent newspaper articles which had appeared during the autumn of 2006. He considered that these had a bearing on the balance of the public interest in respect of the information requested and which, he said, supported the complainant's contentions.
11. Regrettably, due to the heavy workload at the Commissioner's office, the investigation into the complaint did not get underway until the Spring of 2008. On 6 May 2008 the Commissioner's staff asked ECGD to disclose to him, in confidence, the information being withheld. During May and early June 2008 ECGD and the Commissioner's staff corresponded to clarify some confusion that had arisen as a result of changes to ECGD case numbers for requests being made under the Act.
12. On 18 July 2008 ECGD finally provided the Commissioner with the information being withheld, together with a statement of ECGD's case for continuing to withhold it. ECGD said that the information was extremely sensitive and confidential and had only been seen by a limited number of its own staff and then only on a strict need-to-know basis. ECGD said that, in its view, the information was exempt in its entirety under section 36(2)(b) of the Act and that the exemptions contained in sections 27, 29, 41, 42, and 43 also applied to parts of it. This was ECGD's first reference to the section 42 exemption.

13. On 25 September 2008 ECGD told the Commissioner that the late introduction of the exemptions contained in section 42 of the Act has resulted from ECGD's developing understanding and experience of the Act. ECGD asked the Commissioner to consider representations on the section 42 exemption notwithstanding their failure to cite it previously.
14. Also on 25 September 2008, ECGD told the Commissioner that the then qualified person at the original request stage had been Ian Pearson MP. The date of his agreement had been 19 October 2005. ECGD case officers had been notified by the Minister's private office of his agreement.
15. On 2 October 2008 ECGD told the Commissioner that it wished to make a further submission to him on the public interest test as it applied to the section 36 exemption. ECGD provided a further statement to the Commissioner on this matter on 15 October 2008.

Findings of the case

16. The Commissioner has noted a series of newspaper reports published during the autumn of 2006 alleging corrupt practices during the negotiation of the series of AY arms deals. These were based on research into documents placed in The National Archives. Some of those documents had subsequently been found to have been placed there in error and had therefore been withdrawn by the originating departments.
17. During late 2006 the Serious Fraud Office (SFO) conducted an investigation into related matters but disengaged from it in December 2006. Contemporary broadcast news reports by the BBC reported the then Attorney-General as saying that the [SFO] investigation had stopped because of doubts over the prospects of success in any potential prosecution and also on grounds of national security. The then Prime Minister had reportedly said that the UK's relationship with Saudi Arabia was vitally important for the UK in terms of counter-terrorism, in terms of the broader Middle East, in terms of helping in respect of Israel and Palestine, and that that UK strategic interest came first.
18. The Commissioner has received assurance from ECGD officials as to the content of the section 36 submission made to the then qualified person by officials and of the terms of his agreement.

Analysis

19. The Commissioner has considered the public authority's response to the complainant's request for information.

Procedural breaches

20. ECGD's failure to disclose the information identified by the Commissioner as proper to have been disclosed was in breach of sections 1(1)(b) and 10(1) of the Act.

21. The complainant made her request to ECGD on 16 September 2005 but ECGD did not issue a refusal notice until 20 October, some 24 working days later. This was a breach of the 20 day time limit specified by section 17(1) of the Act. The failure to cite the relevant subsections by the time of the completion of the internal review was a breach of section 17(1)(b) of the Act.
22. ECGD said they accepted, and the Commissioner confirmed, that the failure to provide reasons when applying the section 27, 29, 41, 43 exemptions in the refusal notice of 20 October 2005 was a breach of section 17(1)(c) of the Act. ECGD similarly erred in citing the section 35 and 36 exemptions together initially and later relying just on the section 36 exemption at the internal review stage. ECGD's suggestion that it might revert from the section 36 exemption to the section 35 exemption in the alternative was also erroneous.

Exemptions

Section 42 exemption (Legal professional privilege) – late citation

23. Where a public authority has not referred to a particular exemption when refusing a request for information, the Commissioner may exercise his discretion and decide whether, in the circumstances of the case, it is appropriate to take the exemption into account if it is raised in the course of his investigation. Having considered the matter, the Commissioner decided not to accept ECGD's application to rely on the section 42 exemption, which was not made until July 2008.
24. The Commissioner is under no positive duty to consider exemptions which have not been referred to by a public authority although he may do so if it seems appropriate to him in any particular case. The issue was clarified by the Information Tribunal in the BERR case (*Department for Business, Enterprise and Regulatory Reform v Information Commissioner and Friends of the Earth*, (EA/2007/0072)). The Tribunal questioned "whether a new exemption can be claimed for the first time before the Commissioner" and concluded that the Tribunal, and by extension the Commissioner, "may decide on a case by case basis whether an exemption can be claimed outside the time limits set by [sections] 10 and 17 depending on the circumstances of the particular case". The Tribunal also added that: "it was not the intention of Parliament that public authorities should be able to claim late and/or new exemptions without reasonable justification otherwise there is a risk that the complaint or appeal process could become cumbersome, uncertain and could lead public authorities to take a cavalier attitude towards their obligations".
25. The Commissioner has adopted this approach generally and regarded it as appropriate and proportionate to do so here owing to the excessively late citation of the exemption and its applicability. He noted that no health and safety or human rights issues appeared to him to arise in the context of the information to which ECGD had sought to apply the section 42 exemption. He therefore did not proceed to consider application of the section 42 exemption either on his own initiative or in response to the excessively late request from ECGD for it to be considered. However, in the event, the Commissioner decided that the information to which ECGD wished to apply the section 42 exemption should be withheld under the section 43 exemption.

Section 36 – Prejudice to effective conduct of public affairs

26. The Commissioner noted comments by the advocate in his letter of 28 July 2006 concerning the engagement of the section 36(2)(b)(i) and (ii) exemption which the advocate said that he had found it difficult to oppose without knowing the content of the information being withheld.
27. ECGD's statutory function is to assume financial risk through the issue of insurance policies and guarantees. The risk, in the context of AY, was more difficult to quantify as it related to taking a view about the future situation in Saudi Arabia and touched on ECGD and the UK government's present and future relationship with a foreign government with which both were closely engaged. To take a fully informed decision about risk, documents setting out risk assessment information needed to be as full and frank as possible. Their preparation could be inhibited if exporters and officials were unwilling to make full and frank disclosure of all relevant facts. This could apply to the AY documents but could also influence the consideration of future business propositions. On the basis of the above, and other supporting evidence from ECGD, notably that provided on 18 July 2008, the Commissioner was satisfied that the opinion given by the qualified person that there would be prejudice had been reasonable in substance and reasonably arrived at on the basis of relevant factors, and that the exemption contained in section 36(2)(b) of the Act was engaged. He then proceeded to consider the balance of the public interest.

Public Interest test

28. As regards the application of the public interest to the section 36(2)(b) exemption claimed by ECGD, the complainant told ECGD, in her request for an internal review of their decision to withhold the information, that it seemed inconceivable that there was no part of the information that it would not be possible to disclose without having the effects claimed. She added that there was a very specific public interest in information about the "controversial" AY deal and considerable public opposition to the sale of military equipment to a regime which, she said, disregarded human rights and was in a region of conflict.
29. The advocate on behalf of the complainant told the Commissioner that the AY arms deals were matters of the very highest public interest. The value of the current matter was in the region of £8-10 billion. Other estimates had put the value of the agreement even higher and there was the potential for consequential agreements up to values of around £40bn. The agreement had, he said, been described by the exporting company, BAE Systems, as 'Britain's largest ever export agreement'. The agreement was for the sale of arms, principally fighter jets, to Saudi Arabia. This engaged very considerable amounts of UK taxpayers' money as it was being underwritten by ECGD, but also touched upon matters of the "highly controversial public policy" including arms sales to, he said, "a regime whose violations of fundamental human rights norms were matters of public record by a company that is subject to investigations by the Serious Fraud Office" in connection with related matters. He added that, in his view, the public interest in this matter could hardly be greater, it was exceptionally strong. He concluded by saying that no reference had been made by ECGD to the extraordinarily large sums of public monies involved in the decision.

30. ECGD told the Commissioner that in all the circumstances of the case, the public interest in maintaining the exemption outweighed that in disclosing the information. ECGD agreed that there was a general public interest in transparency of decision making and in accountability in the commitment of public funds. However, ECGD said that the complainant has provided no evidence of which ECGD was aware to support her 30 January 2006 assertion that there was a very specific public interest in information about the “controversial” AY deal. ECGD added that the complainant had provided no evidence of the “considerable public opposition” to the sale of military equipment to what she had described as a regime which disregarded human rights - instead setting out her own views as if they were indisputable. ECGD did not doubt that the complainant was interested in this matter, and was a member of the public, but that did not necessarily equate to a “very specific public interest”.
31. ECGD added that the general public interest in transparency of decision making and accountability in the commitment of public funds was outweighed by the following factors in respect of information to be contained in future submissions to, and minutes of, meetings of the Committee, particularly on any future consideration of support for AY but also on consideration of support for other projects and programmes. ECGD said that it was not in the public interest for officials to be provided with a disincentive to make full and candid submissions nor for ECGD to give its support and commit public funds without full and frank advice and the ability to conduct a free and frank exchange of views for the purposes of deliberation. There was a public interest in ensuring risk was properly assessed and controlled by ECGD and in ensuring that such risk did not result in unacceptable financial loss. There was a public interest in allowing ECGD to comply with its financial objectives set by Government which it could only do by fully and rigorously assessing the risks of the projects and programmes it was asked to support. Decisions made on the basis of incomplete information were likely to be less soundly based and therefore more risky and with an increased exposure to potential loss. This would lead to more adverse financial outcomes for ECGD and the tax payer (if, for example, a premium was set too low and, as a result, did not cover the full risk of the exposure). It was not in the public interest for minutes of the Committee to be abridged or not taken at all. Given the significance of the decisions, it was important to record a full audit trail of the discussions leading to the decisions taken.
32. ECGD invited the Commissioner to have regard to the judgment of the High Court in a previous ECGD case (*ECGD v Friends of the Earth [2008] EWHC 638 (Admin)*) in which, ECGD said, the High Court had referred to the fact that disclosure of advice within or between departments relating to decisions which had to be taken at ministerial level would significantly inhibit the conduct of good government. Mitting J had, ECGD said, stated that there was a legitimate public interest in maintaining the confidentiality of advice within and between Government departments on matters that would ultimately result, or was expected ultimately to result, in a ministerial decision. Whilst the weight to be given to those considerations would vary from case to case, the judge had said that he could: “state with confidence that the cases in which it will not be appropriate to give any weight to those considerations will, if they exist at all, be few and far between.”
33. ECGD added that individual paragraphs of submissions to and minutes of the Committee should not be viewed in isolation from the rest of the submissions and

minutes. Disclosure of any part would result in those officials making submissions to the Committee, and members of the Committee, being in a position where they lacked certainty as to what might be disclosed in future. Officials, unsure of which parts of their submissions / minutes might be considered to be disclosable by the Commissioner, in isolation from the rest of the submissions / minutes, would have an incentive in the future to reduce submissions and minutes to the minimum possible, thereby excluding, for example, valuable background material and references to other documents. ECGD said that disclosure of paragraphs containing background material on a named overseas government, other UK government departments (including investigative agencies), Parliament, ECGD's Minister, and BAE Systems, as well as references to other ECGD papers, and press coverage of AY, would create a significant incentive for similar material to be kept out of future submissions and/or minutes and that this would not be in the public interest. If any or all of those parties were to see ECGD's internal deliberations, or if ECGD were to disclose information about them, ECGD would be less well placed to carry out its statutory function in the future as a result.

34. The Commissioner acknowledged the public interest arguments by the parties which are set out above and had regard to the concerns and opinion of the qualified person in determining whether or not prejudice would arise. After a careful evaluation of these arguments the Commissioner concluded that, subject to his subsequent findings on the application of sections 27 and 43 of the Act, the balance of the public interest in relation to the section 36 exemption is in favour of disclosing the remainder of the information sought. This view is based on his belief that any potential harm to the policy and business analysis of future projects and programmes within ECGD, which he has considered but does not judge would be significant, would not outweigh the public interest in disclosing the information.
35. The Commissioner considered the arguments put by the complainant to ECGD in the early correspondence and also those advanced by the advocate. The complainant argued that some at least of the withheld material should have been disclosable; as this decision makes clear, the Commissioner agrees. The complainant described AY as controversial and asserted that there was substantial public concern regarding it but – as ECGD pointed out - did not provide them with evidence to support her assertions. Accordingly, the Commissioner noted, but did not rely heavily on, this line of argument.
36. The Commissioner noted the views of both the complainant herself, and the advocate on her behalf, that there was a strong public interest in the sale of military equipment to the government of a country located within a region of conflict and to a regime that had been accused of human rights violations. The Commissioner accepts that sales of military equipment to countries located in regions of conflict can be legitimate matters for public concern and debate. The Commissioner also sees allegations of human rights violations as matters for legitimate public concern and debate. Both matters can, in his view, be reasons for there to be greater transparency in decision making by public bodies. For the avoidance of doubt the Commissioner makes clear that he has not considered the substance of any allegations of human rights violations, which were being made by both the complainant and the advocate, and has made no findings concerning them. He does however see such allegations as legitimate matters of public concern and debate and considers that any debate about them would be materially assisted by the availability of relevant information.

37. The Commissioner saw that the advocate said that the AY agreement was of high monetary value and speculated as to what that value might be. The Commissioner saw this as primarily a commercial issue between the parties to the AY agreement and not in itself a matter of direct public interest. However the advocate also pointed to a substantial sum of public money that would potentially be at risk from ECGD agreeing to underwrite parts of the AY agreement. This the Commissioner does see as a matter for legitimate public concern and debate that would be assisted by appropriate transparency of information about the ECGD underwriting decision and the process by which it was made.
38. The Commissioner noted that the advocate was also concerned about the now closed SFO investigation into connected matters. The Commissioner saw that the SFO investigation was not closed until December 2006 so that, at the time of the internal review by ECGD in July 2006, it was still continuing. The Commissioner accepts that this too is a matter for legitimate public concern and debate, a debate which could have been illuminated by the greater availability of relevant information. However he saw very little of substance within the content of the information requested, and which he has reviewed, which concerned ECGD's underwriting decisions and process, and which could be said to have any direct bearing on the SFO matter and therefore he decided that it was not relevant to determining the balance of the public interest in this matter.
39. Turning to the issues raised by ECGD, the Commissioner acknowledges that the withheld information contains frank and candid comments and views and recognises that it is important that the decision makers within ECGD should be fully aware of them. The Commissioner noted the concerns of ECGD that the prospect of potential disclosure could have a "chilling effect" on the way in which advice or discussions are recorded. However the Commissioner does not accept that the officials responsible for providing advice and recording information would cease to perform their duties properly for fear that their advice may be disclosed subsequently. Such public servants would be in breach of their professional duty as public servants should they deliberately withhold relevant information or fail to behave in a manner consistent with the Civil Service Code. It is a matter for the bodies concerned, including the ECGD, to ensure that their officials continue to perform their duties according to the required ethical standards. Because public authorities have a duty to keep proper records of meetings for the purposes of effective administration, the Commissioner does not find persuasive the argument that disclosing minutes in one case may discourage proper minute keeping in some future matter.
40. The Commissioner believes that, when public authorities are promoting and defending a particular policy decision (such as underwriting a high value contract), it is beneficial if the public has a clear understanding of the preceding discussion and advice in order to better gauge the thoroughness and robustness of the government policy formulation process. The civil servants concerned have a duty to their senior officers and to ministers which would unquestionably include the provision of full, honest and impartial advice. In the Commissioner's view, civil servants would be in breach of their duty, and damage their integrity as servants of the Crown, if they knowingly withheld relevant information from senior officials or ministers or gave advice other than the best that they were capable of providing. In addition, the Commissioner is aware of judicial support (from Mason J in *Sankey v*

Whitlam (1978) 142 CLR1) for the view that the possibility of future publicity should act as a deterrent against officials providing advice which is specious or expedient. A central argument for the freedom of information legislation is to expose decision-making processes to greater transparency, unless there is a good reason for confidentiality. Such greater transparency – which may sometimes reveal differences of view or emphasis – need not inhibit frankness and candour and may even act to increase them. In this case, however, the Commissioner does not believe that disclosure of the information he has identified as suitable for disclosure would create any real risk of inhibiting officials in future matters. The relevant decisions had already been taken and he has seen nothing in the content of the information that would be likely in the future to inhibit the officials submitting it to senior officers or ministers. He does not therefore accept that the ability or willingness of officials to provide advice with frankness and candour would, or would be likely to be, affected by the disclosure of the information in dispute in this case. In reaching this view, he has had regard to the judgment of Mitting J in the *ECGD* case that the cases in which it will not be appropriate to give any weight to those considerations will, if they exist at all, be few and far between.

41. The Commissioner has also taken account of the views of the Information Tribunal in its Decision of 20 August 2007 in the matter of *the Friends of the Earth and the Information Commissioner and ECGD (EA/2006/0073)*. The Tribunal said, in that case, that ECGD had failed to demonstrate a sufficient public interest in withholding certain interdepartmental responses and had failed to specify clearly and precisely the harm to the public that would result from disclosure of environmental information. The Tribunal also referred to the *Department for Education and Skills case (EA/2006/0006)* and the set of principles established there. Reference was also made by the Tribunal to the decision in the *Office of Government Commerce cases (EA/2006/0068 and 0080)* that too much can be made of the alleged virtues of candour and frankness and the need for safe space for Ministers and officials to consider their positions; the touchstone remained, at all times, the public interest.
42. The Commissioner believes, given the high monetary value of the ECGD underwriting contract, that there is an inherently strong public interest in ECGD being transparent in the policy decisions taken in order to promote accountability in the commitment and spending of public money. If more background information to the decision making process is made public, there is a strong argument that such increased transparency will improve the quality of future advice given by officials and therefore the quality of future decisions and will enable the public to form a view about whether public authorities such as ECGD are acting appropriately. In particular, disclosure of parts of the paper and parts of the minutes would enable the public to appreciate the quality of the advice and the issues considered by ECGD prior to taking the underwriting decision.
43. Finally, the Commissioner notes that it is in the public interest to disclose information where this would help further the understanding of and participation in the public debate of issues of the day. There is an interest in increasing public understanding of how public authorities' decisions affect the public as citizens and taxpayers and, where appropriate, in allowing the public to debate these decisions. The Commissioner considers that, for the public to participate in a debate in an informed way, the issues need to be known. The Commissioner notes that there is a continuing public interest in relation to AY and, consequently, that there is a

public interest in providing further information to the public about the various issues that were being considered prior to ECGD underwriting the decision.

44. The Commissioner therefore considers that, subject to his findings on the other prejudice based exemptions set out below, disclosure of the relevant information would result in more effective public scrutiny of the ECGD decision making process. The Commissioner also considers that this increased transparency should provide an incentive to improve the quality of future decisions within ECGD. Finally, in his view, disclosure would contribute to enabling the public to form a view as to whether ECGD had acted appropriately. Accordingly, the Commissioner is satisfied that the public interest in ECGD maintaining the section 36 exemption does not outweigh the public interest in ECGD disclosing the information that he has identified at annex 2 of this Notice as suitable for disclosure.
45. The Commissioner considered, but did not accept, ECGD's concern that disclosing information selectively might give a misleading impression. He decided that it would be immediately evident to all parties that the information he decided should be disclosed was partial, and it would be open to ECGD to provide any appropriate explanatory background to it that they considered necessary.

Other prejudice-based exemptions

46. The Commissioner then turned his attention to the prejudice based section 27(1), 43(2) and 29(1) exemptions.
47. In *Hogan and Oxford City Council -v- The Information Commissioner* (EA/2005/006, EA/2005/0030), the Information Tribunal applied Mundy J's test to section 31(1) of the Act. In the above appeals, the Information Tribunal stated that: "...there are two possible limbs on which a prejudice based exemption might be engaged. Firstly, the occurrence of prejudice to the specified interest is more probable than not, and secondly there is a real and significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not...The s31(1) prejudice is not restricted to 'would be likely to prejudice'. It provides an alternative limb of 'would prejudice'. Clearly this second limb of the test places a much stronger evidential burden on the public authority to discharge." The Information Tribunal also confirmed that: "an evidential burden rests with the decision maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice."
48. In the present matter, the Commissioner has not been provided with any compelling evidence that prejudice would, or would be likely to, result from disclosure of the information other than as set out below.

Section 27 – International relations

49. in applying the section 27 exemption in July 2006 ECGD said it believed that disclosure of the information would be likely to provoke a negative reaction from a named state to which the information referred (the named state) and would thereby undermine UK defence, foreign policy and industrial interests.
50. The advocate said that without seeing the information he could not comment on whether or not disclosure would provoke a negative reaction from Saudi Arabia.

Even if it did he said that he did not consider that such a reaction would be on a sufficient scale to undermine UK defence, foreign policy and industrial interests.

51. ECGD additionally told the Commissioner that, in its view, disclosure of certain parts of the withheld information would be likely to prejudice relations between the UK and the named state. ECGD said that the UK government had agreed to keep the details of the AY contract confidential. Disclosing the information being withheld would cause offence and thereby prejudice relations between the UK and the named state. The government of the named state would be concerned that the confidence within which its dealings with the UK Government take place would not be respected in the future. The effect of disclosure would compromise the willingness of the government of the named state (and those of some other countries) to provide confidential information to ECGD in relation to future matters which would be detrimental to the interests of the UK as a whole as well as those of ECGD.
52. The Commissioner's staff have viewed the information in the paper and the minutes. He is satisfied, from what he has seen in the content of the information being withheld in this case, that ECGD's analysis is essentially correct and that there would be prejudice to the interests of the UK if the relevant information (i.e. that in respect of which section 27 is claimed) were to be disclosed. In this matter, the Commissioner is satisfied on a balance of probabilities that the higher level test applies and that there would be prejudice to the legitimate interests of the UK as a result of disclosure. In reaching this conclusion, the Commissioner's staff have undertaken a detailed analysis of the content of the information being withheld. The Commissioner has had regard to the evidence provided to him by ECGD. He also had regard to the decision of the Information Tribunal, in the *CAAT* case (*Campaign Against Arms Trade (CAAT) v the Information Commissioner and the Ministry of Defence, EA/2006/0040*) that the government of the Kingdom of Saudi Arabia (KSA) is very sensitive to matters relating to the defence of KSA. The Commissioner has also had regard to the decision of the Information Tribunal in the *Gilby* cases (*Gilby v Information Commissioner & FCO. EA/2007/0071, 0077, 0079*) and to the principles set out there by the Tribunal for the redaction of relevant documents. The Commissioner is satisfied that disclosure of the information he has identified as exempt under section 27 would result in prejudice to the UK's international relations, UK interests abroad, and their protection and promotion for the purposes of section 27(1)(a), (c) and (d) of the Act.
53. Accordingly the Commissioner is satisfied that there would be prejudice to the relationship between the UK government and that of the KSA, not just to the interests of individual companies or enterprises. The Tribunal in the *CAAT* case heard and accepted evidence that KSA holds a pivotal role in the Middle East with importance in economic, cultural, social and security terms and that there is a substantial resident population of UK nationals in KSA. The Tribunal also accepted that the AY project was, and remains, of substantial importance to the UK in economic and employment terms.

Public Interest Test

54. The advocate told the Commissioner that the public interest in disclosure in this particular case was stronger than the public interest in maintaining the exemption.

55. ECGD told the Commissioner that, whilst there is a public interest in transparency of decision making and accountability in the commitment of public funds, the prejudice that would arise from disclosure would have a detrimental effect on UK defence, foreign policy, and industrial and economic interests, and that it was plainly not in the public interest to risk engendering such an effect. Neither was it in the public interest for foreign governments to be inhibited from providing confidential information to the UK – which would be a likely outcome of disclosure in this instance. These considerations, ECGD said, outweighed the public interest in favour of disclosure.
56. The Commissioner has had regard to the views of the advocate and of ECGD. He has also had regard to the decisions of the Tribunal in the *CAAT* and *Gilby* cases in the matter of the balance of the public interest. He noted the decisions of the Tribunal which acknowledged the general importance of transparency and accountability, the nature of the Saudi regime, and the importance of transparency in the fight against corruption. He noted too, information that would inform public debate and provide improved accountability and transparency, through adding to what was already available to the public. However, the Tribunal had decided that these considerations did not negate the public interest in maintaining the UK's good relations with KSA and avoiding prejudice to UK interests in that country or the promotion or protection of those interests. The Tribunal, in the *CAAT* and *Gilby* matters, considered that disclosure of the disputed information would be highly likely to result in real and substantial prejudice of a kind, which would be contrary to the public interest. (However the Tribunal reached a different decision with regard to the possible involvement of UK officials directly or indirectly in the payment of commissions or agency fees in connection with arms sales.)
57. The Commissioner has examined the ECGD information and concluded that, for the relevant information, the public interest in maintaining the exemption outweighed the public interest in disclosure as regards the information which he has decided should be withheld under the section 27(1) exemptions, and which is set out at annex 2 to this Notice. In deciding this, the Commissioner has acted in accordance with the principles set out by the Tribunal for the redaction of relevant documents. For this information, he decided that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Section 43 – Commercial interests

58. Section 43(2) of the Act exempts information if its disclosure would, or would be likely to, prejudice the commercial interests of any person (including those of the public authority holding it.)
59. The advocate told the Commissioner that he did not accept that exposure of ECGD's methodology of arriving at a particular contractual price would cause prejudice to ECGD itself or to the contractor. He said that many public procurement processes made such methodologies publicly available.
60. ECGD told the Commissioner that this information related to the details of contractual terms and the scope of the contract. These details were commercially sensitive and disclosure could damage either ECGD's commercial interests or those of the contractor, BAE Systems, or both. Much of the information (in particular, the precise scope, extent and value of the overall supply, the pricing of

different elements of the project and the mechanism whereby payment was made) would be of great interest to the competitors of BAE Systems and to foreign governments supporting those competitors. It would damage both BAE Systems' position with regard to those competitors and the UK government's position with regard to those of foreign governments. The Commissioner decided therefore that there was a very significant and weighty chance of prejudice to the interests of ECGD such the disclosure of the information would be likely to result in damage to the purchaser's confidence in purchasing from BAES and jeopardise future business.

61. The Commissioner has considered ECGD's arguments carefully but does not concur with them. His view is that, following the implementation of the Act, companies contracting with public authorities can reasonably expect that their commercial dealings will be subject to a high level of public scrutiny and that this should be seen as part of the conditions of contracting with ECGD and other public authorities. However, ECGD itself, needs to maintain the confidence of its commercial partners.
62. After applying the prejudice tests to this matter, the Commissioner is satisfied that disclosure of the information he regards as falling within this exemption and which is set out at annexes 2 and 3 to this Notice, would prejudice the commercial interests of ECGD. The Commissioner has noted that the information sought includes various procedures, the disclosure of which would, or would be likely to, be detrimental to ECGD's negotiating position in future business dealings, not just with BAE Systems but with other companies and could lead to a reduction in ECGD's ability to obtain best value for money for itself and the taxpayer. Accordingly the Commissioner is satisfied that, in releasing the information, there is a real and significant risk of prejudice to the commercial interests of the ECGD and he decided that the exemption is engaged.

Public interest test

63. The advocate told the Commissioner that the public interest in disclosure was, in this particular case, stronger than the public interest in maintaining the exemption.
64. ECGD told the Commissioner that the public interest in openness and transparency in the accountability of public funds was outweighed by the prejudicial effect that disclosure would have on the commercial interests of ECGD, other departments and BAE Systems. ECGD said that it was not in the public interest for the commercial position of BAE Systems to be significantly undermined - as it would be - nor for details of their arrangements with the export credit agency in the country in which they were based to be subject to scrutiny by competitors, other export credit agencies, and foreign governments in general.
65. The Commissioner accepted that disclosure of the information with the prejudicial effects noted above would be likely to occur and would not be in the public interest. He sees merit in transparency in the use of public funds and in strong accountability for the commercial arrangements adopted by ECGD, both in this instance and more widely. However he has also noted that both ECGD and BAE Systems operate within highly competitive commercial environments and that the relevant information could be of value to the competitors of either or both. He is

therefore satisfied that the public interest in the disclosure of the information identified at annex 3 to this Notice as exempt under section 43 is outweighed by the public interest in maintaining the exemption.

Section 29 – The economy

66. ECGD withheld some information under the section 29 exemption. The Commissioner considered the information being so withheld in appendix B(ii) of the paper as set out in annex 2 of this Notice. Section 29(1)(b) says that information is exempt if its disclosure would, or would be likely to, prejudice the financial interests of any administration in the United Kingdom including the government of the United Kingdom.
67. As regards the application of the section 29(1)(b) exemption in this matter, the advocate for the complainant did not accept that exposure of ECGD's methodology of arriving at a particular price would have the effect contended for. He said that many public procurement processes made such methodologies publicly available and there was no obvious reason not to do the same in this matter. The suggestion that disclosure of contract details could damage the customer's relationship with ECGD and therefore damage the UK economy was not credible.
68. ECGD told the Commissioner that it had applied the section 29 exemption to information regarding details of the agreement reached with Saudi Arabia and the strategies employed by the UK Government in negotiating it, as well as information regarding risk analysis. ECGD said that disclosure of this information would prejudice the economic interests of the United Kingdom and the financial interests of the government of the United Kingdom because ECGD's customers and purchasers of those customers' goods and services (including foreign governments) would be able to use the information to put themselves in better negotiating positions in the future (at the expense of the UK government and the UK taxpayer). The information would impact on ECGD and the UK taxpayer if it were disclosed as it would be likely to be used by third parties to maximise any recoveries from ECGD. In addition, ECGD said that disclosure of the information would prejudice the economic interests of the UK and the financial interests of the government of the UK by (1) making foreign governments less willing to enter into arrangements with the UK government and or British firms; and (2) making persons carrying on business in the UK less willing to seek support from ECGD.
69. The Commissioner, having reviewed the relevant information in appendix B(ii) to which ECGD had applied the section 29 exemption, considered that the information being withheld was information of a general character and that its disclosure would be likely to affect ECGD's relationship with its customers such that there was a realistic and substantially more than remote prospect that prejudice would be likely to result to the relationship or future business prospects of ECGD and its partners. The Commissioner therefore decided that the exemption was engaged. He proceeded to consider the public interest in disclosing the information.

Public interest test

70. The advocate for the complainant said that the matter was of the very highest public interest. The value of the overall deal was very considerable and ECGD's

involvement in it engaged very considerable amounts of UK taxpayers' money. He added that it also touched upon matters of highly controversial public policy not only including international arms sales but also the sale of arms to a regime whose human rights violations were, he said, a matter of public record.

71. ECGD said that the public interest in disclosure of information relating to the deployment of public funds and stewardship of the UK's financial resources was outweighed by the public interest in maintaining the UK's negotiating position. Revealing details of ECGD's methodology of arriving at a particular price and conditions, as well as the bargain reached in this particular case, would expose ECGD's hand and undermine ECGD's position in future negotiations by making it easier for future contractors to press for better terms and would consequently have a negative impact on the financial interests of ECGD and hence the UK government.
72. The Commissioner has taken careful note of the public interest arguments put forward by the parties. He has seen that the complainant, in seeking to understand and engage in the issue of the government selling arms to a partner overseas government, needs access to reliable information in order to make a reasoned contribution to the public debate. He has seen the need for ECGD to maintain appropriate confidentiality for its business dealings and that of its business partners. He has seen too that the matter of a guarantee from ECGD inevitably involves putting at risk considerable sums of public money. For ECGD to be held properly accountable for putting the money at risk requires transparency of process and public access to relevant information. He is therefore satisfied that the public interest in disclosing the information identified at annex 2 to this Notice as exempt under section 29 is not outweighed by the public interest in maintaining the exemption.

Section 41 – Information provided in confidence

73. The exemption provided by Section 41 of the Act provides, at section 41(1) that information is exempt information if it was obtained by the public authority from any other person (including another public authority). ECGD sought to apply the section 41 exemption to the entire minutes including their date and list of those attending the meeting. The Commissioner has already decided that some of this information should be withheld under the section 27(1) exemption and did not consider the application of the section 41 exemption to that information. He did however consider its application to the rest of the information in the minutes.
74. In deciding whether information has been 'obtained from any other person' the Commissioner's focus is on the content of the information rather than the mechanism by which it was imparted and recorded. In this matter the Commissioner reviewed the content of the information other than that which he had decided should be withheld under section 27 and concluded that it had all originated from within ECGD itself and had not been "obtained from any other person". He therefore decided that the exemption was not engaged.

The Decision

75. The Commissioner's decision is that the public authority did not deal with the request for information fully in accordance with the Act.
76. The Commissioner decided that ECGD had breached the Act in procedural matters in respect of: sections 1(1)(b) and 10(1) by failing to disclose information; section 17(1) by excessive delay; and, section 17(1)(b) by not citing the relevant subsections.
77. The Commissioner decided that the exemption in section 36 was engaged in respect of all of the withheld information, but that the public interest in maintaining the exemption did not outweigh that in disclosure.
78. The Commissioner decided that the exemption in section 29 was engaged for a small amount of the withheld information but that the public interest in maintaining the exemption did not outweigh that in disclosure.
79. The Commissioner decided that the exemption in section 41 was not engaged in respect of some of the withheld information.
80. The Commissioner decided that the exemptions in sections 27 and 43 applied to some of the withheld information, identified in annex 3 to this Notice, and that in those instances the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Steps Required

81. The Commissioner requires ECGD to disclose the relevant information in accordance with the schedule set out in annex 2 to this decision so as to ensure compliance with the Act.
82. ECGD must take the steps required by this notice within 35 calendar days from the date of this notice.

Failure to Comply

83. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act, and may be dealt with as a contempt of court.

Right of Appeal

84. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

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

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

Dated the 23rd day of February 2009

Signed

**Graham Smith
Deputy Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

General Right of Access

Section 1(1) provides that -

“Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

Time for Compliance

Section 10(1) provides that –

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

Refusal of Request

Section 17(1) provides that -

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

- on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request, or
- on a claim that information is exempt information

must, within the time for complying with section 1(1), give the applicant a notice which –

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies.”

Section 17(3) provides that -

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

- on a claim that in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information, or
- on a claim that in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information

must either in the notice under section 17(1) or in a separate notice within such

time as is reasonable in the circumstances, state the reasons for claiming

(a) that, on a claim that in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information, or

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

International Relations

Section 27(1) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (a) relations between the United Kingdom and any other State,
- (b) relations between the United Kingdom and any international organisation or international court,
- (c) the interests of the United Kingdom abroad, or
- (d) the promotion or protection by the United Kingdom of its interests abroad.”

Section 27(2) provides that –

“Information is also exempt information if it is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.”

The economy.

Section 29(1) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (a) the economic interests of the United Kingdom or of any part of the United Kingdom, or
- (b) the financial interests of any administration in the United Kingdom, as defined by section 28(2).”

Prejudice to effective conduct of public affairs.

Section 36(1) provides that –

“This section applies to-

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

Section 36(2) provides that –

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

- (a) would, or would be likely to, prejudice-
 - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
 - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
 - (iii) the work of the executive committee of the National Assembly for Wales,
- (b) would, or would be likely to, inhibit-
 - (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purposes of deliberation, or
- (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

Information provided in confidence.

Section 41(1) provides that –
“Information is exempt information if-

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”

Legal Professional Privilege

Section 42(1) provides that –
“Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.”

Commercial interests.

Section 43(1) provides that –
“Information is exempt information if it constitutes a trade secret.”

Section 43(2) provides that –
“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”

**Information to be disclosed
The Information Commissioner's Decision**

SUBMISSION FOR RISK COMMITTEE RC(05)212 ("THE PAPER")

Opening tables – disclose framework; withhold figures, s43 exemption
Paragraphs 1 - 4 – disclose
Paragraph 10 – disclose
Paragraph 14 – disclose
Paragraph 15 – disclose from line 1 “We make ...” to “... the post,” in line 8
Paragraphs 16 – 18 – disclose
Paragraphs 23 - 33 – disclose

RC(05)212 Appendix A

Paragraph 1 – disclose, redacting last sentence based on s43 exemption

RC(05)212 Appendix B(i)

Paragraph 1 – disclose first three lines

RC(05)212 Appendix B(ii)

Paragraph 1 – disclose
Paragraph 2 – disclose first two sentences
Paragraph 3 – disclose all including the last two sentences s29 exemption/ public interest
Paragraph 6 – disclose all – s29 exemption / public interest
Paragraph 9 - disclose

RC(05)212 Appendix D

Disclose all.

MINUTES OF RISK COMMITTEE ("THE MINUTES")

First page – disclose all including the date of the meeting
Paragraph 10 – disclose
Paragraph 11 – disclose second, fourth and fifth bullet points
Paragraph 12 - disclose

**Information to be withheld
The Information Commissioner's Decision**

SUBMISSION FOR RISK COMMITTEE RC(05)212 ("THE PAPER")

Opening tables – disclose framework; withhold figures, s43 exemption
Paragraphs 5 – 9 – withhold s43 exemption
Paragraphs 11 - 13 – withhold s27 exemption
Paragraph 15 – withhold all except for the first 8 lines, from line 1 “We make ...” to “... the post,” in line 8, applying the s27 exemption
Paragraphs 19 – 22 – withhold s43 exemption
Paragraphs 34 – 41 – withhold s43 exemption

RC(05)212 Appendix A

Paragraph 1 – disclose redacting last sentence based on s43 exemption
Paragraphs 2 – 9 – withhold s27 exemption

RC(05)212 Appendix B(i)

All – withhold all except paragraph 1, first three lines, s27 exemption

RC(05)212 Appendix B(ii)

Paragraph 2 withhold all except first two sentences – s27 exemption
paragraph 4 – withhold s27 exemption
paragraph 5 – withhold s43 exemption
Paragraphs 7, 8 – withhold s27 exemption

RC(05)212 Appendix C

Withhold all – s43 exemption

MINUTES OF RISK COMMITTEE ("THE MINUTES")

Paragraph 11 – withhold first and third bullet points s27 exemption