

ENVIRONMENTAL INFORMATION REGULATIONS 2004

DECISION NOTICE

Case Reference: FER50096804

6 September 2006

Public Authority: Export Credits Guarantee Department

Address: PO Box 2200
2 Exchange Tower
London
E14 9GS

Summary Decision

1. The complainant requested environmental information from the ECGD relating to governmental communications concerning the Sikhalin LNG project. The ECGD withheld the information, relying on regulation 12(4)(e) of the Environmental Information Regulations. The Commissioner accepts that the information is environmental information and also that it falls within regulation 12(4)(e) as it is "internal communications". The Commissioner's decision is that the greater public interest lies in withholding the information.

The Commissioner's Role

2. The Environmental Information Regulations 2004 (the "Regulations") were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation 18 provides that the Information Commissioner (the "Commissioner") shall enforce the Regulations. In effect, the enforcement provisions of Part 4 of the Freedom of Information Act 2000 (the "Act") are imported into the Regulations.
3. The information requested by the complainant is environmental information as defined in regulation 2 of the Regulations.
4. The Commissioner has received an application for a decision whether, in any specified respect, the complainant's request for information made to the public authority has been dealt with in accordance with the requirements of Part 2 of the Regulations.

The Request

5. The Complainant has advised that on 11 March 2005 the following information was requested from the Export Credits Guarantee Department (the "ECGD") in accordance with regulation 7 of the Regulations:

"1. The correspondence or notification from ECGD to the Relevant Government Departments (defined below) notifying them that an application (or prospective application) was being treated as "potentially sensitive" and requesting comments; and

2. Any and all information received from the relevant government departments in relation to that notification/request in relation to the SAKHALIN LNG project.

The Relevant Government Departments are:

No 10 Downing Street
DTI
UKTI
FCO
DFID"

6. On 4 July 2005, item 1 was provided but ECGD refused to disclose item 2 on the basis that the exception at regulation 12(4)(e) of the Regulations is engaged. The public interest test was applied – ECGD contended that whilst there is an interest in openness and accountability in the policy and decision making processes, there is a strong public interest in the full and frank provision and discussion of advice within Government, because that process makes for better quality decision making. ECGD advised that ministers and officials need to consider all available options to debate their advantages and disadvantages and their candour in doing so could be affected by their assessment of whether the content of their discussion would be disclosed in the near future.
7. On 5 July 2005, the complainant requested an internal review and raised the following issues:
- ECGD's failure to comply with the time limits in the Regulation in responding to the request.
 - Whether exception 12(4)(e) was applicable.
 - Whether the public interest test had been correctly applied. The complainant felt ECGD had not properly considered the public interest in disclosure and the reason for not disclosing the information was a "blanket" reason with no evidence produced of how candour would be affected.
 - Whether partial disclosure had been considered.
 - A new request for information was made for "a full audit trail of the steps taken since [the] request was received on 11 March 2005 including in particular any steps taken to contact each of the relevant departments, the dates on which contacts were made and the dates on which any responses were received".
8. The Commissioner has not considered this new request for information. While he recognises that this new request is connected with the original request (which is

the subject matter of this notice), it is the Commissioner's view that the new request is likely to involve separate and distinct considerations. Consequently, it should be treated separately and no further reference will be made to it within this Decision Notice.

9. On the 7 November 2005, ECGD responded with the outcome of the internal review. An explanation for the delay was provided and the original decision upheld. The public interest test considerations were expanded upon to include the principle of collective responsibility. It was explained that "the prospect of disclosure of departmental responses to potentially case sensitive notices would undoubtedly affect the candour of responses as departments would be sensitive about recording conflicting positions". The balance of the public interest lay in maintaining the exception in respect of all the requested information.

The Investigation

Scope of the case

10. On 24 November 2005 the complainant contacted the Commissioner to complain about the way its request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
 - The delay of 82 days in dealing with the request and 88 days completing the internal review
 - The application of regulation 12(4)(e) – the complainant felt that ECGD had not interpreted the regulation in accordance with Directive 2003/4/EC
 - The application of the public interest test
 - Whether ECGD had properly considered partial disclosure
11. In his investigation of the complaint, the Commissioner obtained a copy of the withheld information and asked ECGD to address the concerns raised by the complainant. In addition, ECGD was asked to expand upon the explanation it had provided to the complainant.
12. As part of the investigation, ECGD provided the Commissioner with an explanation of its duties and the background to the information requested to facilitate the Commissioner's decision making process which is as follows:
13. ECGD is a separate Government Department, reporting to the Secretary of State for Trade and Industry. ECGD's role is to help UK exporters of capital equipment and project-related goods and services to win business and invest overseas.
14. Sakhalin II is the second part of a large oil and gas project to develop offshore oil and gas fields off the coast of Sakhalin Island in Russia. A number of UK firms have been awarded contracts for part of the project and ECGD, along with other lenders and export credit agencies, is currently considering whether to support the project.

15. Where a project (such as Sakhalin II) is likely to have high potential environmental impacts, it is necessary to notify other interested government departments to ensure that any support for the project is consistent with wider government objectives. Other departments are then given an opportunity to provide views on the case or take part in the risk assessment process. The procedure is adopted so that any final decision made by ECGD on whether or not to support a “sensitive” project can be said to represent a collective UK government decision.
16. The discussions in respect of Sakhalin II are ongoing and views of other interested departments have not yet been finalised. No decision has been taken by ECGD or more broadly by the Government on whether the project will be supported. The final view will be dependent on being satisfied that the financial, environmental, social and human rights risks are acceptable.
17. It is a requirement of ECGD that for projects with high potential impacts, project sponsors provide ECGD with the information normally contained in a formal Environmental Impact Assessment, Social Impact Assessment and/or Resettlement Action Plan which are detailed assessments of all of the potential environmental and/or social impacts of the project. There is a vast amount of information about the environmental and other impacts of the project and plans to mitigate these publicly available via the websites of the project sponsors, Sakhalin Energy and others.

Analysis

18. The Commissioner has considered the explanation provided by ECGD both to the complainant and in response to his investigation.
19. The Commissioner notes that the parties agree that the information is environmental information for the purpose of the Regulations and he agrees with that view. The information is written material dealing with policies for the provision of finance for the development of off shore oil and gas fields which is consequently likely to affect the elements of the environment.

Procedural breaches

20. The Commissioner finds that ECGD is in breach of regulation 5 in that it exceeded the statutory time limit (20 working days) for responding to a request made under regulation 7. He notes that an explanation has been provided in accordance with regulation 11(5) which is that a case such as this involves seeking the views of others, in this case other Government Departments and the exporter involved - those being consulted required some time to respond and once the responses had been received, ECGD required time to consider and ensure its response was compliant with the Regulations. In such circumstances, the Commissioner considers the explanation to be satisfactory. However, he finds

that the explanation should have been provided at an earlier date so that the complainant was aware of the delay and the reasons for it.

Exceptions

Regulation 12(4)(e)

21. This regulation provides an exception to disclosure of information where the information involves the disclosure of internal communications. Regulation 12(8) provides that “for the purposes of paragraph (4)(e), internal communications includes communications between government departments”.
22. The Commissioner notes that the complainant believes the regulation does not apply to the information requested as it does not accept that inter departmental communications are protected by any exemption contained in Directive 2003/4/EC (the “Directive”). The complainant contends that Article 4 (1)(e) of the Directive refers only to internal communications of particular public authorities, not communications between different authorities. Further, the Article expressly states that the exemptions stated within it shall be interpreted in a restrictive way. The complainant states that the Commissioner must give effect to the terms of the Directive when interpreting whether or not a public authority has complied with its duties thereunder (or under implementing legislation).
23. The Commissioner does not accept the complainant’s interpretation of the Directive. By including an exception for “internal communications” in Article 4(1)(e) and by its definition of public authorities in Article 2(2), the Commissioner’s view is that the Directive recognises the need to ensure that the formulation and development of government policy and government decision making can proceed in the self contained space to ensure that it is done well. Member states include very small countries with simple structures of government and large complex ones like the UK. It would be an anomaly to allow the government of a country with a simple structure the ability to claim the use of this exception simply because it had fewer internal departments. The Commissioner finds that “internal communications” applies both to communications between government departments and to communications within a single department. Consequently, as the information is clearly communications between departments and that is not disputed by the complainant, he finds that the exception is engaged.

Public Interest Test

24. Regulation 12(4)(e) is a qualified exception - the information can only be withheld if in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
25. The Commissioner accepts that there is a public interest argument in support of releasing this information as to do so would provide a better understanding of the manner in which decisions are reached by government which would promote greater transparency and accountability for actions taken.

26. The Commissioner also accepts that releasing the information would enable the public to understand, contribute to and challenge any decision and the process by which it is reached.
27. In addition, disclosure of the requested information may improve confidence in the manner decisions are taken and this would reassure the public that all relevant information has been taken into account when determining the particular course of action to be taken.
28. However, the Commissioner finds that the public interest test has been appropriately applied by ECGD when reaching the decision to withhold the information and that after carrying out a balancing act, the factors in favour of releasing the information are outweighed by those in favour of withholding the information. In reaching his decision, the Commissioner is mindful of the information provided by ECGD at paragraphs 13 – 17 above.
29. The Commissioner accepts that at this time, to disclose individual department's responses to the sensitive case notification would undermine the principle of collective responsibility. ECGD's decision will reflect the official UK Government position on the project and there is no public interest to be served at this stage in disclosing the different viewpoints held by each department which would undermine collective responsibility and the final decision.
30. The Commissioner also accepts that the prospect of disclosure of Departmental responses at this stage would affect the candour of responses. It is the Commissioners view that the public interest in accessing information about the various impacts of the projects is met by the volume of information already in the public domain.
31. The Commissioner has reviewed the information and is satisfied that a "blanket" public interest test has not been applied by ECGD. The Commissioner does not believe there is a public interest in considering partial disclosure as the totality of each department's response should be kept confidential at this stage. Further, there can be no benefit to the public in disseminating the information in a piecemeal fashion at this time.

The Decision

32. The Commissioner's decision in this matter is that ECGD has correctly applied regulation 12(4)(e) to the information. It is accepted that the information is environmental information for the purposes of the Regulations and also that the information falls within regulation 12 (4)(e) as confirmed by regulation 12(8). The public interest in withholding the information outweighs the public interest in disclosing the information. Consequently, the information has been correctly withheld.
33. However, it is advised that the Commissioner has reached his decision based upon the information at the time the request was made and taking into account

factors at the time of the decision. The Commissioner may well reach a different view with the passage of time.

Steps Required

34. The Commissioner requires no steps to be taken.

Right of Appeal

35. 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@dca.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 sixth day of September 2006

Signed

**Graham Smith
Deputy Commissioner**

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

Legal Annex

Relevant Statutory Obligations under the Regulations

Regulation 5 provides that –

“5. - (1) Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.

(2) Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request....”

Regulation 7 provides that -

“7. - (1) Where a request is made under regulation 5, the public authority may extend the period of 20 working days referred to in the provisions in paragraph (2) to 40 working days if it reasonably believes that the complexity and volume of the information requested means that it is impracticable either to comply with the request within the earlier period or to make a decision to refuse to do so.

(2) The provisions referred to in paragraph (1) are -

- (a) regulation 5(2);
- (b) regulation 6(2)(a); and
- (c) regulation 14(2).

(3) Where paragraph (1) applies the public authority shall notify the applicant accordingly as soon as possible and no later than 20 working days after the date of receipt of the request.”

Regulation 11(5) provides that -

“11. - “ (5) Where the public authority decides that it has failed to comply with these Regulations in relation to the request, the notification under paragraph (4) shall include a statement of -

- (a) the failure to comply;
- (b) the action the authority has decided to take to comply with the requirement; and
- (c) the period within which that action is to be taken.”

Regulation 12 provides that –

“12. - (1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if -

- (a) an exception to disclosure applies under paragraphs (4) or (5); and

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

(2) A public authority shall apply a presumption in favour of disclosure.

(3) To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.

(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that -

(a) it does not hold that information when an applicant's request is received;

(b) the request for information is manifestly unreasonable;

(c) the request for information is formulated in too general a manner and the public authority has complied with regulation 9;

(d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data; or

(e) the request involves the disclosure of internal communications.”

“ (8) For the purposes of paragraph (4)(e), internal communications includes communications between government departments.”